

June 17, 2013

COVANTA ENERGY
Request for Certification for RPS Eligibility

ORDER GRANTING NEW
RENEWABLE RESOURCE
CERTIFICATION

WELCH, Chairman; LITTELL and VANNOY, Commissioners

I. SUMMARY

The Covanta Energy biomass facility in Jonesboro, Maine is granted certification as a Class I new renewable resource that is eligible to satisfy Maine's new renewable resource portfolio requirement pursuant to Chapter 311 § 3(B) of the Commission rules.

II. BACKGROUND

A. New Renewable Resource Portfolio Requirement

During its 2007 session, the Legislature enacted an Act To Stimulate Demand for Renewable Energy (Act). P.L. 2007, ch. 403 (codified at 35-A M.R.S.A. § 3210(3-A)). The Act added a mandate that specified percentages of electricity that supply Maine's consumers come from "new" renewable resources.¹ Generally, new renewable resources are renewable facilities that have an in-service date, resumed operation or were refurbished after September 1, 2005. The percentage requirement starts at one percent in 2008 and increases in annual one percent increments to ten percent in 2017, unless the Commission suspends the requirement pursuant to the provisions of the Act.

As required by the Act, the Commission modified its portfolio requirement rule (Chapter 311) to implement the "new" renewable resource requirement. *Order Adopting Rule and Statement of Factual and Policy Basis*, Docket No. 2007-391 (Oct. 22, 2007). The implementing rules designated the "new" renewable resource

¹ Maine's electric restructuring law, which became effective in March 2000, contained a portfolio requirement that mandated that at least 30% of the electricity to supply retail customers in the State come from eligible resources, which are either renewable or efficient resources. 35-A M.R.S.A. § 3210(3). The Act did not modify this 30% requirement.

requirement as “Class I”² and incorporated the resource type, capacity limit, and the vintage requirements as specified in the Act. The rules thus state that a new renewable resource used to satisfy the Class I portfolio requirement must be of the following types:

- fuel cells;
- tidal power;
- solar arrays and installations;
- wind power installations;
- geothermal installations;
- hydroelectric generators that meet all state and federal fish passage requirements; or
- biomass generators, including generators fueled by landfill gas.

In addition, except for wind power installations, the generating resource must not have a nameplate capacity that exceeds 100 MW. Finally, the resource must satisfy one of four vintage requirements. These are:

- 1) renewable capacity with an in-service date after September 1, 2005;
- 2) renewable capacity that has been added to an existing facility after September 1, 2005;
- 3) renewable capacity that has not operated for two years or was not recognized as a capacity resource by the ISO-NE or the NMISA and has resumed operation or has been recognized by the ISO-NE or NMISA after September 1, 2005; or
- 4) renewable capacity that has been refurbished after September 1, 2005 and is operating beyond its useful life or employing an alternate technology that significantly increases the efficiency of the generation process.³

The implementing rules (Chapter 311, § 3(B)(4)) establish a certification process that requires generators to pre-certify facilities as a new renewable resource

² The “new” renewable resource requirement was designated as Class I because the requirement is similar to portfolio requirements in other New England states that are referred to as “Class I.” Maine’s pre-existing “eligible” resource portfolio requirement is designated as Class II.

³ The 125th Maine State Legislature amended 35-A M.R.S.A. § 3210, sub-section 2, B-4, to provide additional guidance on the meaning of the term refurbish. The new language states that “‘to refurbish’ means to make an investment in equipment or facilities, other than for routine maintenance and repair, to renovate, reequip or restore the renewable capacity resource.” P.L. 2011, ch. 413, § 1.

under the requirements of the rule and provides for a Commission determination of resource eligibility on a case-by-case basis.⁴ The rule contains the information that must be included in a petition for certification and specifies that the Commission shall provide an opportunity for public comment if a petitioner seeks certification under vintage categories 2, 3 and 4. Finally, the rule specifies that the Commission may revoke a certification if there is a material change in circumstance that renders the generation facility ineligible as a new renewable resource.

