

September 25, 2012

MINI-WATT HYDROELECTRIC LLC
Request for Certification for RPS Eligibility

ORDER GRANTING IN PART
AND DENYING IN PART NEW
RENEWABLE RESOURCE
CERTIFICATION

WELCH, Chairman; LITTELL and VANNOY, Commissioners

I. SUMMARY

We approve in part and deny in part Mini-Watt Hydroelectric's (Mini-Watt) petition for certification of the Mini-Watt hydroelectric facility (Facility) as a Class I new renewable resource pursuant to Chapter 311, § 3(B)(3)(d) of the Commission's rules. The part denied is without prejudice with respect to future submissions of additional information in support of certification under the refurbishment prong or a petition for certification under another vintage prong.

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. *Public Utilities Commission Amendments to Portfolio Requirement Rule (Chapter 311)*, Docket No. 2001-391, Order Adopting Rule and Statement of Factual and Policy Basis (Oct. 22,

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.

2007) (Order Adopting Rule). The implementing rules designated the “new” renewable resource 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 prior to September 1, 2005, and, after September 1, 2005, has resumed operation or has been recognized by the ISO-NE or NMISA as a capacity resource; 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.

The implementing rules (Chapter 311, § 3(B)(4)) establish a certification process that requires generators to pre-certify facilities as a new renewable resource under the requirements of the rule and provides for a Commission determination of resource eligibility on a case-by-case basis.³ The rule contains the information that must

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 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.

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 February 16, 2012, Mini-Watt filed a petition to certify its 455 kW Facility located in Orange, Massachusetts as a Class I New Renewable Resource under the refurbishment provision of the Commission's renewable portfolio rules. Ch. 311, § 3(B)(3)(d). The petition states the dam was reconstructed in 1940 after a flood severely damaged the previous dam and that the 175 kW North Powerhouse generating unit ("T1") was installed at that time. The South Powerhouse contains two more generating units, a 120 kW unit installed in 1944 ("T2"), and a new 160 kW unit installed in 2010 ("T3") that replaced a 1944 vintage 120 kW turbine. The petition states the Mini-Watt Facility meets all State and Federal fish passage requirements.

Regarding refurbishment, the petition states the typical life expectancy of a dam is 100 years and 25 years for the equipment. Since September 1, 2005, the Mini-Watt Facility has had \$800,000 worth of project investments, including complete replacement of T3, increased generator and circuit breaker capacity, modernization of the supervisory control and data acquisition (SCADA) system, improvement in the hydraulic actuators and controls, and a new circuit breaker, solid state exciter, and protective relay for T1.

On March 19, 2012, Mini-Watt completed their petition by filing under protective order a detailed list of the project investments. Commission Staff issued a set of follow-up questions on the petition on March 21, 2012, to which Mini-Watt provided answers on March 29, 2012.

As required by our rules, the Commission Staff provided interested persons with an opportunity to comment on the Mini-Watt petition. No comments were filed.

On August 6, 2012, the Commission Staff issued a recommended decision to approve Class I new renewable resource certification for the output of T3, but to deny certification for the output of T1 and T2. Mini-Watt filed reply comments defending their request to certify the output of T1 and T2 as a Class I new renewable resource on August 16, 2012.

III. DECISION

A. Compliance with State and Federal Fish Passage Requirements

As an initial matter, for a hydroelectric facility to qualify as a new renewable resource, it must meet all applicable state and federal fish passage requirements and cannot exceed 100 MW. Ch. 311, § 3(B). It appears from the record that the Facility does have some fish passage facilities in place. According to Mini-Watt, on the North side of the Facility where T1 is located, downstream fish passage was installed in 2002 and the U.S. Geological Service (USGS) installed an eel trap in 2011. Additionally, Mini-Watt stated that on the South side of the Facility where T2 and T3 are located, downstream fish passage was installed in 2004 and the USGS installed upstream eel passage in 2008. Based upon the record, it appears that the downstream fish passage facilities are operated seasonally, mainly in the spring for out-migrating Atlantic salmon smolts.

In support of Mini-Watt's statements that the Facility complies with all state and Federal fish passage requirements, Mini-Watt submitted the initial December 28, 1984 FERC order granting the Facility an exemption from the licensing requirements contained in Article Part I of the Federal Power Act (29 FERC ¶ 61,356) (1984 FERC Order), the May 5, 2009 FERC Order amending the Facility's exemption to include the changes in the Facility's installed capacity resulting from the T3 replacement (2009 FERC Order), and the August 2, 2010 FERC Order approving the Facility's Streamflow Compliance Plan. Mini-Watt also submitted March 2009 letters from the U.S. Fish and Wildlife Service (FWS) and the Massachusetts Division of Inland Fisheries and Wildlife (MDFW) commenting on the proposed license amendment.

