STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

CENTRAL MAINE POWER COMPANY	)
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	)

RESPONSE OF CENTRAL MAINE POWER COMPANY TO NRCM'S REQUEST FOR BOARD JURISDICTION OVER CMP'S APPLICATION FOR PARTIAL TRANSFER OF ITS NECEC PERMITS AND CERTIFICATION

Central Maine Power Company (CMP) opposes the October 7, 2020 Request of the Natural Resources Council of Maine (NRCM) that the Board of Environmental Protection (BEP) assume jurisdiction over CMP's September 25, 2020 Transfer Application (Transfer Application) and consolidate it with the pending appeals of the Department of Environmental Protection's (DEP's or Department's) May 11, 2020 Order (Order) concerning the New England Clean Energy Connect (NECEC) Project (Project).

I. NRCM's improper request of the Board is both premature and indicative of the Board's limited role here.

A. NRCM failed to follow the Chapter 2 procedure by prematurely filing with the Board NRCM's argument for the Board to assume jurisdiction.

Disregarding the procedure for Board assumption of jurisdiction set forth in section 17 of the Department's Chapter 2 rules, which NRCM cites in its opening sentence, NRCM makes its request that the Board assume jurisdiction over the Transfer Application to the Board Chair, members of the Board, the Board's current and former executive analysts, and the DEP's NECEC Project Manager. NRCM's continued strategy of throwing everything at the wall to see

what sticks illustrates its strategy of creating confusion. The applicable procedure is clear, notwithstanding NRCM's attempts to obfuscate it.

Under section 17(A), a person may request that the Board assume jurisdiction over an application by submitting the request "to the Department," not to the Board. The request is submitted first to the Department because it is the Commissioner who first makes a determination as to whether the Board should assume jurisdiction over the application, as set forth in section 17(B).

If the Commissioner determines that the Board should consider jurisdiction (which it should not here for the reasons stated below), the Commissioner provides that recommendation to the Board, and the Board then provides an opportunity for the applicant, governmental agencies, and interested persons to comment on the Commissioner's recommendation. DEP Regs. Ch. 2 § 17(B).

If a request for Board jurisdiction has been made and the Commissioner determines that the Board should not consider jurisdiction, the Commissioner provides to the Board a copy of the request and the Commissioner's determination. DEP Regs. Ch. 2 § 17(B). In that instance – where the Commissioner determines that the Board should not consider jurisdiction – the Department's rules do not provide for an opportunity for comment on the Commissioner's recommendation. *Id.*

NRCM skips these procedural steps, arguing directly to the Board that it should assume jurisdiction for the fictitious reason that the Transfer Application is an "amendment" application related to a project of statewide significance. While the substance of NRCM's argument is incorrect, as discussed below, so too is NRCM's strategic filing of its request with the Board itself. Chapter 2 provides for such comment to the Board only in the instance where the

Commissioner determines that the Board should consider jurisdiction, which has not occurred here. DEP Regs. Ch. 2 § 17(B). The Board thus should disregard NRCM's request.

B. The Board is not required to assume original jurisdiction over the Transfer Application, or to vote on NRCM's request.

NRCM's arguments to the Board that it should assume jurisdiction is not only premature, but it is indicative of how unnecessary Board jurisdiction is here. Resuscitating its argument that the Board must take original jurisdiction over the Project because the Project is of "statewide significance," NRCM here illogically extends this discredited argument to the Transfer Application. NRCM Request at 2, fn. 2.[1] But NRCM's novel interpretation of 38 M.R.S. § 341-D(2), which requires that the Board "decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance," is not germane to the Transfer Application.

Title 38 M.R.S. § 341-D(2) plainly applies only to an "application for approval of permits and licenses," and not to transfers of such approvals. 38 M.R.S. § 341-D(2); *see also* DEP Regs. Ch. 2 § 17(C) ("The Board shall assume jurisdiction over and decide each license application that in its judgment represents a project of statewide significance.") (emphasis added). NRCM

