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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

November 7, 2008 - 10:09 a.m.
Concord, New Hampshire

NHPUC NOV24'08 AM 11:43

RE: DE 08-053
PUBLIC SERVICE OF NEW HAMPSHIRE:
Class IV Renewable Energy Certificate
Eligibility Application for PSNH
Existing Small Hydroelectric Facilities.
(Prehearing conference)

PRESENT: Chairman Thomas B. Getz, Presiding
Commissioner Graham J. Morrison
Commissioner Clifton C. Below

Sandy Deno, Clerk

APPEARANCES: Reptg. Public Service of New Hampshire:
Catherine Shively, Esq.

Reptg. Granite State Hydropower Assn.
and Ashuelot River Hydro, LLC:
Howard M. Moffett, Esq. (Orr & Reno)

Reptg. PUC Staff:
Suzanne G. Amidon, Esq.

Court Reporter: Steven E. Patnaude, LCR No. 52

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P R O C E E D I N G S

CHAIRMAN GETZ: Okay. Good morning, everyone. We'll open the prehearing conference in docket DE 08-053. On April 2nd, 2008, Public Service Company of New Hampshire filed an application for Renewable Energy Certificate eligibility for eight existing hydroelectric facilities. On September 23, the Commission issued a secretarial letter certifying four of the facilities as eligible to produce Class IV RECs and denying certification for four others. On October 3, 2008, Granite State Hydropower Association and Ashuelot River Hydro filed a petition requesting to open an adjudicative proceeding to challenge the Commission's certification of the Gorham, Jackman, Hooksett, and Canaan facilities. And, on October 10, PSNH requested a proceeding to challenge the denial of certification for the Garvins Falls, Ayers Island, Eastman Falls, and Amoskeag facilities.

We issued an order on October 28 commencing an adjudicative proceeding and scheduling this prehearing conference. And, among other things, that order indicated that we were hopeful that the parties would have reached agreement in advance regarding any necessary stipulated facts or admissions, and also

1 agreement on a procedural schedule that would permit a
2 prompt consideration of these legal issues.

3 So, with that background, can we take
4 appearances please.

5 MS. SHIVELY: Good morning. Catherine
6 Shively, for Public Service Company of New Hampshire.

7 CMSR. BELOW: Good morning.

8 CMSR. MORRISON: Good morning.

9 CHAIRMAN GETZ: Good morning.

10 MR. MOFFETT: Good morning,
11 Commissioners. I'm Howard Moffett, with Orr & Reno, in
12 Concord, for Granite State Hydropower Association and
13 Ashuelot River Hydro, LLC. With me this morning is Dick
14 Norman and Jim Nickerson from Granite State Hydropower
15 Association.

16 CHAIRMAN GETZ: Good morning.

17 CMSR. MORRISON: Good morning.

18 CMSR. BELOW: Good morning.

19 MS. AMIDON: Good morning. Suzanne
20 Amidon, for Commission Staff. With me today is Maureen
21 Reno, who is a Utility Analyst in the Electric Division;
22 Steve Mullen, who is the Assistant Director of the
23 Electric Division; and, in the back of the room, Henry
24 Bergeron, who is a Utility Analyst with the Electric

1 Division as well.

2 CMSR. BELOW: Good morning.

3 CMSR. MORRISON: Good morning.

4 CHAIRMAN GETZ: Good morning. And,
5 let's see, there's one other administrative matter I
6 wanted to report. I believe there was a Petition to
7 Intervene from Representative Harvey, is that correct?

8 MS. AMIDON: That's correct.

9 CHAIRMAN GETZ: Are there any other
10 Petitions to Intervene?

11 MS. AMIDON: Yes. On November 5th, FPL
12 filed a Petition to Intervene, FPL Energy Maine Hydro,
13 LLC.

14 CHAIRMAN GETZ: Well, let's address
15 those Petitions to Intervene at this point. Are there any
16 objections to those other Petitions to Intervene?

