**STATE OF MAINE**
**BOARD OF ENVIRONMENTAL PROTECTION**

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|---|---|---|
| IN THE MATTER OF: | ) | |
| | ) | |
| CENTRAL MAINE POWER COMPANY | ) | |
| 25 Municipalities, 13 Townships/Plantations, 7 Counties | ) | APPLICATION FOR SITE LOCATION OF DEVELOPMENT |
| L-27625-26-A-N | ) | ACT PERMIT AND NATURAL |
| L-27625-TB-B-N | ) | RESOURCES PROTECTION ACT |
| L-27625-2C-C-N | ) | PERMIT FOR THE NEW |
| L-27625-VP-D-N | ) | ENGLAND CLEAN ENERGY |
| L-27625-IW-E-N | ) | CONNECT |
| | ) | |

**IECG OPPOSITION TO STAYING THE DEPARTMENT ORDER CONDITIONALLY APPROVING NECEC**

## I. Introduction

In accordance with the Board's October 7, 2020 letter, Industrial Energy Consumer Group ("IECG") hereby provides legal argument in opposition to the renewed applications for a stay of the Department's May 11, 2020 Order ("Permit Order") that were filed by the Natural Resources Council of Maine ("NRCM") and West Forks, et. al. ("West Forks") (together, "Petitioners").

The Board should reject the renewed applications for stay because the Board does not have authority to stay the Permit Order in this circumstance. Even assuming the Board has such authority, Petitioners have not met their burden with respect to the stay criteria. IECG concurs with the Commissioner's conclusion that "Petitioners have not carried their burden of satisfying any of the three parts of the standard for granting a stay, each of which is independently required," along with the reasoning and analysis supporting his conclusion.[1] IECG urges the Board to reach the same conclusion.

While IECG agrees with the Commissioner with respect to each part of the standard for a stay, and agrees emphatically that "there is a contradiction at the heart of the Petitioners' arguments that undercuts their stay request,"[2] IECG will focus primarily on the "likelihood of success on the merits" criterion, specifically, addressing the jurisdictional argument that NRCM has repeatedly raised, which is both the heart of NRCM's underlying appeal and its primary basis for a stay. IECG will also demonstrate that granting a stay would risk substantial harm to the general public in the form of delayed or foregone benefits.

## II. The Board Does Not Have Jurisdiction to Issue a Stay of the Permit Order

[1] Letter Decision by Commissioner Reid, at 4 (August 26, 2020).
[2] Id.

The Petitioners cite no authority under which the Board may either reverse on appeal the Commissioner's order denying a stay or independently stay the Department's Permit Order, because no such authority exists.

The Maine Administrative Procedure Act generally provides that an application for stay of an agency decision shall first be made to the agency, which shall issue a stay "upon a showing of irreparable injury to the petitioner, a strong likelihood of success on the merits, and no substantial harm to adverse parties or the general public."[3] The petitioner may request relief from the Superior Court by demonstrating: (1) that application to the agency for the relief sought is not practicable; (2) the application to the agency was denied; or (3) the agency did not afford the relief requested by the petitioner.[4] Plainly, Section 11004 authorizes only the issuing agency to stay its own action, in this case authorizing the Department to stay the Permit Order. The Petitioners correctly applied to the Department for a stay of the Permit Order, and the Department, acting through its Commissioner, denied the applications. Now, however, Petitioners apply to the Board for the same relief. Section 11004 does not authorize an internal arm of the issuing agency (the Board) to stay an order of the issuing agency (the Department) when application for stay has already been made to and denied by the issuing agency (the Department).

Beyond the Maine Administrative Procedure Act, IECG is unaware of any statute or Department rule that authorizes a party to either: (1) appeal the Commissioner's denial of an application for stay of a Department permit order to the Board or (2) apply to the Board for stay of a Department permit order for which the party has already sought and been denied the same relief by the Department.