[1] NRCM's argument in its June 10, 2020 filing, which it references again now, is that 38 M.R.S. § 341-D(2) requires the Board to make determinations that every project for which DEP has received a permit application are *not* of statewide significance – otherwise, it must assume jurisdiction and review those applications de novo. NRCM June 10, 2020 Application at 3-4. This argument turns the statute on its head. Nowhere is there an affirmative duty on the part of the BEP to make determinations that every project is or is not of statewide significance, as CMP explained in its June 26, 2020 response to NRCM's June 10, 2020 filing, and as former Commissioner Reid explained in his August 26, 2020 denial of NRCM's June 10, 2020 filing, both of which CMP incorporates herein by reference. NRCM nevertheless argues that because it believes that the Board should have original jurisdiction over the permitting of the Project, it makes little sense for the Board to address the Transfer Application in its appellate capacity. NRCM Request at 2, fn. 2. This argument makes no sense, as the DEP has issued no decision on the Transfer Application, and thus the Board has no decision to review in its appellate capacity.

does not, and cannot, allege that the Transfer application meets any of the four criteria that could result in Board assumption of jurisdiction, because those criteria apply to the permitting of an underlying project and not to a subsequent transfer of the permits issued for that project.[2] In other words, a Transfer Application itself cannot be "a project" of statewide significance. Accordingly, the Board need not even vote on the four criteria, because they are irrelevant, and can instead simply accede to a recommendation of the Commissioner that the Board not assume jurisdiction.[3]

II. A transfer application is not a permit amendment, and assumption of jurisdiction and consolidation with an appeal of the underlying permit is inappropriate.

The Commissioner (or the Board, in the event that the Board considers NRCM's request because the Commissioner has recommended that the Board consider jurisdiction) should deny NRCM's request for BEP jurisdiction and consolidation with the pending appeals because NRCM bases its request on a mischaracterization of the Department's rules. NRCM's statement that "a transfer application is a permit amendment" is plainly false. NRCM Request at 1. To the contrary, transfer applications and permit amendments are referred to and treated separately under the Department's Chapter 2 rules.[4] For example, section 21 governs three distinct types of

[2] A transfer application (1) does not have environmental or economic impact, (2) involves an activity previously permitted, (3) rarely comes under significant public scrutiny (and any implication that it does here is deceptive, as NRCM was a party to the Maine Public Utilities Commission (MPUC) proceeding ordering the transfer that resulted in the Transfer Application) (*see infra* fn. 9), and (4) is not located in multiple areas of the state. *See* 38 M.R.S. § 341-D(2); DEP Regs. Ch. 2 § 17(C).

[3] The Board need only determine by vote whether to assume jurisdiction where the four statutory criteria are relevant. The Department's rules do not otherwise require any determination by the full Board. DEP Regs. Ch. 2 § 17. If the full Board were tasked with voting on all requests for assumption of jurisdiction, the criteria for determining such requests would not be limited to "applications for approval of permits and licenses." *Id.*

[4] The Chapter 2 regulations define the words "amendment" and "transfer" as different terms. An "Amendment Application" is "an application to modify a license previously granted by the Department, except for minor revisions." DEP Regs. Ch. 2 § 1(C). A "Transfer of Ownership,"

applications: "License Renewals," "Amendments," and "Transfers." Each type of application is governed by its own subsection, with section 21(B) governing "amendments" and section 21(C) governing "transfers."[5] The Department's Chapter 305 section 17 NRPA Permit by Rule rules, which explicitly govern NRPA permit transfers, nowhere suggest that the transfer of the NRPA permit in any way alters the underlying permit. Furthermore, transfer applications and amendment applications have separate fee schedules.[6] The Department's rules thus make clear that transfer applications are not permit amendments.

There is no doubt that CMP made its Transfer Application to the DEP pursuant to Chapter 2 section 21(C) using the appropriate "Transfer Application" forms for Site Location

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conversely, is not an amendment to an existing license but rather is "a change in the legal entity that owns a property, facility or structure that is the subject of a license issued by the Department." DEP Regs. Ch. 2 § 1(R).

[5] Chapter 2 is replete with additional examples of the distinction between amendment and transfer applications. *See, e.g.,* DEP Regs. Ch. 2 § 11(F) ("Unless otherwise provided by law, all license applications, including renewal, amendment and transfer applications, are subject to the substantive laws and rules in effect on the date the application is accepted as complete for processing.") (emphasis added); DEP Regs. Ch. 2 § 14(A) ("Unless exempted in section 14(C) of this rule, or other Department rule specific to the type of application, within 30 days prior to filing, an applicant shall give public notice of Intent to File a new, renewal, amendment or transfer application.") (emphasis added); DEP Fee Schedule, Air Quality § III (Nov. 1, 2019 through Oct. 31, 2020) ("There are no additional fees for minor revisions, amendments, transfers or renewals [of air emission licenses].") (emphasis added).

