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October 16, 2020

VIA ELECTRONIC MAIL – ruth.a.burke@maine.gov

Mark C. Draper, Chair
c/o Ruth Ann Burke
Board of Environmental Protection
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 and West Forks Petitioners' Renewed Motions for Stay,
and Objection to Supplemental Evidence

Dear Mr. Draper:

Enclosed is the Response of Central Maine Power Company to NRCM's and West Forks
Petitioners' Renewed Motions for Stay, and Objection to Supplemental Evidence.

Sincerely,



Matthew D. Manahan

Enclosure

cc: James Kilbreth, Esq.
Elizabeth Boepple, Esq.
BEP Service List (draft, ver. 10/7/2020)

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 AND WEST FORKS PETITIONERS' RENEWED MOTIONS FOR STAY,
AND OBJECTION TO SUPPLEMENTAL EVIDENCE**

The Chair should deny the September 25, 2020 renewed motions for stay (Renewed Motions) of NRCM and the West Forks Petitioners (collectively, Petitioners) because the Board does not have jurisdiction to consider them. Even if it did, such stay requests are procedural issues to be determined by the Chair and not the full Board; the Chair should deny this re-hash of prior motions, which have been thoroughly briefed and considered, and which fail to provide any justification to upset the Commissioner's determination that no stay is warranted here.

NRCM filed with the Board its prior motion for stay on June 10, 2020, and the West Forks Petitioners filed with the Commissioner their prior motion for stay on June 5, 2020.¹ Each also filed those motions in duplicate with the other decision-maker.² Recognizing the

¹ The West Forks Petitioners ostensibly supplemented their June 5, 2020 motion on June 15 and June 25. Numerous parties briefed the West Forks Petitioners' motion: Old Canada Road, Friends of Boundary Mountains (FBM), Industrial Energy Consumer Group (IECG), NRCM, Wagner Forest, and Western Maine Mountains & Rivers Corporation (WMRC). So too did numerous parties brief the NRCM motion: FBM, IECG, Appalachian Mountain Club, Trout Unlimited, and WMRC. CMP filed its responses in opposition to both motions on June 26, 2020. On July 2, 2020 NRCM filed a reply in support of its stay motion.

² On June 19, 2020 NRCM filed with the Commissioner its motion to the Board and on June 23, 2020 the West Forks Petitioners filed with the Board their motion to the Commissioner.

inefficiency in having two decision-making bodies within the Department simultaneously consider and determine those similar stay motions, and reserving a determination of the Board's ability to stay an order of the Commissioner in any event, Chair Draper on July 16, 2020 referred to the Commissioner NRCM's stay motion. He did so to "allow the Department to efficiently speak with a single voice as it addresses the various arguments for a stay in a consolidated fashion, and [to] conserve resources by avoiding duplicative efforts by the Department and the parties in addressing similar stay requests." Draper Letter to NRCM at 2 (July 16, 2020).³

Former Commissioner Reid, on August 26, 2020, denied the Petitioners' motions, concluding that neither "carried their burden of satisfying any of the three parts of the standard for granting a stay, each of which is independently required." Commissioner Decision on Stay at 4 (Aug. 26, 2020). Because that decision was not a final decision on a license application, the Chair determined that the Renewed Motions, purporting to appeal the Commissioner's decision, "are more appropriately considered as renewed motions or applications for a stay in the context of the existing Board appeals of the NECEC Order." Draper Letter to NRCM and the West Forks Petitioners at 1 (Oct. 7, 2020).

Accordingly, the issue of the Board's jurisdiction to stay the May 11, 2020 Order of the Commissioner (DEP Order) is now before the Chair.⁴ The Board plainly has no such authority.

³ NRCM filed an appeal of the Chair's decision to the full Board on July 22, 2020, to which CMP responded on July 31, 2020. The Chair rejected the appeal.

⁴ In his July 16, 2020 letter to NRCM referring NRCM's appeal to the Commissioner, Chair Draper reserved CMP's argument that the Board lacks authority to stay the Commissioner's Order, finding that "[t]he Board need not address this CMP argument as I have concluded that referral to the Commissioner is warranted for other practical considerations as outlined herein." Draper Letter to NRCM at 21, fn. 1 (July 16, 2020). CMP incorporates herein by reference its June 26, 2020 Opposition to NRCM's Application for Stay, as well as its June 26, 2020 Opposition to the Groups 2/10 Application for Stay and its July 31, 2020 Response to NRCM's Appeal of the Chair's Decision on NRCM's Application for Stay.

