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/	)	LICENSE SUSPENSION
L-27625-2C-C-N/L-27625-VP-D-N/	)	PROCEEDING
L-27625-IW-E-N	)	

POST-HEARING BRIEF OF INTERVENOR INDUSTRIAL ENERGY CONSUMER GROUP

Industrial Energy Consumer Group ("IECG"), an intervenor in this proceeding, submits this Brief in opposition to the suspension or revocation of the DEP's May 11, 2020 Order granting approval for the New England Clean Energy Connect project ("NECEC"), a project which will result in major reductions in greenhouse gas ("GHG") emissions.

1. Introduction and Background.

IECG represents Maine industrial energy consumers and consumer-generators before state, federal, and regional regulatory, legislative, and congressional bodies on energy-related issues. IECG accepts consensus climate science and advocates for rapid, effective climate mitigation, particularly through beneficial electrification, *i.e.*, decarbonizing the economy by electrifying the transportation and heating sectors with an increasingly renewable electricity supply that remains affordable and reliable.

In multiple regulatory proceedings it has been established that the NECEC will (1) reduce and stabilize New England's high and volatile electricity prices, (2) displace marginal fossil fuel generation that increase GHG emissions and create supply-side reliability risks to New England consumers, and, most importantly (3) provide a cost-effective, reliable foundation of electricity supply that is necessary to achieve Maine's climate objectives through beneficial

electrification—the strategic decarbonization of Maine's economy by using increasingly renewable electricity to displace fossil fuels used for heating and transportation.

Nevertheless, the project continues to be the subject of incessant delay tactics of opponents of NECEC, mostly borne of either opposition to electric infrastructure in their backyard while enjoying electricity as a public good, or a desire to profit by maintaining the status quo of high electric prices. Delaying NECEC means delaying, or perhaps foregoing, lower costs, greater reliability, reduced emissions, a $250 million benefits package, and strong action in the face of the climate crisis. Delay of NECEC will further entrench fossil fuel interests and infrastructure opponents, making permitting climate solutions even more difficult, if not impossible.

The efforts of the opponents in this proceeding adds to the growing list of unfounded delay tactics which exacerbate the climate change risk to Maine. [1] The Commissioner must reject this latest effort to hinder the project and deny its benefits to Maine.

The Commissioner has been granted discretionary authority to suspend a license by 38 M.R.S. § 342(11-B) and Chapter 2, § 25(A). In this case, the Commissioner is being asked to suspend the license upon finding that: "There has been a change in any condition or circumstance that requires revocation or suspension of a license." 38 M.R.S. § 342(11-B)(E); Ch. 2, § 27(E). On August 12, 2021 the Commissioner initiated this proceeding upon determining that the August 10, 2021 Superior Court decision in *Black v. Cutko*, No. BCD-CV-2020-29, "represents a change in circumstance that may warrant a suspension" of the May 11, 2020 Order,

[1] Ironically, Intervenors Natural Resources Council of Maine "(NRCM"), West Forks, et al. ("West Forks"), and Friends of the Boundary Mountains ("FOBM") have themselves appealed the Superior Court's *Black v. Cutko* decision, but nonetheless here complain of that very decision here in yet another a strategic effort to kill the Project through delay. (One may recall the Menendez brothers seeking mercy because they were orphans, after murdering their parents.)

because the Superior Court decision "reversed the Director of the Bureau of Parks and Lands' decision. However, the next day Licensees and the BPL appealed the Superior Court decision, thereby staying any "change in circumstance" and restoring the 2020 BPL lease and the status quo.

2. <u>There has been no change in circumstance</u>.

Under Maine Rule of Civil Procedure 62(e), the appeal of a Superior Court decision automatically stays that decision pending review by the Law Court. That automatic stay is now in effect, and applies to "all portions" of the Superior Court's decision. *Most v. Most*, 477 A.2d 250, 263 (Me. 1984), including the unspecified part appealed by the Plaintiffs in *Black v. Cutko*. As the Maine Supreme Court has observed, the purpose of such a stay is to preserve the "*status quo ante"* at the time judgment was entered. See *Tibbetts v. Tibbetts*, 406 A.2d 78, 80 (Me. 1979). Accordingly, the suspension of the Order would disturb the status quo ante and violate the intent of Rule 62(e).