[6] *See, e.g.,* DEP Fee Schedule, Land Resources – Site Location of Development Act (Nov. 1, 2019 through Oct. 31, 2020) ("The fee for a **minor revision, condition compliance, renewal,** or **transfer** is $167. The fee for an **amendment** is one half the processing fee, plus one half the licensing fee; the **minor amendment** fee is $1,524.") (emphasis original); DEP Fee Schedule, Land Resources – Natural Resources Protection Act (Nov. 1, 2019 through Oct. 31, 2020) ("The fee for a **minor revision** and **conditional compliance** of all NRPA permits except codes TA, TB & TC is $167; the fee for a **minor revision** of permit codes TA, TB & TC is $35 if there is no change in square footage. NRPA permits cannot be **amended** and are **transferred** or **extended** using a permit by rule application.") (emphasis original).

and NRPA projects[7] – it did not apply to amend the underlying Order and it did not pay the fees required for any such amendment. Because the transfer and amendment of a DEP permit are distinct processes under the Department's rules, CMP's Transfer Application is not an application to amend the Order.

Nor will the DEP's approval of CMP's Transfer Application "substantively alter the terms of the Permit Order." NRCM Request at 2. If the transfer of a permit modified its underlying terms, as NRCM alleges, there would be no need for separate transfer regulations. Instead, any transfer regulations in that case would be subsumed in the section 21(B) amendment provisions. They are not, because a transfer does not result in "any modification, not exempted from licensing requirements by statute or rule, to a project or activity that is the subject of a Department license." DEP Regs. Ch. 2 § 21(B). Indeed, any DEP findings on the financial capacity and technical ability of transferee NECEC Transmission LLC (NECEC LLC) in no way amend or affect its findings in the Order on the financial capacity and technical ability of CMP, which remain correct regardless of any transfer. That DEP approval of a permit transfer may occur after the transfer of ownership further signals that the transfer itself does not implicate the permit's underlying terms. DEP Regs. Ch. 2 § 21(C)(1).

[7] Because CMP filed a transfer application, not an amendment application, no notice to appellants was required, as NRCM alleges in footnote 3 on page 2. Such "notice of the amendment application" is required only "[i]f a licensee seeks to amend a license regarding an issue that was the subject of an appeal to the Board." DEP Regs. Ch. 2 § 14(B) (emphasis added). CMP does not seek to amend its permit, but rather only to transfer it in part to a new owner as required by the MPUC. Consequently, notice of the Transfer Application need not be provided to appellants as if they were abutters. *Id.* In any event, CMP published Notice of Intent to file its transfer application in three publications, and copied NRCM and the other DEP intervenors on the transfer application filing to DEP, so NRCM is aware of CMP's filing, as evidenced by its request that BEP assume jurisdiction over that application.

NRCM's reliance on the Department's argument for remand of the appeals of the Order from Superior Court to the Board thus is misplaced. NRCM Request at 2-3. Because resolution of the Transfer Application will not "supersede the Permit Order," but will instead result in a separate transfer order, consolidated Board review of the Order and the Transfer Application is unnecessary and inappropriate.

Accordingly, addressing the Transfer Application separately from the appeals of the Order is consistent with the Department's rules and is in no way "impractical, inefficient, and wasteful of Department resources," as NRCM argues. NRCM Request at 3. Indeed, the transfer of a DEP permit indisputably occurs outside of and distinct from the process by which a DEP permit may be amended and/or appealed; it would in fact be "impractical, inefficient, and wasteful" – and would make no sense – to consider the Transfer Application in the same proceeding as the appeal of the underlying Order. The Transfer Application is not an "amendment" of the Order, nor is it "part of the Permit Order," as transfer impacts neither the Order's terms nor its appeal. NRCM Request at 1-2. Consolidation of the Transfer Application with the pending appeals at the Board would be inappropriate and contrary to the procedures set forth in the Department's rules.

