

State of New Hampshire
Before the
Public Utilities Commission

Docket No. DE 10-151

Holyoke Gas & Electric Department
Application for Certification for 14 REC Eligible Facilities

LEGAL BRIEF OF COMMISSION STAFF

Pursuant to the Secretarial Letter of January 31, 2011, Commission Staff hereby submits its legal brief.

INTRODUCTION AND BACKGROUND

On June 2, 2010, Holyoke Gas and Electric Department (HG&E or Applicant) of Holyoke, Massachusetts filed an application for certification of fourteen hydroelectric facilities as sources eligible to produce Class IV Renewable Energy Certificates (RECs) pursuant to RSA 362-F, the New Hampshire Electric Renewable Portfolio Standard (RPS) law.

On July 27, 2010, Staff filed a memorandum with the Commission recommending that the Commission deny the application. Staff, in its memorandum, described the facilities as separately located facilities on a canal system in the City of Holyoke adjacent to the Connecticut River. Staff observed that, although the application stated that each facility has installed upstream and downstream fish passages required by the Federal Energy Regulatory Commission (FERC), responses to Staff inquiry revealed that the Applicant had installed a single upstream and downstream fish passage system for all 14 of the hydro facilities. The fish passage system is installed at the Hadley Falls Station, which is situated at the entrance of the canal system on which the fourteen facilities are located. In its recommendation, Staff pointed out that New Hampshire's RPS law requires that an existing small hydroelectric facility has "actually installed

both upstream and downstream diadromous fish passages and such installations have been approved by the Federal Energy Regulatory Commission.” RSA 362-F:4, IV. Because there is only one upstream and downstream fish passage at the Hadley Falls Station, which serves all the facilities located on the Canal, Staff recommended that the Commission deny certification of the fourteen facilities.

On August 12, 2010, the Commission issued a secretarial letter denying certification of the HG&E facilities to produce Class IV RECs. On September 10, 2010, HG&E filed a motion for reconsideration or, in the alternative, a motion for rehearing of the Commission’s decision. Pursuant to N.H. Code Admin Rules Puc 2505.13, the rules implementing RSA 362-F, the Commission shall conduct an adjudicative proceeding pursuant to RSA 541-A and Puc 200 upon petition by an applicant of any decision under the RPS rules. On October 28, 2010, the Commission issued Order No. 25,160 commencing an adjudicative proceeding and scheduling a prehearing conference. On November 17, 2010, the Commission issued a supplemental order of notice scheduling a prehearing conference for December 7, 2010. Granite State Hydropower Association (GSHA) entered an appearance at the prehearing conference.

On December 8, 2010, Staff filed a recommended procedural schedule stating that the Parties and Staff had determined that the docket could be addressed with paper filings and proposing a deadline for the filing of stipulated finds of fact and legal briefs. The Commission issued a secretarial letter on December 10, 2010 accepting Staff’s recommendation. On January 28, 2011, Staff proposed a revision to the procedural schedule which was accepted by the Commission via a secretarial letter issued on January 31, 2011. Pursuant to the revised schedule, on February 11, 2011, the Applicant, GSHA and Staff filed a Stipulated Finding of Facts with certain attachments as follows: Amended Appendix A , “Facility Information”, Appendix B,

“Figures”, Appendix C “FERC License Orders and Water Quality Certifications”, and Appendix D, the Legislative History of the PRS law (HB 873) and the 2009 amendment (HB229) pertaining to Class IV Eligibility.

I. Reading the plain words of RSA 362-F:4,IV, none of the HG&E hydro facilities qualify for Class IV REC certification.

RSA 362-F:4,IV reads in pertinent part as follows:

“IV. (a) Class IV (Existing Small Hydroelectric) shall include the production of electricity from hydroelectric energy, provided the facility began operation prior to January 1, 2006, has a total nameplate capacity of 5 MWs or less as measured by the sum of the nameplate capacities of all the generators at the facility, has actually installed both upstream and downstream diadromous fish passages and such installations have been approved by the Federal Energy Regulatory Commission, and when required, has documented applicable state water quality certification pursuant to section 401 of the Clean Water Act for hydroelectric projects.”

As stated in the Stipulated Findings of Fact, the FERC hydroelectric stations for which the Applicant seeks certification are located in the City of Holyoke’s 4.5 mile Canal System, which is constructed on three levels. Stipulated Findings of Fact at 2. The Canal System includes seven hydro facilities that are licensed as FERC Project 2004. The seven FERC Project 2004 facilities have a total nameplate capacity of 42.955 MW.