B. Petition for Certification

On June 24, 2010, Covanta Maine LLC (Covanta), a subsidiary of Covanta Energy, filed a petition to certify its biomass facility located in Jonesboro, Maine (Facility) as a Class I renewable resource. The facility is a 27.5 MW circulating fluidized bed plant combusting wood chips, bark, tree limbs and tops, mill residue, and other forest-related biomass and was commissioned in 1987. Covanta sought Class I certification under Section 3(B)(3)(d), the refurbishment vintage category, of Chapter 311 of the Commission rules. In response to a June 30, 2010 request by Staff for additional information, Covanta provided, on July 12, 2010, a detailed list of the major refurbishment projects. In addition, at the request of Staff, Covanta provided, on October 18, 2010, information regarding the accounting treatment of the listed projects.⁵

On November 12, 2010, the Commission issued an Order denying Class I certification on the premise that while the facility was operating beyond its previous useful life, it had not been refurbished. The Commission noted, in its decision that the level of refurbishment investment, relative to the overall value of the facility, was below 25%. Covanta appealed the Commission decision to the Law Court.

On June 5, 2012, the Maine Supreme Judicial Court issued its decision in the case *Covanta Maine, LLC v. Public Utilities Commission*, 2012 ME 74 (Covanta Decision). The Court remanded the case, stating that the Commission improperly denied certification, as the “statute does not require any minimum investment threshold, and imposing this requirement on Covanta was an error of law.” *Covanta Decision*, 2012 ME 74, ¶ 16. The Court stated that the Commission must “make this determination by examining the nature and character of the expenditures without any quantitative requirement related to the amount spent or the ratio of the expenditures to the total value of the facility” *Covanta Decision*, 2012 ME 74, ¶ 17 and must “evaluate the

⁴ In the *Order Adopting Rule* at 6, the Commission noted that a request for certification can be made at any time so that a ruling can be obtained before a capital investment is made in a generation facility.

⁵ Covanta purchased this plant and a nearly identical plant located in West Enfield, Maine for a combined price of \$52 million from co-owners Ridgewood Maine, LLC and Indeck Energy Services, Inc. in December, 2008, and does not have access to the accounting records prior to the purchase.

expenditures to determine whether they were made for the purpose of repair or maintenance or for investment in equipment of facilities.” *Covanta Decision*, 2012 ME 74, ¶19.

On August 14, 2012, Covanta filed an Amended Petition for consideration with the Commission. The Amended Petition states that the original facility had many design flaws that have been, and continue to be, rectified and improved. Since September 1, 2005, Covanta stated that it expended approximately \$6 million to implement major U-beam and T-beam design changes and refurbishments; a complete replacement of the majority of the convection pass waterwalls and the superheaters; total replacement of the bed letdown valves and screws; a major design change to the Facility's ash system; a substantial generator-turbine refurbishment in 2007; and significant electrical upgrades to the Facility's battery systems, programmable logic controllers, and motor protection relays. Covanta provided additional information on the character of the claimed refurbishment investments on February 12, 2013 and April 12, 2013 in response to Staff information requests. In additional comments filed in February, Covanta stated additional investments at Jonesboro include expansion of the fuel yard in 2010 and replacement of the stack in 2011.

The Commission provided interested persons with an opportunity to comment on the amended Covanta petition. The Commission received no comments.

III. DECISION

After considering Covanta's Amended Petition and the additional information provided by Covanta in response to Staff's questions, we find that Covanta's Jonesboro Facility has been refurbished and is operating beyond its useful life pursuant to Chapter 311, section 3(B)(3)(d), and therefore qualifies as a Maine Class I New Renewable Resource. There is no question in this proceeding that the Facility is operating beyond its useful life. The issue before us is whether the Facility has been refurbished within the meaning of the statute.

Covanta's Amended Petition seeks certification under the refurbishment prong of the vintage criteria contained in Chapter 311, section 3(B)(3)(d). This refurbishment prong is also contained in the definition of "New" as applied to any renewable capacity resource in 35-A, MRSA § 3210(2)(B-4). The refurbishment prong defines a new renewable resource as a generation facility that:

has been refurbished after September 1, 2005 and is operating beyond its previous useful life or is employing an alternate technology that significantly increases the efficiency of the generation process.

