I. SUMMARY

We certify as a Class I New Renewable Resource the York hydroelectric project ("KEI Project"), comprised of the New Dam (Estes Lake) Hydroelectric facility in Sanford, Maine and the Old Falls Hydroelectric facility in Kennebunk, Maine as eligible to satisfy Maine's new renewable resource portfolio requirement pursuant to Chapter 311, § 3(B) of the Commission’s rules.¹

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.² 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

¹ Commissioner Littell dissents. See attached Dissenting Opinion.

² 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.
(Oct. 22, 2007). The implementing rules designated the “new” renewable resource requirement as “Class I”\(^3\) 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.\(^4\)

\(^3\) 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.

\(^4\) The 125\(^{th}\) Maine State Legislature recently 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.
Chapter 311, section 3(B)(4) of the Commission’s rules, establishes 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. 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 May 11, 2012, KEI (Maine) Power Management (IV) LLC (“KEI”) filed a petition (“Petition”) to certify its 1.095 MW York hydroelectric project (“York Project”), comprised of the 575 kW New Dam Hydroelectric facility in Sanford, Maine and the 520 kW Old Falls Hydroelectric facility in Kennebunk, Maine as a Class I New Renewable Resource under the refurbishment provision of the Commission’s renewable portfolio rules. Ch. 311, § 3(B)(3)(d). After a protective order was issued by the Commission Staff, KEI supplemented its petition with confidential documents on May 15, 2012.

The Petition states the two run-of-river facilities are 1.4 miles apart on the Mousam River and share the same metering point. Modern operations commenced on December 1, 1984. The Petitions states the New Dam Hydroelectric facility is comprised of two, 24-pole synchronous generators and two horizontal Francis turbines, and the Old Falls Hydroelectric facility is comprised of one, 18-pole synchronous generator and horizontal Francis turbine. The petition states the York Project meets all state and federal fish passage requirements.

According to the Petition, KEI seeks Class I New Renewable Resource certification based on being refurbished after September 1, 2005 and operating beyond its previous useful life or employing an alternative technology that significantly increases the efficiency of the generation process. The Petition states that since September 1, 2005, the New Dam Hydroelectric facility has installed a new draft tube and replaced the bearings of one generator and the Old Falls Hydroelectric facility has had complete replacement of its trash racks, rewinding of its generator, and conversion of its headgate from manual to hydraulic operation. The petition further states that both facilities have installed new programmable logic controllers to allow operation using pond control, providing more optimal use of water so as to operate in a more efficient manner.

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5 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.
As required by our rules, the Commission provided interested persons with an opportunity to comment on KEI's Petition. Five interested persons filed comments. Fred Frodyma and the Estes Lake Association submitted comments in support of the Petition. RJ Mere, Maine Rivers, and the Natural Resources Council of Maine ("NRCM") submitted comments in opposition of the Petition. KEI provided responsive comments on June 22, 2012.

Staff issued its first information request on July 20, 2012, to which responses were filed on October 31, 2012. Staff issued three subsequent follow-up requests for information, to which responses were filed on February 4, 2013, May 3, 2013, and September 13, 2013.

III. DECISION

After considering KEI's Petition and the additional information provided by KEI in response to Staff's questions, we find that the York Project has been refurbished pursuant to Chapter 311, section 3(B)(3)(d), and therefore its output qualifies as a Maine Class I New Renewable Resource. Our decision to grant Class I certification for the York Project is based upon our finding that KEI has satisfied each of the following elements of Class I New Renewable Resource eligibility: (1) Resource Type; (2) Capacity Limit; and (3) Vintage.

A. Resource Type

KEI's Petition states that the York Project is a hydroelectric facility that meets all state and federal fish passage requirements. Comments filed in opposition of the KEI application generally argue that while it may be technically correct that the York Project meets state and federal fish passage requirements, it is disingenuous, since the York Project does not fall under federal jurisdiction, and state jurisdiction does not impose fish passage requirements. Therefore, no fish passage requirements exist.

Upon review of the fish passage permitting information submitted by KEI from the applicable federal and state agencies, we find that the York Project does not presently have any applicable fish passage requirements, and therefore is in compliance with the fish passage requirements of the 35-A M.R.S. §3210(2)(B-3)(e). Based on the plain language of the statute, we find that fish passage requirements do not encompass water quality. We do note that ongoing certification is contingent upon continued compliance with any new fish passage requirements that applicable federal and/or state agencies may impose.

B. Capacity Limit

Chapter 311, section 3(B)(2) provides that a new renewable resource other than wind must not have a nameplate capacity that exceeds 100 MW. The total nameplate capacity of the York Project is 1.095 MW, and as such does not violate the 100 MW cap.
C. Vintage

KEI 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 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 Maine, LLC v. Public Utilities Commission, 2012 ME 74, ¶ 16 (2012) (Covanta).

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. Covanta, 2012 ME 74, ¶¶ 17, 19.

1. Refurbishment

The Commission’s practice in assessing whether a generation facility has been refurbished is to examine a collection of factors, including, but not

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).
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.

