THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

ELECTRIC RENEWABLE PORTFOLIO STANDARD

Adjustments to Class I and Class III Renewable Portfolio Requirements
Docket No. DE 13-021

COMMENTS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

A. INTRODUCTION

1. On January 18, 2013, the New Hampshire Public Utilities Commission ("Commission") issued an order of notice indicating its intention to open a proceeding to review possible adjustments to the minimum requirements to procure Class III Renewable Energy Certificates ("RECs") under RSA Chapter 362-F. The Commission scheduled a pre-hearing conference in the docket for February 14, 2013. On January 28, 2013, Public Service Company of New Hampshire ("PSNH" or "Company") petitioned to intervene in the proceeding. On January 31, 2013, the Commission issued a supplemental order of notice converting the February 14, 2013 pre-hearing conference to a public comment session. In that supplemental notice the Commission also indicated its intention to accept comments on possible changes to the requirements with respect to Class I RECs for useful thermal energy ("thermal RECs"). PSNH, and others, appeared and provided oral comments on the issues noticed by the Commission. At that session, the Commission stated that it would accept written comments on the same topics by February 21, 2013. The Commission identified certain issues it felt should be addressed through written comments. In this submission, PSNH provides further comments as requested by the Commission.

B. CLASS I REC REQUIREMENT

2. In 2012, New Hampshire enacted Senate Bill 218 which, in relevant part, modified the Class I REC requirement by requiring that as of 2013 a set percentage of the Class I requirement was to be satisfied by the acquisition of thermal RECs. RSA 362-F:3. Also, under the new law the Commission was to adopt rules relating to thermal RECs. RSA 362-F:13, VI-a. In its supplemental order of notice, the Commission indicated that it was experiencing delays in adopting rules relating to thermal RECs and sought input about whether, under the authority in RSA 362-F:4, V, it "is reasonable to delay the implementation of the new useful thermal REC requirement for one year until 2014 to allow sufficient time to develop implementing rules."

3. In its comments at the public session on February 14, 2013, PSNH stated that it appeared that RSA 362-F:4, V applied to all of Class I, rather than only the thermal REC portion of Class I. PSNH stated that to the extent the Commission interpreted RSA 362-F:4, V as applying to Class I as a whole, it did not support delaying the incremental change in Class I. PSNH stated that if the Commission determined that it did have the authority to alter the thermal REC requirement alone, PSNH took no position on the advisability of delaying the increase. In its comments, Staff of the Commission stated that it believed the Commission had the requisite statutory authority to delay only the thermal REC requirement and not all of Class I. In seeking further comments, the Commission requested additional discussion on its legal authority to delay the thermal REC requirement alone. In these comments, PSNH responds to the Commission's request for further comments on its legal authority. By commenting on the Commission's authority, PSNH does not intend to modify its prior positions in any way and reiterates that to the extent the Commission interprets its authority as permitting it to modify the requirement for thermal RECs alone, PSNH takes no position. To the extent the Commission determines that it

is limited to modifying the requirements of Class I as a whole, however, PSNH does not favor accelerating or delaying the requirements relating to all of Class I.

4. Initially, PSNH notes that the Commission's authority is that which is expressly granted in, or fairly implied by, statute. *See Appeal of Public Service Company of New Hampshire*, 130 N.H. 285, 291 (1988); *see also Northeast Utilities, Inc.*, Order No. 25,211 (April 5, 2011) at 8-9. With respect to statutory interpretation, the New Hampshire Supreme Court has stated that one must look first to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. *See Appeal of Union Telephone*, 160 N.H. 309, 317 (2010). If the language is not ambiguous there is no need to look to legislative intent. *Id.* Furthermore, statutes are to be interpreted in the context of the overall statutory scheme and not in isolation, and, where possible, statutory provisions are to be interpreted harmoniously. *See Appeal of Pennichuck Water Works*, 160 N.H. 18, 27 (2010).

