

**THE STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DE 13-322**

**SOUTH JERSEY ENERGY COMPANY**

**Objection to 2011 Alternative Compliance Payment**

**Order Denying Petition Pursuant to Rules Puc 102.01 and Puc 2505.13**

**ORDER NO. 25,665**

**May 13, 2014**

In this Order, the Commission denies South Jersey Energy Company's request to retroactively bank 2010 renewable energy certificates and its request for an adjudicative proceeding pursuant to Rules Puc 102.01 and Puc 2505.13.

**I. PROCEDURAL HISTORY**

In July 2012, South Jersey Energy Company (SJE) submitted its Form E-2500 Renewable Portfolio Standard (RPS) compliance report for the 2011 compliance year and paid the associated alternative compliance payment (ACP), pursuant to RSA 362-F:10, II and N.H. Code Admin. Rules Puc 2503.02. After review of SJE's 2011 compliance report, Commission Staff (Staff) notified SJE that additional ACP amounts were due for compliance year 2011. After several communications between SJE and Staff, SJE submitted revised compliance reports for both 2010 and 2011 in November 2012. SJE's 2011 compliance report was again revised and re-submitted with additional back-up documentation in April 2013. These revisions effectively represented a request by SJE that the Commission waive Puc 2503.04(c)(1) to allow SJE to bank additional renewable energy certificates (RECs) created with respect to electricity produced during 2010, and to use these banked RECs to meet its RPS obligation for the 2011 compliance year.

By secretarial letter dated July 9, 2013, the Commission denied the requested rules waivers and related retroactive banking of 2010 RECs. SJE timely sought reconsideration, which was denied by secretarial letter dated October 14, 2013. SJE was directed in this secretarial letter to pay its outstanding ACP balance by November 1, 2013. In a letter dated November 1, 2013, SJE notified the Commission that it would be filing a petition seeking an adjudicative proceeding with respect to its request to retroactively bank RECs for use in meeting its 2011 RPS compliance obligation.

On November 12, 2013, SJE filed a “Petition Pursuant to Rules Puc 102.01 and Puc 2505.13 Regarding SJE 2011 RPS Compliance Requirements” (Petition), together with the pre-filed testimony of Louis DeCicco, the General Manager of SJE. The Petition sought an adjudicative proceeding with respect to SJE’s request for retroactive banking of RECs to meet its 2011 RPS compliance obligation.<sup>1</sup> In a letter dated February 6, 2014, SJE submitted additional argument regarding a statutory provision applicable to its Petition.

On April 30, 2014, Staff filed a memorandum setting forth its analysis regarding the factual and legal issues raised by SJE’s Petition. Staff’s memorandum recommended that the Commission deny SJE’s request for rules waivers and its request for an adjudicative proceeding. On May 6, 2014, SJE’s counsel filed a letter commenting on two matters addressed in Staff’s memorandum.

## **II. POSITIONS OF SJE AND STAFF**

### **A. South Jersey Energy Company**

In the Petition, SJE asked that the Commission give it banking credit for RECs it acquired in 2010 expressly for the purpose of New Hampshire RPS compliance in 2010 and 2011. SJE claimed these RECs were inadvertently not banked in 2010, and therefore were

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<sup>1</sup> By letter dated November 13, 2013, SJE submitted an Errata Sheet with respect to the Petition.

inadvertently retired, and have not been used for any purpose at any time. Mr. DeCicco's testimony provided explanation and documentation regarding SJE's acquisition of certain RECs in 2010, and addressed how and why these RECs were inadvertently retired in 2010 and not banked for use in 2011, as SJE intended. Mr. DeCicco's testimony also included a recalculation of SJE's total ACP payment for 2011 to reflect the value of unused but unbanked 2010 RECs.