As noted above, the statute states that the facility shall have “a total nameplate capacity of 5vMWs or less as measured by the sum of the nameplate capacities of all the generators of the facility. . .” Clearly, the total nameplate capacity of the hydro facilities included in FERC Project 2004 exceed 5vMWs and, consequently, none of the facilities in the Canal System are eligible for certification to produce Class IV RECs.

As further stated in the Stipulated Findings of Fact, the seven remaining hydro facilities included in the application each have separate FERC licenses. These seven facilities for which the Applicant seeks REC certification are also served by the fish passage system situated at Hadley Station and approved under FERC Project No. 2004. *Id.* Again, upon a plain reading of

the statute, it is clear that these seven facilities do not qualify for REC certification. The statute requires that each facility with a total nameplate capacity of 5 MWs or less have “actually installed both upstream and downstream diadromous fish passages and such installations have been approved by the Federal Energy Regulatory Commission. . .” (emphasis added). Because none of the independently-FERC licensed hydro facilities have separately installed both upstream and downstream diadromous fish passages, none of them are eligible for REC certification.

II. The Commission has previously ruled that an applicant cannot disaggregate a hydroelectric facility to qualify individual generators for Class IV REC production.

The Stipulated Findings of Fact state that FERC Project 2004 consists of seven stations.¹ HG&E has requested that the Commission consider each station separately to determine their eligibility for Class IV RECs even though the total nameplate capacity of FERC Project 2004 is 42.955 MW.

The Commission considered a similar issue in Docket No. DE 08-053, *Public Service Company of New Hampshire*, and did not allow the applicant, Public Service Company of New Hampshire (PSNH) to disaggregate a hydroelectric facility to qualify individual generators for the production of Class IV RECs.

In Docket No. DE 08-053, PSNH requested certification of several hydroelectric systems, including Amoskeag, Garvins Falls, Eastman Falls and Ayers Island. In its application, PSNH requested certification of individual generators that were part of each system. For Amoskeag, PSNH requested certification of two generators in the system that had nameplate capacities of 5 MW each, although the Amoskeag system’s total nameplate capacity is 16 MW.

¹ According to HG&E, only the Hadley Falls Station exceeds 5 MW capacity and HB&E has not requested REC certification for the Hadley Falls Station.

For Garvins Falls, PSNH requested certification of the four generators in that system, (two with nameplate capacities of 3.3 MW, one with capacity of 2.4 MW in and one with capacity of 3.2 MW), despite the fact that the total capacity of Garvins Falls equaled 12.20 MW. Similarly, PSNH requested that the two generators at Eastman Falls—one with 1.8 MW capacity and one with 4.6 MW capacity—to be separately certified although the aggregated capacity for Eastman Falls totaled 8.4 MW. Finally, PSNH asked for separate certification of the three 2.8 MW generators in the Ayers Island facility, although the total nameplate for the Ayers Island system was 8.4 MW.

In a secretarial letter dated September 23, 2008, the Commission denied certification for these four facilities because they each exceeded the 5 MW gross nameplate capacity limitation set by the statute. GHSA intervened in the docket and filed a petition requesting an adjudicative proceeding. Subsequently the Commission opened an adjudicative proceeding which included a rehearing of its denial of certification for Amoskeag, Garvins Falls, Eastman Falls and Ayers Island.²

In that proceeding, PSNH argued that the Commission's denial of certification of the Amoskeag, Garvins Falls, Eastman Falls and Ayers Island Facilities was in error because the decision was based on the aggregation of all generation units' nameplate capacities at those facilities. PSNH contended that the statutory language clearly indicated that each individual generator is intended to be a source eligible for certification as a Class IV facility.

The Commission rejected PSNH's argument and stated as follows: "A logical reading of RSA 362-F: in its entirety and RSA 362-F:4, IV in particular leads to the conclusion that 'gross

² For a full procedural history and detailed description of the issues in Docket No. DE 08-053, See Order No. 24,940 (February 6, 2009).

nameplate capacity' relates to the total capacity of a hydroelectric facility, i.e. dam, and not to the capacity of a turbine that is a component part of that facility." Order No. 24,940 at15.

The Commission must apply the same logic in the instant proceeding. The hydroelectric units that are part of FERC Project 2004 have a "gross nameplate capacity" well in excess of 5 MW. HG&E should not be allowed to disaggregate the units to qualify the individual generators for Class IV RECs. The Commission made the correct decision in denying certification for the HG&E hydroelectric units and the decision should be upheld.

III. The Commission has previously determined that RSA 362-F:4, IV requires each small hydroelectric facility to have actually installed both upstream and downstream fish passages.

