

STATE OF NEW HAMPSHIRE
BEFORE THE PUBLIC UTILITIES COMMISSION

DE 08-053

Public Service Company of New Hampshire
Application for Class IV Renewable Energy Certificate Eligibility

GRANITE STATE HYDROPOWER ASSOCIATION'S
AND ASHUELOT RIVER HYDRO, INC.'S
PETITION FOR ADJUDICATIVE PROCEEDING,
MOTION FOR REHEARING
AND MOTION TO SUSPEND DECISION

NOW COME Granite State Hydropower Association (“GSHA”), whose members include approximately 45 small hydroelectric power projects located throughout New Hampshire, and Ashuelot River Hydro, Inc. (“Ashuelot”), a GHSA member which owns the Ashuelot Paper and Lower Robertson projects in Winchester, New Hampshire, and respectfully:

1) petition the New Hampshire Public Utilities Commission (“the Commission”) under N.H. Admin. Rule Puc 2505.13 and RSA 541-A:31, I to conduct an adjudicative proceeding in the above-captioned matter;

2) move, pursuant to RSA 541:3, for rehearing of the Commission’s two decisions dated September 23, 2008 which certified the Canaan, Gorham, Hooksett and Jackman hydroelectric facilities owned by Public Service Company of New Hampshire (“PSNH”) as eligible for Class IV renewable energy certificates (“RECs”) and which determined that such certification decision must be made without an adjudicative proceeding and without considering various (“non-applicant”) filings by GSHA, Ashuelot and others; and

3) move that the Commission exercise its authority under RSAs 541:5 and/or 365:28 and suspend said September 23rd decisions pending further consideration of the matters raised herein.

In support of the foregoing requests, GSHA and Ashuelot state as follows:

BACKGROUND AND PROCEDURAL HISTORY

1. On April 2, 2008, PSNH filed an application with the Commission requesting that eight of its small hydroelectric facilities be certified as renewable energy resources under RSA 362-F (the Electric Renewable Portfolio Standard Act, hereinafter the “RPS statute”) and N.H. Admin. Rules Puc 2500, and that Class IV renewable energy certificates (“RECs”) be issued to PSNH for those facilities.

2. By Motion dated May 6, 2008, GSHA requested intervention in the above-referenced matter and submitted detailed arguments, documentation of the legislative history of RSA 362-F and a Declaratory Ruling issued by the Connecticut Department of Public Utility Control in support of GSHA’s position that: 1) four of the eight hydroelectric facilities identified in PSNH’s application do not qualify for Class IV RECs based on the gross nameplate capacity of the source, and 2) seven of the eight hydroelectric facilities fail to qualify for Class IV RECs because they have not installed both upstream and downstream fish passages as required by RSA 362-F:4, IV.

3. For the sake of convenience, GSHA’s May 6th Motion is not submitted herewith; however, GSHA and Ashuelot hereby expressly incorporate it (and the Exhibits attached to it) herein by reference thereto.

4. On July 11, 2008, PSNH filed a response to GSHA's Motion to Intervene, stating that while it did not object to GSHA's intervention request, PSNH disagreed with GSHA's interpretation of RSA 362-F.

5. GSHA and Ashuelot respectfully assert that when GSHA's May 6th Motion and PSNH's July 11th response are taken together, it is clear that this matter "reached a stage at which it is considered a contested case" within the meaning of RSA 541-A, 31, I. Therefore, GSHA filed a Petition to Commence Adjudicative Proceeding or, in the alternative, a Petition to Accept its Motion to Intervene as a Petition for Declaratory Ruling¹. That filing contains the same exhibits appended to the Motion to Intervene. As with the Motion, GSHA and Ashuelot hereby expressly incorporate GSHA's July 22nd filing herein by reference thereto.

6. PSNH responded to GSHA's Petition and suggested that the Commission act on PSNH's application for REC certification first and then commence an adjudicative proceeding if necessary.

7. Letters expressing agreement with GSHA's interpretation of RSA 362-F: 4, IV were filed with the Commission by Ashuelot, the New Hampshire Department of Environmental Services and State Representative Suzanne Harvey, a chief legislative sponsor of the RPS statute.

8. Commission Staff filed memoranda dated June 27, 2008 and September 4, 2008 setting forth Staff's recommendations regarding the treatment of PSNH's application. Staff recommended: (a) denying PSNH's application for the four largest projects on grounds that they each exceeded 5 MW of nameplate capacity, and b)

¹ This Petition is dated July 21, 2008, however the letter from Ms. Howland to the undersigned refers to it as having been filed on July 22, 2008.

granting PSNH's application for the remaining four projects (Canaan, Gorham, Hooksett and Jackman), on the grounds that upstream and downstream fish passage facilities are not required by RSA 362-F:4, IV and Puc 2502.10.

