STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

and

STATE OF MAINE
LAND USE PLANNING COMMISSION

IN THE MATTER OF

CENTRAL MAINE POWER COMPANY	)
NEW ENGLAND CLEAN ENERGY CONNECT	)
#L-27625-26-A-N/#L-27625-TG-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	)
Beattie Twp, Merrill Strip Twp, Lowelltown Twp,	)
Skinner Twp, Appleton Twp, T5 R7 BKP WKR,	)
Hobbstown Twp, Bradstreet Twp,	)
Parlin Pond Twp, Johnson Mountain Twp,	)
West Forks Plt, Moxie Gore,	)
The Forks Plt, Bald Mountain Twp, Concord Twp	)

RESPONSE OF CENTRAL MAINE POWER COMPANY
TO OBJECTIONS AND MOTIONS TO STRIKE OF GROUPS 2, 4, 8, AND 10

In yet another blatant attempt to delay this proceeding, Groups 2, 4, 8, and 10 object to and move to strike the pre-filed rebuttal testimony of Thorn Dickinson,[1] Justin Tribbet, and Justin Bardwell on the ground that their rebuttal testimony amounts to an application

[1] Group 4 objects to Mr. Dickinson's testimony only.

amendment.[2] These groups ask the Presiding Officers to transmute CMP's routine rebuttal testimony, which responds to pre-filed direct testimony, into a late-filed application amendment.

This is patently untrue. First and foremost, the rebuttal testimony at issue is not a "modification" or amendment to the pending applications, as Group 8 alleges. It is rebuttal testimony, pure and simple. The provisions of Chapter 3 that Group 8 cites undermine its own argument:

> An applicant who modifies a pending license application within sixty days prior to a scheduled hearing shall notify the Presiding Officer at the time of filing of the modification with the Department. Depending upon the nature of the change to the proposed activity and the amount of time remaining before the hearing, the Presiding Officer may provide an opportunity to submit written testimony in response to the proposed modification, postpone the hearing, or take any other appropriate action to ensure that all parties have a full and fair opportunity to address the modification and prepare for the hearing.

In other words, to constitute a modification there must be a *change to the proposed activity*. That is not what we have here. Rather, we have a further explanation of why the Project does *not* need to be modified. The additional alternatives analysis submitted in CMP's rebuttal testimony does not change the Project at all. Thus, the provisions of Chapter 3 that Group 8 cites do not apply in this situation, and may not be used to delay the hearing.

Second, CMP submitted with its Site Law and NRPA applications a conforming alternatives analysis. These groups now complain that CMP's alternatives analysis did not

[2] Groups 2 and 10 move to strike the testimony of Gerry Mirabile and Kenneth Freye on the same grounds, without actually citing any offending portions of those witnesses' testimony. Their testimony, however, does not address undergrounding. Mr. Mirabile's rebuttal testimony is responsive to intervenor Group 6 witnesses Rob Wood, Andy Cutko, and Bryan Emerson's assertions regarding the Project's purpose and need, and intervenor Group 10 witness Matt Wagner's assertions regarding non-transmission alternatives. Similarly, Mr. Freye's rebuttal testimony is responsive to intervenor Group 4 witnesses David Publicover and Jeff Reardon, as well as intervenor Group 2 witness Elizabeth Caruso (who allege that specific portions of the Project could be placed underground), but does not provide any undergrounding alternatives analysis.

include an alternative that CMP determined, at the time of the filing of its applications as well as now, is clearly unreasonable. That is not what the rules require.

Chapter 310.9(A) requires that the alternatives analysis must investigate whether there exists "a less environmentally damaging practicable alternative to the proposed alteration, which meets the project purpose." Furthermore, "practicable" alternatives are limited to those that are "available and feasible considering cost, existing technology and logistics based on the overall purpose of the project." Chapter 310.3(R). As explained in CMP's rebuttal testimony, undergrounding is so obviously excessively costly that it would undermine the Project and defeat the Project's purpose. For that reason, it was not seriously considered until intervenors, several of which now move to strike, complained of its absence.

CMP's rebuttal testimony on undergrounding is a response to the cry of Groups 2, 6, and 8 for this futile exercise; in a Machiavellian set-up, those groups are now using CMP's response to their direct testimony an as excuse to seek to delay the application process and the hearing. But applicants cannot be required to include in their alternatives analyses all possible alternatives, even those that the applicant has determined are patently unreasonable. The DEP's and the LUPC's rules must be construed "in the light of reason," and cannot, as these intervenors claim, "demand what is, fairly speaking, not meaningfully possible, given the obvious." *Cf. Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) (finding that the National Environmental Policy Act's requirement of a discussion of alternatives is limited by a rule of reason, and is not meant to require detailed discussion of suggested alternatives when those alternatives are "only remote and speculative possibilities"). Surely DEP and LUPC do not intend to devote this proceeding to extended discussion of alternatives so remote from reality that they clearly would defeat the Project's purpose. As Mr. Bardwell stated, and as Mr. Dickinson

stated in his testimony before the Public Utilities Commission (PUC)[3] that is quoted by Groups 2, 4, and 10, "It was so clear that undergrounding would not meet the Project purpose or otherwise be practicable, suitable, or reasonably available, in fact, that CMP did not initially include it as an alternative in the application materials filed with DEP and LUPC."[4] CMP only now offers information on why undergrounding is so far-fetched in response to the direct testimony that alleges, without foundation, that undergrounding is a viable alternative and should have been considered.