Article 2 of the Facility's 1984 FERC Order requires that the Facility comply with any terms and conditions that Federal or State fish and wildlife agencies have determined appropriate to prevent loss of, or damage to, fish and wildlife resources. It appears from the record that the FWS has imposed stream flow requirements related to the protection of fish and wildlife resources. 132 FERC ¶ 62,084. Mini-Watt provided an updated Streamflow Compliance Monitoring Plan (Updated Streamflow Plan) as part of its license amendment process at FERC, and the Updated Streamflow Plan was accepted by FWS, the MDFW, and the Massachusetts Department of Environmental Protection (MDEP), and was ultimately approved by FERC. 132 FERC ¶ 62,084.

The March 2009 letters from the FWS and MDFW commenting on the proposed license amendment recognized the existing downstream fish passage present at the Facility and did not object to Mini-Watt's license amendment request. Further, the agencies did not indicate that the Facility was out of compliance with state of Federal fish passage requirements. According to Mini-Watt, MDEP did not comment on any fish passage issues associated with Mini-Watt's license amendment request, despite an opportunity to do so.

Based upon the documentation filed in this case, as well as the absence of any indication from recent reviews of the Facility's license amendment by relevant state and Federal agencies that the Facility is out of compliance with state and federal fish passage requirements, we conclude that the 455 kW Facility presently meets all applicable state and federal fish passage requirements.

B. Vintage Requirement

As mentioned above, Mini-Watt is seeking certification under the "refurbishment" vintage category. This vintage category is set forth in both Chapter 311 of the Commission's rules and the RPS statute set forth in Title 35-A, section 3210.

Under Chapter 311, the refurbishment vintage category requires that the new renewable generation facility:

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.

Ch. 311, § 3(B)(3)(d). The refurbishment vintage category in the RPS statute has essentially the same wording. 35-A M.R.S.A. § 3210(2)(B-4)(4). To clarify the meaning of refurbishment, the Legislature subsequently enacted an amendment to the refurbishment prong of the vintage requirement to provide a definition of refurbishment. 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).

As stated by the Maine Law Court in its recent decision, *Covanta Maine, LLC v. Public Utilities Commission*, 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 Maine, LLC v. Public Utilities Commission*, 2012 ME 74, ¶ 18 (2012) (Covanta Decision).

Pursuant to the Maine Law Court's analysis in the Covanta Decision, 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. *Covanta*, 2012 ME 74, ¶¶ 17, 19.

Mini-Watt has represented in their petition and supporting documentation that they are seeking qualification under the first prong the refurbishment vintage category: that the resource "has been refurbished after September 1, 2005 and is operating beyond its previous useful life." Mini-Watt has not sought certification under the alternative technology portion of the refurbishment prong.

1. Refurbishment

In its Petition, Mini-Watt states that it has completed over \$800,000 in refurbishment projects since September 1, 2005 which, as stated above, include the replacement of T3, increased generator and circuit breaker capacity, the modernization of the Supervisory Control and Data Acquisition (SCADA) system for the entire facility, improvements to hydraulic actuators and controls for interface into new control system for T1 and T2, replacement of the T1 circuit breaker for control system compatibility, installation of a new solid state exciter for T1, and installation of a new protective relay for T1. Petition at 3.

In its March 16, 2012 confidential supplement to the Petition, Mini-Watt submitted a detailed, confidential list of the costs and expenditures related to the Facility that were made after September 2005. The overall project title and some of the items included on the list were identified as related to T3. However, no items were identified as related to T1 or T2. In response to the Staff's information request for a breakdown of the capital investments categorized by the turbine to which they applied, Mini-Watt submitted a revised "List of Tax Based Accounting for Capitalized Investments" that showed an allocation of costs to the T1 and T2 turbines based on an equal sharing of certain categories of costs among the three turbines. Mini-Watt indicated that, based on a review of its records, it could not provide more detail with regard to categorizing the costs by turbine. March 29, 2012 Attachment to Response No. 2.⁴

From a physical and engineering perspective, the complete replacement of T3 constitutes a refurbishment to that part of the Facility, but the evidence presented regarding the investments that were made to T1 and T2 after September 1, 2005 is not sufficient to establish that T1 and T2 were renovated, reequipped or restored. The investments that Mini-Watt has attributed to T1 and T2 are the modernization of the SCADA system for the entire facility, improvements to hydraulic actuators and controls for interface into new control system for T1 and T2, replacement of the T1 circuit breaker for control system compatibility, installation of a new solid state exciter for T1, and installation of a new protective relay for T1. As described earlier, Mini-Watt's responses to Staff's questions suggest that the central premise of the project was to refurbish T3, and that the T1 and T2 investments were made to so that those two turbines would be compatible with the systems installed as part of the T3 refurbishment or that it made sense to upgrade the same components for T1 and T2 at the time that those upgrades were made for T3. When asked to provide additional detail on the investments in T1 and T2, Mini-Watt indicated it could not verify the T1 and T2 investments separately from the T3 investments. Since our finding that T3 has been refurbished is based primarily on the wholesale replacement of T3, we do not decide whether modernization of the SCADA system, improvements to hydraulic actuators and controls, replacement of a circuit