5. Following Senate Bill 218, as of January 1, 2013, Class I RECs include the production of electricity or useful thermal energy from: wind energy; geothermal energy, if the geothermal energy output is in the form of useful thermal energy only if the unit began operation after January 1, 2013; hydrogen derived from biomass fuels or methane gas; ocean thermal, wave, current, or tidal energy; methane gas; eligible biomass technologies; solar thermal energy, if the solar thermal energy output is in the form of useful thermal energy only if the unit began operation after January 1, 2013; Class II sources, if not used to meet the requirements of other classes; certain incremental electricity production at eligible biomass, methane or hydroelectric sources; certain Class III or IV sources following certain capital investments; and certain modified fossil facilities that now use biomass to displace fossil use. RSA 362-F:4, I. Pursuant to RSA 362-F:4, V, "For good cause, and after notice and hearing, the commission may

accelerate or delay by up to one year, any given year's incremental increase in class I or II renewable portfolio standards requirement under RSA 362-F:3." This provision existed prior to, and was not modified by the passage of, Senate Bill 218. In its supplemental order of notice, the Commission relied upon RSA 362-F:4, V as providing authority to modify the requirements relating to thermal RECs.

6. PSNH interprets RSA 362-F:4, V as providing the Commission the authority to accelerate or delay an incremental increase in the requirements for either Class I or Class II RECs. The statute does not, on its face, grant authority to accelerate or delay a portion or subset of either of those classes. There is nothing in the statute separating out any particular technology or source from any others within Class I, and to conclude that it does is to read words into the statute that the legislature did not see fit to include. *See Frost v. Commissioner, New Hampshire Banking Department*, 163 N.H. 365, 374 (2012) (The Court will "interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include."). Similarly, PSNH notes that RSA 362-F:4, VI provides that the Commission may make certain modifications to the requirements for Class III and Class IV RECs. That provision also does not relate to any particular technology or source, but to the classes. Read on its face, and in harmony with RSA 362-F:4, VI, RSA 362-F:4, V limits the Commission to amending requirements for the entirety of Class I, rather than a subset or portion of that class.

7. Furthermore, RSA 362-F:3, which sets the REC amounts that must be procured by electricity providers such as PSNH, reads, in relevant part:

> A set percentage of the class I totals shall be satisfied annually by the acquisition of renewable energy certificates from qualifying renewable energy technologies producing useful thermal energy as defined in RSA 362-F:2, XV-a. The set

> percentage shall be 0.2 percent in 2013, 0.4 percent in 2014, and increased annually by 0.2 percent per year from 2015 through 2025.

The statute states that thermal RECs are to be at a "set percentage" of the Class I totals in each year. It also explicitly states what the set percentage "shall" be. "Generally, the use of the word 'shall' in a statutory provision is a command, requiring mandatory enforcement." *Schiavi v. City of Rochester*, 152 N.H. 487, 489 (2005). In that, for thermal RECs, the statute states what the "set percentage of the class I totals shall be", PSNH interprets the statute as limiting the Commission from altering the thermal REC requirement, though it may be able to affect the overall Class I totals in a particular year. In other words, even if the Commission was to accelerate or delay the Class I totals, the percentage of thermal RECs must remain the same. For these reasons, PSNH believes that a plain reading of these statutes does not permit the Commission to amend the required percentages for thermal RECs alone in 2013.

C. CLASS III REC REQUIREMENT

8. According to its January 18, 2013 order of notice in DE 13-021, the Commission sought comments on whether it is appropriate to adjust Class III REC requirements pursuant to RSA 362-F:4, VI, and if so, what calendar years should be adjusted and how should any adjustments be calculated. In its comments at the public session on February 14, 2013, PSNH stated a willingness to assist the Commission with gathering the facts surrounding this issue and suggested that one or more technical sessions with the relevant stakeholders would be an effective means of gaining a more complete understanding of the Class III market and exploring potential ways to implement RSA 362-F:4, VI. PSNH described the current difficulty in obtaining Class III RECs, and mentioned that a recent Request for Proposal seeking to procure

Class III RECs yielded zero offers. Below, PSNH provides further comments and elaborates on some of the issues discussed at the public session.

