

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

DE 08-053

PSNH Class IV REC Application for Eight Existing
Small Hydroelectric Facilities

**GRANITE STATE HYDROPOWER ASSOCIATION'S PETITION TO
COMMENCE ADJUDICATIVE PROCEEDING OR, IN THE ALTERNATIVE,
TO ACCEPT ITS MOTION TO INTERVENE AS A
PETITION FOR DECLARATORY RULING**

Granite State Hydropower Association ("GSHA") respectfully petitions the Commission either to commence an adjudicative proceeding with respect to the above-captioned matter, or, in the alternative, to accept its May 6, 2008 motion to intervene in this matter as a petition for declaratory ruling under Puc 207.01. In support of its petition, GSHA says:

A. Background and Question Presented

1. On March 28, 2008, Public Service Company of New Hampshire ("PSNH") initiated this proceeding by filing with the Commission a "Class IV Renewable Energy Certificate Eligibility Application for Existing Small Hydroelectric Facilities," in which it requested Renewable Energy Certificate ("REC") eligibility determinations for eight PSNH hydroelectric power projects.

2. On May 6, 2008, GSHA moved to intervene in opposition to PSNH's application for Class IV REC's for its hydro projects. (A copy of GSHA's motion is attached as Exhibit A for ease of reference.) GSHA raised two generic objections to PSNH's request, arguing that (a) four of the PSNH projects (Amoskeag, Garvins Falls, Ayers Island and Eastman Falls) exceed the 5 MW/source size limit established in RSA

362-F:4, IV, and (b) seven of the eight projects (all but Amoskeag) fail to meet the RSA 362-F:4, IV requirement that eligible Class IV sources must have installed both upstream and downstream fish passage facilities after being required to do so by the Federal Energy Regulatory Commission (“FERC”).

3. The Commission has not acted on GSHA’s motion to intervene, leaving GSHA uncertain as to its status in this proceeding, although no party has objected to GSHA’s intervention, and PSNH has expressly stated that it has no objection to GSHA’s request for intervention.

4. Both Staff and PSNH have filed responses to GSHA’s arguments, as if assuming that GSHA is participating as a party in this docket.

- (a) In their Recommendation filed on June 27, 2008, Commission Staff agreed with GSHA’s interpretation of the 5 MW size limitation for Class IV hydro facilities, and accordingly recommended that Class IV certification be denied with respect to the four largest PSNH hydro projects. However, Staff disagreed with GSHA’s interpretation of the fish passage requirement for Class IV hydros. Staff has requested further information on the four remaining hydro projects for which PSNH seeks Class IV certification, and plans to submit a recommendation with respect to these four projects when PSNH completes those applications.
- (b) In its July 11, 2008 Response to GSHA’s motion to intervene, PSNH stated (page 1) that it has no objection to GSHA’s request for intervention, but took issue with GSHA’s interpretations of

both the 5 MW size limitation and the fish passage requirement in RSA 362-F:4, IV and Puc 2502.10. PSNH asked that the Commission make a determination on the eligibility of the Amoskeag Station units (which have both upstream and downstream fish passage facilities, but which total more than 5 MW of capacity), but suggested at p. 3 that:

...For the convenience of other applicants, the Commission should decide if each Class IV Source is required to have a FERC order specifically requiring upstream and downstream fish passage and whether the generating facility must have installed those upstream and downstream fish passageways prior to certification by this Commission...

PSNH noted that it is willing to defer consideration of the other seven applications until this generic issue has been resolved.

The Staff and PSNH responses make clear that these applications are in fact contested.

5. The confusion over GSHA's status may be due in large part to an unresolved issue as to whether a contested application for REC's must necessarily be a "non-adjudicative process" under the Renewable Portfolio Standard Act ("RPSA"), RSA 362-F:11, I, and the New Hampshire Administrative Procedure Act ("APA"), RSA 541-A:1, I, IV and X. In a recent informal e-mail response to a status query from the undersigned's partner Susan Geiger, Commission General Counsel Donald Kreis suggested that there are no intervenors or other parties (as that term is used in RSA 541-A:1, XII) in Docket DE 08-053 "because it is not presently a contested case within the meaning of the Administrative Procedure Act or the Puc 200 rules." Attorney Kreis cited Puc 2505.13, entitled "Adjudicative Proceedings," which provides:

The Commission shall conduct an adjudicative proceeding pursuant to RSA 541-A and Puc 200 upon petition by an applicant, source, or other party aggrieved by a decision under this part.

As Attorney Kreis suggests, this language implies that an initial proceeding to determine REC eligibility under the Puc 2500 rules is not an “adjudicative proceeding,” and that a person or entity who questions or objects to a determination of REC eligibility must wait until that determination has been made in an initial non- adjudicative proceeding before challenging that determination in a subsequent adjudicative proceeding.

