STATE OF MAINE      Docket No. 2017-00099
PUBLIC UTILITIES COMMISSION

ALBANY ENGINEERING CORPORATION ORDER DENYING NEW
Request for Approval of Certification for RENEWABLE RESOURCE
RPS Eligibility CERTIFICATION

VANNOY, Chairman; WILLIAMSON, Commissioner

I. SUMMARY

Pursuant to this Order, the Green Island Hydroelectric Project (Project), a 6.0 MW run-of-river hydroelectric project located along the Hudson River in Green Island, New York and owned by Albany Engineering Corporation (AEC), is denied certification as a Class I New Renewable Resource that is eligible to satisfy Maine’s new renewable resource portfolio requirement pursuant to Chapter 311, section 3(B) of the Commission’s 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. 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 requirement as “Class I” and incorporated the resource type, capacity limit, and the vintage requirements as

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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.

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
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 requirement; 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.

Chapter 311, § 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, or 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.

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.
B. Petition for Certification

On May 17, 2017, AEC filed a petition to certify its Green Island Hydroelectric Project as a Class I New Renewable Resource under the refurbishment provision of the Commission’s renewable portfolio rules. Ch. 311, § 3(B)(3)(d). Pursuant to Commission rules, an opportunity for comment was issued on May 22, 2017. No comments were received. The Commission Staff issued an information request on June 16, 2017 requesting additional information relating to Project operations, the Projects qualifications under the refurbishment provision, and details for the claimed refurbishments, including capital expenditure amounts. AEC filed its responses on July 5, 2017.

According to the petition, the Project’s dam was constructed in 1914 and four hydroelectric generating units were subsequently installed and commissioned in 1922. The original federal license for the Project was issued on March 3, 1921, and it expired on March 2, 1971. A new license was issued on February 2, 1977 with an expiration date of March 2, 2011. The Federal Energy Regulatory Commission (FERC) issued the current license on August 17, 2012, and it is set to expire in fifty years. In its reply to Staff’s Information Request, AEC provided the FERC order issuing this August 17, 2012, hereinafter referred to as the FERC Licensing Order. This license authorizes expansion of the Project’s electricity generating capacity from 6 MW to 48 MW. However, this expansion has not yet occurred and the Project “operates essentially as it has since 1922,” except for “significant equipment refurbishments to extend useful service life and the incorporation of advanced technology for plant automation and operational efficiency.”

Prior to the its most recent FERC licensing, no fish passage requirements applied to the Project. According to AEC, fish could “pass downstream of Green Island either over the project dam or through the navigational lock, and pass upstream through the navigational lock.” Further, the operation of the Project has not changed with respect to hydraulic or generating capacity since going into operation in 1922. There has also been no change to the facility’s intrinsic fish protection and passage characteristics, which currently allow fish to safely pass upstream and downstream either over the dam or through the navigational lock. AEC notes, however, that it is currently planning fish passage upgrades.

While no fish passage requirements previously applied to the Project, the FERC Licensing Order incorporated a 2009 settlement agreement (Settlement Agreement) between the Project’s owners, National Marine Fisheries Service (NMFS), New York State Department of Environmental Conservation (NYSDEC), and US Fish and Wildlife Service (USFWS) (collectively, Resource Agencies) that required the Project owner to “construct, operate and maintain upstream and downstream fish passage facilities.” The Settlement Agreement also described such facilities, including denil and eel ladders and a positive exclusion fish protection system.

The Modified Fishway Prescriptions from the National Marine Fisheries Service in Appendix C of the FERC Licensing Order state that AEC “shall construct, operate and maintain” upstream and downstream fish passage facilities “in a safe, timely and effective manner.” FERC Licensing Order at 81. The Fishway Prescriptions also direct that the fish passage facilities “shall be operational immediately upon construction, consistent with the
schedule outlined in the Settlement Agreement.” *Id.* The Settlement Agreement establishes a schedule that includes simultaneous milestone dates for both the Project expansion and the fish passage facilities. Settlement Agreement at 38-39.

The Settlement Agreement also explains that while the Project has no “designated fish protection and passage facilities,” the agreed to measures will allow for “safe, timely and effective fish passage.” *Id.* at 22. In addition, according to the Settlement Agreement, the “existing navigation lock is not an acceptable route to provide safe, timely and effective upstream fish passage” and the locks “are not designed for fish passage.” *Id.* at 23.

According to AEC, the specific fish passage facilities identified in the Settlement Agreement and FERC Licensing Order are all “related to the expansion of the Green Island Hydroelectric Project.” AEC also states that the primary concern of the Resource Agencies was the potential for the expansion of the Project to affect the characteristics to reduce the ability of fish to pass over the dam or through the navigational lock. AEC claims that its present petition only seeks certification for the 6.0 MW existing facility, which “provides sufficient intrinsic fish protection and passage characteristics to meet all state and federal fish passage requirements.”

