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July 2, 2020

hand delivered

Michele Lumbert, Clerk
Capital Judicial Center
Kennebec County Superior Court
1 Court Street – Suite 101
Augusta, Maine 04330

Re: *NextEra Energy Resources, LLC v. Maine Department of Environmental Protection and Central Maine Power*, Docket No. AP-2020-27

Dear Ms. Lumbert:

Enclosed please find for filing a motion for remand and a motion for a stay, with corresponding proposed orders, in the above-captioned matter. If there are any questions please do not hesitate to contact me at 626-8578.

Also, please enter the appearance of Assistant Attorney General Scott Boak as additional counsel for Respondent Maine Department of Environmental Protection.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Margaret A. Bensinger".

Margaret A. Bensinger
Assistant Attorney General

Enclosures

cc via email: Commissioner Gerald Reid, DEP
Joanna Tourangeau, Esq.
Matthew Manahan, Esq.
Gerald Petruccelli, Esq.
Sigmund Schutz, Esq.
Benjamin Smith, Esq.
James Kilbreth, Esq.

an activity including bulldozing, removing or displacing soil, sand, vegetation or other material, filling, or constructing a permanent structure in, on, over or adjacent to a great pond, a river, stream or brook, or freshwater wetlands of a certain size and nature, must first obtain a permit from the Department pursuant to the Natural Resources Protection Act, 38 M.R.S. §§ 480-A – 480-JJ (NRPA). 38 M.R.S. § 480-C.

2. Central Maine Power Company (CMP) filed a Site Law and a NRPA permit application with the Department requesting approvals for the construction of a transmission line project called the New England Clean Energy Connect (NECEC). The proposed project included a 145.3-mile long, 320 kilovolt High Voltage Direct Current transmission line from Beattie Township to Lewiston; a converter station in Lewiston; a new substation in Pownal; and a new 26.5-mile, 345-kV Alternating Current transmission line from the existing Coopers Mills Substation in Windsor to the existing Maine Yankee Substation in Wiscasset. These applications (NECEC Applications) were declared complete by the Department on October 13, 2017. The Department determined that a public hearing on the NECEC Applications was warranted and 22 parties were granted intervenor status in the resulting adjudicatory proceeding. The six days of public hearing spanned a six week period from April 1, 2019, to May 9, 2019.
3. On May 11, 2020, the Commissioner of the Department (Commissioner) approved the Site Law and NRPA NECEC Applications, with conditions (Licensing Decision). On June 8, 2020, NextEra filed the above-captioned petition for judicial review pursuant to 5 M.R.S. § 11001, *et seq.* and M.R. Civ. P. 80C challenging the Commissioner’s Licensing Decision and, among other things, seeking a remand to the Commissioner “for further proceedings, findings of fact or conclusions of law or directing the agency to hold such

proceedings or take such action as the Court deems necessary.” A direct appeal to Superior Court of a Commissioner’s final license decision is allowed by 38 M.R.S. §§ 344(2-A) and 346. NextEra’s Rule 80C appeal was timely filed.

4. Also on June 8, 2020, a coalition consisting of West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guide Service, LLC, Hawks Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Mike Pilsbury, Matt Wagner, Mandy Farrar, and Carrie Carpenter (the West Forks Petitioners) filed a separate petition for judicial review of the Licensing Decision pursuant to 5 M.R.S. § 11001 *et seq.* and M.R. Civ. P. 80C in Somerset County Superior Court, SOMSC-AP-20-04 (West Forks Appeal). *See* note 1 above.
5. On June 10, 2020, NRCM filed a timely administrative appeal of the Commissioner’s Licensing Decision to the Board pursuant to 38 M.R.S. § 341-D(4) asking the Board to vacate the Commissioner’s Licensing Decision and exercise its original jurisdiction to decide the applications anew or, in the alternative, consider an appeal of the Commissioner’s Licensing Decision. In both scenarios the NRCM appeal requests that the Board hold a public hearing.
6. The Board is an independent appeals board that is part of the Maine Department of Environmental Protection. 38 M.R.S. § 341-D(4). The Board may affirm, amend or reverse the Commissioner’s Licensing Decision, or remand the Licensing Decision to the Commissioner for further proceedings. *Id.* Absent a remand to the Commissioner, the Board’s order on appeal supersedes the Commissioner’s Licensing Decision and constitutes the Department’s final decision on CMP’s NECEC Application. *Id.*; *Champlain Wind, LLC v. Bd. of Env’tl. Prot.*, 2015.ME 156, ¶¶ 13-14, 129 A.3d 279. If