9. By letter dated September 23, 2008 from the Commission's Executive Director and Secretary (attached hereto as Attachment 1), the Commission notified PSNH of its decision on the REC certification application. The letter states that the filings made by GSHA and those referenced in paragraph 7, above, "are not contemplated by the Commission's rules and do not form a basis for the Commission's treatment of PSNH's application." *Letter from Debra A. Howland, Executive Director and Secretary to William H. Smagula, P.E.*, September 23, 2008, p. 2. The letter also sets forth the Commission's decision granting PSNH's application with respect to the four smaller projects, and indicates that the Commission adopts the reasoning and recommendations set forth in Staff's memoranda referenced in paragraph 8, above.

10. In a separate letter (also dated September 23, 2008) from the Commission's Executive Director and Secretary to the undersigned (attached hereto as Attachment 2), the Commission determined that before it could commence an adjudicative proceeding or consider any motions to intervene, comments or other non-applicant filings, the Commission must issue a decision on PSNH's application. *Letter from Debra A. Howland, Executive Director and Secretary to Howard M. Moffett, Esquire*, September 23, 2008, p. 2. The letter further indicates that the Secretarial Letter referenced in paragraph 9, above, had been issued and that to the extent that GSHA "is aggrieved by the Commission's action on PSNH's application, it should file an appropriate petition pursuant to Puc 2505.13." *Id.*

PETITION PURSANT TO PUC 2505.13

11. The instant petition is filed pursuant to Puc 2505.13 because Ashuelot and a number of GSHA's other members are aggrieved by the Commission's decision to certify the Canaan, Gorham, Hooksett and Jackman facilities for Class IV RECs under RSA 362-F:4, IV. By interpreting the RPS statute in a way that allows certification of facilities that have not actually installed upstream and downstream fish passage facilities in response to FERC requirements, rather than interpreting the statute to confine certification only to that subset of small hydroelectric facilities that have actually installed upstream and downstream fish passage facilities in response to FERC directives, the Commission has undercut the Class IV REC market and undermined the intent of the RPS statute. The certification of the PSNH facilities has already created market distortions. One REC broker with whom a representative of GSHA has recently spoken, indicated that as a result of the Commission's September 23rd certification in this case, buyers are now bidding New Hampshire Class IV RECs at \$1.00 even though the alternative compliance payment for this Class is more than \$28.00.

12. GSHA members who are constructing fish passage facilities or those like Ashuelot who have recently purchased projects that will require the installation of fish passages have reasonably relied upon the availability of Class IV REC payments in accordance with the underlying intent of the RPS statute. Ashuelot purchased the Ashuelot Paper and Lower Robertson projects in Winchester (both of which are approximately 900 kw) in 2007. These two projects had both installed downstream fish passage facilities required and approved by FERC many years ago, but both projects are also under a FERC order to install upstream fish passage within one year of the date by

which 750 shad have passed upstream from the Fiske Mill dam, the first (lowest) dam on the Ashuelot River in Hinsdale. The Fiske Mill project is currently in the process of constructing upstream fish passage facilities required by FERC, and Ashuelot believes that the benchmark number of shad will pass upstream from the Fiske Mill project, thus triggering the requirement for upstream fish passage facilities to be installed at Ashuelot Paper, shortly after installation of the Fiske Mill fish passage. Ashuelot is in the process of designing its own upstream fish passage facilities based on FERC orders, but has not started construction. Ashuelot estimates that the total cost for both projects of designing and constructing the necessary upstream fish passage facilities may exceed \$700,000, and it is relying on the sale of Class IV REC's to help defray these costs and keep the two projects economically viable. GSHA and Ashuelot contend that instead of supporting the maintenance of existing hydroelectric projects as the Legislature intended, *see* RSA 362-F: 1, the Commission's decision is financially harming such small hydro generators.

PETITION PURSUANT TO RSA 541:3

13. Given the unusual procedural posture of this case, it is possible that the Commission's September 23, 2008 letters may be viewed as final orders which cannot be appealed to the New Hampshire Supreme Court unless a petition for rehearing is filed under RSA 541:3. Accordingly, to preserve their appellate rights, GSHA and Ashuelot also file this petition pursuant to RSA 541:3.

14. RSA 541:3 provides that any person "directly affected" by an order of the Commission may apply for a rehearing, specifying in the motion all grounds for rehearing. RSA 541:4 requires that the motion "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable."