According to SJE, if the Commission were to permit it to obtain credit for the retired 2010 RECs that were not otherwise used for any RPS compliance, and were to apply this credit to SJE's 2011 RPS compliance requirements, then SJE would be able to reduce the total amount due for the 2011 ACP obligation from \$250,261 to \$171,916. After taking into account prior ACP payments of \$156,412 and \$30,887, SJE's outstanding 2011 ACP balance would be a credit of \$15,383. SJE requested that the Commission undertake an adjudicative proceeding to review its prior denials of SJE's requests to retroactively bank 2010 RECs, and that it allow SJE to use these 2010 RECs to meet its 2011 RPS compliance obligation.

SJE cited the provision of RSA 362-F:7, I regarding the use of unused RECs to meet up to 30% of a supplier's RPS obligation for up to two years following the year of issuance of the RECs. SJE argued that this statutory provision "trumps any contrary rule, including Puc Form E-2500." SJE further asserted that there is no "provision or category" in the New England Power Pool Generation Information System (GIS) for "banked" certificates; however, "SJE is able to demonstrate the existence of the requisite number of 'unused' certificates in the [GIS] system."

SJE made two additional arguments in response to Staff's memorandum. First, SJE stated its belief that Puc 2503.04 is inconsistent with RSA 362-F:7, I, because there is no "provision or category" in this statutory section, or in the GIS rules, for "banked" certificates. In

contrast, Puc 2503.04 purports to require that unused certificates must also be “banked” in order to be eligible for use in compliance with RSA 362-F:7, I. SJE asserted that this difference represents an impermissible inconsistency between the rule and the statute. Second, SJE objected to Staff’s characterization of the Commission’s authority to commence an adjudicative proceeding as “permissive.” SJE asserted it is “well-established that, in a contested case, the Commission must commence an adjudicat[ive] proceeding.” In support of this position, SJE cited Puc 102.01 and Puc 102.04 of the Commission’s administrative rules.

### **B. Commission Staff**

Staff’s memorandum summarized SJE’s filings and its various different requests for retroactive banking of 2010 RECs. Staff analyzed SJE’s reports, documents, and pre-filed testimony, as well as available GIS reports and information. Staff concluded that the Petition had provided no new evidence regarding SJE’s claims and that the evidence it had submitted did not adequately support its retroactive REC banking request. Staff indicated its review raised the following questions for determination by the Commission:

1. Should the Commission grant rules waivers in order to consider and determine SJE’s late-filed requests for retroactive banking of RECs and accordingly reduce its ACP payment obligation for RPS compliance year 2011?
2. If such rules waivers were granted, would it be necessary to conduct an adjudicative proceeding in order to determine SJE’s retroactive REC banking requests?

On the first question, Staff recommended that the Commission deny the necessary waivers of Puc 2503.03(a) and (d) and Puc 2503.04(c)(1), because SJE had not established that the waivers would serve the public interest and would not disrupt the orderly and efficient resolution of matters before the Commission. On the second question, Staff concluded that SJE was not entitled to an adjudicative proceeding before the Commission and that, even if the requested rules waivers were granted, it would not be necessary to conduct an adjudicative

proceeding in order to render a decision regarding the substantive merits of SJE's claims. Staff recommended that SJE's request for an adjudicative proceeding be denied.

### III. COMMISSION ANALYSIS

We have reviewed SJE's Petition and related filings as well as Staff's memorandum. We agree with Staff that SJE has not adequately supported its request for the necessary rules waivers to permit retroactive banking of RECs or its request for an adjudicative proceeding, and we find that SJE is not otherwise entitled to an adjudicative proceeding before the Commission. These conclusions are discussed in more detail in the two sections that follow.

#### 1. Rules Waiver Requests

In order to approve retroactive banking of 2010 RECs as requested by SJE, the Commission would have to waive relevant provisions of N.H. Code Admin. Rules Puc 2503.03(a) and (d) and Puc 2503.04(c)(1). These rules provide as follows:

Puc 2503.03(a) On or before July 1 of each year, a provider of electricity shall file a report with the commission on Form E-2500, Annual Renewable Portfolio Standard Compliance Filing, documenting the provider's compliance with this part for the preceding calendar year.

