

STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION



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February 12, 2021

**SENT VIA ELECTRONIC MAIL ONLY**

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**Re: Proposed supplemental evidence in consolidated appeals of New England Clean Energy Connect (NECEC) 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 and Transfer Order L-27625-26-K-T**

Dear Participants:

This correspondence is in response to proposed supplemental evidence and recent filings of the participants in the above-captioned consolidated appeals.

**I. Summary of Appeals**

On June 10, 2020, the Natural Resources Council of Maine (NRCM) filed with the Board of Environmental Protection (Board) a timely appeal of and a request for hearing on the May 11, 2020, Order of the Commissioner of the Department of Environmental Protection (Commissioner) conditionally approving the application of Central Maine Power Company (CMP) to construct the New England Clean Energy Connect (NECEC Order). On September 25, 2020, NextEra Energy Resources, LLC (NextEra) and the West Forks Group each filed with the Board appeal documents amplifying

their judicial appeals of the NECEC Order pursuant to a Superior Court remand order, and each requested a Board hearing as part of their appeals.<sup>1</sup>

On January 4, 2021, the NRCM filed with the Board a timely appeal of and a request for hearing on the December 4, 2020, Order of the Commissioner (L-27625-26-K-T) conditionally approving the application of CMP and NECEC Transmission LLC to partially transfer to NECEC Transmission LLC the May 11, 2020, NECEC Order (Transfer Order). As stated in my January 19, 2021, letter, the Board will consolidate and process NRCM's appeal of the Transfer Order together with the three underlying appeals of the NECEC Order.

## **II. Proposed Supplemental Evidence and Opportunity for Responses**

My January 8, 2021, letter identified proposed supplemental evidence offered by NRCM and West Forks Group in their respective appeals of the NECEC Order and established a deadline of January 25, 2021, for written comments from the respondents on the admissibility of the appellants' proposed supplemental evidence and any supplemental evidence proposed in response pursuant to Department rule Chapter 2, *Rule Concerning the Processing of Applications and Other Administrative Matters*, § 24(C)(2)(a).

My January 19, 2021, letter stated that NRCM's appeal of the Transfer Order offered no proposed supplemental evidence and established a deadline of February 18, 2021, for the licensee's and any respondents' response to the merits of the appeal pursuant to Chapter 2, § 24(C)(1)(a).

## **III. Participant Responses Regarding Proposed Supplemental Evidence**

### **1. NRCM Supplement to its Appeal**

On January 21, 2021, NRCM submitted – as a supplement to its June 10, 2020, appeal – transcripts of audio files it initially provided to the Board through electronic links contained in its appeal at Appendix B, footnote 1. On January 8, 2021, I ruled that the electronic links to documents will not be accepted pursuant to Chapter 2, § 24(B)(2). Chapter 2, §24 (B)(2) clearly states that electronic links will not be accepted as an exhibit in support of an appeal. NRCM's submission of the transcripts as proposed supplemental evidence were not provided with the written appeal, as required by Chapter 2, § 24(D)(1), and are therefore untimely. Consequently, NRCM's January 21, 2021, supplement is not admitted to the record.<sup>2</sup>

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<sup>1</sup> West Forks Group is comprised of persons who intervened in the Department licensing proceeding and who are now represented by Elizabeth A. Boepple, Esq., BCM Environmental & Land Law, PLLC. Appellants in the West Forks Group are: West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guide Service, Hawks Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Matt Wagner, Mike Pilsbury, Mandy Farrer, and Carrie Carpenter.

<sup>2</sup> Board members will receive only those materials that are admitted to the record. Proposed supplemental evidence and non-record materials not admitted will be redacted or removed from filings as necessary prior to the appeal materials being circulated to Board members.

## 2. Response of CMP and NECEC Transmission LLC

On January 25, 2021, CMP and NECEC Transmission LLC (Appellees) submitted a consolidated response pursuant to my January 8, 2021, and January 19, 2021, letters. The Appellees captioned their response, in part, as a motion to strike supplemental evidence. The Board considers the Appellees' response to be written comments on the admissibility of the Appellants' proposed supplemental evidence rather than a motion to strike evidence since the proposed supplemental evidence was not a part of the record.

