STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

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| 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 | ) |

**INTERVENOR NATURAL RESOURCES COUNCIL OF MAINE'S POST-HEARING REPLY BRIEF**

Pursuant to the First Procedural Order, and the Hearing Officer's email dated October 20, 2021, the Natural Resources Council of Maine ("NRCM") submits this reply to the post-hearing briefs of Central Maine Power Company ("CMP") and NECEC Transmission LLC ("NECEC LLC") (collectively, the "Licensees") and Intervenor Industrial Energy Consumer Group ("IECG"). Based on the hearing and briefing, the Commissioner should immediately suspend any further clearing or construction in Segments 1 and 2—which the Licensees are furiously advancing in a frenetic and desperate attempt to outrun the inevitable—based on the change in circumstance represented by the decision in *Black v. Cutko*. Additionally, immediately following the upcoming hearing on November 22, the entire permit should be suspended based on the additional change in circumstance worked by passage of the referendum prohibiting the project in several ways pending resolution of Licensees' challenge to the referendum.

As the record makes clear, neither Licensees nor IECG have identified a single reason justifying Licensees' continuing construction of a transmission line that cannot be completed as permitted. Their discussion of the purported climate benefits is a red herring as they have acknowledged that there cannot be any climate benefits from a project that cannot be completed. Further, while they may be trying to garner some sympathy for their financial bottom line, the

topic identified for the hearing was the costs to protect the environment, and not the costs to protect their own pocketbooks.

The fact that the Department has allowed NRCM's appeal to the Board to sit idle for more than 18 months is unfathomable. And, if anything, that delay has only contributed to Licensees' false sense of security in keeping their blinders on, ignoring the myriad legal deficiencies with the project, and building the project as quickly as possible with the hope that if and when anyone does actually hold them accountable, they can throw up their hands and say too late. Each and every day these proceedings drag on, Licensees are out in the Maine woods clearing and constructing a transmission line that cannot be connected as permitted and that is now barred by statute. They are imposing all of the environmental harm identified in the Order, all while there is no certainty whatsoever that Licensees will ever be able to connect the NECEC Project and achieve the overall project purpose. The Order must be suspended immediately, and, at the very least, the Order must be suspended for Segments 1 and 2 where Licensees are causing irreparable environmental harm.

## I. Licensees cannot connect the NECEC Project.

### A. Licensees cannot build on the public lands.

True to form, Licensees continue to argue that their lease of the public lands "remains in effect" and ignore the practical reality that they cannot build the NECEC Project on the public lands and thus cannot achieve the overall project purpose. Indeed, they suggest that with a snap of their fingers, they nullified a Maine Judge's determination that their lease was unconstitutional and invalid. Licensees' Post-Hearing Brief at 1 ("The very next day, however, Licensees and the BPL appealed the Superior Court decision, nullifying the 'change in circumstance' by restoring the 2020 BPL Lease and the status quo."). Licensees did no such thing. The filing of an appeal

does nothing to undo the judgment but merely stays execution. More telling, the Law Court Order, which was issued *because of* the Superior Court's decision in *Black v. Cutko*, prohibits Licensees from any clearing or construction on the public lands. Bennett Pre-Filed Direct Testimony, Exhibit A. Licensees can cite to the Rules of Civil Procedure, refer to the standard of review on appeal, and block quote a law professor who has admitted on the record that CMP pays him, as many times as they wish, but none of that changes the simple fact that Licensees cannot currently connect the NECEC Project over the public lands.

Licensees assert that there is no change in circumstance because they still have a valid lease and therefore TRI. But the issue is not TRI. As the Licensees have argued elsewhere, and quote Justice Murphy as confirming, TRI relates only to other proceedings before the Department. It has nothing to do with the changed circumstance that their inability to clear or construct on the public lots, which is necessary for them to connect the Project as permitted, represents. That inability to complete the project purpose as permitted, not TRI, is what this suspension proceeding is all about.

