STATE OF MAINE
BOARD OF ENVIRONENTAL 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

MEMORANDUM IN OPPOSITION TO STAY OF THE MAY 11, 2020 ORDER CONDITIONALLY APPROVING THE APPLICATION OF CENTRAL MAINE POWER ("CMP") TO CONSTRUCT THE NEW ENGLAND CLEAN ENERGY CONNECT PROJECT ("NECEC")

The Maine State Chamber of Commerce and the City of Lewiston oppose any stay of the NECEC Order. To begin, it is not at all clear that the full Board or the Chair may lawfully grant a stay after it has been denied by the Commissioner. The authority is in the agency as provided in the applicable statute, 5 M.R.S.A. § 11004. (An agency may issue a stay of final agency action 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."). Neither of the applications for stay makes the requisite showings of a strong likelihood of success on the merits, or irreparable harm to the Petitioners absent a stay, or the absence of harm to CMP if a stay is granted, or any public interest in delay. Petitioners have not demonstrated that the Commissioner's denial was not the agency's decision, or that the Commissioner's decision is subject to any form of "do-over." But, assuming there is also now authority in the Board or the Chair to rule on another effort at a stay, the only outcome comporting with the statute is denial.

Although discussing a stay in the context of a court proceeding under Rule 80B, the Law Court's analysis is instructive here. Rule 80B(b) "gives persons a mechanism to test a government decision but, by imposing time limits to appeal and not automatically staying the action being reviewed, it recognizes the countervailing policy that the administration of government should not be unnecessarily impeded… A broad reading of the non-stay provision in the rule best reconciles these two policies by not holding government hostage by private parties unless there is some showing made to a court that a stay is proper." *Cobbossee Dev. Grp. v. Winthrop*, 585 A.2d 190, 194 (Me. 1991)(citing *Reed v. Halperin*, 393 A.2d 160, 162 (Me. 1978) (80(B)(b) time limits reflect legislative balance between right to review and proper administration of government)). This, of course, is entirely consistent with DEP Reg. Ch. 2, §24.A: "[t]he filing of an appeal to the Board does not stay the license decision."

Any party seeking any stay in any proceeding at any stage bears the burden of showing the appropriate likelihood of a successful outcome in the proceeding for which the stay is sought. *See, e.g., Jones v. Sec'y of State,* 2020 ME 117, ¶ 2, ___A.3d___ (denying a stay because the moving party had not demonstrated a "substantial possibility" of success on the merits). Repetitions of arguments previously made and rejected do not establish a strong likelihood of success the next time they are considered. Indeed, the well-reasoned rejection of those arguments by the Commissioner, after thorough consideration, is itself evidence against a strong likelihood of success in subsequent review by the Board. Overall, it will be difficult to improve upon Commissioner Reid's analysis on August 26, 2020, denying a stay of this same NECEC Order.

It is important to be clear about what it means for these challengers to succeed on the merits in order to make a probabilistic predictive judgment as to the likelihood of success in this

specific instance. There needs to be a showing that there is a strong likelihood that the Board will make materially different findings of fact, or that the Board will make a materially different assessment when considering either the same findings or different findings in terms of the applicable statutory criteria. That case has not been made. That may be why NRCM has interjected a procedural distraction, unrelated to the environmental merits.

NRCM's argument that the Board was and remains statutorily obligated, and not simply authorized, or obligated if timely asked, to make this licensing decision, to the exclusion of the Commissioner, is wrong. NRCM's argument misconceives or mischaracterizes the nature of the arrangement. Analogies to the jurisdictional powers of courts are misplaced here. There is no serious question about what administrative agency has the responsibility (i.e. "jurisdiction") for acting upon permit applications under Maine environmental laws. The allocation of responsibility between the Board and the Commissioner *within* the Department of Environmental Protection is not a jurisdictional question. If any analogy to judicial proceedings were to be useful here (and that is doubtful), the correct analogy is not to jurisdiction but to venue. This is no more significant than an argument about whether the now-remanded Rule 80C appeals belonged in Somerset County or Kennebec County or on the Business and Consumer Docket of the Superior Court. Whatever the correct interpretation of the statute concerning allocation of authority between the Commissioner and the Board might have been on the first day, those issues go away, as in the case of venue, once the parties undertake to do the work. These Petitioners participated fully in the hearings before the Commissioner and made no timely objection. Thus, the Commissioner's Order is not a nullity under any proper analysis of the administrative law arrangements of Maine government.

But, even if that argument were sound, it would add nothing to the stay analysis. Putting aside all the reasons the argument is wrong, and putting aside all the issues of waiver, estoppel, or laches, the fallacy of the NRCM argument that the Order is a nullity, is that the nullification of the Order is not predictive of a different outcome on the environmental merits before the Board. To the contrary, there is no reason to suppose that the Board's assessment of the environmental merits is likely to be the opposite of the Commissioner's careful analysis.

This too-late argument about "jurisdiction," even if successful, says nothing one way or another as to the likelihood of success on the environmental merits in the proceedings before the Board.

Absent any showing of a likelihood of success by any of the parties seeking a stay, there is no real need to consider whether Petitioners have shown that they will suffer irreparable harm absent a stay. Nor is it necessary to consider the obvious and substantial harm to CMP, other intervenors, and the public that would result from a stay that only delays completion of the Project. It is significant, however, as Commissioner Reid found in his Determination on August 26, that the Petitioners' assertions of harm were unpersuasive.