the Board remands to the Commissioner for further proceedings, that too will eventually result in a Commissioner or Board order that supersedes the original Commissioner order and constitutes a final agency decision on the application.

7. Both the NextEra and West Forks Rule 80C appeals, as well as NRCM's administrative appeal before the Board, allege errors in the factual findings and legal conclusions in the Commissioner's Licensing Decision. There are overlapping issues raised in the three appeals, which strongly supports the remand of the two Rule 80C court appeals to the Board. The Board will be examining the evidence in the record and Commissioner's analysis on these issues and it should have the benefit of hearing the arguments being put forward by NextEra and the West Forks Petitioners to ensure a full review and a decision addressing all arguments.
8. By way of example, in the context of the NRCM appeal the Board will be considering NRCM's argument that CMP's alternatives analysis was inadequate. This issue is also raised in both NextEra's appeal pending in this Court and in the West Forks Petitioners' appeal pending in Somerset County Superior Court. NRCM argues that CMP failed to adequately analyze the option of an underground route, the option of co-location alongside roads, and the option of using taller poles to reduce impacts. In its appeal, NextEra also makes an argument that CMP did not conduct an alternatives analysis of the feasibility of putting the line underground, and the West Forks Petitioners challenge the Commissioner's findings on possible alternatives to the approved project.
9. Another example of a duplicative issue the Board will be considering in the NRCM administrative appeal is whether a portion of the Commissioner's Licensing Decision that requires that, for the Segment 1 portion of the transmission line, the cleared corridor be

narrowed with vegetation tapering is a legal requirement and whether it is supported by the evidence. This is also an issue raised by NextEra in its appeal here.

10. Yet another overlapping issue is whether CMP still has sufficient title, right, or interest under the Department's application processing rule, 06-096 C.M.R. ch.2, §11(D), in light of a Public Utilities Commission order that it transfer the NECEC to a new corporate entity. NRCM has raised this question in its administrative appeal before the Board and the West Forks Petitioners have raised the same question in their Rule 80C appeal in Somerset County Superior Court.
11. In addition, in the NRCM administrative appeal the Board will be reviewing the evidence underlying the Commissioner's findings on the impacts of habitat fragmentation and whether the Commissioner's requirements of land conservation adequately compensate for those impacts. This same issue was also raised by the West Forks Petitioners in their Rule 80C appeal in Somerset County Superior Court.
12. These are detailed and complex issues, and the administrative record for the Commissioner's Licensing Decision fills at least seven boxes.
13. Rule 80C proceedings contemplate review of "final agency action" (or the failure or refusal of an agency to act) in Superior Court pursuant to 5 M.R.S. § 11001 *et seq.* In a Rule 80C proceeding, the court may "remand the case for further proceedings, findings of fact or conclusions of law or direct the agency to hold such proceedings or take such actions as the court deems necessary." 5 M.R.S. § 11007(4)(B).
14. In the interest of administrative and judicial economy, the best way to handle the multiple appeals of the Commissioner's Licensing Decision in different venues is through remand of the Rule 80C appeals to the Board for consideration of those appeals along with

NRCM's pending administrative appeal prior to any judicial review. This would allow the Board to consider all legal and factual objections together, with the benefit of the arguments of all three appellants. Where there are common issues in the appeals this is particularly important in order for the Board to reach the best possible decision. Any Board order on the merits of the appeals will then constitute the Department's final decision on CMP's NECEC Applications and, as such, may be appealed to the Superior Court pursuant to 5 M.R.S. § 11001 *et seq.* and Rule 80C. Should the Board remand to the Commissioner for further proceedings, that process, too, will eventually result in a new final agency decision that may be appealed to court.

