

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

CENTRAL MAINE POWER COMPANY
Application for Site Location of Development
Act permit and Natural Resources Protection
Act permit for the New England Clean Energy
Connect (“NECEC”)

L-27625-26-A-N
L-27625-TB-B-N
L-27625-2C-C-N
L-27625-VP-D-N
L-27625-IW-E-N

**BRIEF OF MAINE STATE
CHAMBER OF COMMERCE,
LEWISTON-AUBURN METRO
CHAMBER OF COMMERCE, AND
CITY OF LEWISTON IN
OPPOSITION TO APPEALS**

The Maine State Chamber of Commerce (“Maine Chamber”), the Lewiston-Auburn Metro Chamber of Commerce (“LA Metro Chamber”) (jointly “the Chambers”), and the City of Lewiston (“the City”) respectfully urge the Board of Environmental Protection to reject the pending appeals by opponents of the New England Clean Energy Connect Project (“NECEC” or “Project”). The Permit under review provides a carefully balanced and well-supported analysis. It imposes several conditions and codifies the changes and improvements to the Project made during the lengthy professional hearings. The record before the Board presents the legal and evidentiary foundation for the Permit’s appropriate balancing of multiple interests.

At the risk of stating the obvious, most administrative licensing or permitting proceedings, and all environmental permitting processes, inherently involve sensitive and complex judgments balancing multiple competing considerations. The arguments presented by opponents of this Project refocus the elemental point that the question is not whether there will be some environmental impacts or effects. The question is whether the environmental changes

to be expected are legally permissible considering the Project's objectives and public benefits, given the conditions, the mitigation, and the compensation. This Permit is well justified legally and factually; these appeals are not.

Often, the task of the Department or the Board is to consider the non-environmental benefits presented to justify environmental changes that will or may result from construction and operation of new or expanded physical assets. Unlike many proposed projects, however, NECEC brings its own significant *environmental* benefits. Introduction of renewable hydropower is an essential element of any comprehensive and durable plan to reduce the carbon footprint of the New England electric grid. Hydropower that is available from Canada cannot be used in New England unless it is transmitted. To defeat the transmission is to reject the hydropower and instead to embrace increased fossil-fueled generation of the electricity needed to meet growing demand for, say, electric vehicles, among other things.

The Chambers and the City have emphasized the improved reliability of electric energy at reduced cost to Maine people and Maine businesses. They have also contended in these and other proceedings that the additional jobs, the enhanced economic development, and the substantial added tax base justify the environmental effects to be expected from this Project. As a matter of physics, the fact that this Project began in response to a Massachusetts initiative cannot confine its benefits to Massachusetts, either environmentally or economically. All Maine electric energy costs will be lower for every user. Significant other targeted provisions will benefit many Maine people directly, and many more indirectly. There will be temporary and permanent jobs with the inevitable multiplier effects of the enhanced payrolls. And the City will realize critical new tax revenues, without raising tax rates, because of the added tax base to be constructed in Lewiston.

The Chambers and the City urge the Board to recognize that the environmental and economic benefits of the Project are amply sufficient under all applicable law to justify the Permit. The Chambers and the City more specifically emphasize that the economic benefits are neither speculative nor insubstantial. All of Maine, but especially the City and the Lewiston-Auburn area, will realize substantial economic and associated civic benefits from construction and operation of this Project. All of this is intuitively obvious and common knowledge. It is also well documented in the PUC Order approving the Stipulation in proceedings in which NRCM was a party. At pages 91-98, the PUC summarizes the important benefits justifying its approval of the Stipulation. The PUC decision has been affirmed by the Law Court.¹ The Board may take administrative notice of the work of other agencies involving the same matter and the same parties. *See, e.g.*, 5 M.R.S. § 9058(1) (“Agencies may take official notice of any facts of which judicial notice could be taken, and in addition may take official notice of general, technical or scientific matters within their specialized knowledge and of statutes, regulations and nonconfidential agency records. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the substance or materiality of the facts noticed.”); *Friedman v. PUC*, 2016 ME 19, 132 A.3d 183 (noting that the PUC “properly took administrative notice of several documents and exposure regulations in the United States and beyond” when it made its decision about the safety of smart meters); *Middlesex Mut. Assur. Co. v. Maine*, 2003 Me. Super. LEXIS 208, 2003 WL 22309109 (finding that the Superintendent of Insurance did not violate the APA by taking notice of rules beyond those specifically for insurance, i.e., looking at the rules of the Maine Fuel Board, after the close of the evidence in an administrative proceeding).