Finally, as it relates to the Maine Administrative Procedure Act, West Forks argues that "trying to persuade the decisionmaker that he got it wrong makes the standard of likely success on the merits virtually insurmountable."[5] IECG agrees. Stays are an extraordinary form of relief, especially when the Commissioner got the Permit Order right based on an extensive record and sound reasoning. Complaining about the "logic" of the process specified by law does not help create a novel means of relief through the Board now (and only reveals the fundamental weakness of West Forks' argument on the merits).

For the foregoing reasons alone, the Board should reject the Petitioners' renewed stay applications.

## III. Response to NRCM Renewed Stay Request

NRCM's renewed request for a stay focuses, for the fourth time now, on Board jurisdiction, essentially arguing that because NRCM has questioned on appeal the Commissioner's authority to issue the Permit Order, the very existence of that question somehow makes NRCM likely to succeed on the environmental merits of its appeal. NRCM states:

[3] 38 M.R.S. §11004.
[4] Id.
[5] West Forks, Appeal of Commissioner Reid's August 26, 2020 Denial of Application for Stay, at 7 (September 25, 2020).

> There exists a substantial question regarding whether the Commissioner had the authority to issue the Permit Order in the first place, and that Order at a minimum should be stayed while the Board addresses that question. *If*, as the relevant statutes make clear, he did not, then the Permit Order is null and ought to be vacated or, at the very least, stayed during the pendency of proceedings before the Board.[6]

As explained later, the word "if" is critical word that NRCM struggles to understand. Under NRCM's logic, the repeated raising of a jurisdictional argument, without more, makes it likely to succeed in convincing the Board to reverse the Department on the environmental merits. That is neither the law nor the practical reality of this proceeding spanning over three years. The Board itself has recognized this flawed logic in denying NRCM's appeal of the Board's decision to refer NRCM's application to the Commissioner, stating:

> Your appeal letter asserts that NRCM's stay application is not a typical stay motion because only the Board may make decisions on the NECEC permit applications here. Your letter bases these assertions on NRCM's underlying arguments regarding the Board's statutes and regulations that are at issue in NRCM's Board appeal and assumes those arguments are correct. The Board has not yet decided NRCM's appeal or the merits of these arguments and will not presume their validity for procedural purposes while NRCM's appeal is pending.[7]

No matter how many times or in what context NRCM repeats its jurisdictional argument, NRCM's own belief—that its underlying argument about Board jurisdiction correct—does nothing to demonstrate that there is a strong likelihood of success on the merits.

Even assuming that the jurisdictional argument somehow improves the substantive merits, NRCM is wrong about Board jurisdiction. The Commissioner's dismissal of NRCM's argument is sound and should guide the Board in dispensing with the recycled argument now. The Commissioner stated:

> NRCM's Motion also argues that it has a strong likelihood of success on the merits of its claim that the Board was required to assume original jurisdiction pursuant to Chapter 2, §17 of its regulations, and 38 M.R.S. §§ 341-D(2) and 344(2-A), and that the NECEC Order is therefore invalid. The record reflects that neither NRCM nor any other party requested that the Board assume jurisdiction of the permit applications during the 20-day period for filing such a request set forth in Ch. 2, §17(A). Similarly, no party ever attempted to raise this issue in the two and a half years the applications were pending. In a proceeding where neither the Commissioner nor any party requests Board jurisdiction, the Board has discretion as to whether to assume jurisdiction, but is not required to do so. See 38 M.R.S. § 341-D(2) ("The board may vote to assume jurisdiction of an application if it finds that at least 3 of the 4 criteria of this subsection are met."); Chapter 2, §17(B) ("The board may assume jurisdiction over any application on its own initiative if it finds that at least 3 of the 4 criteria in section 17(C) are met."). In any event, all appeals of the NECEC Order are now before the Board, see fn. 1 above, and in its review of the NECEC Order the Board "is not bound by the commissioner's findings of fact or conclusions of law but may adopt, modify, or reverse findings of fact or conclusions of law established by the commissioner." 38 M.R.S. § 341-D(4)(A). Even if NRCM could show that the Board was required to assume jurisdiction over the application at the outset, which they cannot, it is difficult to see how the Board's current involvement would not render

[6] NRCM, Appeal of Commissioner Reid's August 26, 2020 Denial of Stay Request, at 1-2 (September 25, 2020) (emphasis added).
[7] Letter Decision by Board Chair Draper, at 1 (August 4, 2020) (emphasis added).