The Appellees oppose almost all proposed supplemental evidence in both the NECEC Order and Transfer Order appeals, asserting that the Appellants failed to address and satisfy the criteria for inclusion of the supplemental evidence, as required by Chapter 2, §§ 24(B)(3) and 24(D).<sup>3</sup>

## 3. Response of Industrial Energy Consumer Group (IECG)

On January 25, 2021, IECG filed a response pursuant to my January 8, 2021, letter in which it argues that NRCM's proposed supplemental evidence should not be admitted and that NRCM's request for a hearing should be denied.

## 4. Response of Lewiston-Auburn Group

On January 25, 2021, the Maine State Chamber of Commerce, the Lewiston-Auburn Metro Chamber of Commerce, and the City of Lewiston (collectively, Lewiston-Auburn Group) filed a joint response pursuant to my January 8, 2021, letter in which they argue that NRCM's proposed supplemental evidence should not be admitted and that NRCM's request for a hearing should be denied.

## 5. West Forks Group Objection to Response of the Appellees

On February 1, 2021, West Forks Group filed a response to the Appellees' January 25, 2021, consolidated response. In so doing, West Forks Group requests that I grant its September 25, 2020, request for a Board hearing and deny the Appellees' motion to strike proposed supplemental evidence.

On February 1, 2021, the Appellees filed an objection to West Forks Group's response arguing that the Board's procedural rules for appeals do not allow for such a response. West Forks Group replied to the Appellees' objection arguing that because the Appellees elected to fashion their filing as a motion, "West Forks [Group] followed Maine's general practice and procedure which allows for a response to a motion." West Forks Group objected to the Appellees' objection to its response on the basis that in litigation a response to a reply to a motion is not permitted.

As I stated above, the Board does not consider the Appellees' January 25, 2021, comments on the proposed supplemental evidence a motion. The Board's rules do not provide for an appellant to respond to an appellee's comments on the admissibility of the appellant's proposed supplemental evidence. Consequently, West Forks Group's February 1, 2021, response is not admitted to the record. None of the filings from February 1, 2021, will be circulated to Board members.

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<sup>3</sup> The Appellees are not opposed to the admission of the Public Utilities Commission Stipulation. See section IV.2 below.

## 6. NRCM Opposition to Response of the Appellees

On February 3, 2021, NRCM filed a response opposing the January 25, 2021, Response of the Appellees. NRCM asserts that "The [Board] should consider the supplemental evidence proffered by NRCM in these now-consolidated appeals and it should hold a hearing to take further testimonial evidence and better understand the existing evidence." (Footnote omitted.)

On February 4, 2021, the Appellees submitted an objection to NRCM's February 3, 2021, response, arguing that the Board's procedural rules for appeals do not allow the proponents of supplemental evidence to respond to objections concerning admissibility of that proposed supplemental evidence.

As discussed in section III(5) above, the Board's rules do not provide for an appellant to respond to an appellee's comments on the admissibility of an appellant's proposed supplemental evidence. NRCM's February 3, 2021, response is not admitted to the record. The February 3, and 4, 2021, filings will not be circulated to Board members.

## IV. Rulings on Proposed Supplemental Evidence

The record for appeals decided by the Board is the administrative record prepared by Department staff in its review of the application, unless the Board admits supplemental evidence or decides to hold a hearing on the appeal. The Board may allow the record to be supplemented on appeal when it finds that the evidence offered is relevant and material and that:

- (a) the person seeking to supplement the record has shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time; or
- (b) the evidence is newly discovered and could not, by the exercise of reasonable diligence, have been discovered in time to be presented earlier in the licensing process.

Chapter 2, § (24)(D)(2).

The following provides a discussion of and ruling on all proposed supplemental and extra-record evidence.

1. Scientific journal article. NRCM proposed as supplemental evidence Appendix C to its appeal, an article from *Northern Journal of Applied Forestry*. I stated in my January 8, 2021, letter that the Department staff had confirmed that the article is already in the administrative record. Upon further review, staff has determined that the article is not in the record. An electronic link to article was previously submitted, not the article itself, in a citation in Intervenor Group 4's April 13, 2020, comments on the draft NECEC Order.<sup>4</sup> The parties were reminded that comments on the draft Order could not include new evidence and should consist of argument based on the evidence that was in the record.

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<sup>4</sup> Group 4 is a consolidated group of persons who intervened in underlying proceeding for the NECEC Order. Group 4 consists of the Natural Resources Council of Maine, the Appalachian Mountain Club, and Trout Unlimited.

The Appellees assert that “NRCM makes no showing as to the relevance or materiality of this article, and even if it were relevant, NRCM makes no showing of its due diligence in bringing this publicly-available article, published more than sixteen years ago, to the attention of the Department....”

