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Admitted in: MA, ME, NH

July 31, 2020

Via Electronic Mail (Cynthia.S.Bertocci@maine.gov)

Mark C. Draper, Chair
Board of Environmental Protection
c/o Cynthia S. Bertocci
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, L-27625-IW-E-N
Response of CMP to NRCM's Appeal of the Chair's Decision on NRCM's Application for Stay

Dear Mr. Draper:

Enclosed is the Response of Central Maine Power Company to NRCM's Appeal of the Chair's Decision on NRCM's Application for Stay.

Sincerely,



Matthew D. Manahan

Enclosure

cc: James T. Kilbreth, Esq.
Gerald Reid, Esq., DEP Commissioner
Ruth Ann Burke
DEP Hearing Service List

STATE OF MAINE
BOARD 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 APPEAL OF THE CHAIR'S DECISION ON NRCM'S APPLICATION
FOR STAY**

The Natural Resources Council of Maine (NRCM) has appealed to the full Board (the Stay Appeal) Chair Draper's decision to refer to the Commissioner NRCM's request for a stay of the Commissioner's May 11, 2020 Order (the DEP Order) approving CMP's applications for the New England Clean Energy Connect Project (NECEC or Project). The Board should disregard NRCM's Stay Appeal, and the Chair should not set the Stay Appeal for discussion at a Board meeting, because there is no legal basis for an appeal to the Board of the Chair's decision here. To the contrary, the Chair has authority to take this action on his own, and there is no provision for an appeal to the full Board of that decision. If the Board were to consider the Stay Appeal, it should ignore most of what NRCM argues in that appeal, because it has nothing to do with the Chair's referral to the Commissioner of NRCM's Stay Request. That is, NRCM confuses in its Stay Appeal its filings in its underlying appeal of the DEP Order, rehashing arguments on vacatur that are irrelevant to the Chair's decision here because the Chair did not refer to the Commissioner NRCM's request for vacatur or appeal of the DEP Order. Finally, and in any event, the Board lacks authority to decide a request for stay of the DEP Order, and thus the Chair's referral was proper.

A party has the ability to appeal to the Board a decision of the Chair only when the DEP's rules specifically provide for that ability. For example, Chapter 2 of the Department's rules provides that "The Chair's ruling to dismiss an appeal for lack of standing as an aggrieved person is appealable to the full Board." DEP Regs. Ch. 2 § 24(A).¹ Similarly, the Department's Chapter 3 rules governing licensing hearings (which we do not have here) provide that "Pre-hearing rulings made pursuant to section 4(C)(1) through 4(C)(5) are appealable to the full Board in Board licensing proceedings and to the Commissioner in Commissioner licensing proceedings where the Commissioner is not the Presiding Officer." DEP Regs. Ch. 3 § 4(D)(1). If there were a general right to appeal all procedural decisions made by the Chair, there would be no need for these provisions. By explicitly carving out as subject to appeal to the full Board the decision of the Chair set forth in Chapter 2 section 24(A) to dismiss an appeal for lack of standing, and Chapter 3 sections 4(C)(1) through 4(C)(5) (identifying applicable statutes and rules, acting upon subpoena requests, ruling on admissibility of evidence, limiting issues to be heard, and acting on intervention petitions), the DEP's rules exclude as appealable to the Board other decisions of the Chair (e.g., regulating the course of the proceeding, ruling upon issues of procedure, certifying questions to the Board for its determination, etc.).

In limiting the bounds of what is appealable, the DEP rules allow matters to proceed more efficiently. To allow appeals to the Board of any decision by the Chair would result in an unwieldy process that would encourage appeals simply to delay the process. Hence, the DEP's rules specifically set forth those decisions of the Chair that are appealable to the full Board.

¹ Chapter 2 section 24(A) also provides that the Chair's dismissal of an appeal for untimeliness is not appealable to the full Board. In contrast to dismissal for lack of standing, such dismissal for untimeliness is explicitly carved out as not subject to appeal to the full Board to avoid confusion because, although both rulings are final agency action dispositively resolving the appeal, there is no subjective judgment involved in making the timeliness determination and thus no cause for review by the full Board.

Because Chapter 2 sets forth no authority for appeals of Chair rulings other than on standing (when there is no hearing involved), NRCM has no appeal right here.

NRCM nevertheless seeks to appeal the Chair's decision to refer to the Commissioner NRCM's request for a stay of the DEP Order because NRCM believes the Chair's decision is dispositive of the issues it has raised in its appeal to the Board of the DEP Order. NRCM misconstrues the Chair's decision as referral of "our request to vacate or stay" the DEP Order. In fact, NRCM did not file a "motion" that requested vacatur or stay in the alternative, as indicated in the Stay Appeal, but instead made two separate June 10, 2020 filings:

1. Request for Board of Environmental Protection Review of NECEC and, Alternatively, Appeal of the Department's Order Approving NECEC (Vacatur and Appeal Request), and
2. Application for Stay of Agency Decision (Stay Request).