17 MR. MOFFETT: Mr. Chairman, I haven't
18 seen the Motion to Intervene, we did not get copied on it.
19 I would say that I would not expect that we would object
20 to the Motion to Intervene. But, not having seen it, I'd
21 like at least to be able to see the Motion to Intervene.

22 CHAIRMAN GETZ: Okay. Well, why don't
23 we just give you the opportunity, you can respond in
24 writing to either or both of the petitions. Okay. For

1 purposes of this -- Ms. Amidon, DES is indicated as having
2 filed comments. But is my understanding correct that they
3 did not petition to intervene?

4 MS. AMIDON: That's correct. They filed
5 comments for the Commission's consideration. And, the
6 comments were similar to comments they previously filed
7 with respect to the application. They did not file a
8 Motion to Intervene.

9 CHAIRMAN GETZ: Okay. Thank you. Well,
10 then, let's turn to Ms. Shively. Do you have a statement
11 of position or anything to report with respect to
12 procedures in this case?

13 MS. SHIVELY: I guess I would start by
14 saying that, as indicated in our response that was filed
15 earlier, we object to the Motion for Rehearing and we
16 object to the Motion to Suspend the decision. We disagree
17 with the Petitioners' position regarding certification of
18 our Gorham, Canaan, Hooksett, and Jackman hydro projects
19 as Class IV sources of Renewable Energy Certificates.
20 And, we also disagree with the Commission's decision to
21 combine individual generation at our other facilities and
22 deny RECs for the facilities at Amoskeag, Garvins Falls,
23 Eastman Falls, and Ayers Island.

24 I think that there's a significant issue

1 in this case, and that is, you know, the statutory
2 interpretation of the applicable statute, and whether or
3 not the legislative history has any bearing on that
4 statute. Our position is that the statute is clear. And
5 that, you know, given the application of the statute --
6 the application of the statute to our facilities, I think
7 that we have sufficient facts to make that determination.

8 However, if the Commission has a
9 different opinion about that, and believes that the
10 legislative history is important and needs to be looked
11 at, we would like an opportunity to have an adjudicatory
12 hearing and introduce evidence on that. I think, for
13 example, you know, the Granite State Hydro --

14 CHAIRMAN GETZ: Excuse me. I'm sorry.
15 Introduce evidence on the legislative history?

16 MS. SHIVELY: Well, certainly, to the
17 legislative history and certain of the other allegations
18 that were made in the responses to the Commission's
19 findings.

20 CHAIRMAN GETZ: Well, I guess what I'm,
21 -- if we can get to this issue, I mean, the posture of
22 this case is pretty unusual. There's been a lot of -- a
23 lot of argument already and quite a bit contained in the
24 submissions. But I guess I'm having difficulty seeing why

1 this isn't purely a legal issue, an interpretation of
2 362-F:4, IV, and why we can't dispose of this matter in a
3 round of briefs?

4 MS. SHIVELY: Well, if the Commissioners
5 believe that the statute is clear on its face, and there
6 is no need to look to the legislative history, I would
7 certainly agree with you. However, you know, if the
8 legislative history and some of the intent is relevant,
9 and there's a lot of information about the legislative
10 history and intent filed in the responses, I think that
11 there needs to be an opportunity for at least a
12 stipulation of facts or an adjudicatory proceeding.

13 And, I would note, just as an example,
14 you know, there's a Motion to Suspend outstanding, and
15 there's some allegations based on hearsay only that, you
16 know, support that motion. And, we would certainly like
17 an opportunity, if that hearsay is going to be considered
18 as a basis for the Commission's decision, to contest that.

19 CHAIRMAN GETZ: Well, but it seems to me
20 the Motion to Suspend is a collateral issue to the
21 interpretation of the statute in the first instance, which
22 is our primary issue here.