Even if the Board did have jurisdiction to grant a stay here, a motion for a stay is a procedural issue, as the Chair recognized in his October 7 letter, to be decided by the Chair. Finally, even if the Board did have jurisdiction to grant a stay here – regardless of whether it may do so by order of the Chair or the full Board – the Petitioners’ Renewed Motions for stay amount to nothing more than recycled requests that have already been rejected by the Department. The Board should stand by that which has already been decided and not undo the Commissioner’s well-reasoned August 26, 2020 decision.

I. The Board lacks jurisdiction to stay a DEP Commissioner’s order.

NRCM’s and the West Forks Petitioners’ Renewed Motions to the Board must be denied because the Board does not have authority to issue the stay they seek. Neither party cites, because such authority does not exist, any statute or rule that authorizes the Board to stay an order of the Commissioner.⁵

The West Forks Petitioners refer to the provision of the Administrative Procedure Act (APA), in 5 M.R.S. § 11004, that a motion for a stay of an agency decision “may be made to the Superior Court, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the petitioner had requested.” Because they first requested that the Commissioner issue a stay, but are unhappy with the Commissioner’s decision, they allege that the next rung up the chain of appeal lies with the Board. But there is no such provision allowing internal agency “appeals” of stay decisions in the APA, which allows only that a stay request be made to the issuing agency or

⁵ See CMP’s June 26, 2020 Opposition to NRCM’s Application for Stay, incorporated herein by reference.

to Superior Court.

Equally unpersuasive is the West Forks Petitioners' argument that the Commissioner should not be charged with a review of his own order. West Forks Renewed Motion at 7. The plain language of the APA requires just that – “[a]pplication for a stay of an agency decision shall ordinarily be made first to the agency.”⁶ The “agency” that issued the decision here is the DEP, via its Commissioner, to which the West Forks Petitioners' and NRCM's stay requests were already made and denied.

This conclusion is supported not only by the clear language of Section 11004 and the Attorney General Opinion that NRCM cited in its June 10, 2020 motion for stay,⁷ but also by the DEP's rules, which provide that “[t]he filing of an appeal to the Board does not stay the license decision.” DEP Regs. Ch. 2 § 24(A). Because the issuing entity here is the Commissioner, Section 11004 confers jurisdiction on the Commissioner, not the Board, to stay the DEP Order

⁶ See also Me. Op. Att'y Gen. No. 80-116 (July 15, 1980) (“What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained”).

⁷ Me. Op. Att'y Gen. No. 80-116 (July 15, 1980). That opinion addressed whether Section 11004 requires that an application for a stay of a *Board* decision be made to the Board rather than to Superior Court, and found that the APA requires that an application for stay be made to the tribunal that issued the decision (in that case, the Board), and not to the reviewing tribunal (in that case, Superior Court). Me. Op. Att'y Gen. No. 80-116 (July 15, 1980) (reviewing the legislative history of Section 11004 and noting that “[t]he law developed by the federal courts under the parallel rule governing stays from district court judgments is quite clear that requests for stays are properly made to the District Court in the first instance, even after an appeal of the judgment has been taken.”). Consequently, Section 11004, in the opinion of the Office of the Attorney General, confers jurisdiction on the tribunal that issued the underlying decision to consider and act on a petition for a stay of that tribunal's decision when the petitioner has appealed that decision to Superior Court. *Id.*

when the petitioner has appealed that order to court.⁸

II. Even if the Board did have jurisdiction to stay a DEP Commissioner's order, a stay motion is a procedural issue to be decided by the Chair.

