

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 REPLY BRIEF OF INTERVENOR
INDUSTRIAL ENERGY CONSUMER GROUP

Industrial Energy Consumer Group (“IECG”), an intervenor in this proceeding, submits this Reply Brief in continued 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”).

The most important things a government such as ours can have as it faces the long-term future are right principles, rather than the gift of prophecy.

George F. Kennan

The famous American diplomat George F. Kennan designed principles of America's strategy for the conduct of the Cold War to contain and neutralize the Soviet Union. The principle quoted above guided him in those efforts. This concept may be useful as the Department confronts both confusing tactics and uncharted and unprecedented decisions. There are highly significant matters at stake in this controversy. Reliance on right principles matters immeasurably.

The briefs of the project opponents do nothing to advance their strategy to undermine an approved project which will hold the promise of greatly reducing GHG emissions. The Commissioner must reject their continued grasping at straws in an attempt to turn a suspension provision intended for genuine and significant changes in circumstance into an opportunity to circumvent the reasoned regulatory process.

1. There is no legally cognizable change in circumstance.

Here, the parties opposing NECEC have offered a variety of unsubstantiated arguments in support of their request that the license be revoked or at least suspended. Tellingly, most recently opponent NRCM has changed course, apparently realizing the awkwardness of its own circumstance of relying on the Superior Court decision in *Black v. Cutko* as a “change in circumstance.” The awkwardness, of course, arises from the Menendez brothers-like position of NRCM and other opponents having themselves appealed *Black v. Cutko* to the Supreme Judicial Court. The Plaintiffs have asserted to the Department as a change in circumstance their own challenge to their own earlier-argued change in circumstance. This makes little sense.

Apparently realizing that awkwardness, and the import of Rule 62(e), M.R.Civ.P., NRCM has now suggested that the voluntary agreement among the parties to the pending *Black v. Cutko* appeal that NECEC will undertake no construction in the areas subject to the BPL lease of public lots is somehow disabling as a change in circumstance. Once again, Plaintiffs assert their own action they have voluntarily taken as a change in circumstance. The voluntary agreement has no effect on the lawfulness of the underlying leases and merely reflects a staging of construction plans by NECEC as a courtesy. NECEC has admitted no legal conclusion, nor has Defendant BPL. It is strikingly odd to assert a courtesy in which the opponents have participated to be a “change in circumstance.”¹ This suggestion should be rejected by the Department.

Moreover, as IECG has previously argued, even if 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

¹ A temporary adjustment to the timing and sequencing of steps during a large construction project is not a change of circumstance that warrants suspension. If that were the case, just about any project approved by DEP would be subject to suspension if its timeline changed in any way. The project opponents seek here to create an absurd precedent which would haunt future proceedings.

suspending and the impact of requiring suspension. In the case of NECEC, a massive linear infrastructure solution to climate change, the delay of construction over a small segment of the project, covering only a tiny fraction of land necessary to achieve the critical project purpose does not require or justify suspension of the Project.

Also, as Licensee's Brief makes clear, in great detail, there would be no permanent negative impact to the environment by allowing construction to continue during the pendency of the BPL lease litigation. As the record demonstrates, (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*, 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 all these reasons, the Commissioner must refuse to suspend the DEP Order.

2. The Opponents' effort to invoke the recent Initiative has no merit.

NRCM now alleges the November 2 Initiative is additional grounds for suspension of the DEP Order. NRCM Brief at 2. The Initiative has no legal effect at this time and whether or not it will ever have any legal effect is yet to be determined.² Therefore, consideration of its impact

² Within 20 days after a referendum the Secretary of State must submit a certified copy of the tabulation of the results. 21-A M.R.S. §722. Within 20 days thereafter, the Governor must make a public proclamation of the results of the referendum. Me.Const., Art. 4, Pt. 3, §19. In 30 days after the Governor makes the public proclamation, the measure which was the subject of the referendum shall take effect and become law. *Id.* Accordingly, assuming that the Secretary of State and Governor fully utilize these time periods, which is the most likely scenario, the Initiative would not become effective before January 1. IECG fully expects that by that date, a ruling could very well be issued by the Court staying the effective date pending resolution of the litigation over the Initiative or deciding the merits. In either event, it remains that the Initiative is not law.

