

STATE OF MAINE
MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. PUC-19-182

NEXTERA ENERGY RESOURCES, LLC,

Appellant,

v.

PUBLIC UTILITIES COMMISSION, et al.,

Appellees.

ON APPEAL FROM
THE MAINE PUBLIC UTILITIES COMMISSION

BRIEF OF APPELLEE

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INTRODUCTION

The Natural Resources Council of Maine (“NRCM”) is a nonprofit membership organization protecting, restoring, and conserving Maine’s environment, now and for future generations. Consistent with its mission, NRCM was an active party in this underlying proceeding at the Maine Public Utilities Commission (the “Commission”). NRCM opposed the issuance of a certificate of convenience and necessity (“CPCN”) for Central Maine Power Company (“CMP”) to construct the New England Clean Energy Connect Project (“NECEC”), because there was no legal basis to find a public need under Title 35-A M.R.S. § 3132 (“Section 3132”). Therefore, NRCM joins Appellant, NextEra Energy Resources, LLC, in requesting that this Court vacate the Commission Order granting a CPCN for NECEC.¹ NRCM will not repeat the arguments presented Appellant’s Brief, but files this Brief to add NRCM’s perspective to several of the legal errors identified by Appellant.

STATEMENT OF FACTS

NRCM accepts the Statement of Facts as set forth in Appellant’s Brief.

¹ See (A. 64-102 (*Cent. Me. Power Co.*, Request for Approval of CPCN for the New England Clean Energy Connect Consisting of the Construction of a 1,200 MW HVDC Transmission Line from the Québec-Maine Border to Lewiston (NECEC) and Related Network Upgrades, No. 2017-00232, Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation (M.P.U.C. May 3, 2019) (the “Order”).

STATEMENT OF THE ISSUES

NRCM accepts the Statement of Issues as set forth in Appellant's Brief.

STANDARD OF REVIEW

NRCM accepts the Standard of Review as set forth in Appellant's Brief.

SUMMARY OF ARGUMENT

As the Appellant points out, this case presented the Commission with the first opportunity to apply Section 3132 to a petition for a CPCN to construct a transmission project proposed to address the public policy of a state other than Maine – in this case, the Commonwealth of Massachusetts. (A. 80.) In doing so, however, the Commission did not comply with certain fundamental statutory requirements, including the statutory requirement to investigate and use non-transmission alternatives, the determination of whether there was a public need when the statutory criteria set forth in Section 3132(6) were taken into account, mitigation of adverse impacts on scenic and recreational values, and the approval of a stipulation that was not supported by NRCM. For these reasons, this Court should vacate the Commission's Order. To not vacate and remand the Order would set a disturbing precedent that large transmission lines and associated transmission line upgrades can be approved by the Commission without regard to

whether the transmission line is consistent with the mandates and intent of the Legislature as set forth in Section 3132. In sum, affirming the Commission's Order would provide it more delegated authority than intended by the Legislature in Section 3132. Thus, the Order should be vacated.

ARGUMENT

I. The Commission Erred by not Requiring the Results of an Independent Third-Party Investigation into the Use of Nontransmission Alternatives.

Over the years, the Legislature carefully drafted and amended Section 3132 to ensure that the Commission considers the use of nontransmission alternatives over the use of transmission lines. *See* 35-A M.R.S. § 3132(2-C)(C) (2013);² 35-A M.R.S. 3132(2-D); 35-A M.R.S. § 3132(6); 35-A M.R.S. § 3132(15) and 35-A M.R.S. § 3132-A(2). Specifically, in the underlying proceeding, the legislative mandates required that the Commission require the submission of the results of an independent third-party investigation into the use of nontransmission alternatives. However, in this proceeding the Commission did not require such an investigation. Therefore, in a proceeding with a 1,200 megawatt transmission line that covers 145 miles of Maine, and includes numerous other new and upgraded transmission line

² *See* 35-A M.R.S. § 3132(2-C)(C) (2013), *repealed by* P.L. 2017, ch. 201, § 3 (eff. Nov. 1, 2017) (“The petition for approval of the proposed transmission line . . . must contain . . . results of an investigation by an independent 3rd party, which may be the commission or a contractor selected by the commission, of nontransmission alternatives to construction of the proposed transmission line.”).

segments and substations (A. 71-72), the Commission, in contradiction to plain and clear mandates and intent of the Legislature, granted a CPCN for NECEC and all its new transmission lines and upgrades without any consideration in the proceeding of the use of nontransmission alternatives – alternatives that could lower the overall impact of NECEC on Maine. The Commission’s decision to not require any investigation into the use of nontransmission alternatives in this proceeding foreclosed the opportunity to lessen the impact NECEC, including all of its multiple transmission lines, could have on the statutory criteria set forth in Section 3132(6), such as scenic and recreational values. Accordingly, the Commission’s error of not requiring the consideration of the results of an independent third-party investigation into the use of nontransmission alternatives in the proceeding, leaves a void in the record that goes to whether the overall impact NECEC was properly considered consistent with the statutory scheme of Section 3132. Thus, the Commission erred as a matter of law, which requires that its Order be vacated.