Senate Bill 148 ("SB 148")

9. Various parties at the public session suggested that the Commission should delay or otherwise postpone docket DE 13-021 in favor of allowing SB 148, which is currently pending before the New Hampshire legislature, to correct any real or perceived problems with the Class III REC requirement. As currently drafted, SB 148 reduces the 2013 requirement for Class III RECs from 6.5% to 5.5% and the 2014 requirement from 7.0% to 5.5%. It also increases the Class III Alternative Compliance Payment ("ACP") rates to a minimum of $45 per REC in 2015 and beyond. PSNH does not intend to offer any discussion of the merits of SB 148 in these comments. PSNH does, however, strongly believe that DE 13-021 is the more suitable forum to carefully consider the state of the Class III market. SB 148 includes numerous changes to the renewable portfolio standard ("RPS") statutes covering a wide spectrum of issues, and not simply changes to Class III.

10. PSNH believes it more likely that a proper review of the current imbalance in Class III REC supply and demand will be conducted by the Commission rather than by the legislature. Accordingly, and for the reasons discussed below, PSNH feels that the existing statute, RSA 362-F:4, VI, provides a solid vehicle for addressing the issue and that SB 148 is not the appropriate conduit to address this dynamic market.

RSA 362-F:4, VI

11. RSA 362-F:4, VI states:

> After notice and hearing, the commission may modify the Class III and IV renewable portfolio requirements under RSA 362-F:3 for calendar years beginning January 1, 2012 such that the requirements are equal to an amount between 85 and 95 percent of the reasonably expected potential annual output of

available eligible sources after taking into account demand from similar programs in other states.

This provision appears to address the exact situation presently before the Commission. Class III and Class IV relate to existing renewable resources (as opposed to Class I and II which were created to spur investment in a desired quantity of new resources), and when the original RPS bill was debated, it was undoubtedly a difficult task to determine the proper percentage requirements that would result in a market that was neither a perpetual buyer's market nor a consistent seller's market. Further, it was unknown exactly what quantity of existing resources would qualify for Class III. As an example, it is possible that the legislature believed that at the time the RPS law was established, all of the six (6) New Hampshire-based independent biomass generators (the "Wood IPPs") might qualify. However, due to the law's emission limitations for the Wood IPPs, it was unknown which units would be able to meet these limits or whether certain of the Wood IPPs would require expensive environmental retrofits to lower either their NOX or Particulate Matter emissions, or both. The revenue potential of the Class III RECs was thought to be a possible means to finance these capital upgrades. As of today, only two (2) of the six (6) Wood IPPs are qualified to generate Class III RECs.

12. In addition, and regarding "demand from similar programs in other states", the original RPS drafters could not have known with any certainty what other New England states would do that might impact the demand for resources capable of generating New Hampshire Class III RECs. In fact, as was noted at the public comment session, the Connecticut Class I market has become the favored market for most all of the resources that are currently eligible to create New Hampshire Class III RECs.

13. RSA 362-F:4, VI was crafted in a manner that permits the Commission to address these, or other, scenarios. In fact, the language allows for multiple adjustments, perhaps as often

as annually, if needed to respond to changing market conditions. Had, for example, all six (6) Wood IPPs earned Class III qualification, and had the Connecticut Class I market been structured differently, Docket No. DE 13-021 may have been opened to examine the appropriateness of increasing, rather than decreasing, the percentage requirements. Thus, the Commission should rely upon its authority in RSA 362-F:4, VI to address the changing aspects of the Class III REC market.

Alternative Compliance Payments

14. Whenever a load serving entity cannot find RECs in the market, as is the current situation, it is required to make an ACP into the Renewable Energy Fund ("REF"). For the 2011 RPS compliance year, New Hampshire load serving entities paid a total of $19 Million into the REF. Of this total, $15.5 Million was related to the Class III requirement. PSNH alone paid over $7 Million in Class III ACP payments. For 2012 compliance, PSNH anticipates a similar injection of money into the REF. PSNH is concerned with these large ACP payments. The original RPS law was intended as a method to bring an important revenue stream to existing renewable resources. Given that the current Class III eligible resources can now earn higher revenues selling RECs elsewhere, it certainly can be debated whether the intention of the legislature in creating the Class III requirement is being fulfilled. These ACP expenditures are funded by electric customers, and PSNH strongly believes that the Commission has an obligation to fully explore this issue, not only based upon the direction from the legislature in RSA 362-F:4, VI, but also pursuant to its statutory authority and obligation to ensure electric rates are just and reasonable.