AEC also provided a list of claimed refurbishments performed on the Project and identifies the previous useful life for each refurbished component. As stated in AEC’s petition, refurbishment work included refurbishment to bearings, replacement of wicket gates, rewound generators, new facility backup air compressor, and a trash rake replacement and automation. In its reply to Commission Staff’s information requests, AEC provided capital expenditures invested in the Project since September 1, 2005. AEC also explained that prior to refurbishments, the annual generation at the Project was as low as 25 MWh in 1998 and 1999. However, the refurbishment investments raised average annual generation to 37,900 MWh from 2000 through 2016 and allowed the Project to operate at its original installed generating capacity of 6.0 MW.

**III. DECISION**

After considering AEC’s petition, the additional information provided by AEC in response to Staff’s questions, and documents identified in the FERC docket for the Project, the Commission finds that the Green Island Hydroelectric Project at this time does not satisfy the resource type requirements of Chapter 311, section 3(B)(1), and therefore its petition for Class I certification is denied.

While clearly a hydroelectric generator, to find that the Project is a Class I eligible resource would also require an affirmative finding that it meets all state and federal fish passage requirements. MPUC Rules, c. 110, § 3(B)(1)(f). Based on the ambiguous language of the Settlement Agreement and what appears to be an ongoing proceeding at FERC, such a finding is not presently possible.

AEC contends that the fish passage facilities required by the Settlement Agreement relate to the Project expansion and because the Project has yet to expand the existing facilities meet FERC fish passage requirements. Certainly, the schedule in the Settlement Agreement outlining coextensive construction of the Project expansion and the fish
passage facilities would support this claim. If this were the only evidence available, the Project may comport with the resource specifications for Class I certification.

However, AEC’s contention is contradicted by additional language in the Settlement Agreement and the FERC Licensing Order, as well as the claims of the other parties to the Settlement Agreement. The Settlement Agreement states that the measures it adopts are necessary for safe, timely and effective fish passage and, at least for upstream fish passage, the current Project facilities are unacceptable. On its face, the Settlement Agreement is ambiguous as to whether the fish passage facilities are to be built coincident with the Project expansion.

In addition, filings in the FERC docket for the Project, FERC Docket No. P-13, indicate that AEC’s assertion that the fish passage facilities mandated by the Settlement Agreement relate to the Project expansion is an understanding not completely shared by the other parties to the stipulation. Several of these filings are summarized as follows. On October 24, 2016 FERC issued a letter requesting AEC to file a fish passage and project construction status report. Letter requesting Albany Engineering Corporation to provide additional information within 30 days re the Green Island Project, FERC Docket No. P-13-034 (Oct. 24, 2016). Under the terms of the Settlement Agreement and later modifications this report was to be filed six months prior to the start of construction, the deadline for which was August 17, 2016. AEC filed progress reports on December 30, 2016 and February 17, 2017. Project Progress Report Update of Albany Engineering Corporation, FERC Docket No. P-13-034 (Dec. 30, 2016); Albany Engineering Corporation Project Progress Report Additional Information, FERC Docket No. P-13-034 (Feb. 17, 2017). Through these reports, AEC describes discussions with the Resource Agencies regarding fish passage that have occurred since the FERC Licensing Order and contends that the construction schedule advocated by these agencies is impractical and the process has been inflexible. AEC also outlines the changes in circumstances that have caused delay in the construction of the Project expansion and fish passage facilities.

In their most recent filings, the Resource Agencies respond to AEC’s February 17, 2017 report and dispute AEC’s claims on this issue. For example, USFWS states that AEC “is out of compliance with the fish protection and passage requirements in the license” and “is in violation of the construction deadlines.” U.S. Fish & Wildlife Service/NYFO submits Comments on Green Island Project Progress Report, FERC Docket No. P-13-000 (Mar. 24, 2017). NMFS asserts that the Project “has been operating under a new license for almost five years with no protection measures for public trust resources . . . [and] . . . the Licensee has been given many years of delay on their fish passage requirements to resolve internal issues.” NOAA Fisheries comments _ Green Island Hydroelectric (FERC P-13) Response to Albany Engineering Corporation’s February

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4 This is not intended to be an exhaustive review of the FERC filings on this issue, which are numerous. Rather, several of the most recent and representative documents are identified and summarized. This is sufficient, as the Commission does not decide whether AEC is operating the Facility in compliance with the fish passage requirements of the Settlement Agreement. This is a decision within the jurisdiction of FERC. Instead, the identified documents indicate that this is an open issue such that the Commission cannot make an affirmative finding that the Project meets all state and federal fish passage requirements.

While the accusations of the resource agencies are hardly determinative of whether AEC is meeting all FERC fish passage requirements, they demonstrate that this issue is currently not settled. Accordingly, a finding that the Project complies with the resource requirements for Class I certification cannot be made at this time and AEC’s petition is denied. As AEC has not demonstrated that the Project meets the resource specifications of Chapter 311, section 3(B), the Commission does not reach the other requirements for Class I certification, including whether the Project has been refurbished and is operating beyond its previous useful life.

Dated at Hallowell, Maine, this 18th day of September, 2017.

BY ORDER OF THE COMMISSION

/s/ Harry Lanphear  
Harry Lanphear  
Administrative Director

COMMISSIONERS VOTING FOR:  
VANNOY  
WILLIAMSON

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5 AEC’s petition is denied without prejudice and AEC is free to renew its petition once this matter is resolved by FERC.
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.