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November 30, 2020

VIA ELECTRONIC MAIL

Mr. James R. Beyer
Regional Licensing & Compliance Manager
Bureau of Land Resources
Maine Department of Environmental Protection
106 Hogan Road, Suite 6
Bangor, ME 04401

RE: New England Clean Energy Connect, License Transfer Application; Response to November 25, 2020 NRCM Comments

Dear Mr. Beyer:

NRCM's comments on the application for partial transfer of the Project – a transfer intended to shield Maine ratepayers as required by the Maine Public Utilities Commission in a proceeding to which NRCM was a party – are yet another transparent attempt to stall the Project by whatever means. Contrary to NRCM's comments, the DEP's requirements for such transfer are straightforward and are met here. NRCM's attempt to cloud the record with inaccuracies and misrepresentations – particularly with regard to proceedings in which it is a party – should be disregarded.

I. CMP and NECEC LLC (the Applicants) have demonstrated sufficient TRI.

There is no doubt that the 2020 Lease provides sufficient title, right, or interest (TRI) for the BPL lands at issue. As it has done in the underlying proceeding and on appeal, NRCM continues to conflate the question of BPL's *authority* to grant the 2020 Lease with the *scope* of the lease's terms. The Plaintiffs in *Black v. Cutko* – including NRCM – do not dispute that the lease allows for construction of a portion of the Project on the leased land. Indeed, the Plaintiffs complain specifically that the lease allows this activity and seek an injunction prohibiting it. Accordingly, NRCM's statement that "a central issue in *Black v. Cutko* is the scope of the use rights conveyed by the 2020 Lease to CMP and NECEC LLC" is patently false. There is no dispute concerning the scope of the 2020 Lease, which by its plain terms is "of sufficient duration and terms" and thus provides the required "title, right or interest in all of the property that is proposed for development or use." DEP Regs. Ch. 2 § 11(D)(2).

Consequently, the *Black v. Cutko* litigation does not bring the 2020 Lease "within the holding of *Tomasino*" because BPL and CMP – the only parties to the lease – do not "dispute whether the activity for which a permit is sought is allowed by the terms of their agreement," as NRCM states. In *Tomasino v. Town of Casco*, 2020 ME 96, 237 A.3d 175, the Law Court addressed a situation in which a developer relied on an easement that was

disputed by the owner of the land subject to the easement, not by another party to the proceeding. *Id.* ¶ 8. The State – the landowner here – has never disputed the rights granted to CMP under the 2020 Lease (or the 2014 Lease) and is actively defending the validity of the lease in the *Black v. Cutko* litigation.[1]

The Law Court determined in *Tomasino* that a developer could not establish TRI by relying on an easement (not a lease, as is at issue here) that may or may not have been broad enough in *scope* to permit the cutting of trees (and about which there was not sufficient evidence in the record). *Id.* ¶¶ 7, 15 (noting that it was unclear whether the easement included the right to remove trees, and that the developers had thus "failed to demonstrate that they have the kind of interest that would allow them to cut the trees"). There is no dispute that the *scope* of the 2020 BPL lease (or the 2014 BPL lease) is broad enough to permit clearing and construction. Rather, NRCM's dispute in *Black v. Cutko* (and here) is over BPL's *authority* to grant the 2020 Lease (i.e., the validity of the lease). NRCM would like the DEP to second-guess the legitimacy of the lease itself, when it is valid on its face and when the parties to the lease do not dispute its scope, which is far beyond what the DEP's rules and the Law Court's cases require or authorize.[2]

Maine courts are clear that an applicant need only make a prima facie showing of title, right, or interest. *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."). Nothing requires or authorizes DEP to act as an adjudicatory body to determine ownership rights or resolve property disputes. *See Southridge Corp. v. Bd. of Envt'l 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, the standard set forth in Chapter 2.11(D) establishes merely the threshold showing an applicant must make before the application is sufficient for review. To have a "legally cognizable expectation" an applicant need only present *prima facie* evidence of TRI, which CMP and NECEC LLC have done here.

