

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 09-008

INDECK ENERGY-ALEXANDRIA, LLC

Application for Class I Renewable Energy Certification

MOTION FOR REHEARING

Indeck Energy-Alexandria, LLC ("Indeck"), a biomass electric generation facility located in Alexandria, New Hampshire, moves the Commission pursuant to N.H. Code Admin. Rule Puc 203.07 and RSA 541:3 to reconsider its October 15, 2012 decision to recertify Indeck's facility to be eligible to produce Class I renewable energy certificates ("RECs") as of July 1, 2011, and instead recertify Indeck's facility to produce RECs effective April 1, 2011, the beginning of the second calendar quarter of 2011.

1. On October 1, 2012, Indeck requested an order stating that Indeck's eligibility to produce RECs, which had been suspended for failure to meet quarterly average NOx emissions requirements during the first quarter of 2011, was no longer suspended, and that Indeck was eligible to produce RECs effective at the beginning of the second calendar quarter of 2011. *See generally, Motion for Clarifying Order.*

2. Although the New Hampshire Department of Environmental Services ("NHDES") certified Indeck's eligibility to produce RECs for the second quarter of 2011 (Exhibit 1) and, although the Commission's staff also recommended recertification of the facility effective as of the beginning of the second quarter (Exhibit 2), the Commission recertified the facility effective at the beginning of the third quarter of 2011. *See Secretarial Letter* dated 10/15/12 at 2. Exhibit 3.

3. The effect of the Commission's decision and apparent interpretation of N.H. Code Admin. Rule 2505.04 is to deny a facility the ability to produce RECs for a minimum of two calendar quarters, including in a quarter during which the facility meets eligibility requirements. This interpretation penalizes a facility during a period in which the facility complies with the emissions requirements. No justification for such a penalty can be found in RSA 362-F, or in the Commission's rules.

4. The Commission's reasoning for recertifying Indeck to produce RECs beginning the third quarter of 2011 is not set forth in the October 15, 2012 Secretarial Letter. The Commission's decision to use the third quarter may however, be based in whole or in part upon a misunderstanding of staff's recommendation. The Secretarial Letter states that staff recommended that "the Commission recertify the Alexandria facility as eligible to produce Class I renewable energy certificates (RECs) as of July 1, 2011." Exhibit 3 10/15/12 at 2. In fact, staff recommended that "the Commission issue an order clarifying that Indeck's eligibility be reinstated and that Indeck is *recertified to produce New Hampshire Class I RECs effective beginning the second quarter of 2011.*" Exhibit 2. In other words, staff recommended that the suspension be lifted and Indeck be eligible to produce RECs as of April 1, 2011, the beginning of the second quarter.

5. If the Commission disagreed with the staff and DES, and instead reached its own conclusion, then the Commission's use of the third quarter misinterprets and misapplies N.H. Code Admin. Rules Puc 2505.04(i).

6. Subsection (i) of Rule 2505.04 provides that "Upon demonstration pursuant to (h) above, the facility shall be certified to be issued certificates as of the next calendar quarter." N.H. Code Admin. Rules 2505.04(i). Because NHDES certified that the Indeck facility was

fully compliant with emission limitations throughout the second quarter of 2011, it is apparent that the Commission must have interpreted the phrase “shall be certified to be issued certificates as of the next calendar quarter” to mean “shall be certified to be eligible to produce certificates as of the next calendar quarter following the quarter in which a facility demonstrates that it has come back into compliance with emission limitations.” This interpretation does not harmonize the several subsections of Rule 2505.04.

7. There are three provisions in Rule 2505.04 that are specifically applicable to recertification, subsections 2505.04(g), (h), and (i), and all must be harmonized and given effect. *See, e.g. Nashua School Dist. v. State*, 140 N.H. 457, 458-59 (1995) (all parts of a statute must be harmonized and construed together to effectuate the statute’s overall purpose, and to avoid illogical or unjust results).

8. Rule 2505.04(g) states the substantive rule for the duration of the period during which a previously certified facility will be ineligible to produce RECs. Subsections (h) and (i) merely state the procedural mechanisms by which the substantive rule in subsection (g) is to be given effect.

9. Subsection (g) provides that, “The suspension of certification pursuant to (f) above *shall be for so long as the facility is out of compliance with the limit on emissions.*” N.H. Admin. Code Rule 2505.04(g) (emphasis supplied). Because the Indeck facility ceased being out of compliance with the NOx emissions standard at the end of the first quarter and was in compliance with the statutory limit on emissions during the entirety of the second quarter of 2011, subsection (g) requires the suspension to cease at the end of the first quarter of 2011. The Commission’s interpretation of Rule 2505.04(i), which continues the suspension for a full quarter during which Indeck was in compliance with emissions requirements, effectively reads

subsection (g) out of the rule. This raises the issue whether the procedural mechanisms stated in subsections (h) and (i) can be interpreted and applied in a manner that gives effect to subsection (g).