¹ *NextEra Energy Res., LLC v. Me. PUC*, 2020 ME 34, 227 A.3d 1117.

EMPLOYMENT BENEFITS FROM THE NECEC

The PUC Staff's consultant, London Economic International (LEI), authored a report for the Commission entitled "Independent Analysis of Electricity Market and Macroeconomic Benefits of the New England Clean Energy Conned Project" (May 21, 2018), which was reviewed by the DEP prior to issuing its Permit.² The report forecast that the Project will generate, on average, over 1,600 direct, indirect, and induced Maine jobs each year during the six-year development and construction period. Over 850 of these are direct jobs and the remaining 750+ jobs will be indirect and induced. Although the direct jobs are projected only through the construction and development period, not all the indirect and induced jobs will simply disappear when construction is complete, as some of those jobs are likely to transition into other economic activity, which will benefit not only those who are employed, but also the State at large.

LEI also modeled the number of Maine jobs that the NECEC will generate once it goes into service. LEI's analysis found that the NECEC will generate 291 new Maine jobs on average each year during the 15-year operations period that was the subject of the LEI study, many of which are due to the lower wholesale electricity market prices that will result from completion and operation of the NECEC. The jobs created by the NECEC will be steady, good paying jobs that will benefit Maine residents and businesses. In a time when Maine has been losing paper mills and confronting the challenge of how to encourage economic growth and prosperity, the

² *Central Maine Power, New England Clean Energy Connect*, Site Location of Development Act, Natural Resources Protection Act, Freshwater Wetland Alteration, Significant Wildlife Habitat Water Quality Certification, Nos. L-27625-26-A-N, L-27625-TG-B-N, L-27625-2C-C-N, L027625-VP-D-N, L-27625-IW-E-N, Order at 105 (Me. Dep't of Env'tl. Prot. Jan. 8, 2020).

Chambers and the City emphasize that the employment opportunities created by the Project provide a concrete and substantial benefit to all of Maine.

ENERGY PRICE EFFECTS

The NECEC is also good for Maine businesses and residential energy consumers because it will reduce electricity prices in Maine and across the region. Energy prices are an important concern for the Chambers and their members and for the City and all municipalities. Energy costs are a significant factor for every Maine company in making day-to-day decisions and in planning for future growth. Businesses considering a move to Maine must account for the extent to which energy costs will affect their bottom lines. The Maine Chamber has repeatedly been advised that energy costs are one of the leading reasons why businesses are reluctant to relocate to our State or expand into Maine. Even though Maine offers many advantages, including a hard-working and capable workforce, high energy costs can be a deal breaker.

The NECEC will help to remedy that problem. There can be no dispute that the NECEC will lower energy prices. In the PUC proceedings, there was expert testimony agreeing that the NECEC will reduce wholesale electricity market prices in New England, which will result in lower electricity costs for Maine's retail electricity consumers. These savings for Maine's people and businesses are significant. Although the Chambers and the City support the NECEC for several reasons, the energy cost reduction benefits of the Project are particularly significant for the City itself, for other large and small municipalities and non-profits, for Maine businesses that use a lot of electric energy, and for any prospective Maine business that is considering its future energy costs.

