UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY and ENVIRONMENT MAINE, Plaintiffs, v. NEXTERA ENERGY RESOURCES, LLC; NEXTERA ENERGY MAINE OPERATING SERVICES, LLC; FPL ENERGY MAINE HYDRO, LLC; and THE MERIMIL LIMITED PARTNERSHIP, Defendants.	C.A. No. 2:11-cv-38-GZS

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO AMEND THE DISCOVERY SCHEDULE

Defendants hereby respond to Plaintiffs' opposition to Defendants' Motion To Amend the Discovery Schedule. Plaintiffs' opposition adds little to the points made in their letter dated February 13, 2012 and attached to Defendants' Motion. In essence, Plaintiffs still rely on a mishmash of points – some of which are self-contradictory – to oppose a relatively minor revision to the schedule to allow the proceedings in this case to reflect documents which are at the core of Defendants' defense to Plaintiffs' claims. To allow such weak tactical considerations to trump the ability of the judicial process to reflect the key issues in the case would be inappropriate at best. Defendants' Motion should be allowed.

Defendants will briefly respond here to new or modified arguments made in Plaintiffs' Opposition. First, Plaintiffs argue that the Motion should be denied for failure to obtain the consent of the judicial order prior to filing. Consistent with Plaintiffs' overall approach to the

Motion, this hypertechnical objection truly elevates form over substance. Defendants contacted the Court simultaneously with filing the Motion. Given the extremely tight deadlines – as evidenced by Plaintiffs' own request to accelerate the briefing schedule – they can hardly complain about Defendants' efforts to bring this Motion to the Court's attention, by both filing and timely telephone notice, as promptly as possible.

On the merits, Plaintiffs continue to argue that Defendants are both too late and too early in bringing this Motion. On the too late side, Defendants made best efforts to hold to the court-established schedule, but it was not possible to complete the relevant HCP sections for public release prior to February 29. Given their importance, that Defendants had hoped to complete them earlier is hardly reason to ignore them in implementing an appropriate discovery schedule.

On the too early side, it is just not relevant that the HCP may change at some point in the future. That goes, as Defendants noted in their original Motion, to the question of dismissal or stay. If an HCP were approved by the Services prior to entry of judgment in this case, that would be relevant to whether this Court should retain jurisdiction, because approval of the HCP would reflect the ***Services'*** determination of what is necessary to attain recovery of the species. Here and now, however, issuance of the ***draft*** HCP instead reflects the ***Defendants'*** considered judgment regarding what measures it believes are necessary. Fundamentally, this case will be about the Court's judgment between the competing visions of the Plaintiffs and the Defendants. Simply put, it is almost bewildering that the Plaintiffs would object to having the schedule provide the parties and their experts the opportunity fully to reflect Defendants' position in the battle of ideas.[1]

[1] Plaintiffs also restate their view, expressed in their February 13 letter, that the Parties need not wait until the reports are provided to the public, because there must already be internal working drafts and Defendants can provide those drafts to their experts and the Plaintiffs. This argument fails for two reasons. The first reason is that Defendants' proposals will not in fact be finalized until the public comment draft is released. The second reason, and the one that perhaps provides the best window into the true basis for Plaintiffs' opposition, is that such internal working drafts

Plaintiffs also state that the Rule 30(b)(6) deposition of the Defendants should not be postponed. As Defendants previously noted, they are willing to proceed on the previously agreed date. However, as also noted, if the Court otherwise allows this Motion, Plaintiffs would not be able to fully question Defendants' witnesses regarding the draft HCP sections to be released on February 29. In that case, Defendants would ask this Court to make clear that the Plaintiffs may not extend or attempt to reopen the deposition to address those just-released HCP sections.

Plaintiffs assert that the schedule cannot accommodate the brief extension sought in the Motion. However, Plaintiffs have not even begun to demonstrate that the delay cannot be managed by the Parties. Indeed, here too, while stating that any delay is infeasible, Plaintiffs appear to be trying to have it both ways, when they state that two weeks is ***not enough*** time for them to supplement their expert reports following issuance of the HCP draft sections on February 29. If Plaintiffs do not want to supplement, Defendants would be prepared to submit their expert reports on March 14, in order to minimize the necessary extension. If, on the other hand, Plaintiffs want to supplement, but cannot do so by March 14, Defendants would be prepared to accede to any reasonable request by the Plaintiffs for more time past March 14. In such a case, however, the Parties would require a longer extension of the schedule.

The current schedule recognizes two fundamental realities. First, the Plaintiffs are the plaintiffs. They have the burden of proof and logically go first; Defendants' experts necessarily are responding, in substantial part, to what Plaintiffs' experts assert. Second, it does not make

quite obviously are subject to both the attorney-client privilege and the work product privilege. Plaintiffs should not be permitted such an otherwise unauthorized and inappropriate window into the development of Defendants' approach to the HCP, when the entire issue can be solved by a short extension to the schedule.

sense to take expert depositions until expert reports have been completed.[2] Thus, if Plaintiffs do acknowledge the significance of the draft HCP sections and want to supplement their expert reports, then they should have time to do so, but Defendants should still have two weeks (which is already a decrease from what the schedule now provides) to respond, and the schedule should provide sufficient time following the service of these reports to conduct expert depositions.

Finally, Plaintiffs assert that the schedule in the other cases should not be delayed to accommodate any delay in this case. Defendants believe it is important to keep the cases on the same schedule, particularly given that the Court's recent order partially consolidating the cases requires that the depositions of Plaintiffs' experts be coordinated.[3]

For all of the foregoing reasons, and the reasons stated in Defendants' original Motion, the Motion to Amend the Discovery Schedule should be allowed and the schedule revised as proposed in the Motion.

[2] A logical corollary is that it would not make sense to commence expert depositions knowing that they would have to be continued due to later supplements. The depositions should be conducted when the reports – in full – are done.

[3] Defendants understand that the defendants in the other cases do believe that an extension would be appropriate and would like to provide them with an opportunity to state their views as part of the Court's resolution of this Motion. However, Plaintiffs are correct that only the Defendants in this case are affected by the precise issue that triggered this Motion – the release of critical HCP draft sections just after Defendants' expert reports are due. The parties to this case and, in particular, the Defendants, need to know as promptly as possible whether that schedule will be extended.

NEXTERA ENERGY RESOURCES, LLC
NEXTERA ENERGY MAINE OPERATING SERVICES, LLC
FPL ENERGY MAINE HYDRO, LLC
THE MERIMIL LIMITED PARTNERSHIP
By their attorneys,

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Dated: February 16, 2012

Certificate of Service

I hereby certify that on this 16th day of February, 2012, I electronically filed the within document with the Court's CM-ECF system, which automatically sends notification to counsel of record.

/s/ Seth D. Jaffe
Seth D. Jaffe (MA BBO No. 548217)