15. For the reasons set forth in paragraphs 11 and 12 above, Ashuelot and other GSHA members are directly and adversely affected by the Commission's September 23rd decision which adopted Staff's recommended interpretation of RSA 362-F: 4, IV and certified the four PSNH hydroelectric facilities for RECs. Further, for the reasons set forth in GSHA's filings of May 6, 2008 and July 21, 2008, both of which are incorporated by reference herein, as well as for the reasons discussed below, the substantive decision is unlawful and unreasonable.

The Commission's Decision is Contrary to a Plain Reading of the Statute

16. The Commission's certification decision is unjust and unreasonable as it is contrary to a plain reading of the statute. RSA 362-F:4, IV states that in order to qualify for Class IV RECs, an existing small hydroelectric facility, among other requirements, must have "installed upstream and downstream diadromous fish passages that have been required under the terms of its license or exemption from the Federal Energy Regulatory Commission..." ("FERC"). A plain reading of the statute is that a REC-qualifying small hydroelectric facility must have installed upstream and downstream diadromous fish passages that have been required and approved by FERC *either* 1) under the terms of the facility's license, or 2) under the terms of any exemption granted by FERC. Thus, it is clear from a plain reading of the statute that FERC-required and -approved fish passageways must be installed at a facility before it can qualify for RECs. Contrary to the assertions made by Staff in their memorandum dated September 4, 2008, upon which the Commission has relied in its decisions, GSHA has not ignored the "FERC-required" language of the statute. In fact, the opposite is true. GSHA and others have expressly argued that installation of fish passageways approved and required by FERC is a

necessary prerequisite for REC certification. *See GSHA's Motion to Intervene*, ¶¶ 9 and 10 and *Letter from Robert R. Scott, Director, Air Resources to Debra A. Howland*, August 18, 2008, attached as Attachment 3 (reference in final statute to “approved under its FERC license or exemption” was intended to set a standard for the construction of the required fish ladders.)

The Commission's Decision is Inconsistent with Legislative Intent

17. To the extent that the language in RSA 362-F:4, IV is viewed as ambiguous, or where more than one reasonable interpretation exists, then a resort to legislative history is appropriate. *See In Re Malouin*, 926 A.2d 295 (2007). A review of the legislative history of RSA 362-F reveals that the Commission's decision as well as Staff's interpretation of the statute, are both inconsistent with the Legislature's intent. The legislative history attached as Exhibit A to both GSHA's Motion to Intervene and its Petition dated July 21, 2008 clearly establishes that: 1) the statute was drafted so that RECs would be available to existing small hydroelectric facilities “that actually have both fish ladders for wild fish to migrate up and downstream” (*see GSHA's Motion to Intervene, Exhibit A, excerpt of Transcript of Senate Committee on Energy, Environment and Economic Development hearing on HB 873-FN-L, testimony of Ms. Joanne Morin*, p.10); and 2) uncontradicted testimony was presented at the legislative hearing on HB 873-FN-L indicating that “the Legislature intends the Class IV definition in HB 873 to apply to any hydroelectric project *which has been required to and has provided, at a minimum, upstream and downstream...fish passages*” (*letter of Jonathan H. Winer to Senator Martha Fuller Clark, April 17, 2007, attached as Exhibit A to GSHA's Motion to Intervene*).

The Commission's Decision is Inconsistent with the Policy Underlying RSA 362-F

18. The certification decision is unlawful, unjust and unreasonable in light of its effect on the REC market (as described above) which is plainly contrary to the purpose of RSA 362-F. Statutes should be interpreted in light of the legislature's intent in enacting them and in light of the policy to be advanced. *State v. Polk*, 927 A.2d 514 (2007). The Commission's decision is inconsistent with the policy of fostering the sustainability of existing small hydroelectric facilities by allowing RECs only for those facilities that have incurred substantial financial obligations to install fish passages required and approved by FERC either under the terms of the facility's FERC license or under the terms of any exemption granted by FERC. The decision, therefore, should be reconsidered.

The Commission's Decision Leads to an Absurd and Illogical Result

19. When statutory language is ambiguous, courts examine the statute's overall objective and presume that the legislature would not pass an act that would lead to an absurd or illogical result. *See Estate of Gordon-Couture v. Brown*, 152 N.H. 265 (2005). Here such an absurd and illogical result has already occurred. The Commission's certification decision has led to the situation where virtually all small hydroelectric facilities in New England² will qualify for Class IV RECs, thereby resulting in an oversupply of those RECs, which has already depressed the market price of those RECs to a point that render them almost worthless to those facilities that have either incurred substantial capital and operating costs to comply with FERC-required fish

² While all but one of GSHA's members are regulated by FERC, only a smaller subset of GSHA's members has been required by FERC to install upstream and downstream fish passages in order to protect environmental values. It is that smaller subset of GSHA's members that properly qualifies for RECs under RSA 362-F:4, IV.

passages; or are in the process of installing such facilities; or that are required to install such facilities but have not yet installed them and applied for Class IV certification . This is clearly contrary to the purpose of RSA 362-F, *see RSA 362-F:1*, as well as the Legislature's intent in enacting that statute. Accordingly, the Commission must reconsider its certification decision.