Puc 2503.03(d) The report shall include:

\* \* \*

(14) Total excess certificates by class to be banked for future compliance years.

Puc 2503.04(c) An owner of certificates, or fractional certificates, may bank unused certificates by filing with the commission:

(1) By July 30 of each year, for certificates tracked by the GIS to be banked from the prior calendar year, a report issued by GIS to the owner indicating the total number of certificates owned and settled for the prior calendar year.

Under these rules, SJE was required by July 1, 2011, to list the number of unused RECs it sought to bank for use during the 2011 and/or 2012 RPS compliance years, and to support its claim to bank these RECs by submitting the specified GIS reports as back-up documentation. SJE first attempted to revise the number of 2010 RECs subject to banking in late 2012. SJE is

attempting, through its Petition and earlier submissions, to revise and supplement its required reports to claim additional banked RECs more than 16 months after the applicable deadline.

Pursuant to N.H. Code Admin. Rules Puc 201.05(a), the Commission may waive its rules if the waiver serves the public interest and will not disrupt the orderly and efficient resolution of matters before the Commission. Under Puc 201.05(b), the “public interest” is based on whether:

- (1) Compliance with the rule would be onerous or inapplicable given the circumstances of the affected person; or
- (2) The purpose of the rule would be satisfied by an alternative method proposed.

We agree with Staff that SJE has not provided sufficient evidence to support granting the requested rules waivers pursuant to these standards. Given that other electricity providers have been able to comply with the reporting requirements and meet the specified filing deadlines without issue, we cannot determine that “compliance with the rule would be onerous or inapplicable given the circumstances” of SJE. Nor has SJE proposed any alternative method that would satisfy the purposes of the REC banking reporting rules.

We further believe that SJE’s requested rules waivers would “disrupt the orderly and efficient resolution of matters before the commission,” because electricity providers must file by July 1 their RPS compliance reports with respect to the preceding compliance year and must file by July 30 their GIS reports showing the total RECs owned and settled to justify the number of unused RECs to be banked for potential future RPS compliance. SJE did not originally seek a waiver of these rules until more than 16 months after the deadline for requesting REC banking. SJE’s latest recalculation of RECs requested to be retroactively banked was submitted more than two full years after the banking request was due. These substantially late attempts to increase the number of 2010 RECs banked for future use are disruptive to the Commission’s administration

of the RPS program, to budgeting with respect to the renewable energy fund, and to planning renewable energy fund expenditures.

SJE has asserted that the Commission's rules and filing requirements regarding REC banking are inconsistent with, and therefore "trumped" by, the provisions of RSA 362-F:7, I. This statutory section provides, in relevant part, as follows:

Certificates shall only be used by providers of electricity for compliance with the requirements of RSA 362-F:3 in the year in which the generation represented by the certificate was produced, except that unused certificates of the proper class issued for production during the prior 2 years may be used to meet up to 30 percent of a provider's requirements for a given class obligation in the current year of compliance.

As noted by SJE, this statutory provision does not contain the word "banked," nor does it include any reporting requirements or filing deadlines. That does not mean, however, that the rules are inconsistent with the statute. Administrative rules provide the details to implement statutory requirements and in New Hampshire the Joint Legislative Committee on Administrative Rules ensures that agencies limit rules to their statutory mandates.

Under RSA 362-F:13, I, the Commission is authorized and directed to adopt rules to administer the RPS program, including the use of RECs by electricity providers to meet their RPS compliance obligations. The Commission's Puc 2500 rules, including the specific rules at issue here, have been adopted pursuant to this statutory authority, and in accordance with the Administrative Procedure Act, RSA 541-A. In this case, the reporting and filing obligations and deadlines included in Part 2503 of the Commission's administrative rules specify the process by which an electricity provider must provide evidence to the Commission to verify the number of unused RECs it may use for future RPS compliance under RSA 362-F:7, I. The rules implement the statute and are not inconsistent with or superseded by the statute. Under RSA 541-A:22, II, these rules are valid and binding on the persons they affect, have the force of law, and "shall be

prima facie evidence of the proper interpretation of the matter that they refer to.” As such, these rules can be waived only pursuant to the procedures and standards set forth in Puc 201.05. SJE has not demonstrated that its requested rules waivers are justified in these circumstances, as discussed above, and we therefore deny the requested waivers.