As the Chair noted in his October 7, 2020 letter, a decision on a stay request is not a substantive decision appealable to the full Board. Draper Letter to NRCM and the West Forks Petitioners at 1 (Oct. 7, 2020). The Board instead is tasked with deciding certain license applications and appeals of Commissioner license decisions. *See* DEP Reg. Ch. 2 §§ 17 (Board Assumption of Jurisdiction over an Application), 19(C) (Board Decisions), and 24 (Appeal to the Board of Commissioner License Decisions). The Chair, conversely, is tasked with deciding procedural issues. *See* DEP Reg. Ch. 2 §§ 24(A) (authorizing the Chair to dismiss an appeal for untimeliness and for lack of standing), 24(C)(3) (authorizing the Chair to rule on the admissibility of proposed supplemental evidence), 24(D)(3) (authorizing the Chair to accept into the record additional evidence and analysis or supplemental evidence), and 24(F)(4), (6) (authorizing the Chair to make procedural rulings during a hearing); DEP Regs. Ch. 3 §§ 4(C)(1)-(C)(5) (authorizing the Presiding Officer in a hearing to make pre-hearing rulings). Nowhere in Chapters 2 or 3 is the full Board tasked with deciding a motion for stay or rendering any other license-related decision other than on a license application or an appeal of a license order. Accordingly, even if the Board had jurisdiction grant a stay, a motion for a stay is a procedural issue to be decided by the Chair and not by the full Board.

III. Petitioners cannot meet the high burden for a stay.

Even if the Board had authority to issue a stay of the DEP Order, the Renewed Motions

⁸ Note that Section 11004 governs the stay of agency action when the petitioner has appealed that agency's decision to Superior Court. It does not apply here because (1) NRCM has not appealed to Court, and (2) the Superior Court has remanded to the Board the West Forks Petitioners' appeal.

should be denied (again) because Petitioners have presented no arguments in their Renewed Motions that would upset the Commissioner’s determination that neither has “carried their burden of satisfying any of the three parts of the standard for granting a stay, each of which is independently required.” Commissioner Decision on Stay at 4 (Aug. 26, 2020). A petitioner for a stay or other injunctive relief bears the burden of showing that the circumstances of the case justify the exercise of such discretionary action. *In re Maine Today Media, Inc.*, 2013 ME 12, ¶ 13, 59 A.3d 499, 502 (Me. 2013) (citing *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010)). This burden is high, as injunctive relief is “an extraordinary remedy only to be granted with utmost caution when justice urgently demands it and the remedies at law fail to meet the requirements of the case.” *Bar Harbor Banking & Tr. Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980) (citing *R. Whitehouse, Equity Jurisdiction* § 563 (1900)).

Pursuant to the APA, a petitioner for a stay must affirmatively demonstrate three elements: (1) irreparable injury to the petitioner, (2) a strong likelihood of success on the merits, and (3) no substantial harm to adverse parties or the general public. 5 M.R.S. § 11004. The Law Court has stated that the first two criteria are the most critical, and require a showing of more than mere possibility. *In re Maine Today Media, Inc.*, 2013 ME 12, ¶ 13, 59 A.3d 499, 502 (Me. 2013) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 375-76 (2008); *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010)). However, failure to demonstrate any one of these criteria requires that injunctive relief must be denied. *See Bangor Historic Track, Inc. v. Dep’t of Agric.*, 2003 ME 140, ¶ 10, 837 A.2d 129, 132-33 (Me. 2003). Petitioners fail to meet any, let alone all, of these necessary elements for a stay, and thus their Renewed Motions must be denied.

First, Petitioners fail to show irreparable injury, which is a prerequisite to the granting of

injunctive relief. *Bangor Historic Track*, 2003 ME 140, ¶ 10, 837 at 133. Even if CMP could now begin construction,⁹ Petitioners have failed to demonstrate how construction will cause any injury, let alone “irreparable injury,” which is defined as “injury for which there is no adequate remedy at law.” *Id.* (citing *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980)). As former Commissioner Reid stated, “[t]he question is whether Petitioners would suffer irreparable harm if clearing of the corridor in [Segment 1] were to begin while an appeal is pending.” Commissioner Decision on Stay at 4 (Aug. 26, 2020). Not only has the injury alleged – impact to habitat and existing uses – already been carefully examined by the DEP, but Petitioners have failed to explain how any clearing in commercial forestland and in compliance with the specific and comprehensive conditions set forth in the DEP Order – designed to reduce or eliminate impact to habitat and existing uses – would cause them any concrete and specific injury. They failed to do so in their initial motions and fail to do so again in their Renewed Motions. *See* Commissioner Decision on Stay at 4 (Aug. 26, 2020).