OTHER MACROECONOMIC BENEFITS OF THE NECEC

In addition to increased jobs and lower energy costs, and the general positive effect on Maine's GDP, the NECEC will benefit Maine by increasing property tax revenues. These benefits, too, are significant. In fact, LEI estimated that the NECEC will increase Maine's GDP, on average, over \$98 million per year (fixed 2009 dollars) during the construction and operations period, and over \$29 million per year (fixed 2009 dollars) during the operations period. Maine's towns and cities where Project infrastructure will be located will directly benefit through additional municipal property tax revenues. Both LEI and CMP estimate that the NECEC will generate over \$18 million in total property tax revenues each year, once the NECEC investments are fully reflected in property valuations.

Part of the Project will be sited in Somerset County. The memorandum of understanding between CMP and stakeholders in Somerset County will provide significant economic development opportunities for the promotion of outdoor activities and tourism in that part of our State. And, when the NECEC is in fact constructed, CMP has agreed to fund additional development of broadband and Wi-Fi in the area, which would benefit all businesses, and the community generally, particularly in today's economy, where high-speed connectivity is often a necessity for businesses of all sizes.

INCREASED TAX REVENUES FOR LEWISTON

Because the Converter Station – a new station that will convert the Direct Current electricity to Alternating Current electricity that can enter the New England electric grid in Maine – will be constructed and operated in Lewiston, businesses and residents in the Lewiston-Auburn region will particularly benefit from enhanced employment opportunities and enhanced economic activity. In addition to local citizens and businesses realizing their respective

individual shares of statewide benefits, the City of Lewiston's municipal revenues will be materially enhanced. Increased municipal property tax revenues provided by the NECEC will help Lewiston meet the needs of its residents, including those who need it most. More than other cities among the ten largest in Maine, Lewiston is struggling with increasing demands for services. Coupled with this increased demand, the City has a much lower assessed property value per capita than any of its peer cities. For example, based on the U.S. Census Bureau's July 1, 2017 population estimates and Maine Revenue Service 2018 data, Lewiston's per capita assessed value was approximately \$61,728, the lowest of any of the ten largest cities in Maine. At the same time, the community's median household income (\$39,890) is only about 75% of Maine's (\$53,024) overall, and the City's poverty rate of 21.4% is nearly double Maine's overall rate of 11.1%.

In recent years, Lewiston has also experienced a significant influx of New Mainers. Many of these families understandably need additional support and social services to adjust to their new lives here in Maine, particularly given their initial language and economic challenges. Likewise, about two-thirds of Lewiston's school students come from economically challenged backgrounds, with one-third present or former English language learners. The NECEC will provide increased municipal tax revenues to communities in which the Project is sited, including especially to Lewiston. These new revenues will allow Lewiston to better address the needs of its residents, including those who need social services support from the City. Importantly, the NECEC will provide this benefit without any increase in the tax rate and may even permit the City to lower a state adjusted tax rate of \$23.66 that is already approximately 57% higher than the statewide average rate of \$15.06. This economic benefit to the City and its residents will be

accomplished at no cost to the City or its residents and businesses and, as importantly, at no cost to any neighboring community or to the State. This is all net added value.

THERE IS NO JURISDICTION QUESTION

As the Superior Court already ruled in litigation involving these same parties, the question of whether the Board, instead of former Commissioner Reid, should have presided at the NECEC hearing is not at all a matter of “jurisdiction” and has been waived both by the failure to ask the Board to hold the hearing and by the explicit request that the Commissioner hold the hearing that was held.³ This is not a matter about which these Appellants have any right to complain.

The fundamental point is that there is no jurisdiction question at all. The authority to determine the issuance or denial of environmental permits lies within a single administrative agency in Maine, the Department of Environmental Protection. Decisional authority ranges from routine administrative staff level approvals, or permits by rule, to Commissioner decisions, to Board decisions. The distribution of those responsibilities is not jurisdictional in any meaningful operational sense for purposes of this appeal.