## 2. Adjudicative Proceeding Request

In the Petition, SJE requested an adjudicative proceeding to resolve its claims related to retroactive REC banking, citing N.H. Code Admin. Rules Puc 102.01 and Puc 2505.13.<sup>2</sup> We note, however, that Puc 2505.13 provides an adjudicative process for a party aggrieved by a Commission decision under Part Puc 2505, *Source Eligibility Determination and Monitoring*. Part Puc 2505 covers certification of renewable energy generators as eligible to produce RECs, and does not address electricity providers’ use of RECs to meet their RPS compliance obligations. No specific provision in Part Puc 2503, *Renewable Portfolio Certificate Obligations*, which contains the rules at issue here, provides for or references the availability of an adjudicative proceeding.

Under Puc 102.01, an “adjudicative proceeding” is defined as a “proceeding conducted pursuant to the procedure followed in contested cases, as set forth in RSA 541-A:31 through RSA 541-A:36 and the rules of the commission.” “Contested case” is defined in our organizational rules as “a proceeding in which the legal rights, duties, or privileges of a party are *required by law* to be determined by the commission after an opportunity for hearing.” N.H. Code Admin. Rules Puc 102.04 (emphasis supplied); *see also* RSA 541-A:1, IV. SJE has identified no provision of applicable law or rules requiring that a hearing be held with respect to an electricity provider’s use of RECs to meet its RPS obligations. We therefore conclude that

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<sup>2</sup> SJE cited Puc 2505.13 based in part on a reference to this rules section contained in the Commission's secretarial letter dated October 14, 2013.

the Commission is not required to conduct an adjudicative proceeding to render a decision regarding SJE's Petition.

Even if a hearing is not required by law, the Commission "*may* commence an adjudicative proceeding at any time with respect to a matter within [its] jurisdiction." RSA 541-A:31, II (emphasis supplied). We believe this statutory authority is permissive rather than mandatory, and does not require the Commission to conduct an adjudicative proceeding merely because a party has requested such a proceeding. We do not believe it is necessary to hold a hearing before reaching a decision regarding SJE's rules waiver requests and, because we have denied the requested waivers, there is no need to conduct an adjudicatory proceeding regarding the substantive merits of SJE's request for retroactive banking of unused RECs. We therefore deny SJE's request for an adjudicative proceeding.

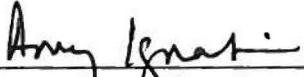
**Based upon the foregoing, it is hereby**

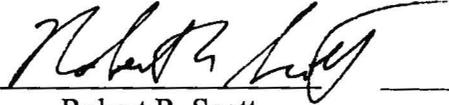
**ORDERED**, that the Petition of South Jersey Energy Company Pursuant to Rules Puc 102.01 and Puc 2505.13 Regarding SJE 2011 RPS Compliance Requirements is DENIED; and it is

**FURTHER ORDERED**, that South Jersey Energy Company shall pay to the State of New Hampshire the sum of \$62,962, the outstanding balance of alternative compliance payments due for the 2011 renewable portfolio standard compliance year, on or before July 1, 2014.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of

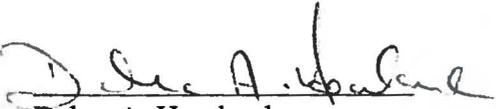
May, 2014.

  
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Amy D. Ignatius  
Chairman

  
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Robert R. Scott  
Commissioner

  
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Martin P. Honigberg  
Commissioner

Attested by:

  
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Debra A. Howland  
Executive Director