DrummondWoodsum
ATTORNEYS AT LAW

David M. Kallin
Admitted in ME

207.253.0572
dkallin@dwmlaw.com

84 Marginal Way, Suite 600
Portland, Maine 04101-2480
207.772.1941 Main
207.772.3627 Fax

Via E-mail Only to NECEC.DEP@maine.gov

November 25**,** 2020

Jim Beyer
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333

RE: DEP Project # #L-27625-26-K-T; New England Clean Energy Connect Partial Transfer

Dear Mr. Beyer:

On November 19, 2020, the Board declined to consider assuming original jurisdiction over the New England Clean Energy Connect Partial Transfer application, and by letter dated November 13, 2020, Acting Commissioner Loyzim directed that comments be submitted to you for consideration by the Department of Environmental Protection ("DEP") on this application. Natural Resources Council of Maine ("NRCM") provides its comments herein below.

1. **The Partial Transfer Application does not demonstrate sufficient title, right or interest ("TRI") in NECEC Transmission LLC ("NECEC LLC").**

DEP rules require that an applicant "maintain sufficient title, right, or interest throughout the entire application process," and when a lease is relied on, the "lease or easement must be of sufficient duration and terms, as determined by the Department, to permit the proposed construction and reasonable use of the property, including reclamation, closure and post closure care." 06-96 CMR ch. 2 § 11(D)(2). The Law Court recently clarified further that when a lease or easement is relied on for TRI, "[u]nlike title owners, easement owners are subject to a second layer of necessary authority—what the easement itself allows—in addition to what the applicable ordinances and statutes allow." *Tomasino v. Town of Casco*, 2020 ME 96, ¶ 15, 237 A.3d 175.

Here, CMP's TRI for certain lands which are the subject of the permit CMP seeks to transfer to NECEC LLC was a 2014 lease of public reserved lands ("2014 Lease"). The 2014 Lease is void as a matter of law because (i) the State signed it prior to the issuance of a certificate of public convenience and necessity ("CPCN"), and (ii) it lacked the constitutionally mandated 2/3 vote of approval of the State Legislature. Me. Const. art. IX, § 23; 12 M.R.S. §§ 598-598-A. NRCM and others raised this issue before the DEP. *Se* NECEC Order at 8. The DEP failed to determine whether the scope of the 2014 Lease included granting CMP the right to build the NECEC. Instead, the DEP deferred to its sister agency, the Bureau of Parks and Lands ("BPL"). *See* NECEC Order at 8. Since, BPL acknowledged that the 2014 Lease was illegal because the

State signed it prior to the issuance of a CPCN and BPL terminated the 2014 Lease. Consequently, CMP lacked TRI for the NECEC Order.

In this transfer application, NECEC LLC relies on a new 2020 lease ("2020 Lease") to make the requisite demonstration of TRI over these public reserved lands. The 2020 Lease is new- and was not presented as part of the underlying NECEC Order process. *See* Transfer Application, NECEC Stipulation Attachment 1, Transfer Agreement at Pages 2, 63-80. Whether the scope of the 2020 Lease includes construction and operation of the NECEC is an issue currently being considered by the Superior Court in *Black v. Cutko*, Docket No. BCDWB-CV-2020-29. That issue was highlighted by the Court at a recent hearing on October 21, 2020, which resulted in this exchange between the Court and Assistant Attorney General Lauren Parker, representing BPL:

> THE COURT: Right. But I just want to be clear. I believe in your brief in a footnote you say that if the lease resulted in substantial alteration of the uses of this land, that a legislative vote of two-thirds of both houses was absolutely required constitutionally. That's the Bureau's position?
>
> MS. PARKER: Yes. That's what we understand the Constitution and the designated land statute to say.

In other words, a central issue in *Black v. Cutko* is the scope of the use rights conveyed by the 2020 Lease to CMP and NECEC LLC—if those use rights are broad enough to result in a substantial alteration, then the lease is invalid because it has not received a legislative vote of two-thirds of both houses. Further, by Order dated October 30, 2020, the Superior Court held that "[i]n the matter currently before the Court, the public reserved lands subject to the Lease are kept as a public trust, and full and free public access to the public reserve lands is the privilege of every citizen of the State," and found that the plaintiffs in that case had a particularized injury to challenge whether the 2020 Lease allowed the NECEC by virtue of their interest in the public reserved lands. *Black v. Cutko* Order at 4-5 (Oct. 30, 2020). In other words, while the State is a party to the 2020 Lease, it acts only on behalf of its public trust obligations to the people of the State of Maine.