In its Petition, KEI provides a list of investments made to the York Project since September 1, 2005. According to KEI, all of these investments were made prior to KEI’s acquisition of the facilities in 2009 from Ridgewood Maine Hydro Partners, L.P. and KEI does not have records to indicate whether these expenditures were capitalized or expensed for tax purposes.

Absent information regarding which investments were capitalized or expensed, it is more difficult to distinguish which projects more closely fit the definition of routine maintenance or repair rather than refurbishment investments. However, we find that the investments made at Old Falls Dam, particularly that of the rewind of the 520 kW generator and installation of a programmable logic control (“PLC”) system, are beyond the normal scope of routine maintenance or repair projects. The new trash racks at Old Falls Dam also contribute to our determination that the Old Falls Dam has been refurbished to be a new renewable generation resource for purposes of Maine Class I certification. While the determination of refurbishment is more difficult at New Dam due to the lower degree of investment, we find that the new draft tube and PLC system are investments in equipment other than for routine maintenance and repair that reequip and renovate the renewable capacity resource.

2. Operation Beyond the Facility’s Previous Useful Life

KEI seeks qualification of its investments under the useful life sub-prong of the refurbishment vintage category. The age of the Old Falls and New (Estes Lake) Dams exceed 100 years, as evidenced by the fact that the federal licensing documentation suggests both dams were constructed around the turn of the 20th century. KEI also states in their initial Petition that the facilities began commercial operation on December 1, 1984. We interpret this date to represent a prior refurbishment effort. With dams exceeding 100 years and much of the equipment exceeding at least 30 years, we find the York Project is operating beyond its previous useful life.

Accordingly, we

ORDER

1. That the electrical generation of the KEI York Project is certified as a Maine Class I New Renewable Resource; and

7 KEI also sought qualification under the alternate technology sub-prong, but it is not necessary to make a determination here on whether the York Project meets this standard, and we decline to do so, as the York Project is operating beyond its previous useful life.
2. That KEI, or the York Project successive owner, shall provide timely notice to the Commission of any material change in the characteristics or operation of the York Project, including applicable fish passage requirements, from that described in the submissions filed by KEI in this proceeding.

3. That ongoing certification is contingent upon continued compliance with any fish passage requirements that applicable federal and/or state agencies may impose.

Dated at Hallowell, Maine, this 8th day of October, 2013.

BY ORDER OF THE COMMISSION

/s/Harry Lanphear

Harry Lanphear
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Vannoy

COMMISSIONERS VOTING AGAINST: Littell
DISSENT OF COMMISSIONER LITTELL

I would not approve this request but would table it to seek legislative clarification. To qualify as a Maine Class I New Renewable Resource, a dam must comply with any applicable fish passage requirements under the clear terms of the statute. In this case which occurs at only a very small number of dams in Maine, the recent documents provided by KEI create a dim picture on the impact of the Old Falls Dam on fish habitat and therefore passage because habitat necessary for fish to live is degraded below the federal and state water quality standards. I find it hard to conclude that the Legislature intends this Commission to be concerned with compliance with fish passage but ignore dam impacts on water quality that render fish passage rather meaningless.

It is clear that a mile of the Mousam River below the Old Falls Dam is classified as a Category 4-C Non-attainment due to “Low dissolved oxygen from bottom release” from the dam itself. This mile of the Mousam is not attaining its Class B Water Quality Standard for dissolved oxygen. Nonattainment under the Clean Water Act is not a matter to be easily dismissed.

Fish rely upon dissolved oxygen to live and afford the aquatic habitat for other species upon which they depend. The lack of attainment eliminates the likelihood of managing the river for the species identified as present in the river and especially as present in this section of the river. The Maine Department of Inland Fisheries and Wildlife (DIFW) identified salmonids, largemouth and smallmouth bass, black crappie, chain pickerel and white perch as species in the project area. DIFW Inter-Departmental Memo from Sonny Pierce to Steve Timpano regarding Old Falls Hydro – DEP # L 014423-35-A-N (July 23, 1987). In fact, DIFW attempted to address this exact issue of inadequate flows back in 1987 when it asked the then-owner of the dam to determine current leakage flow and maintain sufficient flow to provide for food production and to maintain water quality:

In order to maintain wetted habitat in the by-pass channel for basic food production and to maintain water quality, it is requested that at least a 7 Q10 flow [the minimum 7-day flow occurring every 10 years] or approximately 9 cfs [cubic feet per second] be provided to the by-pass channel at all times. If the current leakage flows are less than that, this Agency would require that the appropriate amounts of additional flow be provided. DIFW Inter-Departmental Memo from Sonny Pierce to Steve Timpano regarding Old Falls Hydro – DEP # L 014423-35-A-N (July 23, 1987).

The current non-attainment designation for the mile below this dam means that there is a water quality issue effecting fish species in the mile below the dam. While the Mousam River met its Class B standard in 1987 before the work on the dam in 1989, it

does not now. The volunteer data which the dam owner presents\(^9\) does not address the portion of the Mousam River above the confluence with Cold Water Brook nor is volunteer data sufficient to alter a non-attainment finding by DEP that is accepted by EPA without appropriate review of the attainment status.