Jurisdiction is a term uncomfortably borrowed from centuries of jurisprudence concerning the authority of courts. The judicial analogue is properly termed “subject matter jurisdiction,” (i.e., what business in what court) to distinguish it from “personal jurisdiction” (i.e., what parties in what court). Subject matter of one kind or another may be exclusively committed to the authority of a single court or concurrently within the jurisdiction of two or

³ Order on NRCM’s Motion to Stay DEP Commissioner’s Order at 6-7, KEN-AP-20-27, SOM-AP-20-04 (Me. Super. Jan. 11, 2021) (*Murphy, J.*).

more courts. For example, cases within the diversity jurisdiction of the federal courts may lawfully be litigated in either a state court or a federal court. In Maine, there are cases that may be litigated in the District Court or the Probate Court⁴, and there are cases that may be litigated in the Superior Court or the District Court.⁵

As the Superior Court recognized, the Board's "jurisdiction" to hear permit applications is more akin to a claims-processing rule.⁶ Within the DEP, the respective roles of the Commissioner and the Board are not an issue of "jurisdiction." The DEP's Chapter 2 rules set forth the authority of both the Board (in certain circumstances) and the Commissioner to consider permit applications that are within DEP's jurisdiction. Accordingly, it no longer matters whether the issues now before the Board on appeal might have been decided in the first instance by the Board. When the Board did not take the case, it did not leave the Commissioner without authority to act. Indeed, because the Board had not assumed the authority to decide the permit application, the Commissioner had the duty to decide, and he did so skillfully, thoroughly, thoughtfully, and most of all fairly.

These Appellants must necessarily contend either that everything that has occurred to date (including the Permit itself) was a nullity and should be disregarded *or* they must admit that the case is now properly before the Board on appeal (and on remand from the Superior Court) for appellate review of the record. They appear to have acknowledged that the years of work should not now be expunged from the record requiring everyone to start again. No jurisdiction issue

⁴ See, e.g., 18-C M.R.S. § 9-103 (adoptions), and others that may be litigated in the Superior Court or the Probate Court, see, e.g., 4 M.R.S. § 252 (equity regarding administration of estates).

⁵ See, e.g., 4 M.R.S. § 165 (criminal matters); 4 M.R.S. § 152(2) (certain civil actions when no equitable relief is demanded); 4 M.R.S. § 152(3) (enforcement of liens); 4 M.R.S. § 152(5) (foreclosures).

⁶ *NextEra Energy Resources, LLC v. Maine DEP*, SOM-AP-20-04, p. 5-6 (Bus. & Consumer Ct. Aug. 11, 2020, *Murphy, J.*).

really matters unless its functional effect is to delete from all history all the work that has been done, including issuance of the Permit, so as to require a judicial determination that the Permit is a juridical nullity. However, Justice Murphy in the Superior Court has already decided that the Permit is not a juridical nullity and has remanded it to this Board for appellate review.⁷ Because there was never a true jurisdiction issue and any timing issues are long waived or moot, the Board should now proceed to consider the Permit on appeal.

THE BIG PICTURE

Contextually, it is appropriate to note what this Project does not involve. This is not a proposal to build an industrial facility requiring a determination of what levels of new air pollution or new water pollution the public health, safety, and comfort can be legally required to accept. This is not a proposal to replace forests or fields, or wetlands with acres of impervious surface, hosting shopping malls or casinos or office parks. This is a proposal to transmit clean hydropower from Quebec to Lewiston to enter the New England electric grid, reducing the carbonization resulting from the use of electrical energy in New England, including in Maine. This is not to say there are no environmental tradeoffs, but only to say that the function of all environmental legislation and regulation is to evaluate the appropriateness of the tradeoffs, not to generate interminable proceedings within proceedings on top of proceedings to stall proposed projects to death, or to preclude approval of any project that may affect a part of a working forest, no matter how reasonable or responsible its purposes and design.