20. In addition, the Commission's decisions are unlawful and unreasonable for their failure to commence an adjudicative hearing as required by RSA 541-A:31, I at the time that this matter reached the stage at which it is considered a contested case. While RSA 362-F:11, I provides the Commission with the authority to issue REC certificates using a non-adjudicative process, the provisions of RSA 541-A:31, I nonetheless require an adjudicative proceeding if the matter reaches a stage at which it is considered contested. Principles of statutory construction require a harmonious reading of RSA 362-F:11 and RSA 541-A:31, I. Where reasonably possible, two conflicting statutes dealing with the same subject matter should be construed consistently with each other in order to lead to reasonable results and effectuate the legislature's purpose. *See In Re New Hampshire Public Utilities Commission Statewide Electric Utility Restructuring Plan*, 143 N.H. 233, 240 (1998). A harmonious reading of RSA 362-F:11 and RSA 541-A:31, I is possible. The Commission can review and approve REC applications in a non-adjudicative process by issuing Orders Nisi which do not take effect until the time period for filing comments and/or requesting a hearing has expired. If parties aggrieved by or otherwise interested in the matter do file comments and/or request a hearing before the certification order takes effect, then an adjudicative process could be commenced to consider the contested issues. The Commission has employed this process for several

years in connection with its review and approval of competitive local exchange carriers' applications for authority to conduct operations in New Hampshire. Accordingly, ample precedent exists for this process.

21. Further, both of the Commission's September 23rd decisions are unreasonable for their failure to consider the information submitted by GSHA in its May 6th Motion to Intervene and its Petition dated July 21, 2008, as well as the information filed by Ashuelot River Hydro, Inc., the New Hampshire Department of Environmental Services and State Representative Suzanne Harvey. DES Air Resources Director Scott was the lead agency author of, and testified at the Senate committee hearing on, HB 873. Representative Harvey was a prime sponsor of that bill. Thus, their opinions on this matter are clearly relevant and should be accorded great weight. While Staff may be entitled to its opinion as to the proper interpretation of RSA 362-F:4, IV, GSHA and Ashuelot believe that all of the information submitted to the Commission on this issue should have been examined by the Commission before it issued its decision in this case, especially in light of the fact that there is substantial disagreement among the parties as to the proper interpretation of RSA 362-F:4, IV. GSHA and Ashuelot note that while there may be disagreement among the parties as to the proper interpretation of the fish passages requirement, there is no such disagreement among the authors of the RPS statute.

22. Although RSA 362-F: 11 mentions a "nonadjudicative process", the statute contains no description of the process and does not expressly prohibit the Commission from reviewing all information submitted to it which has a bearing on the question of whether an applicant meets the statutory criteria for REC certification. Thus,

it was unjust and unreasonable for the Commission to expressly ignore the relevant information filed by GSHA and others.

MOTION FOR SUSPENSION OF CERTIFICATION DECISION

23. The Commission's REC certification decision should be immediately stayed to prevent further distortion of the REC market and financial harm to small hydroelectric facilities that qualify for Class IV RECs, pending a final, unappealable decision in this docket.

WHEREFORE, GSHA and Ashuelot respectfully request that the Commission:

A. As soon as possible, to prevent further damage to the Class IV REC market, convene an adjudicative proceeding as provided in N.H. Admin. Rule Puc 2505.13 and RSA 541-A:31, I on the contested matters raised herein;

B. To the extent that the September 23, 2008 certification letter to PSNH constitutes a final order, grant a rehearing of this matter under RSA 541:3;

C. Take administrative notice under RSA 541-A: 33, V of all of the documents filed thus far in this docket;

D. Suspend the September 23, 2008 certification decision pursuant to the Commission's authority under RSAs 541:5 and/or 365:28, pending further consideration of the matters raised herein; and

E. Grant such further relief as it deems appropriate.

Date: October 3, 2008

Respectfully submitted,

GRANITE STATE HYDROPOWER ASSOCIATION

and

ASHUELOT RIVER HYDRO, INC.

By their Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was, on this date, sent either by first-class mail, postage prepaid, or by electronic mail to those persons listed on the Service List.

Date: October 3, 2008

Howard M. Moffett
Howard M. Moffett