II. The Commission incorrectly interpreted Maine’s Renewable Energy Generation Goals in the Context of Section 3132

Similar to the consideration of nontransmission alternatives, the Legislature in Section 3132(6) mandated that the Commission take into account “state renewable generation energy goals” when determining the public need for the

proposed transmission line. Here, as with the requirement to study nontransmission alternatives, the Legislature intended to use the opportunity during the review of a proposed transmission line to consider whether or not the proposed transmission line is consistent with the state renewable generation energy goals. As with the nontransmission alternatives investigation, the Commission failed to take into account the state renewable energy goals consistent with the Legislative intent and clear language of the statutes for the reasons set forth in Appellant's Brief. The most egregious of the errors is the Commission conclusion that NECEC supports the state renewable energy goals under 35-A M.R.S. § 3210 (2010 & Supp. 2018). Title 35-A M.R.S. § 3210 expressly capped the amount of hydroelectric energy that qualifies under the renewable portfolio standard at 100 MWs, and NECEC intends to import 1,200 MWs.

III. The Commission's Deferral to Maine Department of Environmental Protection ("DEP") and Land Use Planning Commission ("LUPC") on the Mitigation of the Adverse Impacts to Scenic and Recreational Values.

As pointed out in Appellant's Brief, the Commission found that NECEC would result in substantial, adverse impacts on the current scenic and recreational values in Maine for the 53-mile new transmission corridor of NECEC running from the Canadian border in Beattie Township to the Town of Caratunk. (A. 126-127, 129.) Yet, the Commission, with no legal authority to do so, opted to defer

the consideration of the substantial and adverse impacts of NECEC to DEP and LUPC instead of considering appropriate mitigation in the underlying proceeding.

(Id.) The Commission deferred to these other agencies without transferring the record in the underlying proceeding to the DEP and LUPC proceedings and with no formal notification to these agencies that the Commission decided to defer to these agencies in the hope that they would consider mitigation measures rather than denying the CPCN to NECEC or continue the review of NECEC by directing CMP to submit sufficient evidence of mitigation in the underlying proceeding. There is no legal basis under Maine law for one agency without specific statutory authority to defer to another agency. The Commission statutes provide it no such authority. Instead, the Commission is required to take into account scenic and recreational values, and in a permitting proceeding, such as a CPCN, this includes the appropriate amount of mitigation. The Order cannot stand, when on the one hand the Commission finds a substantial adverse impact, while, on the other hand, it defers its legal obligation to consider the mitigation of the adverse impact to other agencies. This shows an arbitrary and capacious (i.e., unreasonable) decision-making that is reversible error, and, therefore, requires the Order be vacated.

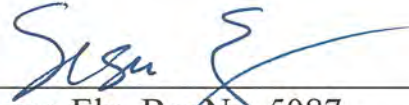
IV. The Commission erred in approving the Stipulation.

As set forth in Appellant's Brief, the Commission approved a non-unanimous stipulation, despite only 11 of 30 parties signing the stipulation. (A 146.) NRCM, only Maine-based environmental organization participating in the proceedings, did not sign the stipulation and filed comments in opposition to the stipulation stating that the stipulation did not represent a sufficiently broad spectrum of interests and was not in the public interest. (A 148-149) As with the Maine generator interests, the Order falls to address why NRCM's interest were not disenfranchised by the approval of the Stipulation. Thus, as Appellant Brief points out for the Maine generator interests, the same holds true for NRCM that there is lack of the requisite clarity and comprehensive findings necessary for meaningful judicial review. Therefore, the Commission's approval of the Stipulation should be vacated.

CONCLUSION

For the foregoing reasons, the Commission erred as a matter of law providing a CPCN to NECEC, and, therefore, the Commission's Order should be vacated.

Respectfully submitted this 23rd day of September, 2019.



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CERTIFICATE OF SERVICE

I, Susan Ely, hereby certify that on this 23rd day of September, 2019, I caused two (2) copies of the foregoing Brief of Appellee to be served on counsel for Appellant's and the intervening parties by first-class mail, postage prepaid upon, and provided a courtesy copy by electronic mail to the following:

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