Ruling: NRCM has not shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time. Appendix C is not admitted.

2. Public Utilities Commission documents. In its appeal of the NECEC Order, NRCM proposed as supplemental evidence Appendix D, the Public Utilities Commission Stipulation dated February 21, 2019 (PUC Stipulation). In its appeal of the Transfer Order, NRCM proposed as supplemental evidence Exhibit 2: the May 3, 2019, Public Utilities Commission Order granting a Certificate of Public Convenience and Necessity and Approving Stipulation (PUC Order). The Appellees state that since the PUC Order approving the PUC Stipulation is already in the administrative record, they do not object to admitting Appendix D, which is not.

West Forks Group cites to the PUC Stipulation on page 15 of its appeal but did not attach the document as required pursuant to Chapter 2, § 24(D)(1).

Ruling: The Department staff have identified that while the PUC Order is in the record for the Transfer Order, the PUC Stipulation is not. I find that the PUC Stipulation is relevant and material to the arguments on the consolidated appeals, and it was approved in its final form late in the Department's underlying proceeding; therefore, it is admitted.

3. Unredacted testimony. Unredacted versions of written testimony from the hearing in the underlying NECEC Order proceeding are proposed as supplemental evidence by NRCM (Appendices E, F, G, H, I, M, and N) and West Forks Group (Appendices WF-C, WF-D, WF-E, WF Exhibit 1, WF Exhibit 2, and WF Exhibit 3).<sup>5</sup> West Forks Group (in Appeal footnote 1) and NextEra (in Appeal footnote 1) seek to incorporate by reference all of the pre-filed direct, rebuttal, and surrebuttal, hearing testimony, and the comments on the draft NECEC Order, and any attachments or exhibits thereto, from Intervenor Groups 1, 2, 4, 6, 8, and 10.

The written testimony of these witnesses as submitted here by the Appellants is in its original form, but it was partially or fully stricken when it was submitted as hearing testimony because portions or all of it were not relevant to the licensing criteria that were to be topics at the hearing. When testimony was stricken on that basis, but it was relevant to other licensing criteria that were applicable to the proposed project, the parties were informed that they could submit that information on those non-hearing topics as written comments to the Department staff for consideration.

NRCM argues that the evidence proposed here in its original form was either ignored or could not have been brought to the attention of the Department earlier in the licensing process.

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<sup>5</sup> West Forks Group proposes as supplemental evidence Appendix WF-E, which it describes as the May 28, 2019, response of Roger Merchant to Dr. Erin Simons-Legaard testimony. The Department staff is unaware of the referenced document, which was not attached to West Forks Group's appeal and is described as dated subsequent to the issuance of the May 11, 2019, NECEC Order.

The Appellees argue that NRCM has not satisfied the criteria for inclusion of the supplemental evidence because NRCM did not, as it could have, submit the stricken testimony as comments to the Department while the record in the underlying proceeding was open. With regard to NextEra's general attempt to incorporate by reference all hearing testimony, comments on the draft NECEC Order, and attachments to comments on the draft NECEC Order, the Appellees argue that NextEra did not follow the procedural requirements for offering supplemental evidence in that it did not attach to its appeal copies of the proposed supplemental evidence.

Ruling: The Presiding Officer in the underlying proceeding provided that parties could submit to the Department as comments on the permit applications the testimony or portions of testimony that were stricken on the basis of not being relevant to the topics being addressed at the hearing, provided that the comments were relevant to the overall statutory and regulatory criteria. NRCM, West Forks Group, and NextEra did not submit as comments while the administrative record remained open the information or comments that they now propose as supplemental evidence. In addition, NRCM, West Forks Group, and NextEra do not specify how the stricken testimony is relevant and material to the arguments on appeal. The Appellants have not shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time. Therefore, NRCM Appendices E, F, G, H, I, M, and N are not admitted. West Forks Group Appendices WF-C, WF-D, WF-E, WF Exhibit 1, WF Exhibit 2, and WF Exhibit 3 were not attached with the written appeal and are not admitted.

West Forks Group's and NextEra's incorporation by reference of unredacted testimony is disallowed. With regard to the incorporation by reference of the proposed supplemental evidence that was not attached to West Forks Group and NextEra appeals, any documents referenced that were not attached to the appeal as required pursuant to Chapter 2, § 24(D)(1) are not admitted. However, it should be noted that the underlying record is a part of the record for this appeal. To the extent the proposed supplemental evidence that was referenced but was not attached is prior admitted testimony, that testimony is already a part of the record for the appeals.

