STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

and

STATE OF MAINE
LAND USE PLANNING COMMISSION

IN THE MATTER OF:	)	
	)	
CENTRAL MAINE POWER COMPANY	)	APPLICATION FOR SITE LOCATION OF
25 Municipalities, 13 Townships/Plantations,	)	DEVELOPMENT ACT PERMIT AND
7 Counties	)	NATURAL RESOURCES PROTECTION
	)	ACT PERMIT FOR THE NEW ENGLAND
L-27625-26-A-N	)	CLEAN ENERGY CONNECT
L-27625-TB-B-N	)	
L-27625-2C-C-N	)	
L-27625-VP-D-N	)	
L-27625-IW-E-N	)	
	)	
CENTRAL MAINE POWER COMPANY	)	
NEW ENGLAND CLEAN ENERGY CONNECT	)	
SITE LAW CERTIFICATION SLC-9	)	

GROUPS 2 AND 10'S POST-HEARING REPLY BRIEF

Intervenor Group 2 and Intervenor Group 10 (collectively, "Groups 2 and 10") by and through their attorneys, BCM Environmental & Land Law, PLLC, submit this Post-Hearing Reply Brief, in support of their position to deny Central Maine Power Company's ("CMP" or "Applicant") application for the so-called New England Clean Energy Connect ("NECEC" or "Project"), 145-mile, 150 foot wide[1] transmission corridor.

I. Group 3 Asserts the Wrong Legal Standard for the Alternatives Analysis.

[1] The actual width of the right of way under the control of CMP is 300 feet wide.

Group 3 clearly enjoyed finding phrases to illustrate its concept[2] – however misguided – for its proposition that project opponents desire a "perfect" project. Contrary to Group 3's literary descriptions, Groups 2 and 10 and other NECEC opponents do not ask the Applicant to attain perfection with its project. We simply ask that CMP meet its burden of proof to satisfy the established legal standards set forth in 38 M.R.S.A. § 480-D. Nothing in the record suggests that CMP even attempted to meet its burden, regardless of how Group 3 project supporters may wish it to be so by focusing on "practicable alternatives" in the abstract. Moreover, Group 3's constricted view of the alternatives analysis loses sight of the forest for its focus on the trees, i.e., the overarching purpose of Maine's Natural Resources Protection Act ("NRPA"). As the Legislature declared in its purpose statement: "[T]he cumulative effect of frequent minor alterations and occasional major alterations of these resources poses a substantial threat to the environment and economy of the State and its quality of life." 38 M.R.S.A. § 480-A.

The threat posed by NECEC to Maine's western mountains environment and economy is real, not something contemplated in the abstract nor something to be treated with such a marginalized perspective. By claiming that the opponents would only be satisfied with a "perfect" project makes light of the real and substantial impacts this industrial corridor will wreak upon the people and businesses in the northern segment. But perhaps that is not surprising since Group 3 is comprised of interests strictly focused on the economy of the Lewiston/Auburn area of the state, an area that has suffered economically for years. However, even assuming NECEC would deliver an economic benefit to that area (we do not concede that it would) that does not justify destroying the environment and economy of another area of the state. This is a prime example of the divisive nature of this project: pitting neighbor against neighbor, one area of the state against another. This

[2] Voltaire famously said, "the best is the enemy of the good." Similar sage advice is attributed to Confucius ("[b]etter a diamond with a flaw than a pebble without") and Shakespeare ("[s]triving to better, oft we mar what's well"), Group 3's Post Hearing Brief, p. 1.

does nothing to further the legislative intent and goals of NRPA and flies in the face of the defined purpose of protecting the citizens of the state of Maine from "significant adverse economic and environmental impacts…" that threaten, "the health, safety and general welfare" of the people. 38 M.R.S.A. § 480-A.