> that harmless error. Accordingly, I find that there is not a strong likelihood of reversal of the NECEC approval on the basis of this argument.[8]

In response to this thorough takedown, NRCM accuses the Commissioner of "sleight of hand" by virtue of his allegedly ignoring the word "shall."[9] To the contrary, it is NRCM that is using misdirection to minimize the operative language in the relevant statutes, particularly the word "if."

Title 38 M.R.S. § 341-D(2) states:

> Except as otherwise provided in this subsection, the board shall decide each application for approval of permits and licenses that ***in its judgment*** represents a project of statewide significance. A project of statewide significance is a project that meets at least 3 of the following 4 criteria:
> …
> The board shall also decide each application for approval of permits and licenses that is referred to it jointly by the commissioner and the applicant.
> The board shall assume jurisdiction over applications referred to it under section 344, subsection 2-A ***when it finds*** that at least 3 of the 4 criteria of this subsection have been met.
> The board ***may*** vote to assume jurisdiction of an application ***if it finds*** that at least 3 of the 4 criteria of this subsection have been met.

(Emphasis added). Under this statute, the Board is only required to assume jurisdiction if an application is jointly referred, which undisputedly did not occur here. In all other instances, the Board has discretion.

The Board's discretion is embodied in the phrase "in its judgment," which unequivocally conditions its duty to assume jurisdiction. In practice, the Board exercises its judgment through a vote that occurs in four possible instances, three of which are specified in 38 M.R.S. § 344(2-A)(A).[10] First, *if* the Commissioner determines on his own that the criteria are *initially* met, the Commissioner must refer the application to the Board. Second, *if* an interested person requests referral (and the Commissioner has not already referred the application on his own), he must notify the Board. Third, *if* the Commissioner *subsequently* determines that the criteria are met, the Commissioner must refer the application to the Board. In each case, the operative word is "if," despite NRCM's myopic focus on the word "shall." Had any of these three conditions been met, the Commissioner would have notified the Board and the Board would have taken a vote. Beyond Section 344, the Board has discretion to hold a vote on its own accord and "may" assume jurisdiction "if" it finds the criteria have been met. In sum, the Board must hold a vote in three situations and may hold a vote if it so chooses. If a vote is held, the Board "in its judgment" can determine there is or is not jurisdiction.

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[8] Letter Decision by Commissioner Reid, at 5 (August 26, 2020).
[9] NRCM, Appeal of Commissioner Reid's August 26, 2020 Denial of Stay Request, at 2 (September 25, 2020).
[10] 38 M.R.S. § 344(2-A)(A), in relevant part, states: "A. Except as otherwise provided in this paragraph, the commissioner shall decide as expeditiously as possible ***if*** an application meets 3 of the 4 criteria set forth in section 341-D, subsection 2 and shall request that the board assume jurisdiction of that application. ***If*** an interested person requests that the commissioner refer an application to the board and the commissioner determines that the criteria are not met, the commissioner shall notify the board of that request. ***If*** at any subsequent time during the review of an application the commissioner decides that the application falls under section 341-D, subsection 2, the commissioner shall request that the board assume jurisdiction of the application" (emphasis added).

NRCM spent nearly three years before the Department and failed to request referral during the applicable time period or raise the issue to the Commissioner so that he might exercise his discretion to subsequently determine the criteria have been met. That would be nothing short of an extraordinary oversight if the current Board appeal, coupled with the prior history of Superior Court appeals and various stay requests by multiple parties, were not merely a tactic to cause confusion and delay. In any event, NRCM's inaction failed to trigger a Board vote. The Board apparently also declined to vote on the NECEC application on its own accord. While NCRM may dispute the Commissioner's decision that the NECEC application did not initially or subsequently meet the applicable criteria, and may not agree with the Board's exercise of discretion to not hold a permissive vote, the time has long passed for such disputes to be raised. Under no plausible reading of the statutes is the Board now required to assume original jurisdiction over the NECEC application. Making such an implausible argument over and over again does not give NRCM a strong likelihood of success on the underlying environmental merits.