Stated otherwise, the issue before the Board is not whether some new industrial facility ought to be allowed to emit particulates or gasses or effluents that are harmful for miles around.

⁷ See *NextEra Energy Resources, LLC*, SOM-AP-20-04 at 5-6.

The balancing question is whether some habitats for some species may reasonably be disrupted or adjusted to some degree to facilitate the transmission of energy that does not involve fossil fuels, despite the objections of the fossil fuels industry and its allies. Instead of questions about a proposed project's potential effect on public health, opponents here argue that the views from some private land to locations on other private land must not be altered lest they offend the aesthetic sensibilities of tourists who have no right to be on any of that private land anyway, except by consent of the owners, and they argue that a working forest will somehow be desecrated forever if a transmission line is widened or extended or constructed in places where there are already logging activities involving logging roads.

The Chambers and the City understand that the Board's appellate review is not deferential and that the Board legally is empowered to come to different judgments about the balances to be struck. Given the careful and conscientious balances reflected in the Commissioner's thorough Order, however, with all the conditions and mitigation and compensation, it is unlikely that there is any good reason for striking a materially different balance. And it is implausible that the law would even allow, much less require, rejection of the Project, given the conditions the Order documents as part of the legal analysis. That is not a matter of deference. That is simply a matter of recognizing the high probability that the balances in the Permit, given the legal substrate for the analysis, are as good as or better than alternatives likely to be chosen in even a non-deferential review of the entire evidentiary record.

CONCLUSION

The Chambers and the City fully support Maine's longstanding commitment to robust administrative procedures, conducted and staffed by expert professionals for the full consideration of the environmental risks of any proposed business development. But all

applicants, whatever the project, are entitled to basic procedural fairness for the timely consideration of the evidence and the facts in accordance with the law as written, and not as opponents might wish it had been written. The opponents of this Project have been accommodated at least as fully as they might reasonably expect in a fair process. In fact, the Applicant and the Commissioner have responded to their legitimate concerns and made this Project better. That is all to the good for the people and for the Project. The quality of that iterative process and its product now leaves the opponents with nothing except procedural obfuscation and obstruction, not to improve the Project further, but to hope to defeat it on a fabricated procedural technicality, or to string out the process to stall the Project to death.

A good example is the recent futile challenge to the transfer of the Permit to meet the reasonable requirements of the PUC, given its concerns about separating or not commingling the business activities or economics of the Project with those of its affiliates. There was no legitimate basis for supposing that a routine transfer among related parties was a matter of environmental concern meriting any attention by this Board. However, the Appellants' challenges to that routine reorganization, and their serial demands for reconsideration of every decision, do much to expose what is actually at work here. Process arguments in any appellate process draw their legitimacy, if any, from a showing that the process used had a significantly improper effect on the decision of the merits. These opponents' many process arguments fail that basic test and are only distractions from the merits. The Board should get to the real issues as expeditiously as reasonably possible and decide them with finality.

The Chambers and the City thoroughly respect the integrity, the professionalism, the diligence, the patience, and the fairness of everyone in State government who has worked on this Project at any time. The Chambers and the City also respect those intervenors and members of

the public who have raised legitimate considerations that have been accommodated in the Permit now before the Board. The remaining transparently obstructionist tactics need to be addressed promptly and efficiently. In the unlikely event that any of them should have any merit, the Board will undoubtedly fulfill its public responsibilities.

Having followed this matter closely, the Chambers and the City have no doubt that the Permit is an excellent culmination of a fair and thorough process taking full account of all legal requirements and appropriately weighing all credible evidence of all environmental and other concerns that are properly the subject of modern environmental regulation. If every project that will reduce the carbon footprint of the New England electric grid can be defeated because some trees will be cut down in a working forest, we will have turned environmental regulation on its head. The Chambers and the City respectfully urge the Board to act promptly, decisively, and with unmistakable finality.

Dated: MARCH 12, 2021

Respectfully submitted,



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