This prong is a two part test that requires the Commission to first determine whether the facility has been “refurbished,” and then to determine whether the facility is operating beyond its previous useful life or employing an alternate technology that significantly increases the efficiency of the generation process.

To clarify the meaning of refurbishment, the Legislature subsequently enacted an amendment to the refurbishment prong of the vintage requirement. Pursuant to the statutory amendment, “to refurbish” means “to make an investment in equipment or facilities, other than for routine maintenance and repair, to renovate, reequip or restore the renewable capacity resource.” 35-A M.R.S.A. § 3210(2)(B-4).⁶

As stated by the Maine Law Court, the purpose of the refurbishment provision is to encourage the preservation of older existing renewable generation facilities by creating an incentive for owners to make the investments necessary to preserve and extend the useful lives of these older facilities. *Covanta Decision*, 2012 ME 74, ¶ 16.

Pursuant to the Law Court’s analysis in *Covanta*, in the course of making its determination regarding whether there has been a refurbishment, the Commission must consider the nature and character of the expenditures to determine whether they were made for the purpose of repair or maintenance or for investment in equipment or facilities. *Id.* at ¶¶ 17, 19. The Court stated that the Commission must “make this determination by examining the nature and character of the expenditures without any quantitative requirement as to the amount spent or the ratio of the expenditures to the total value of the facility” *Id.* at ¶ 17. The Commission’s practice in assessing whether a generation facility has been refurbished is to examine a variety of factors, including, but not limited to, the condition of the facility prior to the investments and the nature of the expenditures to determine whether they appear to be related to routine maintenance and repair. While the Law Court found that the Commission must make a determination on refurbishment “by examining the nature and character of the expenditures without any quantitative requirement related to the amount spent or the ratio of the expenditures to the total value of the facility,” *Id.* at ¶ 17, the Commission still reviews the magnitude of post-September 1, 2005 expenditures as part of our determination regarding the character of the investment and whether the investment is more in the nature of routine maintenance and repair or refurbishment.

The Law Court noted that while tax accounting treatment “is not dispositive in deciding whether an expenditure is a repair or maintenance item or a

⁶ The Commission interprets this language as making “explicit the Commission’s existing practice of disregarding investments made for routine maintenance and repair when looking at whether a facility has been refurbished.” *Verso Bucksport LLC Request for Certification for RPS Eligibility*, Docket No. 2011-102, Order Granting New Renewable Resource Certification at 7, fn. 10 (Nov. 23, 2011).

refurbishment investment,” it also made clear that it is a factor that the Commission can consider when making its determination as to whether an expenditure was related to maintenance or refurbishment. *Id.* at ¶ 18. Accordingly, we arrive at our final determination through an examination of the nature and character of the expenditures, of which tax treatment is one, but not the sole, indicator.

Expenditures that have been expensed for tax purposes are more likely to be related to maintenance and repair than refurbishment. Covanta argues in its amended petition that “considerations used by accountants and auditors in treating certain expenditures as capitalized or expensed has absolutely nothing to do with the purposes of the Maine RPS or whether the expenditures actually constitutes a refurbishment that extends the useful life of the Facility within the meaning of the RPS statute.” Covanta Amended Petition at 17. However, in its 2010 annual report, Covanta states that, “[a]dditions, improvements and major expenditures are capitalized if they increase the original capacity or extend the remaining useful life of the original asset more than one year. Maintenance repairs and minor expenditures are expensed in the period incurred.” Moreover, a November, 2010 Internal Revenue Service (IRS) guide (*Capitalization v Repairs – Audit Technique Guide*), makes clear that amounts incurred to add value or substantially prolong the useful life of plant or equipment or adapt it to a new or different use must be capitalized and that amounts incurred for incidental repairs and maintenance are not capital expenditures.