⁴ Mini-Watt also submitted information in support of its Petition for Certification related to the value of the facility, but the Commission has not relied upon any comparisons of investment per facility value analyses in coming to this decision in light of the rejection of this type of analysis in the Covanta Decision.

breaker and installation of a solid state exciter and protective relay, standing alone without association with a turbine replacement, is a sufficient basis for a finding of refurbishment. There is insufficient evidence in this record to make such a finding.

In Mini-Watt's reply comments to Commission Staff's recommended decision, Mini-Watt states that T1 and T2 have been refurbished, but that much of the investment occurred before September 1, 2005. However, the certification requirement clearly states that a new renewable resource means a facility that has been "refurbished after September 1, 2005 ..." and therefore we do not consider investments that occurred before that date. Chapter 311, § 3(B)(3)(d).

We find that there is a sufficient legal basis in both the renewable portfolio statute and rule for certifying a portion of a renewable generation facility as a new renewable resource while excluding other parts of the facility. The Commission's Order adopting Chapter 311 contains language that contemplates that the entire facility may not be certified as a refurbishment. Specifically, the Chapter 311 Order states that:

"We note that the Legislature specifically included vintage categories that allow the incremental energy of a facility constructed prior to September 2005 to qualify if that energy comes from capacity added *or refurbished* after September 1, 2005." Chapter 311 Order at page 7 (emphasis added).

Maine Public Utilities Commission Amendments to Portfolio Requirement Rule (Chapter 311), Docket No. 2007-391, Order Adopting Rule and Statement of Actual and Policy Basis at 7 (Oct. 22, 2008) (emphasis added).

This language conveys that only the portion of the generation facility or renewable resource that is refurbished after the September 1, 2005 date is eligible for certification as the new renewable resource, rather than the entire renewable generation facility.

2. Operation Beyond the Facility's Previous Useful Life

To be certified as a new renewable resource the resource must be "operating beyond its previous useful life." Mini-Watt states in their petition that while the dam may have an expected useful life of 100 years, the equipment has a useful life of 25 years. Although we do not necessarily accept Mini-Watt's representations regarding the expected useful life of the Facility or the equipment, we find it reasonably likely that the T3 turbine is operating beyond its previous useful life given that the new T3 turbine replaced a turbine that was put in service nearly 70 years ago. While T1 and T2 are also of a similar vintage and therefore presumably also operating beyond their previous useful lives, as discussed above, it is not clear they have not been refurbished.

C. Conclusion

For these reasons, we approve certification of only the output from the 160 kW T3 Mini-Watt hydroelectric facility as a Class I new renewable resource eligible to satisfy Maine's new renewable resource portfolio requirement pursuant to Chapter 311, § 3(B)(3)(d) of the Commission rules. The metering of the output by the 160 kW T3 must be in compliance with GIS NEPOOL Rules, which may include the need for a 3rd party meter reader.

While we deny certification of the output of T1 and T2 as a Class I new renewable resource based upon the evidence before us, our decision is without prejudice and shall not preclude Mini-Watt from submitting a petition for certification of T1 and T2 under another vintage prong, nor does this decision preclude Mini-Watt from submitting a petition for certification under the refurbishment vintage prong provided that Mini-Watt includes in its petition additional information that was not submitted previously that supports a finding of refurbishment of T1 and T2. This additional information, for instance, may take the form of more explicit details of the exact expenditures spent on T1 and T2 and how those investments renovated, reequipped or restored the renewable capacity resource.

Accordingly, we

ORDER

1. That the output of the 160 kW T3 be certified as a Maine Class I new renewable resource;
2. That the output of T3 be metered in compliance with GIS NEPOOL Rules, which may include the need for a 3rd party meter reader;
3. That the output of the 175 kW T1 and 120 kW T2 be denied certification as a Maine Class I new renewable resource without prejudice to future petition under another certification prong or the supply of additional information that clarifies the investments into T1 and T2 in support of Mini-Watt's position that those turbines have been refurbished.

Dated at Hallowell, Maine, this 25th day of September, 2012.

BY ORDER OF THE COMMISSION

/s/ Karen Geraghty
Karen Geraghty
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Littell
 Vannoy

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 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 1004 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.
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.A. § 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.A. § 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.