Any consideration of any harms needs to be undertaken with specific reference to whose interests are in question. NRCM, in its own organizational capacity, cannot demonstrate any harm and indeed may well be experiencing enhanced fundraising because the high profile of these proceedings. It is not readily apparent what harms to NRCM are even being asserted. The other dozen or so individuals and organizations have presumably overlapping but non-identical interests and no effort has been made to show how any of them will be irreparably harmed or even adversely affected by denial of a stay. The harms of which they complain are essentially the same generic harms that have already carefully been considered by the Department, the Land

Use Planning Commission, and the PUC in getting the Project to this point. But if the Board is disposed to think that there is any individualized harm to any of the parties seeking the stay, the harms to the Project's owner in the form of delay costs and risks of non-completion are well-established.

Moreover, a stay would clearly be contrary to the public interest. An improvident stay would adversely affect: (1) the availability, reliability, and cost of electricity on the New England Energy Electric Grid and therefore throughout the State of Maine; (2) meaningful steps toward the decarbonization of the New England Grid for the greater public good for generations to come; and (3) the economic benefit including good jobs, improved infrastructure for all forms of economic development, and the multiplier effect of the salaries and wages to be paid for those jobs and the other economic benefits of that economic development.

The Chamber advocates for approximately 5,000 Maine businesses and the important interests of their owners, employees, vendors, customers and communities. The economic benefits are widespread and important. A stay that only postpones the realization of those benefits is a substantial harm to Maine. Additionally, the City of Lewiston stands to suffer substantial economic harm from any delay in the completion of the NECEC Project. In supporting CMP's Petition for a Certificate of Public Convenience and Necessity in the Public Utilities Commission, the Brief of the City of Lewiston summarized the economic benefits to be realized in and by Lewiston and it is not seriously to be doubted with any delay in the realization of these benefits is a significant harm. The City's position statement then remains an apt statement of the City's position now. That Brief stated in part the following (footnotes omitted):

> "The NECEC will provide increased municipal tax revenues to communities in which the Project is sited, including to Lewiston, where CMP proposes to construct a converter station for the NECEC. These new revenues will be a substantial benefit for Lewiston. Both the Commission Staff's consultant, London Economic

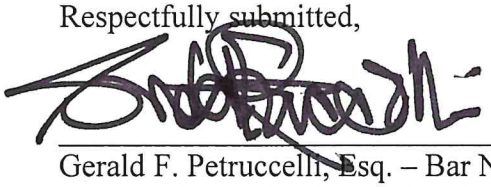
> International (LEI), and CMP estimate that the NECEC will generate over $18 million in total property tax revenues each year, beginning in 2023 once property valuations fully reflect the NECEC investments. MCBER estimates that such revenues for the City alone will be approximately $8.39 million annually, beginning in 2023. This revenue injection will better allow Lewiston to address the needs of its residents, including those who need social services support from the City. Importantly, the NECEC will provide this benefit without requiring a corresponding 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 rate of $15.06. On this basis, the City firmly believes that CMP's decision to locate its converter station in a diverse and economically challenged community addresses serious issues of social equity by providing the community with greater fiscal ability to address the unique needs of our population. This economic benefit to the City of Lewiston and its residents is accomplished at no cost to the City and, as importantly, at no cost to any neighboring community or to the State. This is all net added value."

There will also be both construction jobs and jobs for persons to operate and maintain the station, all of which will be beneficial to Lewiston residents and to the City itself. Any delay in the initiation of those real benefits is undeniably a significant harm.

Prompt, fair, and thorough administrative proceedings necessarily involve a component of delay which is justified by the public benefits. This Project has been before the Department for over three years. A comprehensive, thorough—and notably conditional—licensing Order was issued. Further delay, at this stage of multiple proceedings, needs its own independent justification which has not been presented by these Petitioners. It is their burden to show a strong likelihood of success and they have not done so. It is their burden to show that they will be irreparably harmed in some material fashion if a stay is denied and they have not done so. It is their burden to show that the parties opposing the stay will not be harmed by a stay and they have not done so. It is their burden to show the public will not be harmed by a stay and they have not done so. There is no basis on the record now before the Board for the Board to determine that Petitioners have satisfied even one of the several requirements for issuance of a

stay in accordance with the relevant statute. Their stay requests have already properly been denied. The Board should deny any stay and proceed appropriately to complete the proceedings.

Respectfully submitted,



Gerald F. Petruccelli, Esq. – Bar No. 1245
Attorney for Maine State Chamber of Commerce and the City of Lewiston

Petruccelli Martin & Haddow, LLP
P.O. Box 17555
Portland, Maine 04112-8555
gpetruccelli@pmhlegal.com
Tel: 207-775-0200
Fax: 207-775-2360

PMH PETRUCCELLI, MARTIN & HADDOW, LLP
ATTORNEYS AT LAW

Two Monument Square
Suite 900
P.O. Box 17555
Portland, ME 04112-8555

Tel: 207.775.0200
Fax: 207.775.2360
www.pmhlegal.com

GERALD F. PETRUCCELLI
gpetruccelli@pmhlegal.com

October 16, 2020

BY EMAIL ONLY
Mark C. Draper, Chair
Board of Environmental Protection
c/o Ruth Ann Burke
17 State House Station
Augusta, ME 04333-0017
Ruth.A.Burke@maine.gov

Dear Chair Draper,

In accordance with your letter dated October 7, 2020, we are filing by electronic mail only Opposition to Stay. This filing is made on behalf of the Maine State Chamber of Commerce and the City of Lewiston, Intervenors in the DEP, LUPC, and PUC proceedings concerning this Project.

Thank you.

Sincerely,

Gerald F. Petruccelli

GFP/kc
CC: Service List

{P0204735.1}