If the Legislature saw sufficient import in fish passage to reserve Class I qualification only for those facilities adequately providing fish passage where applicable, it is hard for me to conclude that non-attainment of water quality standards established to provide minimal levels of oxygen for fish to survive caused by the dam itself is something the Legislature would have wanted the Commission to ignore. The fish passage requirement indicates the legislature is concerned with maintaining and even improving fish habitat and fisheries in the context of Class I qualifications under the RPS.

If fish passage is important enough to specify as a criteria for a Class I resource, ensuring minimal aquatic habitat criteria under the Clean Water Act (as specified in law by the Legislature) would seem an \textit{a priori} consideration when a facility is impacting or eliminating the habitat for the fish for a mile of the Mousam River. The impacts from the facility causing non-attainment with federal and state law would render the fish passage requirement meaningless when habitat near the dam is degraded so as to eliminate those species’ ability to pass.

This case is a unique set of facts not addressed by the Commission before. We have not faced Clean Water Act non-attainment issues caused by the dam itself, and I would give the Legislature an opportunity to clarify whether the Commission should narrowly focus on fish passage even in the case that the facility itself causes inadequate in-stream conditions to sustain the fish species present in the Mousam that would pass or whether facilities that cause such impacts should mitigate those impacts as an element of Class I New Renewable Resource qualification.

To ignore the impacts of the dam, while noting there are no fish passage requirements is inconsistent with the Board of Environmental Protection (BEP) Order approving the upgrades to the Old Falls dam in 1988. The BEP explicitly conditioned its order upon an ongoing obligation to provide fish passage based on recommendations of the relevant state agencies. The BEP’s condition of approval provided that:

\begin{quote}
Based upon the recommendations from the Atlantic Sea Run Salmon Commission, the Department of Inland Fisheries and Wildlife, or the Department of Marine Resources, the applicant shall provide such upstream and/or downstream fish passage facilities as may be required by the Board, after notice to the applicant and opportunity for public hearing, to allow the migration of
\end{quote}

\(^{9}\) Volunteer River Monitoring Program (VRMP) 2010 Data Report, Maine Department of Environmental protection Volunteer River Monitoring Program, August 2011, Doc #: DEPLW-122, 


Ignoring the non-attainment resulting from the dam design allowing insufficient dissolved oxygen which renders fish passage as a requirement rather meaningless because the habitat to sustain the fish is eliminated is inconsistent with the purpose of the RPS qualification to allow for fish passage.

I suggest the Commission ask the Legislative to consider clarifying whether a dam causing non-attainment under Federal and State law should be eligible for qualification as a Class I New Renewable Resource. This situation of a dam design not allowing adequate dissolved oxygen to meet federal and state water quality standards occurs at a small number of dams in Maine. It can be mitigated by the dam owner. I am not convinced that the Legislature intends such a facility rendering the fish passage requirements meaningless should qualify as Class I RPS resources as opposed to Class 2, the lower value RPS category.

As to the New (aka Estes Lake) Dam, I do not view the investments as sufficient to qualify as a refurbishment. The installation of a new draft tube and replacement of bearings and seal on a generator are items that regularly are required to maintain a hydro facility. The new programable logic controller installed in Feb. 2006 is only a small level of investment. These investments were undertaken by the prior owner, Maine Hydro Partners, L.P. before the purchase of the dams by KEI in 2009. The prior owner did not seek Class I certification. While we cannot use a quantitative criteria as the sole decisional criteria under the Law Court’s Decision in Covanta it is a factor we can consider. Given the market value of the facility, I do not see the logical controller investment as sufficient to qualify the entire facility as refurbished. This would be consistent with our decision in the Order denying the West Enfield Class I certification for replacement of a single boiler bed letdown screw. See Order Denying New Renewable Resource Certification, Dock. 2010-189, June 17, 2013 at 7. Creating a smaller denominator by isolating the market value of the equipment as distinct from the rest of the facility is not particularly persuasive to me as the total capital value of the moveable and permanent capital constitutes the value of the facility.

The problem I see with the majority reasoning on the New Dam qualifying as a refurbishment is that this statutory category, (vintage category 4), is listed among vintage categories 1-3: construction of a new facility (vintage category 1), new capacity at an existing facility (vintage category 2), or starting a mothballed facility out of operation for more than two years (vintage category 3), all involving substantial investments. I apply the interpretive principle of ejusdem generis; the meaning of general words of a phrase are to be limited to things or items of the same general class as those expressly mentioned. See Penobscot Nation v. Stilphen, 461 A.2d 478, 489.
(Me. 1983). The fourth vintage category should be read with the company it keeps in vintages one through three to be somewhat akin with the levels of investment to qualify for those vintages. These expenses are more similar to repair and maintenance than to refurbishment. I therefore would find that New Dam does not meet the refurbishment criteria of the RPS statute.
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. 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.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.