There is no reason why CMP's efforts to demonstrate what is plainly obvious – that undergrounding the Project is not a practicable alternative – in response to the pre-filed direct testimony of complaining parties should cause any delay of this proceeding. The presiding officers ordered the filing of rebuttal testimony, and made no order for sur-rebuttal. Nor is there any reason to now provide for sur-rebuttal, as suggested by Group 8, simply because CMP gave

[3] Group 4 also objects to the portion of Mr. Dickinson's testimony discussing the stipulation proposed to the PUC. It is necessary for Mr. Dickinson to discuss the stipulation, however, to address the intervenors' assertion that undergrounding is a reasonable alternative, because the cost to CMP of the stipulation relates directly to whether undergrounding is a practicable alternative, considering its cost in relation to the Project's cost.

[4] Group 8 cites Justin Bardwell's testimony to allege that CMP actually conducted an alternatives analysis that included undergrounding before CMP submitted the applications in September 2017, but withheld that analysis from the application's alternatives analysis, in an apparent effort (concocted some 18 months prior to the hearing next week) to deprive the intervenors of the ability to submit prefiled testimony responding to that portion of the alternatives analysis. In fact, Mr. Bardwell does not state in his rebuttal testimony that CMP conducted such an analysis prior to submitting the application in 2017. Rather, Mr. Bardwell refers to the analysis conducted for its rebuttal testimony in response to the intervenors' complaint that the analysis was not included in the application: "After a thorough review, CMP determined that undergrounding any additional segments of the NECEC transmission line is not a practicable, or a suitable or reasonably available alternative, due to the extremely high cost, limited environmental benefits, increased risk and impacts during construction, and potential adverse operational impacts." In other words, CMP conducted this "thorough review" in 2019 – not 2017 – which supported its initial decision to not even include undergrounding as an alternative to consider in the application's alternatives analysis, as stated in the portion of Mr. Bardwell's testimony quoted in the text above.

them answers to their questions; all parties are able to cross-examine CMP's witnesses on the veracity of its rebuttal testimony at the hearing next week. CMP has not modified or amended the applications in any way so, as noted above, the provisions in Chapter 3 to allow additional time do not apply here.

Should the presiding officers determine, however, that an additional hearing day is necessary to consider CMP's rebuttal testimony on undergrounding (and CMP has already noted its objection to such an additional hearing day), CMP is amenable to offering Mr. Dickinson for cross-examination on his rebuttal testimony on that additional day along with Mr. Tribbet and Mr. Bardwell (and Mr. Freye and Mr. Emond), as Group 4 proposes.

Finally, Groups 2 and 10 also object in their Motion to Strike to the non-testimony comments CMP filed on the Project's greenhouse gas (GHG) emissions benefits, apparently because those intervenors misconstrue the DEP's Third Procedural Order allowing such comments to exclude CMP. *See* Group 4 Motion to Strike at 2. After submission of argument – ordered by the DEP's Presiding Officer – by both intervenors and CMP as to whether the topic of GHG emissions should be added to this proceeding as a hearing topic, the Presiding Officer "determined that net greenhouse gas emissions will not be added as a topic to be addressed at the hearing, however the parties may submit written evidence on this issue into the record. The issue can be adequately addressed through written submissions." DEP Third Procedural Order at ¶ 8.a. Nowhere does the Presiding Officer limit the filing of such comments to the intervenors alone. To the contrary, the Presiding Officer opened the record to all parties to submit written evidence on GHG emissions benefits, after which the DEP "will determine the relevance of submitted evidence to its review under the Site Location of Development Act, the Natural Resources Protection Act, and the pertinent regulations interpreting those laws." *Id.* To allow

the intervenors but not the applicant to submit such evidence not only would result in an incomplete record, but would be plainly unfair to CMP.

For the foregoing reasons, the motions of Groups 2, 4, 8, and 10 to strike portions of CMP's pre-filed rebuttal testimony should be denied.

Dated this 28th day of March, 2019.

Matthew D. Manahan
Lisa A. Gilbreath

PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
(207) 791-1100

Attorneys for Applicant Central Maine Power Company