23 Mr. Moffett, can you respond? What's
24 your clients' position on this matter?

1 MR. MOFFETT: Yes, Mr. Chairman. Thank
2 you. Basically, it is the position of Granite State
3 Hydropower Association and Ashuelot River Hydro that the
4 issues in this case relate primarily to statutory
5 interpretation. But we feel that, because the Commission
6 has adopted an interpretation of that statutory
7 requirement relating to fish passage facilities in
8 particular, in RSA 362-F:4, IV, that we believe is at odds
9 with the legislative intent, we think it is important to
10 have the opportunity to make sure that there is -- that
11 there is evidence in the record on the legislative intent.

12 CHAIRMAN GETZ: And, how would you
13 propose to get that? What evidence is that and how would
14 you get that in the record? Are we talking about deposing
15 members of the Legislature or --

16 MR. MOFFETT: Or letting them testify,
17 or --

18 CHAIRMAN GETZ: And, how is that
19 representative of legislative intent?

20 MR. MOFFETT: Well, I think --

21 CHAIRMAN GETZ: Is that something we can
22 recognize, the testimony of particular legislators, out of
23 a House of 400 members and a Senate of 24 other members?

24 MR. MOFFETT: I think that -- I think

1 that there is a record on legislative intent. There is
2 legislative history that is relevant. We have introduced
3 --

4 CHAIRMAN GETZ: Well, certainly I
5 understand that, and that's why I was troubled both now by
6 Ms. Shively's comments and your comments, that we're going
7 to go -- you want to go beyond the written legislative
8 history that the Legislature has already accumulated, to
9 somehow get to evidentiary or issues of intent by others
10 beyond the written legislative history?

11 MR. MOFFETT: No, not necessarily, Mr.
12 Chairman. Let me try to state it as clearly as I can. I
13 do think it is relevant that you had a letter and
14 documentary evidence submitted by the prime sponsor of the
15 RPS legislation in the House. I think that where there is
16 any question at all about what the intent of the
17 Legislature was in the statute, it certainly is relevant
18 to take that into account. I would not insist that we
19 need to allow Ms. -- Representative Harvey to come in and
20 testify, as long as she's allowed to present a written
21 summary, including the legislative history, from the
22 Senate Committee hearings and any other history that she
23 thinks is relevant.

24 DES has also filed testimony. DES was

1 the architect of that legislation, working with
2 Representative Harvey. In both cases, they have suggested
3 an interpretation of the statute that was intended by the
4 Legislature that is at odds with what the Commission Staff
5 and ultimately the Commission decided the statute meant.

6 We just think that, where there is a
7 disagreement, where there is arguably some ambiguity in
8 what the statute meant, the testimony of the authors of
9 the statute are entitled to some serious weight. And, we
10 think that the Commission erred in choosing an
11 interpretation that was at odds with the stated --

12 CHAIRMAN GETZ: Can you provide any
13 citations in New Hampshire law that would allow us to go
14 beyond the written legislative history, to take into
15 account the recollections of particular persons who were
16 involved with the passage of legislation? And, it seems
17 to me it just really opens a door that's a very difficult
18 one to --

19 MR. MOFFETT: I want to be careful not
20 to suggest to you, I do not mean to suggest to you that we
21 think Representative Harvey ought to be allowed to speak
22 for the Legislature in this forum, as opposed to in the
23 well of the House. What I am suggesting is that the
24 history of the legislation before the committees of the

1 House and Senate that were responsible for its passage is
2 a pretty fair indication of what the authors intended.
3 And, there is going to be no indication in that history
4 that what the House actually -- what the House as a whole
5 or the Senate as a whole actually intended is different
6 from -- from what the record is going to show about the
7 intent of the authors, including DES and Representative
8 Harvey.