The DEP's TRI consideration is limited to whether a lease on its face gives the lessee the right to construct the proposed project. The DEP does not determine the BPL's authority to grant the 2020 Lease, and is entitled to rely on the determination of its sister agency in concluding that the 2020 Lease is *prima facie* evidence of TRI.

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[1] CMP further notes that, while not relevant to the transfer application, NRCM's statement that "BPL acknowledged that the 2014 Lease was illegal" is false and, notably, unaccompanied by any citation. BPL never has acknowledged any such thing. It appears NRCM is suggesting that the 2020 Lease serves as an "acknowledgement" that the 2014 Lease was illegal, but NRCM provides no basis or support for that argument.

[2] Further, whatever the outcome of the 2020 Lease litigation, it does not affect the permit being transferred, and would not affect the DEP's processing of the partial transfer application. Even if the 2020 Lease were found to be infirm, that eventuality would not mean that the Applicants failed to make the required colorable showing of TRI during the processing of the transfer application.

II. NECEC LLC has demonstrated financial capacity.

There also is no doubt that NECEC LLC has demonstrated adequate financial capacity. NRCM's assertion that NECEC LLC's evidence of financial capacity is inadequate because it is "vague" does not comport with the filing itself. Attachment B to the partial transfer application is a September 24, 2020 Commitment Letter from Avangrid, Inc. and Avangrid Networks, Inc. (the "Commitment Letter") indicating a commitment to provide to NECEC LLC a specified amount of funds and the uses for which the funds may be utilized, which is an explicit form of financial capacity allowed under the DEP's rules. DEP Regs. Ch. 373 § 2(B)(3)(a). That letter sets forth the Project costs and states the commitment of Avangrid and Avangrid Networks to provide definite funds in no uncertain terms:

> 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.
>
> 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. Furthermore, 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. [Attachment B at 2 (emphasis added).]

Such commitments are precisely what the DEP's rules require:

> Letter of commitment or intent to fund. A letter from a financial institution, governmental agency, or other funding entity indicating a commitment to provide to the applicant a specified amount of funds and the uses for which the funds may be utilized. [DEP Regs. Ch. 373 § 2(B)(3)(a) (emphasis added).]

NRCM nevertheless tries to muddy this clear letter of commitment of specified funds, claiming that the "commitment must be proved" without explaining how, beyond the express commitment of NECEC LLC's parent companies via a letter of commitment, one would "prove" a stated commitment from a funding entity. In any event, no such additional "proof" is required under the DEP's rules. In addition, the rules expressly contemplate a commitment to provide funds to an applicant and does not require a showing by the applicant that it has its own independent funds. NRCM appears to read the rules as requiring capitalization of the applicant at the time of application to the DEP, which would obviate the need for a letter committing funds, which is expressly allowed. NECEC LLC has financial capacity as a result of the commitment from Avangrid and Avangrid Networks to provide the required funds.

Failing to demonstrate any deficiency in the Commitment Letter, NRCM proceeds through the other financing mechanisms allowed under the DEP's rules, claiming that the Commitment Letter is a deficient subsection (3)(b) "self-financing" mechanism and next that it also is a deficient subsection 3(a) intent to fund. The Commitment Letter is neither,

and thus NECEC LLC need not demonstrate "that funds have been set aside" or that regulatory "approvals" are required prior to funding. Even if NECEC LLC were demonstrating financial capacity via one of those other mechanisms, however, the Commitment Letter plainly demonstrates that funds have been allocated to the Project, and the condition precedent to an intent to fund – approval of the partial transfer application – has not yet occurred here. NRCM's obfuscating tactics should be disregarded.

CMP respectfully requests that the DEP continue to process its application for partial transfer of the Project without delay.

Sincerely,

Matthew D. Manahan

cc: Service List (by email)