The DEP must consider a project’s impact on habitat and existing uses under the Natural Resources Protection Act,¹⁰ the Site Location of Development Act,¹¹ and their implementing

⁹ CMP must still obtain a U.S. Department of Energy (DOE) Presidential Permit and a U.S. Army Corps of Engineers (Corps) Permit under Clean Water Act Section 404 prior to construction of the Project at the Canadian border and in Segment 1, respectively, as well as the authorization of each municipality the NECEC crosses. NRCM’s allegation in its Renewed Motion that “with every day, CMP moves closer to obtaining those permits” is irrelevant, as the ability to challenge to those permits constitutes adequate remedy at law. Furthermore, Petitioners’ continued failure to provide any legal analysis of what construction CMP can perform before it receives all of its remaining permits, and failure to provide any factual analysis of whether and how any such construction would actually cause them harm, is fatal because “[w]ithout satisfactorily answering these questions, Petitioners [can]not carry their burden of showing irreparable harm.” Commissioner Decision on Stay at 4 (Aug. 26, 2020).

¹⁰ 38 M.R.S. § 480-D(1).

¹¹ 38 M.R.S. § 484(3).

regulations¹² – and such impact was litigated as explicit hearing topics in this proceeding.¹³ Indeed, the harm that Petitioners allege in support of a stay was the gravamen of their positions throughout this proceeding,¹⁴ and the six days of DEP hearings “highlighted the impacts the proposed project would have on fish and wildlife habitat, scenic character, and recreational uses of the Segment 1 area.”¹⁵ After thorough examination of the testimony, public comment, and record evidence over the course of this proceeding,¹⁶ the Commissioner conditioned DEP approval on additional mitigation that is supported by testimony from Group 4, of which NRCM was a member.¹⁷ The Commissioner found that, with such conditions, “adequate provision for the protection of wildlife will be achieved.”¹⁸

With regard to existing uses, the Commissioner concluded that “because the scenic impact of the project is not unreasonable, the Department further finds the project will not have an unreasonable adverse effect on existing uses that are related to the scenic character.”¹⁹ But the Commissioner did not stop there. To the contrary, he also “evaluated the potential impact of the applicant’s project on existing uses, looking beyond the scenic impacts,” particularly regarding “the potential impact of Segment 1,” and concluded that “the project will not have an

¹² DEP Regs. Chs. 315, 335, and 375.

¹³ DEP Second Procedural Order ¶ 7.

¹⁴ *See, e.g.*, Group 4 Initial Brief at 11-53; Publicover Direct at 3; Reardon Direct at 6; Groups 2 and 10’s Post-Hearing Brief at 7-10; Pre-Filed Direct Testimony of Group 2 Witness Elizabeth Caruso at 3 (“Caratunk residents will not only be impacted financially through their livelihoods from which they derive income to support families, but also in their ways-of-life.”).

¹⁵ DEP Order at 1.

¹⁶ DEP Order at 56.

¹⁷ DEP Order at 77.

¹⁸ DEP Order at 76-77.

¹⁹ *Id.*

unreasonable adverse impact on existing uses, including recreational or navigational uses.”²⁰ It is entirely illogical for Petitioners to now argue that a stay is required to prevent the alleged harm that the DEP has already thoroughly considered and mitigated through the conditions in the DEP Order. As Commissioner Reid noted, Petitioners’ “argument amounts to the conclusory assertion that any such clearing or construction activity would inherently cause them irreparable harm. That is not enough to justify the issuance of a stay.” Commissioner Decision on Stay at 5 (Aug. 26, 2020).

Second, Petitioners cannot show a strong likelihood of success on the merits. This criterion is critical, and requires a showing of more than mere possibility of success on the merits. *In re Maine Today Media, Inc.*, 2013 ME 12, ¶ 13, 59 A.3d 499, 502 (Me. 2013) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 375-76, 172 L.Ed.2d 249 (2008); *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010)).²¹ Instead, a petitioner for a stay must show specific circumstances that justify the exercise of this extraordinary remedy. *In re Maine Today Media*, 2013 ME at ¶ 13, 59 A.3d at 502; *Bar Harbor*, 411 A.2d at 79.

