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Admitted in: MA, ME, NH

January 25, 2019

Susanne Miller, Director
Eastern Maine Regional Office
Maine Department of Environmental Protection
106 Hogan Road, Suite 6, 3rd Floor
Bangor, ME 04401

RE: NECEC – Title, Right, and Interest

Dear Presiding Officer Miller:

As promised at the prehearing conference last week, this letter responds to the November 21, 2018 filing from NextEra Energy Resources, LLC (NextEra), which responds to your letter of November 16, 2018. In short, and as discussed below, NextEra is grasping at straws.

First, NextEra argues that 38 M.R.S. § 487-A(3) merely serves to “clarify that any purchases of land or easements necessary for a transmission line project (other than eminent domain acquisitions) need not be consummated until after permits issue,” but NextEra asserts that Section 487-A(3) does not affect the Chapter 2.11(D) requirement that the applicant must show title, right, or interest (TRI) during the processing of the application. That is, according to NextEra, even if the applicant is allowed by Section 487-A(3) to purchase the property or easements *after* issuance of the permit, the applicant must demonstrate *before* issuance of the permit *the ability* to purchase the property or easements (via an option to purchase), in order to have standing to pursue the permit under Chapter 2.11(D).

This argument makes no sense, because it would render Section 487-A(3) meaningless. Chapter 2.11(D) does not require an applicant to purchase property or easements prior to issuance of a permit, because it allows issuance of a permit as long as the applicant has provided, *inter alia*, an option agreement allowing the applicant to purchase the property or easements after issuance of the permit. Because Chapter 2.11(D) allows issuance of a permit prior to purchase of the property or easement, Section 487-A(3) must do something more (for transmission lines greater than 100 kV), or else Section 487-A(3) would be unnecessary. For Section 487-A(3) to have any effect it must mean that TRI is not required to establish standing if the transmission line applicant proposes to purchase property or easements after issuance of the permit.

Second, NextEra states that it is unaware of any provision under the Natural Resources Protection Act (NRPA) that is similar to Section 487-A(3) of the Site Law. Thus, presumably, according to NextEra, CMP must demonstrate TRI during the processing of the NRPA portion of the application even if it does not need to do so for purposes of the Site Law portion. In fact, Section 487-A(3) applies by its own terms to NRPA applications:

In the case of a gas pipeline or a transmission line carrying 100 kilovolts or more, a permit *under this chapter* may be obtained prior to any acquisition of lands or easements to be acquired by purchase. The permit must be obtained prior to any acquisition of land by eminent domain.

38 M.R.S. § 487-A(3) (emphasis added). “This chapter” is Chapter 3 of Title 38, which includes the NRPA as well as the Site Law. Thus, Section 487-A(3) applies with equal force to NRPA applications.

In any event, Maine courts are clear that even when there is doubt about an applicant’s TRI in a property, the permitting authority nonetheless should process the permit application unless the applicant clearly lacks sufficient TRI. In other words, an applicant need only make a *prima facie* showing of TRI. See *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983) (finding that an applicant need only have a “legally cognizable expectation of having the power to use the site in the ways that would be authorized by the permit or license he seeks.”). This standard does not require or authorize DEP to act as an adjudicatory body to determine ownership rights or resolve property disputes. See *Southridge Corp. v. Bd. of Env’tl Prot.*, 655 A.2d 345 (Me. 1995) (holding that a landowner whose property interest was based entirely on an adverse possession claim, on which he may or may not prevail, had sufficient TRI in the disputed land to apply to the DEP for a permit). Rather, this standard establishes the threshold showing an applicant must make before his or her application is sufficient for review. To have a “legally cognizable expectation” an applicant need only present *prima facie* evidence of title, right, or interest.¹

CMP has already provided the relevant deeds, which show that CMP has TRI in all property proposed for development or use. Although it is not required, attached to this letter are maps depicting and identifying the parcels over which the NECEC transmission line is proposed to cross and for which CMP has documented TRI, as NextEra requested. These maps delineate the parcels for which CMP has TRI and link each parcel to its respective TRI evidence CMP submitted as part of its September 2017 application to the DEP and LUPC.

¹ Even if CMP were required to demonstrate TRI for all property proposed for development or use, Chapter 2 provides that one way to demonstrate TRI is through evidence of “the ability and intent to use the eminent domain power to acquire sufficient title, right or interest to the site of the proposed development or use.” If CMP obtains a Certificate of Public Convenience and Necessity from the Maine Public Utilities Commission, it would have the ability to obtain such eminent domain power. 1 M.R.S. § 816(3); 35-A M.R.S. § 3136(1). The requirement in Section 487-A(3) that the DEP permit must be obtained prior to acquisition of any land by eminent domain further demonstrates that TRI is not required to establish standing prior to issuance of the permit.

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Thank you for your consideration of this letter. Please let me know if you have questions or need additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew D. Manahan", with a long horizontal flourish extending to the right.

Matthew D. Manahan

Enclosures

cc: Service Lists