## IV. Risk of Substantial Harm to the General Public

NRCM and West Forks both make conclusory allegations that staying the Permit Order will not cause substantial harm to the general public and will even benefit the general public. NRCM argues that, because several permits are outstanding, NECEC is not "shovel ready" anyway (which directly contradicts the harm NRCM alleges will occur with construction).[11] West Forks states "that the only "public" which should be considered is the citizenry of Maine" and not the citizens of Massachusetts or Quebec or any corporate shareholders.[12] NRCM and West Forks ignore the myriad benefits that the general public in Maine will enjoy if NECEC is timely permitted, constructed, and operated. Delay and uncertainty risk the evaporation of any such benefits, which would harm the general public.

First, it important for the Board to understand the 2019 stipulation approved by the Maine Public Utilities Commission ("MPUC") in granting NECEC a certificate of public convenience and necessity. As described by the Governor's Energy Office, the 2019 stipulation is a "strong $258 million stipulation" that "will enhance the benefits inherent in NECEC."[13] The 2019 stipulation includes, for Maine citizens, substantial electric rate relief, broadband improvements, electric vehicle and heat pump incentives, as well as scholarships, a grant for offshore wind research, and commitments to study emissions and renewable energy integration in Maine, each of which is undoubtedly a benefit to the general public in Maine, but if and only if NECEC achieves commercial operation. Critically, the MPUC approved the 2019 stipulation independent of its decision to grant a certificate of public convenience and necessity, stating: "The Commission concludes that the NECEC meets the applicable statutory standards for a CPCN independent of the additional benefits that will be conveyed by the February 21, 2019 Stipulation. However, the

[11] NRCM, Application for Stay of Agency Decision, at 10 (June 10, 2020).
[12] West Forks, Appeal of Commissioner Reid's August 26, 2020 Denial of Application for Stay, at 11 (September 25, 2020).
[13] "Governor Mills Secures Discounted Electricity for Maine from Hydro-Quebec" (July 10, 2020), available at https://www.maine.gov/governor/mills/news/governor-mills-secures-discounted-electricity-maine-hydro-quebec-2020-07-10.

provisions of the Stipulation augment the benefits of the Project."[14] NRCM, a party to the MPUC's proceeding, vigorously opposed the 2019 stipulation.

Second, it is important for the Board to understand that after the 2019 stipulation was approved, an additional agreement (the "2020 stipulation") was reached as part of a related MPUC proceeding in docket 2019-00179. As described by the Governor's Energy Office, "Hydro-Québec has signed a formal binding commitment to sell electricity directly into Maine at a discounted price via the New England Clean Energy Connect (NECEC)" and "as part of the commitment, Hydro-Québec will accelerate $170 million in benefits negotiated last year, including rate relief for Maine consumers and incentives for broadband, electric vehicle charging stations, and heat pumps."[15] The power commitment will allow Maine to directly purchase electricity via NECEC at a market discount or, at a minimum, will provide $40 million in payments "to an entity designated by the GEO that ensures benefits to Maine retail energy customers." Pending review and approval by the MPUC, the benefits agreed to by Hydro-Québec under the 2019 stipulation will be accelerated "upon the issuance of final permits rather than the commercial operation date."[16] If the Permit Order is stayed, and ultimately possibly vacated, the direct public benefits to Maine created by both the 2019 and 2020 stipulations could be delayed or entirely foregone. As the public "Support Agreement" accompanying the 2020 stipulation states, Hydro-Québec's payments are "[s]ubject to and conditioned upon (A) the issuance of the State of Maine and U.S. Army Corp of Engineers ("ACOE") permits required for the construction and operation" of NECEC, with "permits" defined to include the Site Location of Development Act permit and a Natural Resources Protection Act permit issued by the Department in the Permit Order.[17] Hydro-Québec's payments, however, "may be suspended" if, and for as long as, "[c]onstruction of a material part of the NECEC Transmission Line is suspended indefinitely or for an announced period of greater than 30 days."[18]