15. A remand in this case is also supported by the doctrine of primary jurisdiction which holds that as a general rule, the courts will not decide an issue which an administrative agency with jurisdiction over the matter has not yet considered. *Bryant v. Town of Camden*, 2016 ME 27, ¶ 9, 132 A.3d 1183; *Levesque v. Town of Eliot*, 448 A.2d 876, 878 (Me. 1982), citing *Brennan v. R.D. Realty Corp.*, 349 A.2d 201, 207 (Me. 1975). This principle applies to legal as well as factual matters, especially in those circumstances in which a court would defer to the agency's interpretation. *American Automobile Manufacturers Assoc. v. Massachusetts Dept. of Env'tl. Prot.*, 163 F.3d 74, 81 (1st Cir. 1998) (proceeding stayed to give the U.S. Environmental Protection Agency an opportunity to rule on a Clean Air Act interpretation). Maine courts have accorded the Board substantial deference in interpreting the laws it administers. *S.D. Warren Co. v. Bd. of Env'tl. Prot.*, 2005 ME 27, ¶¶ 5–7, 868 A.2d 210, *aff'd*, 547 U.S. 370 (2006).
16. A remand is also supported by the Court's inherent power to manage its docket in a manner that is fair to litigants who have acted in good faith in filing actions. It is all but

certain that, in the absence of a remand, this Rule 80C appeal and the West Forks Appeal would be challenged on mootness and general justiciability grounds when the Board issues its decision on NRCM's pending administrative appeal. This is true because the Board's decision will replace the Commissioner's Licensing Decision as the Department's final agency action in this matter, at which point the Commissioner's decision at issue here and in the West Forks Appeal will no longer be a final agency action or have independent legal significance. 38 M.R.S. § 341-D(4); *Champlain Wind*, 2015 ME 156, ¶¶ 13-14, 129 A.3d 279. Rather than issue a stay and dismiss this appeal later, it is fairer to Petitioner NextEra, which after all properly exercised its right to directly appeal to Superior Court, to remand its appeal to the Board to allow its arguments to have continued vitality and to be reviewed administratively, which will preserve its right, if it participates below, to appeal the new Department decision on CMP's NECEC Applications.

17. Furthermore, this Court has previously addressed a near identical situation involving Rule 80C and Board appeals of the same underlying decision and resolved the matter by ordering a remand to the Board "for consideration of the arguments raised in [the Rule 80C] appeal together with an independent administrative appeal challenging the same decision . . .". See *Watts v. Maine Dept. of Envtl. Prot.*, KENSC-AP-11-54 (Me. Super. Ct., Ken. Cty., Mar. 8, 2012) (attached as Exhibit A); see also *Watts v. Bd. of Envtl. Prot.*, 2014 ME 91, ¶ 4 & n.4, 97 A.3d 115 (on appeal of a final Board decision affirming a DEP order, acknowledging a prior Superior Court remand to the Board for consolidation with a separate Board appeal).

18. Remand of this matter pursuant to 5 M.R.S. § 11007(4)(B) is warranted here as it will avoid unnecessary litigation and docket activity, conserve judicial and party resources, and adhere to the doctrine of primary jurisdiction now that the Board is proceeding with an administrative appeal that will eventually supplant the Licensing Decision. Remand is also the only way to ensure fairness to all parties in this high-profile matter of Statewide interest by allowing Petitioner's arguments to be raised before the Board for its full consideration in advance of any new Department final agency action that may eventually be subject to further judicial review. Under no circumstances should this Rule 80C appeal proceed until the conclusion of NRCM's administrative appeal before the Board of the same underlying Licensing Decision, at which point a new final agency action may be subject to appeal and this appeal would likely be moot and subject to dismissal.