Setting aside the effects of the referendum, which will be discussed in more detail in the upcoming proceedings, Licensees assert that even if they do not prevail on their appeal in *Black v. Cutko*, the Bureau of Parks and Lands "could and almost certainly would simply reissue the lease, allowing the Project to continue along the permitted route" and that the Bureau would not find a substantial alteration. Licensees' Post-Hearing Brief at 5. It is troubling that Licensees seem to think that the Bureau's issuance of a new lease is pre-determined and that it is a forgone conclusion that the Bureau would find no reduction or substantial alteration of the public lands. If the Superior Court's decision is affirmed, then the Bureau will be required to adopt and follow a public process and consider additional information from such process before making a

determination as to whether the NECEC Project will reduce or substantially alter the public lands.[1] The outcome of that process is not—or should not be—preordained. Licensees also incorrectly argue that the Bureau previously made the requisite constitutional determination. Licensees' Post-Hearing Brief at 5. As the Superior Court observed, Maine's constitution requires a different analysis than the one the Bureau allegedly conducted considering "some degree of environmental impact." *Black v. Cutko*, Docket No. BCD-CV-2020-29, *Decision and Order (14 M.R.S.A. § 5953 & M.R. Civ. P. 80C)* at 25, (Me. Super. Ct., Aug. 10, 2021). The Superior Court further explained:

> While judicial review of the 2020 lease was made possible given AAG Parker's belated disclosure of the lease, there is no competent evidence in the record to support any assertion that BPL—prior to deciding to enter into the lease and prior to executing the lease—made the requisite finding as to whether the 2020 lease would reduce or substantially alter the uses of the subject lands, and certainly not one using the controlling statutory definitions.

*Id.* at 26.

The only thing that is certain at this time is that it will be several months before the Law Court issues a decision about whether Licensees can build on the public lands. Unless and until that decision is overturned, Licensees will not be able to complete the project; there simply is no basis for allowing them to continue to destroy the Maine woods on the hope and prayer that they will prevail.

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[1] An example of one such additional piece of information the Bureau would need to consider is the "Joint Resolution, Expressing the Sense of the Legislature Regarding the use of Public Land Lease by State," adopted on July 19, 2021, which states in pertinent part:

> That We, the Members of the One Hundred and Thirtieth Legislature now assembled in the First Special Session, on behalf of the people we represent, express our sense in accordance with the Constitution of Maine, that the lease provided to CMP to cross the public reserved lands in West Forks Plantation and in Johnson Mountain Township constitutes a substantial alteration of those lands, requiring a 2/3 vote of all the members elected to each House of the Legislature.

**B. Licensees' proposed alternatives are not viable.**

Rather than reading the plain language of the Forest Society of Maine's Moosehead Region Conservation Easement or the Pierce Pond Watershed Trust's Conservation Easement, or giving any credence whatsoever to the easement holders' interpretations of their respective easements, or acknowledging either the practical or legal issues with HDD, Licensees argue that they can and will build above or under the protected lands. Both FSM and PPWT have made it clear that they intend to protect their lands from the NECEC Project. And Licensees have made it clear that they intend to ignore the easement holders and misrepresent their positions.

In addition to Mr. Dickinson's false testimony that he had conversations with FSM and his refusal to retract his false testimony after FSM requested that he do so, NRCM's Post-Hearing Brief at 9-10, Licensees inaccurately and misleadingly stated that FSM was unable to point to language prohibiting the NECEC Project. Licensees' Post-Hearing Brief at 8. During the public hearing, Ms. Tilberg quoted one section of the MRCE that prohibits the NECEC Project and then, because Mr. Manahan disagreed with the easement holder's interpretation of the term "new long distance energy or telecommunications distribution systems," he asked her to quote a section using the words transmission line. Ms. Tilberg responded: "Well I think it might take a while from me to do that and if you had called us ahead of time I would have been glad to share all of this with you but since we just found out about this on Friday, you know, it's a little short notice." NECEC Suspension Hearing Video, Public Session, at 2:13:00-2:13:11. *See also* NRCM's post-hearing brief at 13-15 (discussing MRCE's prohibition of the NECEC Project). Thereafter, Mr. Metzler of FSM testified and offered to provide the specific language to Licensees. NECEC Suspension Hearing Video, Public Session, at 2:16:30-2:16:59. Presumably,

however, Licensees have not yet actually contacted FSM despite FSM's repeated invitations for them to do so.