Finally, it is also worth noting that NRCM once again vigorously and needlessly opposed the 2020 stipulation. The MPUC had already approved the NECEC, regardless of the 2019 stipulation, and the Law Court upheld that decision.[19] NRCM's substantive arguments against NECEC with respect to the MPUC permitting process are moot. The 2020 stipulation presented only the possibility of incremental benefits to Maine and nothing more; NRCM could not "win" its substantive arguments against NECEC in the context of the 2020 stipulation. Blinded by its own zealous advocacy, though, NRCM opposed discounted electricity, electric vehicles, heat pumps and the like, just for the sake of opposition. Based on this history, the Board would be justified in questioning the credibility of NRCM and its arguments for a stay, especially given that the Permit Order included extensive conditions, providing "an unprecedented level of natural

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[14] *Central Maine Power Company*, Request for Approval of CPCN for the New England Clean Energy Connect Consisting of the Construction of a 1,200 MW HVDC Transmission Line from the Québec-Maine Border to Lewiston (NECEC) and Related Network Upgrades, No. 2017-00232, Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation, at 6 (Me. P.U.C. May 3, 2019).

[15] "Governor Mills Secures Discounted Electricity for Maine from Hydro-Quebec" (July 10, 2020), available at https://www.maine.gov/governor/mills/news/governor-mills-secures-discounted-electricity-maine-hydro-quebec-2020-07-10.

[16] Id.

[17] MPUC, Docket No. 2019-00179, NECEC II Stipulation Attachment 17, Support Agreement, at 2.

[18] Id., at 5-6.

[19] *See generally*, *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, 227 A.3d 1117.

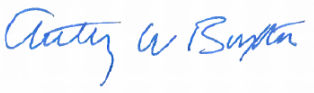
resource protection for transmission line construction in the State of Maine," that were based in substantial part on NRCM's own advocacy.

## V. Conclusion

The Board should deny the Petitioners' renewed applications for stay because it has no authority to stay the Permit Order in this circumstance. Even assuming the Board has authority to issue a stay here, the Petitioners failed to meet any of three necessary criteria for a stay. NRCM's jurisdictional argument is wrong and its repeated invocation of a wrong argument provides no support that it is likely to succeed on the environmental merits of its appeal. Furthermore, issuing a stay would substantially harm the Maine general public by causing the delay or cancellation of significant benefits created by the 2019 and 2020 stipulations.

DATED: October 16, 2020

Respectfully submitted,



Anthony W. Buxton
R. Benjamin Borowski
Counsel to Industrial Energy Consumer Group
Preti Flaherty Beliveau & Pachios LLP
P.O. Box 1058, 45 Memorial Circle
Augusta, ME 04332
Telephone: 207-623-5300

PretiFlaherty

Portland, ME
Augusta, ME
Concord, NH
Boston, MA
Washington, DC

Anthony W. Buxton
abuxton@preti.com
207.791.3296

October 16, 2020

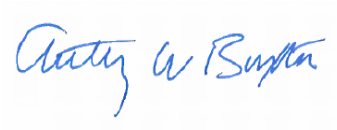
Mark C. Draper, Chair
Board of Environmental Protection
c/o Ruth Ann Burke
17 State House Station
Augusta, ME 04333-0017

**RE: Central Maine Power Company, New England Clean Energy Connect**
**Department Order L-27625-26-A-N, L-27625-TB-B-N, L-27625-2C-C-N, L27625-VP-D-N, L27625-IW-E-N**
**RENEWED APPLICATIONS FOR STAY OF NECEC ORDER**

Dear Mr. Draper:

Enclosed for filing please find Industrial Energy Consumer Group's legal argument in opposition to the renewed applications for stay of the Department's May 11, 2020 Order filed by the Natural Resources Council of Maine and West Forks, et. al.

Regards,



Anthony W. Buxton
R. Benjamin Borowski
Counsel to Industrial Energy Consumer Group
Preti Flaherty Beliveau & Pachios LLP
P.O. Box 1058, 45 Memorial Circle
Augusta, ME 04332
Telephone: 207-623-5300

Enclosures