Petitioners have not made any showing of likely success on the merits here. Instead, they rehash arguments and attach evidence that have already been thoroughly analyzed and addressed by the Department. Commissioner Reid’s findings on the likelihood of success in this proceeding, which occupied nearly three years of intensive and iterative work, and built a record of tens of thousands of pages, is informative:

²⁰ *Id.* at 56-58.

²¹ NRCM’s citation to the 1980 Attorney General Opinion for the proposition that it need show “merely a substantial possibility of success” is 30-years stale, and subsequent case law dictates that a showing of more than a “substantial possibility” of success is required. NRCM June 10, 2020 Application at 8.

West Forks and NRCM challenge the findings on the practicability of the underground option and alternative routes, the impacts to brook trout habitat and forest fragmentation, and the conservation land. Petitioners made these same arguments during the processing of the application, and the evidence of potential harm to the environment received great scrutiny. The terms and conditions of the NECEC Order are supported by extensive evidence in the record, and are the product of thorough analysis by the Department's professional staff. The order's factual findings are therefore likely to be upheld on appeal. [Commissioner Decision on Stay at 5 (Aug. 26, 2020).]

The DEP Order is a comprehensive, 236-page document that specifically sets forth the arguments of the parties, many of which Petitioners now echo, and the DEP's reasoned findings and conclusions on those arguments. Based on conditions developed in large part by NRCM's own witness testimony, the DEP found that the mitigation ordered sufficiently assuaged the harm Petitioners allege.²² Given that the record is replete with competent evidence supporting the DEP Order, Petitioners cannot show a likelihood of success on the merits, let alone the required "strong likelihood."

With respect to NRCM's argument that the Commissioner was without authority to issue the permit in the first instance because the NECEC is a project of statewide significance, that argument is entirely without merit for the reasons discussed in Commissioner Reid's August 26, 2020 Decision and as discussed in CMP's June 26, 2020 Opposition to NRCM's Application for Stay. Furthermore, as Commissioner Reid noted, "[e]ven if NRCM could show that the Board was required to assume jurisdiction over the application at the outset, which they cannot, it is difficult to see how the Board's current involvement would not render that harmless error. Accordingly, I find that there is not a strong likelihood of reversal of the NECEC approval on the basis of this argument." Commissioner Decision on Stay at 5 (Aug. 26, 2020).

Neither NRCM nor the West Forks Petitioners raises any error that shows a strong

²² See, e.g., DEP Order at 76-92.

likelihood of success on the merits.

Third, Petitioners fail to show that a stay will not result in substantial harm to CMP or the general public. Because CMP needs to begin construction well before any appeals are resolved in the Law Court in order to meet its required in-service date, CMP would be harmed by a stay of the DEP Order to the extent that it would not be able begin construction where otherwise fully authorized.²³ Despite this well-established and substantial harm to CMP, the West Forks Petitioners repeat their claim that “CMP should not begin work absent those outcomes and approvals which further illustrates why a stay of the Order will not cause substantial harm to CMP.” West Forks Petitioners Renewed Motion at 10. As Commissioner Reid found, this argument is unpersuasive and contrary to Petitioners’ claim of irreparable harm. Commissioner Decision on Stay at 4 (Aug. 26, 2020).

Such a delay, and possible cancellation (pursuant to contractual in-service obligations) of the Project, also would result in harm to the general public because of the loss of economic benefits of the Project: it will create an average of 1,691 jobs per year in Maine, peaking in 2021

²³ The West Forks Petitioners cite at pages 9-10 the decommissioning condition of the DEP Order, purportedly because it would be “foolhardy” for CMP to begin construction prior to compliance with DEP Order conditions. It certainly would not be “foolhardy” for CMP to begin construction given that the likelihood of Petitioners’ success on the merits is exceptionally low. And this argument is a red herring. Not only are many of the DEP Order conditions pre-construction conditions (and hence CMP must satisfy those conditions prior to beginning construction), but compliance with a post-construction condition like the submission of a decommissioning plan within one year of the start of commercial operation is entirely irrelevant to the three stay criteria. So too is the citizens’ referendum that the West Forks Petitioners reference at page 10 of their Renewed Motion, the outcome of which is entirely unknown, even if it were to appear on the ballot at some future time. Commissioner Reid dismissed Petitioners’ parallel argument on the November 2020 referendum, stating, “Petitioners’ argument that a November 2020 referendum vote might effectively strip the project of a required PUC approval is not relevant to the likelihood of success on the merits of the two appeals of the Commissioner’s NECEC Order, and consequently to these stay requests.” Commissioner Decision on Stay at 5 (Aug. 26, 2020).