6. This view is consistent with RSA 362-F:11, I, which provides that the Commission shall certify the classification of an existing or proposed generating facility “in a non-adjudicative process.” However, it leads to other questions and problems, among them:

- (a) Two proceedings rather than one would be necessary in any case that is in fact contested (even if the Commission is on notice from the beginning that the case is contested), thus resulting in considerable duplication of effort, delay, and inefficiency in decision-making.
- (b) If, under Puc 2505.13, only an applicant, source, or other party aggrieved by an [initial] decision may petition to initiate an adjudicative proceeding (effectively, an appeal of the initial decision), but no person or entity other than the applicant can obtain standing as a party in the initial proceeding (because it is not a “contested case” within the meaning of RSA 541-A:1, IV), then how does an entity like GSHA - which has a clear interest in the

outcome (see paragraph 11(3) below) but is neither the applicant nor a “source” nor apparently a “party” - obtain standing to appeal the initial determination in a subsequent adjudicative proceeding?

7. GSHA is not necessarily asking the Commission to resolve this procedural question as part of the instant case, but in order to avoid duplication of effort and the inefficient use of Commission resources, and in light of the importance of the generic questions raised by GSHA’s May 6 filing, GSHA respectfully asks the Commission either to commence an adjudicative proceeding to determine the eligibility of PSNH’s hydro projects for Class IV status, or, in the alternative, to treat GSHA’s May 6 motion to intervene as a petition for declaratory ruling under Puc 207.01.

B. Conversion to Adjudicative Proceeding

8. GSHA respectfully suggests that it would be appropriate for the Commission to convert Docket 08-053 to an adjudicative proceeding by taking note of the fact that the proceeding is in fact contested, and acknowledged as such by both the applicant (PSNH) and the Commission Staff, as well as by the would-be intervenor (GSHA).

9. RSA 541-A:31, II gives the Commission authority to commence an adjudicative proceeding “at any time with respect to a matter within [its] jurisdiction.” Paragraph I of the same statute provides that “An agency shall commence an adjudicative proceeding if a matter has reached a stage at which it is considered a contested case...” (emphasis added).

C. Petition for Declaratory Ruling

10. If the Commission declines to commence an adjudicative proceeding, then GSHA respectfully requests that the Commission accept its May 6 motion to intervene (attached) as a petition for declaratory ruling under Puc 207.01.

11. GSHA submits that none of the three grounds for dismissal set forth in Puc 207.01(c) exist, in that:

- (1) The motion sets forth factual allegations about PSNH's hydro projects that are definite and concrete;
- (2) The issues raised by GSHA's motion are not hypothetical, nor do they involve a request for advice on how the Commission might decide a future case; and
- (3) The legal rights of GSHA's members - several of whom own hydro projects in New Hampshire that are less than 5 MW in size and have installed both upstream and downstream fish passage facilities required by FERC - are impacted by the PSNH filing and GSHA's motion to intervene. GSHA believes and will present evidence to show that if PSNH's small hydro projects are granted Class IV REC's based on PSNH's interpretation of the size limit and fish passage requirements in RSA 362-F:4, IV and Puc 2502.10, then virtually all small hydroelectric projects located in New England would qualify for Class IV REC's, the Class IV REC market would be flooded, and Class IV REC's would effectively have no market value.

12. GSHA requests the opportunity to present testimony and other evidence in

support of its opposition to PSNH's request in an adjudicative proceeding, and to that end requests that the Commission either commence an adjudicative proceeding or accept GSHA's May 6, 2008 motion to intervene as a petition for declaratory ruling under Puc 207.01.

Respectfully submitted

GRANITE STATE HYDROPOWER
ASSOCIATION

By its attorneys,

Orr & Reno, P.A.
One Eagle Square
P.O. Box 3550
Concord, NH 03302-3550

By: Howard M. Moffett
Howard M. Moffett
(603) 223-9132
HMoffett@orr-reno.com

Dated: July 18, 2008

Verification

The undersigned Regina Phillips, an authorized representative of petitioner Granite State Hydropower Association, hereby affirms that I am generally familiar with the matters discussed and the facts alleged in the foregoing petition, and that they are true, accurate, and complete to the best of my knowledge and belief.

Regina Phillips

State of New Hampshire
County of Rockingham, ss

Signed and sworn to (or affirmed) before me on July 18, 2008 by _____

Lidia Capellan
Justice of the Peace/Notary Public

seal

Certificate of Service

I hereby certify that a copy of the foregoing was, on this date, sent via first-class mail, postage prepaid, to William H. Smagula, P.E. and Gerald Eaton, Esq., at Public Service Company of New Hampshire, PO Box 330, Manchester, NH 03105-0330.

Date: 7/21/08

Howard M. Moffett
Howard M. Moffett