In addition to Group 3's mischaracterization of the project opponents' criticism of CMP's inadequate alternatives analysis, Group 3 misapplies federal law and erroneously interprets Maine law. Group 3 cites to several federal cases involving the US Army Corps of Engineers and the application of the Clean Water Act. Group 3 stretches to analogize the alternatives analysis embodied within 40 C.F.R. 230.10 Restrictions on Discharge which directs the Army Corps as the permitting agency to conduct an evaluation of practicable alternatives for dredging or filling. While the terminology may be similar to that which is found in Maine's NRPA and the promulgated Department Rule Chapters, it is axiomatic and therefore wrong as a matter of law to apply a federal standard when 1) there is no pre-emption of federal law and 2) there is a clearly defined applicable state law.[3] Here, there is no need to analogize. The state law standards for the practicable alternatives analysis is set forth and, not only defined under state statue, but also interpreted by Maine's Law Court. For example, in *Uliano et al. v. Brd. of Envtl. Prot.,* 2005 ME 88, 876 A.2d 16, the Law Court did not find fault with the Board of Environmental Protection's analysis of determining whether a practicable alternative exists, citing to 2 C.M.R. 06-096 310-7 § 9(A) which includes: "(1) utilizing, managing or expanding one or more other sites that would avoid the wetland impact; (2) reducing the size, scope, configuration or density of the project as proposed, thereby avoiding or reducing the wetland impact; (3) developing alternative project designs, such as cluster development,

[3] *See Roadway Package Systems v. Kayser*, 257 F.3d 287, 293 (3rd Cir. 2000) ("When required to determine the legal standards governing a particular controversy, courts typically confront two choice-of-law questions. The first is the horizontal question: whether the laws of State X or State Y supply the relevant rule of decision. Choice-of-law doctrines and, consequently, choice-of-law clauses speak to this issue. The second choice-of-law question that courts face is the vertical one: whether the rule of decision is supplied by the laws of State X or by federal law.")

that avoid or lessen the wetland impact; and (4) demonstrating the need, whether public or private, for the proposed alteration." *Uliano et al. v. Brd. of Envtl. Prot.,* 2005 ME 88, 89, 876 A.2d 16, 19. The Law Court found that the Board had adequately conducted the alternatives assessment because practicable alternatives were presented as part of the record. However, the Law Court remanded because the Board failed to conduct a balancing analysis weighing the practicable alternative as a factor in determining whether the project in that case would "unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses."

Group 3's proposition that federal law is necessary for the Department to understand how to conduct an assessment of the practicable alternatives, or that reliance on federal law somehow lends credence to the Applicant's failure to conduct *any* adequate alternatives assessment in its application, is simply wrong as a matter of law.

Finally, Group 3's Post-Hearing Brief misrepresents the role of the practicable alternatives as a balancing factor. The Law Court in the 2005 *Uliano* appeal set forth the legal principle that the alternatives analysis is a factor in assessing the unreasonable interference of a project with existing scenic, aesthetic, recreational or navigational uses. However, in order for a practicable alternative to be considered as a factor, one would assume that a practicable alternative exists in the record. Group 3 would have the Department simply accept whatever the Applicant says it considered and rejected because the project had to meet the price point it set when it submitted the project for consideration under the Mass RFP. Alternatives that would have added to the cost, such as burial in an already disturbed area, according to CMP's own witnesses, would have defeated the purpose of the project, i.e., to win the Mass RFP. Since real world practicable alternatives were simply rejected out of hand, there is no alternative factor to weigh. Accordingly, Group 3's alternatives analysis section in its Post-Hearing Brief fails to state the applicable legal standard and fails to correctly characterize the practicable alternatives factor.

II. Group 3's "Context" Section of Their Brief is Irrelevant to the Standards the Department Must Assess.

Group 3 continues to misunderstand and mischaracterize the legal process in which this industrial project is being evaluated. As Group 3 did in their pre-file testimony, (all of which was stricken) they yet again paint this large-scale industrial project as mana from heaven with overblown and unsubstantiated claims of benefits for the environment and the general economy of Maine. Not only unsubstantiated but also irrelevant. Given that the statements made therein are not relevant to the standards set forth in 38 M.R.S.A. § 480-D or the relevant rules, the Department should strike that section of Group 3's Post-Hearing Brief as they did with Group 3's pre-file testimony.

CONCLUSION

The Applicant failed to meet is burden. Group 3's supporting Post-Hearing Brief is rife with irrelevant, unsubstantiated claims and erroneous legal conclusions. Group 3's attempts to gloss over the Applicant's inadequate and problematic application should be disregarded or simply viewed for what it is: a voice pleading for recognition but failing to understand the process. The Department's job is clear: to measure adverse effects and undue interference based on the record at the close of the hearing. In doing so, Groups 2 and 10 believe the Department will arrive at the correct conclusion: for the benefit of all Mainers, this project should be denied.

Respectfully Submitted,
Intervenor Group 2 and Intervenor Group 10
By their attorneys,

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