4. Legislative history. NRCM proposes as supplemental evidence in footnote 1 of Appendix B electronic links to audio files described as "Recordings of ACF Committee LD 1893 hearing, work sessions, and language review." I stated in my January 8, 2021, letter that "[c]itations to legal materials such as public laws, statutes, and officially-maintained legislative history are generally allowed and may be considered by the Board regardless of whether they are included in the Department record. NRCM's citations to the legislative history related to LD 1893 fall into this category and, without a ruling on their relevance, completeness, or materiality, will not be struck from the NRCM's appeal."

The Appellees request that I reconsider my January 8, 2021, ruling with respect to legislative history and NRCM's proposed supplemental evidence. The Appellees argue that despite the consideration that may be given by the Board to legislative history, when offered as proposed supplement evidence the materials must be relevant, material, and brought to the attention of the Department at the earliest time possible – a threshold the Appellees argue NRCM has not demonstrated. The Appellees further argue that while legislative history is generally admissible for

the purposes of interpreting current law, this proposed supplemental evidence relates to proposed legislation that never became law.

The Appellees raise similar arguments against admitting the following proposed supplemental evidence of NRCM:

- Appendix J (written testimony of Nick Bennett, NRCM, March 15, 2019, to the Joint Standing Committee on Environment and Natural Resources in support of L.D. 640);
- Appendix K (written testimony of Nick Bennett, NRCM, March 15, 2019, to the Joint Standing Committee on Environment and Natural Resources on L.D. 640 in response to March 28, 2019, memorandum of CMP's Thorn Dickenson); and
- Appendix L (written testimony of Thomas Saviello, March 15, 2019, to the Joint Standing Committee on Environment and Natural Resources regarding L.D. 640).

The Appellees also argue that the following statements in NRCM's appeal are "neither relevant nor material, nor brought to the attention of the Department at the earliest possible time, and therefore should be stricken."

- "When notified of the [Certificate of Public Convenience and Necessity] requirement at a February 18, 2020, work session held by the Agriculture, Forestry, and Conservation ("ACF") Committee of the Maine Legislature on LD 1893, 'An Act To Require a Lease of Public Lands To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes,' [Bureau of Public Lands] Director Andy Cutko stated that, 'Now that I am aware of the utilities requirement I would certainly want to follow the law and get that secured prior.' The ACF Committee unanimously voted out of committee an amended version of LD 1893 finding that the Illegal BPL Lease violated 35-A M.R.S. § 3132 and requiring any new lease to receive a two-thirds vote of all elected members of both houses of the Legislature." NRCM NECEC Order appeal at 10.
- "This conclusion will be borne out by testimony before the Board, where NRCM plans to offer the testimony of former Maine Senator Thomas Saviello regarding the history and purpose of this legislation." NRCM Transfer Order appeal at 4.

Ruling: L.D. 640 was not enacted by the Legislature and thus never became law. Legislative history surrounding L.D. 640 may be considered by the Board to the extent it is relevant to an appeal issue, which here, is the Board's interpretation of its regulatory title, right or interest requirement. I reiterate my January 8, 2021, statement on these appendices. The Board may consider legislative history and arguments to the extent relevant to the issues in the appeals, and there is no need to admit these materials as supplemental evidence. The arguments made in the NRCM appeal set forth above are not stricken.

5. Non-record statements. The Appellees argue that non-record statements offered by Appellants in their appeals of the NECEC Order and the Transfer Order should not be admitted because the statements are not supported by evidence within record.

i. By NRCM

- a. The Appellees argue that the italicized portions of the following statements are not based on any evidence in the record.
- *“NECEC involves an activity not previously permitted or licensed in the State . . . . Unlike other transmission line projects contemplated by the Department and the Land Use Planning Commission in the past, the NECEC does not meet any reliability need for Maine or connect a new generator within Maine to the grid.”* NRCM Transfer Order appeal at 3 (emphasis added by Appellees).
  - *“NECEC involves an activity not previously permitted or licensed in the State . . . . Unlike other transmission line projects contemplated by the Department and LUPC in the past, this project does not meet any reliability need for Maine or connect a new generator within Maine.”* NRCM NECEC Order appeal at 6 (emphasis added by Appellees).

Ruling: These statements are in the nature of an argument and are not adding factual information to the record. They will not be stricken.