III. A hearing before any of the Department's decision-making bodies is unwarranted.

A hearing on the Transfer Application is unwarranted here, by either the DEP or the BEP, and would result in the waste of the Department's resources that NRCM protests. NRCM Request at 3; *see also* NRCM Request at 1-2, fns. 1-2. A hearing is necessary only in those instances where there is "credible conflicting technical information regarding a licensing criterion and it is likely that a hearing will assist the Department in understanding the evidence." DEP Regs. Ch. 2 § 7(B). The purpose of a hearing is to develop the record with such additional

testimony and other evidence, without which the Department or the Board cannot render a decision. NRCM fails to make any showing that there is credible conflicting technical information that would warrant a hearing to assist the Department or the Board.[8] Indeed, it can make no such showing, because a transfer application requires only a showing of the transferee's technical and financial capacity, and does not involve the production of detailed technical information relevant to the construction of the project itself.[9] There is no reason, and NRCM

[8] Likewise, NRCM fails to comply with the requirement that it must provide an offer of proof regarding the testimony and other evidence that would be presented at a hearing, which must consist of a statement of the substance of the evidence, its relevance to the issues on appeal, and whether any expert or technical witnesses would testify. DEP Regs. Ch. 2 § 24(B)(4).

[9] NRCM fabricates a conflict when it states that CMP has "conceded" that the MPUC required in May 2019 that CMP transfer all Project permits to NECEC LLC. NRCM Request at 2 ("CMP thus acknowledges that, as of May of 2019, it was required to transfer any outstanding permit applications before the Department, but did not do so in the year that passed while the Commissioner considered the Permit Order. NRCM raised this exact issue in its appeal to the Board of the Permit Order with regard to right title and interest, as well as findings regarding financial capacity and technical ability.").

As NRCM is fully aware, because it intervened as a party to the MPUC proceeding and periodically participated in case conferences and settlement negotiations, the MPUC's May 3, 2019 Order granting the Project a certificate of convenience and necessity and approving the stipulation requires that CMP transfer the Project to NECEC LLC prior to commencing construction of the Project. However, before the transfer of the Project can occur, the MPUC must authorize the creation of NECEC LLC as a Maine public utility pursuant to 35-A M.R.S. § 708 and grant the necessary approvals to effectuate the transfer of the Project to NECEC LLC pursuant to Maine's public utility affiliated interest transaction statute, 35-A M.R.S. § 707.

After an extensive negotiation process, CMP, NECEC LLC, the Office of the Public Advocate, the Governor's Energy Office, and the Industrial Energy Consumer Group finalized and submitted a stipulation on July 30, 2020 that resolved the issues in the MPUC proceeding that CMP and NECEC LLC initiated as required by MPUC's May 3, 2019 Order, including the approval of NECEC LLC as a public utility and the affiliate transaction approvals required to effectuate the transfer of the NECEC to NECEC LLC. As NRCM is aware, the MPUC Commissioners unanimously approved the stipulation on October 20, 2020. MPUC Docket No. 2019-00179. There thus is no "credible conflicting technical information" regarding the transfer of the Project that would necessitate a hearing here.

states no reason, to further develop the record on CMP's Transfer Application by holding a hearing.

Because there is an adequate record on which the Department (or the Board, if it assumes jurisdiction) can render its decision on the Transfer Application, and because NRCM cannot demonstrate that there is sufficient conflicting technical evidence on a licensing criterion to warrant a public hearing, a hearing on the Transfer Application is unwarranted and would be a waste of Department resources. *Concerned Citizens to Save Roxbury v. BEP*, 2011 ME 39, 15 A.3d 1263; *Martha A. Powers Trust v. BEP*, 2011 ME 40, 15 A.3d 1273.

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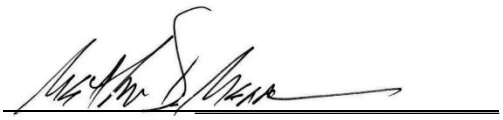
For the foregoing reasons, the Commissioner should recommend denial of, and the Board should accept that recommendation and thereby deny, NRCM's request that the Board assume jurisdiction over CMP's Transfer Application and consolidate it with the appeal of the DEP Order, and that it hold a hearing on that consolidated proceeding.

Dated this 27th day of October, 2020.



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