at 3,506 jobs; it will increase Maine's Gross Domestic Product by nearly \$64 million over the six-year period; it will generate approximately \$18 million of additional municipal tax revenue; and it will reduce wholesale electricity cost.²⁴

Importantly, the Commissioner's Order is crucial in the fight against climate change, and any delay in construction that would result from a stay therefore also is detrimental to the general public. As the Order noted, climate change "is the single greatest threat to Maine's natural environment":

It is already negatively affecting brook trout habitat, and those impacts are projected to worsen. It also threatens forest habitat for iconic species such as moose, and for pine marten, an indicator species much discussed in the evidentiary hearing. Failure to take immediate action to mitigate the GHG emissions that are causing climate change will exacerbate these impacts.²⁵

Combating climate change is perhaps the greatest public benefit of the Project, and Mainers cannot afford to await the outcome of appeals, potentially several years down the road, for the Project to reduce "overall GHG emissions through corresponding reductions of fossil fuel generation (primarily natural gas) in the region."²⁶ Petitioners simply have not met the requirements for issuance of a stay of the DEP Order.

IV. Petitioners' supplemental evidence should be stricken.

As noted above, the vast majority of the Renewed Motions is identical in substance to the Petitioners' prior stay motions. NRCM even incorporates its prior stay motion by reference at page 4, footnote 7. While neither NRCM nor the West Forks Petitioners has presented any persuasive arguments to upset the Commissioner's decision, both purport to introduce

²⁴ See CMP's Site Law Application at § 1.4 (Sept. 27, 2017).

²⁵ DEP Order at 105.

²⁶ *Id.*

supplemental evidence in their Renewed Motions. CMP objects to the introduction of, and hereby moves to strike, any such evidence not in the administrative record, including the following statements and exhibits:

- NRCM Renewed Motion at 4: “Yet with every day that passes, CMP moves closer to obtaining those permits. Indeed, the Army Corps of Engineers recently announced that it expects to issue permits to CMP imminently. See **Exhibit A** (Army Corps Letter).”
- NRCM Renewed Motion Exhibit A (USACE Letter).
- All supplemental evidence indexed at Appendix B to NRCM’s June 10, 2020 Appeal, incorporated into NRCM’s June 10, 2020 Application for Stay at page 9, footnote 10, to the extent also incorporated into its September 25, 2020 Renewed Motion at page 4, footnote 7.
- West Forks Petitioners Renewed Motion at 9: “The Petitioners are likely to succeed on the merits once the Board critically reviews the existing and any supplemental evidence Petitioners and NRCM present.”
- West Forks Petitioners Renewed Motion Exhibit 1 (unredacted testimony of witness McMahan, portions of which were stricken in the Joint Fifth Procedural Order at 5).
- West Forks Petitioners Renewed Motion at 10: “Finally, there is another citizen’s referendum that may moot the entire application.”

Nowhere in the Renewed Motions do Petitioners request that this supplemental evidence be added to the record and considered by the Board, nor do they address the criteria for inclusion of supplemental evidence set forth in Chapter 2, Section 24(D). Instead, they simply attach that supplemental evidence without regard for the explicit procedure required to supplement the record, and without demonstrating how that evidence is relevant and material to the three stay criteria.²⁷ That supplemental evidence therefore should be stricken.

²⁷ As Commissioner Reid explained in his August 26, 2020 Decision, Petitioners’ arguments on as yet unissued permits is unpersuasive and contrary to their arguments on irreparable harm, and Petitioners’ arguments regarding the November 2020 referendum is not relevant to the likelihood of success on the merits of the appeals. Commissioner Decision on Stay at 4-5 (Aug. 26, 2020). Furthermore, the West Forks Petitioners’ explicit reference to supplemental evidence and inclusion of stricken testimony certainly do not lend any credence to Petitioners’ likelihood of success on the merits.

For the foregoing reasons, CMP requests that the Chair deny the Renewed Motions for a stay of the Commissioner's May 11, 2020 Order and strike Petitioners' supplemental evidence.

Dated this 16th day of October, 2020.



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