9 So, what I'm saying is, as long as we
10 get into the record the legislative history that was
11 introduced -- I shouldn't say "introduced", because we
12 never got a chance to introduce it, it was never even
13 taken account of in the earlier proceeding, because it
14 wasn't an adjudicative proceeding. As long as we are
15 given the opportunity to -- I shouldn't say "we", as long
16 as Representative Harvey and DES are given an opportunity
17 to present evidence, and it can be documentary, it doesn't
18 have to be in an evidentiary hearing, but we think that
19 the transcript of the testimony before the Senate
20 Committee on Energy, Environment is very relevant to what
21 the authors of the statute intended. And, presumably, --

22 CHAIRMAN GETZ: Well, that's a different
23 thing, isn't it, the transcript that is part of the
24 legislative history?

1 MR. MOFFETT: Yes, it is.

2 CHAIRMAN GETZ: As opposed to live
3 testimony or an affidavit from Representative Harvey or
4 someone from DES?

5 MR. MOFFETT: Yes. And, I'm agreeing
6 with you, Mr. Chairman. I'm not trying -- let me be
7 clear. I'm not suggesting here that the Commission should
8 hold an evidentiary hearing so that Representative Harvey
9 can testify after the fact. All I'm suggesting is that
10 the legislative history that is incorporated in the
11 testimony before the Senate and House Committees on this
12 issue is very relevant to the question of what the
13 Legislature intended by that provision in the statute.

14 CHAIRMAN GETZ: Well, then, it becomes
15 an issue of, to the extent we have comments that have been
16 filed by Representative Harvey or DES, and it's a question
17 of, as a legal matter, what weight to give it, is that
18 correct?

19 MR. MOFFETT: It is. I certainly would
20 hope that the Commission would give some weight to the
21 legislative history, if the question boils down to
22 statutory intent.

23 CHAIRMAN GETZ: Well, I mean, but
24 there's a difference between the legislative history,

1 which would be a normal part of any interpretation of the
2 statute, as opposed to additional comments beyond the
3 recognized legislative history.

4 MR. MOFFETT: I agree with you about
5 that. And, I'm saying that the former is critical. We're
6 not arguing that there ought to be an opportunity for the
7 latter.

8 I would like to say one other thing
9 while we're talking about this. I think -- I think the
10 parties tried hard in the intervening week to reach
11 agreement on a number of factual issues that are relevant
12 to the outcome in this case. We had hoped that we would
13 have a written stipulation to provide this morning. We
14 didn't quite get there, but I think we can. I think I can
15 represent, on behalf of my clients, that my clients do not
16 take any issue with the factual representations that PSNH
17 has made about the individual generating projects for
18 which they are seeking certification here.

19 Our issue, and the one that we think
20 does require a full record, goes to the question of
21 statutory intent, specifically on the issue of fish
22 passage facilities, but also on the issue of size. And,
23 as part of that, as part of the question of legislative
24 intent, we think there needs to be an opportunity for

1 testimony or evidence to be provided in some way on the
2 question of what the Legislature understood about the
3 potential market for Class IV RECs in New Hampshire. It
4 makes --

5 CHAIRMAN GETZ: See, that's where I'm
6 having trouble, what the Legislature understood. As
7 contained in the written formal legislative history that
8 we can refer to or what particular legislators or
9 particular individuals involved in the legislation
10 intended or thought?

11 MR. MOFFETT: Let me be more specific,
12 and let me get away from tying that to legislative intent.
13 We think it is a crucial factual question in this case
14 what the total market for Class IV RECs would be,
15 depending on which interpretation of the statute,
16 specifically with respect to fish passage facilities, but
17 also with respect to size, that the Commission ultimately
18 adopts.

19 To be as direct and clear about it as I
20 can, we believe that, if the Commission adopts the
21 interpretation of the statute that the Staff has
22 recommended in this case, with respect to the requirement
23 for fish passage facilities, it basically means that every
24 small hydroelectric project in New England, in all six New

1 England states, of less than 5 megawatts would be able to
2 qualify for Class IV RECs, because the requirement becomes
3 virtually meaningless, the requirement for fish passage
4 facilities becomes virtually meaningless. If you say that
5 fish passage facilities are not required unless they have
6 been required by FERC, you basically are saying that any
7 small hydroelectric facility of less than 5 megawatts
8 anywhere in New England can qualify, because the ones that
9 don't have fish passage facilities are the ones that were
10 not required by FERC to install them.