Therefore, contrary to the claims of the opponents of the project, there has been no change to any title right or interest held by NECEC.[2] There has been no "change in any condition or circumstance" and there is no legal prerequisite for a suspension. There has been no change in title, right, or interest (TRI) in the BPL leased lands because the BPL lease is still fully and legally in effect. There can legally be no change in circumstances until the litigation over the BPL lease is final, and only in the event the opponents prevail. The Commissioner has no such authority to suspend here without such event. Suspension would not only be without legal authority, it would also cause unnecessary delay and damage. Therefore, to issue such an order

[2] Furthermore, as a primary matter, title, right and interest (TRI) is a prudential standard related to standing, which is relevant only during the application process. NECEC maintained TRI throughout the application process, which is now complete. TRI is no longer a cognizable issue and to urge suspension on such grounds is unfounded.

at this time would clearly be an abuse of discretion and reversible error.

3. <u>Suspension is not a reasonable action even if there were a change in circumstances</u>.

Moreover, even if there were a change in circumstance and the Commissioner might have authority to act here, the actions must be reasonable and appropriate to the situation. Even assuming there were a change in circumstance, the statute does not mandate, nor even recommend, suspension. Rather the decision to suspend must be made by the Commissioner based on a fair review of the facts, the effect of not suspending and the impact of requiring suspension. In the case of NECEC, a massive linear infrastructure solution to climate change, the potential invalidation of a lease covering only a tiny fraction of land necessary to achieve the critical project purpose does not require suspension. To the contrary, it requires an opportunity to remedy whatever title, right and interest (TRI) may later become lacking, coupled with the operation of a presumption that a TRI deficit will be remedied upon a *prima facie* showing that the deficit can reasonably be eliminated. Also, reasonable project construction should continue in unaffected areas. This is not hopscotch; this is a climate matter.

Under § 342(11-B)(C), a parallel provision to the provision at issue here, the Commissioner also has authority to suspend a license, in the case where "[t]he licensed discharge or activity poses a threat to human health or the environment." This ground for suspension drives to the heart of the Department's mission: to protect human health and the environment. The Legislature's approach in §342(11-B) is to grant the Commissioner the discretion and the responsibility to act in a manner that protects the public interest. In the case of NECEC, the Department has found that the project promotes the public interest. The Department found that "[c]limate change … is the single greatest threat to Maine's natural environment." "Failure to take immediate action to mitigate the GHG emissions that are causing climate change will

exacerbate these impacts." The Department has further found that NECEC will reduce emissions and create "GHG benefits." It would be ironic at best if project opponents could thwart a climate solution through delay by License suspension, and thereby exacerbate the single greatest threat to Maine's environment, based on doubt over a tiny percentage of TRI.

Therefore, in light of advancing climate change, NECEC construction in unaffected areas should continue. If it is later determined that TRI is lacking, or the project suspended for any reason, CMP should be afforded an opportunity to cure and a beneficial presumption that cure is possible upon a *prima facie* showing. The reality of linear infrastructure is that its construction is not a binary or singular event; it is an ordered and interdependent process that occurs over vast areas and across many years. Linear infrastructure opponents should not be allowed to kill projects by preventing the construction of a single pole in any place at any time, because such an entitlement would making constructing any future transmission lines impossible from a cost and risk perspective and would make irreversible climate harm a foregone conclusion. Such an entitlement would also ignore that fact that, unlike with other types of infrastructure constructed in a single place in less time, there may be many ways to re-route a linear infrastructure project so that its purpose can still be accomplished.

4. <u>Allowing construction to continue during the BPL lease litigation will result in no harm to the environment</u>.