Moreover, in the very section that Ms. Tilberg pointed to, the MRCE, "*unless expressly permitted elsewhere* in this Conservation Easement," prohibits all "structural development associated with … residential, commercial, industrial, private, public and institutional uses." MRCE, Section 2, Recorded at Book 2165, Page 9. The easement broadly defines "structure" to include "anything constructed or erected with a fixed location on or in the ground, or attached to something having a fixed location on or in the ground." MRCE, Section 1, recorded at Book 2165, Page 8. There can be no question that the NECEC would be a structural development associated with some or all of those uses that was constructed or erected on or in the ground. The MRCE plainly prohibits all structures except those expressly permitted—and expressly permits only certain defined "Utility Transmission Structures" which by definition are only local distribution structures. Thus, Licensees have it exactly backward—due to the very language Ms. Tilberg pointed to, the NECEC is expressly *prohibited* unless there is language expressly allowing it—which there is not. The express limitation on long distance energy distribution *systems*, by its own terms excludes distribution and transmission lines[2]—but even if it did not, that specific prohibition does not limit the general prohibition on all structures not expressly authorized. Moreover, the State of Maine, acting through the Department of Agriculture,

[2] Contrary to the position advanced by Licensees, the distinction between "distribution lines" and "transmission lines" is not a term of art in the conservation easement context, and the MRCE does not distinguish between them—as evidenced by the definition of "Utility Transmission Structures" which is expressly defined as local distribution. *See* MRCE, Section 1. Thus, when the MRCE, "without limiting the generality of the foregoing" prohibition on *all structures* also specifically prohibits "new long-distance energy or telecommunications distribution *systems* that traverse or transect the Protected Property," MRCE, Section 2, it is prohibiting all parts of the system of distributing energy—including all forms of transmission and distribution. A conservation easement is not a utility contract, and the terms of art that may apply there do not apply in the conservation easement—where the terms are given their regularly understood meaning.

Conservation and Forestry, Bureau of Parks and Lands, is a "Third Party" with rights of interpretation and enforcement over the MRCE, yet there is no evidence that Licensees discussed the issue with BPL, or that BPL has any disagreement with FSM's interpretation.

Even if Licensees had a colorable legal argument that they could build over or under the lands protected by conservation easement—which they do not—they would likely find themselves in a protracted legal battle before receiving a court decision as to whether or not they could in fact build over or under such lands. Additionally, the referendum prohibits both of the proposed alternative routes by virtue of the fact that they would run through the Upper Kennebec Region—a topic for the next stage of this proceeding.

After cursorily drawing two lines on a map, and faced with the legal and practical barriers to both alternatives, Licensees added the possibilities of using HDD or going through Cold Stream Forest. However, for all of the reasons set forth in NRCM's Post-Hearing Brief, HDD is not the panacea Licensees presume[3] and any route through Cold Stream Forest would face the same legal issues as the public lands in *Black v. Cutko* and separately require 2/3 legislative approval under the Lands for Maine's Future statute. NRCM's Post-Hearing Brief at 15-18. Licensees have failed to identify any viable alternative routes and have admitted that they do not intend to pursue alternatives until the Law Court issues its decision on their appeal. NRCM's Post-Hearing Brief at 7. Now that the referendum has passed, Licensees will have to go back to the drawing board for an alternative route that does not run through the Upper Kennebec Region.

[3] Although the provisions of the referendum will be addressed separately, the requirement of 2/3 legislative approval for the construction or operation of any transmission line on public lots goes directly to the claimed possible use of HDD.

## II. Licensees have not committed to off-site mitigation as required by the Order and are irreparably harming the environment with their continued construction.

Licensees continue to claim that constructing the NECEC Project pursuant to the Order, and decommissioning it in the event it cannot be completed, is all that is required to protect the environment. Licensees' Post-Hearing Brief at 2. This is false. Licensees chose a select quote from the Order that does not tell the whole story. Licensees' Post-Hearing Brief at 6 ("the Commissioner found that constructing the Project pursuant to the DEP Order 'will result in adequate provision for the protection of wildlife.'") (quoting Order at 82)). The Order more fully states:

> Furthermore, the landscape-scale wildlife habitat impacts associated with fragmentation that will occur, even with this vegetation management, will not be unreasonable, ***given that they will be mitigated and offset through the required additional conservation within the western Maine forest area in which Segment 1 is located***. ***Provided the applicant implements these measures***, the Department finds that the project will result in adequate provision for the protection of wildlife.