11 So, you've got a situation where you're
12 going to have hundreds of megawatts of potential capacity
13 trying to -- potentially eligible for certification in the
14 Class IV hydro REC market. And, we think there needs to
15 be an understanding that, if that had been the case, the
16 Legislature probably just wouldn't have bothered to talk
17 about fish passage facilities, because it becomes a
18 meaningless requirement.

19 CHAIRMAN GETZ: Ms. Amidon, do you have
20 anything on any of these issues, process or otherwise?

21 MS. AMIDON: No. Staff filed its
22 recommendation earlier in this, in connection with the
23 application from PSNH. And, that's in the record. And,
24 just to summarize that, we agreed with the issue that

1 Granite State Hydro raised concerning the size of the
2 facilities, and made a recommendation that the Commission
3 disqualify five of the facilities for which PSNH filed an
4 application. And, in addition, we feel that the statute
5 is plain on its face, that the facilities to be eligible
6 must have fish passages as required by the facility's FERC
7 license or its FERC exemption. And, we believe that -- we
8 believed and recommended that the Commission apply the
9 statute literally as what it says.

10 We don't have any other position with
11 regard to what has been said today.

12 CHAIRMAN GETZ: Ms. Shively, do you have
13 anything to respond to Mr. Moffett? And, I guess where
14 I'm headed is that I'm interested in knowing, is there --
15 would it be at all useful for us to follow the normal
16 procedure and to permit a technical session and a
17 recommendation or are you so at odds that, on process,
18 that that wouldn't be useful?

19 MS. SHIVELY: I don't think that we're
20 particularly at odds on process. And, I think, as I
21 indicated earlier, if the Commission believes the statute
22 is clear on its face, I think that the information
23 regarding the legislative history is not relevant. If the
24 Commission doesn't believe that, then, you know, there

1 certainly may be some relevance to that information. I
2 think that we would be able to stipulate as to information
3 the Commission could or should use in making its
4 determination, if that were necessary, you know, regarding
5 the transcripts of the legislative hearings or, you know,
6 other information. But, you know, I think the
7 Commission's got to determine initially whether that
8 material is relevant or not, whether the statute's clear
9 on its face; we think it is, they think it's not.

10 CHAIRMAN GETZ: I mean, I certainly
11 don't want to get into a two-phase process, in terms of
12 making a decision, in the first phase, as a legal matter,
13 whether it's clear on its face, and then calling you back,
14 to then to have to figure out what the process is from
15 then. I don't think that's the best use of our resources.
16 I don't think that's conducive to a prompt and orderly
17 conduct of the proceeding.

18 MS. SHIVELY: Well, perhaps we could
19 have, and other people can chime in, perhaps we can have
20 the technical session, and see if we could come up with a
21 procedural schedule that would enable us to get facts that
22 the Commission could use, if they felt it was necessary,
23 stipulated, or additional facts, and then you would be
24 able to take whatever action you felt was appropriate.

1 CHAIRMAN GETZ: Mr. Moffett, how do you
2 feel about that?

3 MR. MOFFETT: Mr. Chairman, I agree that
4 it would be useful to have a technical session. I think
5 that there are a significant number of the relevant facts
6 that we can and should try to agree to, just to save our
7 resources. I want to say again, though, that I think at
8 the end of the day there may well be a couple of important
9 factual points that we may not be able to agree on. And,
10 in that situation, I think we need to work through with
11 counsel for PSNH and the Staff whether or not they are the
12 kinds of facts that could be treated by the filing of
13 affidavits or whether it's important to give opposing
14 parties the opportunity to cross-examine on the evidence
15 that is submitted.