Not only did NRCM individually caption each of these two filings and submit each as a separate document, but NRCM's June 10, 2020 transmittal letter to the Chair makes clear that it was making two separate filings with the Board. It is only the second of those filings, NRCM's Stay Request, that Chair Draper referred to the Commissioner. Chair Draper made this clear in his July 16, 2020 letter to NRCM, describing the two pending stay requests (that of NRCM before the Board and that of Groups 2 and 10 before the Commissioner), and stating that he is "referring NRCM's stay request to the Commissioner for his consideration and ultimate decision on both that request and West Forks' earlier stay request."

Accordingly, it is NRCM that "substantially misapprehends" the nature of its own filings, muddling its Stay Request and its Vacatur and Appeal Request, and rehashing its argument in its Vacatur and Appeal Request that the Board's authority over projects of statewide significance mandates vacatur. NRCM cites that Board authority in support of its argument that the Board must correct the "flawed" process by vacating the DEP Order and undertaking independent

review of the Project. Stay Request at 3-5. But this argument is not the “principal ground” of NRCM’s Stay Request, which NRCM now incorrectly characterizes as an alternative to its vacatur request; rather, the Board’s authority over the Project is at the core of NRCM’s Vacatur and Appeal Request. Appeal at 4, n.1. NRCM confuses its requests when it argues that “[t]he Board Chair does not have the authority unilaterally to refer NRCM’s motion to the Commissioner, nor does the Commissioner have the authority to consider it.” Appeal at 4. NRCM itself recognized the Commissioner’s clear authority to consider a request for a stay of his own DEP Order when it filed with the Commissioner on June 19, 2020 its Stay Request (in support of the Groups 2 and 10 stay request to the Commissioner), noting that all arguments made in NRCM’s Stay Request “are equally applicable here,” to the Groups 2 and 10 stay request.² Nowhere in that filing does NRCM take issue with the Commissioner’s authority to decide whether to stay the DEP Order.

Simply put, NRCM’s Stay Request requested stay of the DEP Order, and its Vacatur and Appeal Request requested vacatur of the DEP Order (or, in the alternative, an appeal of that DEP Order) for the reasons stated in NRCM’s Stay Appeal. Because there is no singular “motion” for vacatur and stay that the Chair referred to the Commissioner, the grounds NRCM states in its Stay Appeal – relevant to its Vacatur and Appeal Request – are irrelevant to the Chair’s referral of the Stay Request and should be disregarded. The Chair did not refer to the Commissioner NRCM’s Vacatur and Appeal Request, which “requests that the Board vacate the Order, exercise its original jurisdiction and review the NECEC *de novo*, including holding a public hearing,” and

² NRCM’s June 19, 2020 filing of its Stay Request with the Commissioner makes clear that NRCM will suffer no harm from the Commissioner deciding that request. NRCM’s filing was made in support of the request of Groups 2 and 10 for precisely the same remedy, which is a stay of the DEP Order.

it remains pending before the Board.³ Vacatur and Appeal Request at 40.

In any event, the Chair has not improperly “delegate[d] Board responsibilities to the Commissioner,” as NRCM states. Stay Appeal at 2. Instead, referral of NRCM’s Stay Request is appropriate because the Board does not have authority to issue the stay NRCM seeks, as CMP explained in its June 26, 2020 Opposition to NRCM’s Application for Stay, incorporated herein by reference. It thus is appropriate that the Chair referred to the Commissioner NRCM’s Stay Request, for the reasons stated in the Chair’s letter, and for lack of authority to stay an order of the Commissioner.

For these reasons, CMP requests that the Chair reject NRCM’s Stay Appeal or, if it is placed on a Board agenda, that the Board deny it.

Dated this 31st day of July, 2020.



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³ Indeed, it is precisely the pendency of its Vacatur and Appeal Request that NRCM cites as warranting a stay of the DEP Order. NRCM claims in its Stay Request that “[s]taying the Order during the pendency of NRCM’s appeal, filed simultaneously herewith, is within the authority of the Board and is appropriate for this project of statewide significance that has not yet been reviewed by the Board.” Stay Request at 1. NRCM argues that “until the Board determines that the NECEC is *not* a project of statewide significance or exercises its mandatory review of projects of statewide significance, the Order must be stayed.” Stay Request at 2. For that reason, NRCM “requests that the Board Stay the Order until the Board completes its review.” Stay Request at 12.