Order at 82 (emphasis added).

NRCM has repeatedly raised the Order's requirement that Licensees perform three types of mitigation, including off-site mitigation, to adequately protect the environment. *See, e.g.*, NRCM's Response to Licensees' Objections to Mr. Merchant's Pre-Filed Testimony at 3; NRCM's Post-Hearing Brief at 4, 19, 22-23. Yet Licensees have focused exclusively on on-site mitigation and decommissioning and have been silent as to the Order's required off-site mitigation. The most likely explanation for their silence is that they are not going to perform the off-site mitigation of purchasing 40,000 acres of conservation land unless the NECEC Project becomes operational.

Licensees have vowed to continue constructing a Project that cannot be connected under the permitted route, does not have any viable alternatives, and is barred by statute. In fact, since

the suspension hearing on October 19, 2021, Licensees have cleared new sections of Maine's woods, including between Route 201 and Capital Road close to the public lands—even though this newly cleared area would have to be abandoned as part of any reroute—and in the Jack Pine forest in the sensitive northwestern section of Segment 1. Where Licensees' witness had to update the status of their construction activities between the date of their map on October 13 and the date of the hearing on October 19, it is not surprising that they have further destroyed Maine's environment in the weeks following the hearing and while awaiting a decision from the Commissioner as to whether their permits will be suspended. Even if Licensees decommission the Project, they will not have performed the off-site mitigation, which will leave the environment in those areas inadequately protected under the very terms of the Department's own Order. To prevent this inevitable yet completely unnecessary environmental destruction, the Commissioner must immediately suspend the Order as to Segments 1 and 2.[4]

## CONCLUSION

Clearing for a utility line to nowhere brings all of the environmental harms identified in the Department's Order, and can bring none of the hypothetical benefits that might come from a line that met the project purposes. Licensees have, at their own risk—while appeals remain pending before the Board—cleared and constructed at breakneck pace so that they can claim it is too late for the Department or the people of Maine to put a stop to their folly. But, as the Superior Court held in *Black v. Cutko,* Licensees' illegal lease—an issue raised by NRCM in the

[4] Despite Licensees and IECG repeatedly urging the Commissioner to exercise her discretion in their favor during the suspension hearing, Licensees argue in their post-hearing brief that a decision adverse to them to suspend the Order would be unconstitutional under the theory that the standard for the Commissioner to revoke or suspend a license under 38 M.R.S. § 342(11-B)(E) and DEP Regs. Ch. 2 § 27(E) "is overly subjective and thus void for vagueness." Licensees' Post-Hearing Brief at 13, n.11. It is unsurprising the Licensees are preemptively setting the stage for a legal challenge if things do not go in their favor. The people of Maine have stood up to Licensees and NRCM urges the Commissioner to do the same regardless of their veiled threat of future legal action.

Department proceedings and before the Board on appeal—was void from the start, way back in 2014. CMP should have known this since 2014, and was certainly on notice at least as early as when NRCM raised it before the Department. It is time for the Department to put a stop to Licensees' willful imposition of the environmental harms identified in the Order in clearing a line to nowhere. For all of the foregoing reasons and the reasons in its opening brief, NRCM requests that the Commissioner immediately suspend the Order, or at the very least, prohibit any further construction and clearing in Segments 1 and 2 until final resolution of *Black v. Cutko*.

Dated: November 9, 2021

*/s/ James T. Kilbreth*

James T. Kilbreth, Bar No. 2891
David M. Kallin, Bar No. 4558
**DRUMMOND WOODSUM**
84 Marginal Way, Suite 600,
Portland, ME 04101-2480
jkilbreth@dwmlaw.com
dkallin@dwmlaw.com
(207) 772-1941
*Attorneys for Natural Resources Council of Maine*