Covanta indicated that it does not have tax records available to it for the period prior to when it assumed ownership of the Facility in 2009. The records produced by Covanta for 2009 and 2010 indicate that the only investments at the Jonesboro Facility that were capitalized for tax purposes in 2009 were related to the convection pass waterwall, primary and secondary superheaters, the U-beams, and the stack replacement projects. In the absence of actual records for the period between September 1, 2005 and 2009, we presume that investments of a similar nature were also likely capitalized. Accordingly, the U-beam investment in 2006 and furnace and convection waterwall investments in 2008 were likely capitalized. However, in examining the other claimed refurbishment expenditures (such as expenditures to maintain the Facility’s electrical system), and without any countervailing tax records to suggest otherwise, we find these to be in the nature of maintenance or repair expenditures rather than refurbishment expenditures.⁷

⁷ The nature of the turbine overhaul conducted in 2007, whether it was capitalized or not, does not constitute a refurbishment investment for the same reason that the turbine overhaul conducted at the ReEnergy Fort Fairfield Facility does not constitute a refurbishment (see *ReEnergy Fort Fairfield LLC Request for Certification for RPS Eligibility*, Docket No. 2011-374, Order Granting New Renewable Resource Certification (June 14, 2013) (ReEnergy Order)). Turbine overhauls, even major overhauls, unless resulting in clear refurbishment of the turbine generator (e.g., replacement of the turbine rotor and governor, see *Verso Bucksport LLC Request for Certification for RPS Eligibility*, Docket No. 2011-102, Order Granting New Renewable

The U-beam replacements made in 2006 and 2009 at the Jonesboro Facility⁸ were conducted to rectify what Covanta claims is a design flaw that causes the U-beams, which in other facilities may last much longer, to only have an expected life of about five years. Thus, replacing the U-beams has become a regularly required investment at this facility, with an expected useful life of around five years, even when utilizing new and purportedly improved arrangements and materials at each repair. The now routine nature of this investment at this facility, while perhaps non-routine in another context at another facility, suggests to us that replacement of the U-beams is in the nature of major routine maintenance or repair⁹ rather than refurbishment. We therefore find that the periodic U-beam replacement at Jonesboro does not constitute a refurbishment.

The remaining capital expenditures at the Jonesboro Facility are the replacement of the convection pass waterwalls, primary and secondary superheaters, and the stack. We find f these expenditures, in aggregate, are substantial enough to constitute “an investment in equipment or facilities, other than for routine maintenance and repair, to renovate, reequip, or restore the renewable capacity resource.” Specifically, replacement of the majority of the convection pass waterwalls and the superheaters, combined with replacement of the Facility’s stack,¹⁰ constitutes refurbishment of the Jonesboro Facility.

For these reasons, we grant certification of Covanta’s Jonesboro biomass facility as a Class I new renewable resource eligible to satisfy Maine’s new renewable resource portfolio requirement pursuant to Chapter 311, § 3(B) of the Commission rules.

Resource Certification at 7 (Nov. 23, 2011)), constitute extended routine maintenance. Commissioner Vannoy does not join this finding and would also include the turbine overhaul as a refurbishment investment (for the same reason discussed in the ReEnergy Order at 16).

⁸ The U-beams at this facility have been replaced at various times prior to 2006 as well (February 6, 2013 Affidavit of Ken Nydam at 3).

⁹ Commissioners Welch and Littell view the periodic U-beam expenditures as being akin to substantial routine maintenance, similar in concept to major turbine overhauls. Commissioner Vannoy does not view the periodic U-beam expenditures as akin to major turbine overhauls, but rather as expenditures that have become an expected repair. Under either interpretation, the U-beams do not constitute a refurbishment.

¹⁰ The Facility’s stack had not yet been replaced or been proposed to be replaced when we initially denied the Jonesboro Facility as a refurbished facility eligible for Maine Class I certification.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 11(D) of the Commission's Rules of Practice and Procedure (65-407 C.M.R. 110) within **20** days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought. Any petition not granted within **20** days from the date of filing is denied.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21** days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.