This brings the 2020 Lease at issue in the *Black v. Cutko* litigation directly within the holding of *Tomasino*: in circumstances where the parties to a lease dispute whether the activity for which a permit is sought is allowed by the terms of their agreement, the title, right, and interest requirement for administrative standing "is not met" until the question about the "parameters" of the interest are "factually determined by a court with jurisdiction to do so." *Tomasino*, 2020 ME 96, ¶ 15. Accordingly, administrative standing "is not met" here by the 2020 Lease until the court answers whether the 2020 Lease allows construction and operation of the NECEC.

Accordingly, the Department must deny the transfer application for lack of TRI.

2. NECEC LLC failed to demonstrate sufficient financial capacity to support transfer of the NECEC Order.

DEP Rules require that the transferee must demonstrate "the technical and financial capacity" and intent to: (a) comply with all terms and conditions of the applicable license, and (b) satisfy all applicable statutory and regulatory criteria. DEP Rule Ch. 2, § 21(C)(1). NECEC LLC has not done so here. Most of the financial information accompanying the Partial Transfer Application focuses on the financial capacity of Avangrid, Inc. *See* Attachment B to Partial Transfer Application. The transfer application nowhere demonstrates capitalization of NECEC LLC with even a single dollar. Instead, it makes vague assertions that "Avangrid and Avangrid Networks have committed to provide NECEC LLC the funding needed for NECEC LLC to acquire the project from CMP and for construction and operation of the NECEC Project as approved." But that commitment must be proved, not merely alleged. And it is NECEC LLC that must have the financial capacity, not Avangrid or Avangrid Networks. DEP Rule Ch. 2, § 21(C)(1) & Ch. 373, § 2(B).

The Partial Transfer Application alleges that "Avangrid will make equity contributions of **up to** $1,000,000,000 to Avangrid Networks to fund the corresponding equity contributions to be made by Avangrid Networks to NECEC LLC. In turn, Avangrid Networks will make such equity contributions to NECEC LLC." *See* Attachment B to Partial Transfer Application (emphasis added). It does not demonstrate transfer of a single dollar to NECEC LLC, nor specify that any of those funds are set aside to NECEC LLC to comply with the terms and conditions of the NECEC Order. This facially fails to comply with the self-funding requirement in the Department Rules that the applicant demonstrate "that funds **have been set aside** for the proposed development." DEP Rule Ch. 373, § 2(B)(3)(b) (emphasis added). An "intent to fund" letter is sufficient only "where funding is required but there can be no commitment of money until approvals are received," *id.* § 2(B)(3)(a), a condition precedent not present here.

Next the Partial Transfer Applications states, "In addition, Avangrid and NECEC LLC will execute a $500,000,000 revolving loan agreement, which provides a source of debt financing to NECEC LLC during the construction phase of the NECEC Project." *Id.* This statement fails for the same reasons as the above statement—once permits have been issued, a statement of an "intent to fund" is insufficient. Likewise these vague promises of future loans are insufficient to meet the requirement that "where one or more limited liability corporations are part of the applicant's corporate structure, evidence must be submitted describing the applicant's corporate structure, and demonstrating that the proposed financing is clearly linked from the financing institution to the applicant." DEP Rule Ch. 373, § 2(B)(3)(a). Here, all that NECEC LLC submits is documentation that its parent may provide funds in the future. NECEC LLC must document compliance with the financial capacity requirements at the time of the transfer, not at some future time.

Finally, the Partial Transfer Application states that "Avangrid will provide parent guarantees, letters of credit, or other such instruments or collateral support required by NECEC LLC counter-parties to support the construction of the NECEC Project." *See* Attachment B to Partial Transfer Application. But the contractual arrangements that may or may not be required in the future "by NECEC LLC counter-parties" are irrelevant to the Department's determination

of whether NECEC LLC has the current financial capacity, other than to suggest that Avangrid expects NECEC LLC to be under-capitalized enough that contracting parties will require parent-guarantees from Avangrid itself.

Accordingly, NECEC LLC has not established that it has met the financial capacity requirements of DEP Rule Ch. 373, § 2(B).

For the above reasons, the Department must deny the Partial Transfer Application.

Sincerely,

David M. Kallin

cc: Service List (by email only)