- b. The Appellees argue that the following statements are not based on any evidence in the record. The Appellees further argue that while case law may be cited in support of legal argument, NRCM may not refer to factual information in such cases to supplement the record, without making a showing as to its relevance, and a showing of due diligence in bringing it to the Department's attention at the earliest possible time.
- “NECEC has come under significant public scrutiny, as evidenced by . . . multiple citizens’ referenda, legislative initiatives (L.D. 1893, An Act To Require a Lease of Public Lands To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes), and various state and federal court cases aimed at stopping it.” NRCM Transfer Order appeal at 3-4.
  - “A Google search reveals the same: the term “CMP Corridor” returned roughly 21,600 results on June 8, 2020. More than 66,000 Mainer’s likewise signed petitions in support of a ballot initiative aimed at stopping the Corridor, which is slated to appear on the November ballot. *Reed v. Secy of State*, 2020 ME 57, ¶ 2.” NRCM NECEC Order appeal at 7.

Ruling: The statements above are assertions of a factual nature and are not in the administrative record. NRCM has not demonstrated that this non-record material is relevant and material nor demonstrated that it was brought to the attention of the Department at the earliest time possible. NRCM’s two statements identified above are stricken from its appeal documents.

ii. By West Forks Group

The Appellees argue that the following statement and referenced newspaper article in West Forks Group’s appeal of the NECEC Order are not in the record in, nor relevant to, West Forks Group’s appeal of the NECEC Order.



- “CMP has not legally possessed sufficient right, title, and interest at all times, due to the transfer of assets to another entity during the proceedings. In addition to having no evidence of the ownership of the NECEC, the Order is based on the false premise that CMP will fund, construct, own, and operate NECEC, which it cannot do.” West Forks Group appeal at 13-14.
- “(Portland Press Herald article, *Despite its opponents, CMP corridor project well underway*, dated March 8, 2020)” West Forks Group appeal at 15.

Ruling: West Forks Group did not appeal the Transfer Order. Moreover, the NRCM's appeal of the Transfer Order did not include proposed supplemental evidence; thus, no responsive supplemental evidence may be offered by a respondent. With regard to the referenced newspaper article, West Forks Group did not attach the article as required pursuant to Chapter 2, § 24(D)(1) to be considered for admission. The statement and the article identified above in West Forks Group's appeal are stricken.

iii. By NextEra

NextEra cites, but does not attach to its appeal a copy of, the North American Electric Reliability Corporation Reliability Standard FAC-003-4.

Ruling: The Department staff determined that the referenced document is not in the administrative record and NextEra did not attach it to its appeal as required pursuant to Chapter 2, § 24(D)(1) to be considered for admission. The references to this document are stricken.

6. Electronic links. The Appellees argue that electronic links in footnotes 18, 59, and 60 of NRCM's appeal, which were not identified in my January 8, 2021, letter, should be stricken pursuant to Chapter 2, § 2, § 24(B)(2).

Ruling: Footnotes 18, 59, and 60 of NRCM's appeal are stricken pursuant to Chapter 2, § 24(B)(2).

7. Hearing. Each of the appellants has requested a hearing on the appeals. Board hearings on appeals are discretionary and are governed by Chapter 2, §§ 24(F) and 7(C). The Board, after considering the administrative record and oral arguments on appeal, will decide whether to hold a hearing based on whether there is credible conflicting technical information regarding a licensing criterion and that holding a hearing would likely assist the Board in understanding the evidence.

## V. Response to Merits

In accordance with Chapter 2, § 24(C)(4), a written response to the merits of NRCM's, West Forks Group's, and NextEra's appeals of the NECEC Order may be filed by the Appellees and any person who submitted written comment on the underlying applications for the NECEC Order. Written responses are due by **5:00 p.m. on March 12, 2021**. Filings may be by electronic mail provided the signed original document is received by the Board within three (3) working days of the filing

deadline. All filings must be copied to the service list. Filings with the Board must be directed to:

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If you have any questions, you may contact Board Executive Analyst William F. Hinkel at [bill.hinkel@maine.gov](mailto:bill.hinkel@maine.gov) (207) 314-1458 or Assistant Attorney General Peggy Bensinger at [peggy.bensinger@maine.gov](mailto:peggy.bensinger@maine.gov) (207) 626-8578.

Respectfully,



Mark C. Draper, Chair  
Board of Environmental Protection

cc (via e-mail only): Service List (rev. October 19, 2020)