10. Subsection (h) provides that, “A facility suspended pursuant to (f) above shall have its suspension lifted upon demonstration to the commission of certification by the department that it meets the limits on emissions.” N.H. Admin. Code Rule 2505.04(h). Subsection (h) does not state how long the suspension is to last (that is stated in subsection (g)); instead, subsection (h) provides that the Commission must act to lift the suspension once NHDES certifies to the Commission that a facility has met the emissions limitations and reporting requirements of subsection (f). Read in conjunction, then, subsections (g) and (h) require a suspension to last only so long as a facility is out of compliance, require reporting and certification of compliance with emission limits by DES, and require the lifting of that suspension by the Commission for periods during which the facility is in compliance with emissions limits. In accordance with this regulatory model, and in a report to the Commission dated August 1, 2011, NHDES certified that Indeck had demonstrated its eligibility to produce RECs for the second quarter of 2011. Exhibit 1.

11. Subsection (i) then directs that “the facility shall be certified to be issued certificates as of the next calendar quarter.” Here again, there is an issue of how to interpret and apply the procedural mechanism described in subsection (i) so as to give full meaning to the limited duration of a facility’s suspension stated in subsection (g). There are two ways of interpreting this language to give effect to subsection (g). The first is to focus on the phrase “certified to be issued certificates.” The phrase is not certified “as eligible *to produce* Class I renewable energy certificates” as stated in the Secretarial Letter, but is instead “certified *to be*

issued certificates.” N.H. Code Admin. Rule 2505.04(i). Given the structure of the state’s RPS law, the NEPOOL GIS, and subsection (h), subsection (i) can and should be read as a directive to the Commission to certify to the Registry Administrator at APX Environmental Markets that NEPOOL GIS should issue New Hampshire renewable energy certificates to the facility on the certificate creation date following the next calendar quarter, pursuant to the applicable NEPOOL GIS operating rules. *New England Power Pool Generation Information System Operating Rules*, Rule 2.1(b). In other words, once a previously suspended facility demonstrates its eligibility for any particular calendar quarter, it should be issued certificates with respect to such quarter on the next certificate creation date following the end of such quarter. This delay is, in fact, built into the certificate registry system. Certificates for eligible generation during the first calendar quarter are issued by the NEPOOL GIS during the second calendar quarter following the end of the first calendar quarter, i.e., during the third calendar quarter. Certificates for eligible generation produced during the second calendar quarter are issued by the NEPOOL GIS during the fourth calendar quarter and so on. Such an interpretation and application is fully consistent with the substantive limitation on suspension stated in subsection (g).

12. The second way of interpreting the procedural mechanism in subsection (i) is to focus on the phrase “next calendar quarter” and relate that phrase to the language in (g) that authorizes suspension only for the period of time that a facility fails to meet emissions limits. This interpretation would require the Commission to recertify a facility “as of the next calendar quarter” following the quarter of non-compliance. Here again, that would be as of the beginning of the second calendar quarter of 2011 for the Indeck facility.

13. This latter interpretation - that because a suspension shall last “only for so long as the facility is out of compliance with the limit on emissions” recertification must be effective “as

of the quarter following the quarter of non-compliance” – is fully consistent with the Commission’s past application of Rule 2505.04 which occurred in this docket. *See Secretarial Letter* dated March 17, 2011 (interpreting Rule 2505.04 and recertifying the facility for the fourth quarter of 2010 following non-compliance during the third quarter of 2010). Exhibit 4.

14. Unlike the two possible interpretations discussed above, the interpretation of subsection (i) that is implicit in the Commission’s October 15, 2012 Secretarial Letter is in direct opposition to the substantive requirement in subsection (g). It is not possible to harmonize the Commission’s interpretation of subsection (i) with the substantive requirement in subsection (g) that any suspension shall last only “for so long as the facility is out of compliance with the limit on emissions.” Indeed, the Commission’s interpretation guarantees a minimum *two* quarter suspension even if a facility is in compliance with emissions limits during one of those quarters, by linking recertification to demonstration of compliance rather than to compliance itself. Such a link is not justified when subsection (g) clearly ties the duration of a suspension to the period of non-compliance with emissions limits, not to the day on which demonstration is made by the facility, demonstration is made by NHDES, or a certification is issued by the Commission.

15. Lastly, even if the Commission were to change its interpretation of Rule 2505.04, the Commission should apply its new interpretation prospectively only.

Based on the foregoing, Indeck Energy-Alexandria, LLC respectfully moves the Commission to reconsider its Secretarial Letter of October 15, 2012 and recertify the Alexandria facility to be issued RECs effective April 1, 2011, the beginning of the second quarter 2011.

Respectfully submitted,

INDECK ENERGY-ALEXANDRIA, LLC

By Its Attorneys,
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Date: November 6, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties listed on the attached service list pursuant to the requirements of Rule Puc 203.02 and 203.11.

Date: November 6, 2012

David K. Wiesner
David K. Wiesner, Esq.

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:
DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.