In Docket No. 08-053 (referenced above) and Dockets No. DE 08-123 and 124 (*FPL Energy Maine Hydro, LLC*), the Commission considered the meaning of the law's requirement for the installation of upstream and downstream diadromous fish passages. *See* Order No. 24,940 (February 6, 2009). In that proceeding, PSNH and FPL Energy Maine Hydro, LLC (FPL Energy) argued that then-applicable statutory language³ merely required a facility to comply with FERC license conditions regarding fish passages. PSNH said that it complied with the FERC license conditions imposed by installing fish passages when required under the terms of the FERC licenses. Order No. 24,940 at 9. GSHA, which intervened in these prior dockets, contended that the statutory language regarding fish passages was meant to apply to only small hydroelectric facilities that have been required by FERC to install both upstream and

³ Before being amended in 2009, the statutory language read as follows: "Class IV (Existing Small Hydroelectric) shall include the production of electricity from hydroelectric energy, providing the source began operation prior to January 1, 2006, has a gross nameplate capacity of 5 MWs or less, has installed upstream and downstream diadromous fish passages that have been required and approved under the terms of its license or exemption from the Federal Energy Regulatory Commission, and, when required, has documented applicable state water quality certification pursuant to section 401 of the Clean Water Act for hydroelectric projects."

downstream fish passages. GSHA referred to the legislative history of RSA 362-F in support of its position. *Id.* at 13.

The Commission determined that the statute was ambiguous and considered the legislative history to determine the meaning of the statutory provision requiring eligible facilities to have “installed upstream and downstream diadromous fish passages that have been required and approved under the terms of its license or exemption from the [FERC]. . .” RSA 362-F:4, VI. Upon review, the Commission concluded that “only those hydroelectric facilities that have both upstream and downstream fish passages are eligible for certification for Class IV RECs.” *Id.* at 17.

In the instant proceeding, there is one fish passage system which supports all 14 of the hydroelectric units that are part of the HG&E application. Although the fish passage system may be appropriately designed for the entire Canal System, none of the individual stations, with the possible exception of Hadley Station where the fish passages are located, have actually installed both upstream and downstream diadromous fish passages. Therefore, even if the Commission were to disaggregate the stations as requested by HG&E, none of the facilities would meet the fish passage requirement of RSA 362-F:4, IV.

IV. The 2009 Legislative Amendment (HB 229) to RSA 362-F:4, IV clarified the requirement that qualifying hydroelectric facilities must have installed both upstream and downstream fish passages.

In 2009, the General Court enacted HB 229 which amended RSA 362-F:4, IV by clarifying the requirement that, for small hydroelectric facilities to be eligible to produce Class IV RECs, such facilities must have installed both upstream and downstream fish passages pursuant to the requirements of a FERC license. Staff’s position is that the law is clear regarding that requirement. Should the Commission find that the current statutory language is ambiguous,

Staff refers the Commission to the legislative history of HB 229 contained in Appendix D to the Stipulated Findings of Fact.

Representative Suzanne Harvey was one of the co-sponsors of HB 229. On April 9, 2009, Representative Harvey testified before the Senate Energy, Environment and Economic Development Committee on HB 229. What follows is a quote from Representative Harvey from that hearing.

“Class IV definition in HB 873, which is the RPS, was intended to apply to hydro electric projects that have been required to and have provided at a minimum up stream and down stream androgynous [sic] fish passages. That was from sea to fresh water. And in the event catadromous fish passages from fresh to sea water also are required by regulators, then the project must also have up stream and down stream fish passages.

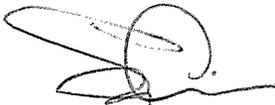
The intent of the RPS was to reward the plants and the owners that went to the trouble and expense of installing diadromous fish passages by deeming them eligible for the RECs and to specify the size of the plant for eligibility. So, that for instance, very large projects would not overwhelm the market for Class IV RECs. The text of the act was evidently not clear enough for Class IV renewable sources, and we want to make sure the intent of the law is followed in any future rulings.”

Senate Energy, Environment and Economic Development Committee Hearing Transcript, April 9, 2009, at 2.

The legislative history of HB 229, subsequently enacted into law on June 10, 2009, clearly indicates that the General Court intended to require a small hydroelectric facility to have actually installed both upstream and downstream fish passages to qualify to produce Class IV RECs. In other words, to be eligible to produce Class IV RECs, a hydroelectric facility must have a nameplate capacity of 5MW or less and have actually installed both upstream and downstream fish passages as required and approved by FERC. Based on this requirement, none of the facilities in HG&E’s application qualify for Class IV REC certification and the Commission’s original decision to deny such certification should be upheld.

In conclusion, the Staff contends the Commission made the correct decision when it denied the certification of HG&E's facilities to produce Class IV RECs and we recommend that the Commission reaffirm its denial.

Respectfully Submitted



Suzanne Amidon on behalf of
Commission Staff