For the above reasons, the Respondent requests that the Court remand this Rule 80C appeal to the Board for consolidated Board consideration of NextEra's arguments raised together with NRCM's independent administrative appeal challenging the same underlying decision, as well as the West Forks Appeal of that same decision, if remanded to the Board from Somerset County Superior Court. In addition, to ensure that NextEra is given a full and fair opportunity to state its positions with respect to the Licensing Decision, the Respondent also requests that the remand be accompanied by the following instructions to the Board, which is incorporated in Respondent's proposed draft order:

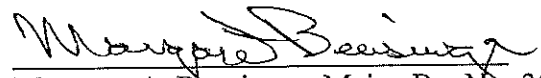
Upon remand, NextEra shall be given an opportunity to submit to the Board a more detailed written appeal statement that more fully articulates the arguments made in its June 8, 2020 Rule 80C appeal and that states whether it requests a public hearing or the

inclusion of supplemental evidence in the record, in accordance with the Board's procedural rules governing administrative appeals, 06-096 C.M.R. ch. 2 § 24(B).

Respectfully submitted,

Dated: July 2, 2020

AARON M. FREY,
Attorney General



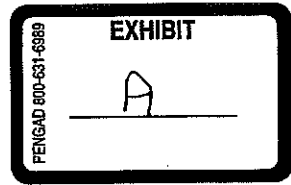
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Attorneys for Respondent Maine
Department of Environmental Protection

NOTICE

Pursuant to M.R. Civ. 7(c), matter in opposition to this motion must be filed within 21 days, unless another time is provided by the Rules or set by the court. Failure to file such a timely opposition will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.



SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-11-54

STATE OF MAINE
KENNEBEC, ss.

DOUGLAS H. WATTS,)
)
Petitioner)
)
v.)
)
MAINE DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)
)
Respondent)

ORDER

alt oral argument on 2/8/12

After consideration of Respondent's Motion for Remand, and good cause having been shown, it is hereby

Ordered that the Respondent's motion is granted and that:

1. The above-caption Rule 80C appeal is remanded to the Maine Board of Environmental Protection for consideration of the arguments raised in this appeal together with an independent administrative appeal challenging the same decision. *brought by Charles Fradette.*
2. Mr. Watts shall be given ^{*until 4/12/12*} an opportunity to submit to the Board a more detailed written appeal statement that more fully articulates the arguments made in his September 27, 2011 Rule 80C appeal and that states whether he requests a public hearing or the inclusion of supplemental evidence in the record, in accordance with the Board's procedural rules governing administrative appeals, 06-096 CMR 2.24.B.
3. In the unlikely event the independent administrative appeal of Mr. Frchette is withdrawn before the Board issues an order on appeal, Mr. Watt's administrative appeal shall continue to be considered and decided by the Board.

Dated: 2/8/12

[Signature]

JUSTICE, Superior Court

STATE OF MAINE
KENNEBEC, ss.

RECEIVED AND FILED
KENNEBEC SUPERIOR COURT

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-11-54

2011 OCT 18 P 2:16

MICHELE LUMBERT
CLERK OF COURTS

DOUGLAS H. WATTS,
Plaintiff

MOTION TO REMAND


v.

MAINE DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Respondent

1. Petitioner Douglas H. Watts asks this Court to REMAND the final license decision by the Maine DEP Commissioner dated August 30, 2011 and captioned #L-19937-33-J-N (Approval) back to the Maine Commissioner of the Maine DEP for further consideration and evidence gathering subject to the following conditions:

2. The DEP Commissioner shall grant all interested parties fifteen (15) days from the date of the Court's Order to submit any evidence, comments and other materials to the administrative record for this proceeding.

3. The DEP Commissioner shall issue a Final Order which approves or denies this license no later than 30 days after this Court's Order.


Oct. 17, 2011

2/8/12
Petitioner failed to appear
for oral argument on date. The
motion to remand to DEP was denied.
However, see order of the same
date remanding this matter to DEP
and providing Petitioner with opportunity
to file further information by 7/15/12.
L-2

Respectfully submitted,

Dated: July 2, 2020

AARON M. FREY,
Attorney General



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Department of Environmental Protection

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