is beyond the proper scope of this proceeding. Furthermore, any legal questions that may exist are properly and solely cognizable in the judicial branch.³

3. Suspension of the DEP Order would do serious harm to the public interest in reducing GHG emissions.

The matters at stake in this controversy obviously are significant to Maine. Whether it is possible to construct the large infrastructure necessary to meet our climate goals, as recognized by the Department in issuing the underlying NECEC permit, and therefore whether we will achieve those climate goals in time to avoid catastrophic global disaster by reaching irreversible levels of global warming remain unanswered. But the Department should also be aware that climate-concerned entities far beyond Maine have observed the significance of this decision in the larger climate battle being waged by other states, the federal government and other nations, just as the apparently unsuccessful Glasgow COP summit expires.

Spectrum News, November 2, 2021⁴: [Maine votes to block CMP’s transmission corridor, likely teeing up litigation](#)

Reuters, Nov 3. [Maine voters reject Quebec hydropower transmission line](#)

Energy and Policy Institute, November 3, 2021: [NextEra spent \\$20 million to “ban” clean energy transmission project in Maine](#)

Bloomberg Law, November 3, 2021: [Avangrid Power Line Rejection Deals Blow to Emissions Goals \(2\)](#)

UPI (shared by Vigour Times, 6 Park News), November 3, 2021: [Power line corridor through Maine in jeopardy after rebuke by voters](#)

Daily Energy Insider, November 3, 2021: [Maine voters reject plan to complete transmission line, Avangrid subsidiaries file suit](#)

³ IECG is aware that the Commissioner re-opened this license suspension proceeding to include argument on whether the Initiative would constitute a change in circumstance requiring suspension of the DEP Order, on an aggressively abbreviated schedule. As matters presently stand, such a process is premature, and such an abbreviated schedule is unnecessarily constrained and a denial of due process.

⁴ Articles listed are not available as links but will be sent upon request.

Reuters (shared by US News), November 3, 2021: [Battle in Maine Woods Reflects Challenge for U.S. Clean Power Ambitions](#)

Forbes, November 5, 2021: [Maine Voters' Rejection Of Transmission Line Shows Again How Land-Use Conflicts Are Halting Renewable Expansion](#)

Law 360, November 5, 2021: [\\$1B Power Line Rejection A Reminder Of Grid Project Hurdles](#) (subscription)

The Regulatory Review, November 8, 2021: [The Need to Change Jurisdiction Over the U.S. Electric Grid](#)

IECG does not cite these articles for their truth, rather, but for the truth of their existence.

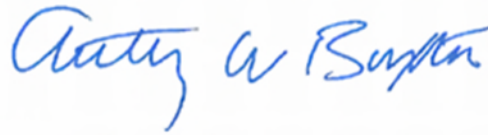
These are not ordinary times; the State motto “Dirigo” may have greater significance than ever before.

In these circumstances, what Maine, acting through the Department, does now is of especial importance. If the battles between fossil fuel interests, fear and difficult climate mitigation have just begun, the future may be strongly influenced by the extent to which society keeps its wits about it and adheres to right principles in times of difficulty. Certainly there will be controversy, and certainly there will be setbacks, even defeats. But those events cannot deter us from that dictates of science, reason and common sense. As the perfect must not be the enemy of the good, so those climate actions broadly examined and reasoned to conclusion must be carried to their logical and lawful conclusions, whatever those may be. To allow a chaotic blizzard of inconsistent, illogical opposition to blind us to a destination that is existential would be a tragic result.

IECG respectfully suggests the right principle here is that set forth in the Department’s statutes and in other provisions of Maine law. IECG encourages the Department to sweep the swirling blizzard of opposition arguments from its vision and stay the course in the enforcement of Department law and rules, with cognition of other proceedings intended to properly litigate recent developments. Fear, self-interest and chaos are not right principles.

Dated at Augusta, Maine, this 9th day of November, 2021.

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