There would be no permanent negative impact to the environment by allowing construction to continue during the pendency of the BPL lease litigation because, as demonstrated by testimony presented in this proceeding, (a) construction of the Project pursuant to the DEP Order avoids or mitigates impact to the environment, (b) even in the unlikely event that the Project cannot be constructed across the BPL lands at issue in *Black v. Cutko*, there are Project route alternatives that avoid the BPL lands, and (c) even in the unlikely event that the

Project cannot move forward because the BPL lands and all alternative routes become unavailable, NECEC LLC has committed to decommission the HVDC transmission line, allowing the Project route to return to its natural state. For these reasons, the Commissioner should decline to suspend the DEP Order.

5. Suspension of the DEP Order harms the public interest in reducing GHG emissions.

Suspension of the Project would delay if not terminate the Project's GHG reduction benefits, allowing the effects of climate change to continue to ravage Maine.

It would harm Maine citizens to allow questions raised by opponents – questions still unresolved by Maine's highest court concerning TRI in a mere 0.9 mile of the 145 miles of new transmission line – to impair the development of a project that takes many years to develop and which will significantly mitigate climate change if allowed to move forward. As IECG's representative has stated, "We face a very daunting challenge as a society to meet climate changes, demands, and we will only do so if we cooperate in the development of the very extensive projects that will meet that challenge." Hearing recording at approx. 0:12:11 (Buxton).

As Maine and the rest of the world face an upcoming climate calamity if actions are not taken, it is important to keep in mind the explicit words of the DEP in recognizing that the NECEC project is a critical component of Maine's strategy to counter climate decline:

> Climate change, however, is the single greatest threat to Maine's natural environment. It is already negatively affecting brook trout habitat, and those impacts are projected to worsen. It also threatens forest habitat for iconic species such as moose, and for pine marten, an indicator species much discussed in the evidentiary hearing. Failure to take immediate action to mitigate the GHG emissions that are causing climate change will exacerbate these impacts. The Maine Public Utilities Commission (PUC), which has jurisdiction necessary to assess GHG emissions from the project in light of its impact on the electricity grid, concluded that, 'the NECEC [project] will result in significant incremental hydroelectric generation from existing and new sources in Quebec and, therefore, will result in reductions in overall GHG emissions through corresponding

> reductions of fossil fuel generation (primarily natural gas) in the region.' The Department reviewed documents in the PUC's proceeding, including the London Economics International, LLC report. The Department also reviewed the Examiner's Report and finds its conclusions to be credible. The Department accepts the PUC's finding on this issue and weighs the NECEC project's reductions in GHG emissions against the project's other impacts in its reasonableness determination. In doing so, the Department finds the adverse effects to be reasonable in light of the project purpose and its GHG benefits, provided the project is constructed in accordance with the terms and conditions of this Order.

Construction of the NECEC is now proceeding in accordance with the terms and conditions of the Department's Order. It is imperative that this massive climate infrastructure initiative be allowed to continue in due course while the BPL issues are resolved in the Court.

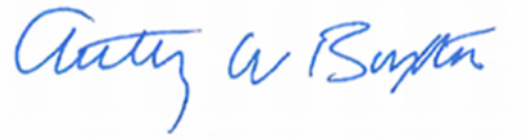
The harsh hearing comment of counsel for a major project opponent ironically states the issue perfectly:

> "…There are no climate change benefits for a project that can't be completed and deliver the power." Hearing recording at approx. 0:17:00 (Kilbreth).

Exactly: That's why the project must continue.

Dated at Augusta, Maine, this 2nd day of November, 2021.

INDUSTRIAL ENERGY CONSUMER GROUP



By: Robert Dorko, President
Industrial Energy Consumer Group
P.O. Box 5117
Augusta, ME 04333
Anthony W. Buxton
Counsel to the Industrial Energy Consumer Group
Preti Flaherty Beliveau & Pachios, LLP
P.O. Box 1058, 45 Memorial Circle
Augusta, ME 04332
Telephone: 207-623-5300
Fax: 207-623-2914