16 I'd like to say one other thing. I
17 wasn't as clear as I could have been a moment ago in
18 talking about why we think the market for Class IV RECs is
19 a relevant issue. But let me just -- let me just say, and
20 I don't -- this is argument, it's not evidence, but just
21 so that the Commissioners understand where we think the
22 discussion about this needs to go.

23 By our calculations, and this is subject
24 to discussion in the technical session, the total energy

1 produced in New Hampshire that would be subject to the
2 percentage allocations in the RPS statute for 2008 is
3 going to be somewhere in the ballpark of 12 million
4 megawatt-hours. For 2008, Class IV hydro RECs are
5 entitled to 0.5 percent, that's one half of one percent of
6 that total. By our calculations, that translates to
7 capacity equivalent to about 15 megawatts. That's one
8 five (15) megawatts. That is the -- That would account
9 for all of the Class IV RECs that are available in New
10 Hampshire to existing hydro facilities.

11 If you then consider the fact that there
12 are hundreds of small hydroelectric projects throughout
13 the six New England states of less than 5 megawatts, the
14 total capacity value of those projects that would
15 potentially be eligible are going to be in the hundreds of
16 megawatts. I don't -- We haven't run the numbers, we
17 don't know what they are, but they would far, far exceed
18 the roughly 15 megawatts that we think could essentially
19 account for the entire REC market for Class IV RECs in New
20 Hampshire.

21 We need the opportunity to develop that,
22 that argument. And, I understand that that's what it is
23 at this point, it is an argument. But we think we ought
24 to be able to present evidence on it. I don't know to

1 what extent --

2 CHAIRMAN GETZ: Well, it seems like
3 those particular facts are pretty objective and knowable
4 without the basis for a lot of dispute that would, I would
5 think, would require much in the way of live testimony.

6 MR. MOFFETT: Yes. And, it may be that,
7 in the technical session, we could figure out a way of
8 trying to get to that. I'll just say one other thing, if
9 I may, to close off an issue earlier. We've looked at the
10 FPL Motion to Intervene. Granite State Hydro and Ashuelot
11 River have no objection to that Motion to Intervene. So,
12 for what that's worth.

13 CHAIRMAN GETZ: Okay. All right. Is
14 there anything else to address this morning?

15 MS. AMIDON: I just want to be clear
16 what the Commission would like after following this
17 technical session and what kind of guidance you would like
18 us to provide you. And, for example, are you interested
19 in expediting the review of this issue or what you're
20 looking for in terms of the timeframes to have the briefs
21 available to the Commission?

22 CHAIRMAN GETZ: Well, I think, at this
23 point, it sounds like the primary litigants are in
24 agreement to pursue a technical session to see if you can

1 reach agreement on a procedural schedule and a means of
2 moving forward. So, I think, at this point, unless
3 there's objection from the Bench, that I think we'd just
4 let the parties go into a technical session, make a
5 recommendation, and hope that there's a meeting of the
6 minds, and then we'll review a proposal in writing after
7 the technical session.

8 MS. AMIDON: Okay.

9 CHAIRMAN GETZ: Okay. Anything else
10 this morning?

11 MS. SHIVELY: Yes. I would just like to
12 note for the record that we also did not receive the
13 motions to intervene. And, we haven't had a chance to
14 look at them. But we will respond to those.

15 CHAIRMAN GETZ: Okay.

16 MS. AMIDON: And, Staff has no objection
17 to either Motion to Intervene.

18 CHAIRMAN GETZ: All right. If there's
19 nothing else, then we will close the prehearing
20 conference, await a recommendation from the parties, and
21 take the matter under advisement. Thank you, everyone.

22 MR. MOFFETT: Thank you.

23 MS. AMIDON: Thank you.

24 **(Whereupon the prehearing conference ended at 10:39 a.m.)**