



Agenda Date: 6/18/14

Agenda Item: 8B

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF THE PETITION OF COVANTA) ORDER
FAIRFAX, INC. AND VIRGINIA ELECTRIC POWER)
COMPANY - FOR PARTIAL WAIVER OF N.J.A.C. 14:8-) DOCKET NO. QO131009098
2.6(C)-(G)

Parties of Record:

James L. Neal, on behalf of Virginia Electric Power Company
Nancy Tammi, Esq., on behalf of Covanta Energy Corporation

BY THE BOARD:

By this Order, the New Jersey Board of Public Utilities ("Board") considers a petition filed jointly by Covanta Fairfax, Inc. ("Covanta") and Virginia Electric and Power Company ("Virginia Electric") for a "retroactive waiver" of N.J.A.C. 14:8-2.6.

BACKGROUND

Covanta which owns and operates the Covanta Fairfax Resource Recovery Facility ("Covanta Facility") is a wholly-owned subsidiary of Covanta Holding Corporation ("CHC"), a public company with its principal offices at 445 South Street, Morristown, New Jersey. Virginia Electric is a public service corporation in the Commonwealth of Virginia (together with Covanta, "Petitioners"). Petitioners state that the Covanta Facility sells its entire generation output to Virginia Electric pursuant to a long-term power purchase agreement. The Covanta Facility is located outside of New Jersey and, accordingly, the creation of Class II RECs on the basis of its generation is subject to specific rules and requirements set forth in N.J.S.A. 48:3-51 and N.J.A.C. 14:8-2.6 (c)-(g). To qualify for Class II Renewable Energy Certificates ("RECs") under the rule, a resource recovery facility located outside of New Jersey must satisfy two criteria: it must be located in a state with retail competition as defined in N.J.A.C. 14:4-1.2, and it must have received an environmental compliance determination from the New Jersey Department of Environmental Protection ("NJDEP") that the facility meets or exceeds all New Jersey Clean Energy Program ("NJCEP") requirements that would apply if the facility were located in New Jersey, or meets equivalent environmental requirements. N.J.A.C. 14:8-2.6(c).

Petitioners allege and Staff does not dispute that in 2005, the Board included the REC certification number for the Covanta Facility, NJ-10009-MSW-11-AC, in a list of eligible Class II generators provided to PJM-EIS Generation Attributes Tracking System ("GATS") as the

administrator of the Class I and Class II REC market.¹

According to the petition, in 2013, “based on reliance on the GATS REC certification number provided by the Board to the GATS [sic] in 2005,” Virginia Electric sold a number of EY² 2013 RECs to various third parties. Petition at 3. Following Virginia Electric’s sale of Class II RECs under the above-referenced REC certification number, Petitioners state that Virginia Electric was informed by supplier/providers that Covanta would be required to submit an annual Class II generator affidavit for EY 2013, pursuant to N.J.A.C. 14:8-2.6(g). Petitioners further state that Virginia Electric discussed this matter with Board and GATS staff, but that neither Covanta nor Virginia Electric was able to produce a copy of the NJDEP determination that was needed to provide the basis of the annual certification. Petition at 4. On further investigation, there proved to be no record that Covanta or any other party had ever requested an environmental compliance determination for this facility, as required by N.J.A.C. 14:8-2.6(c) and (d). In the absence of such a determination, Covanta represents that it was unable to sign the annual affidavit required by N.J.A.C. 14:8-2.6(g)(iii) and, consequently, any Class II RECs based on its EY 2013 energy production were not eligible to satisfy the New Jersey Renewable Portfolio Standard. Petitioners state that Virginia Electric proceeded to cancel some, but not all, of the outstanding EY 2013 Class II REC purchase and sale agreements that it had entered into with third parties.³

On October 1, 2013, Petitioners filed a petition with the Board for a “retroactive” waiver of N.J.A.C. 14:8-2.6(c)-(g) as these rules apply to RECs issued by GATS to the Covanta Facility, and an extension of time for the Covanta Facility to comply with the relevant rules. According to the petition, Covanta submitted a copy of its request for an environmental compliance determination on the same date to the Board’s Office of Clean Energy (“OCE”) and the NJDEP’s Office of Innovative Technology.

Petitioners maintain that N.J.A.C. 14:1-1.2 supports waiver of the rule.

STAFF RECOMMENDATION

As noted above, the determination as to whether an out-of-state resource recovery facility qualifies as a Class II renewable energy generator eligible to produce Class II RECs that may be used to satisfy New Jersey’s Renewable Portfolio Standard (“RPS”) is governed by N.J.A.C. 14:8-2.6 (c)-(g). These rules provide, in pertinent part, that:

(c) Electricity generated by a resource recovery facility located outside of New Jersey shall qualify as class II renewable energy if both the following criteria are met:

1. The facility is located in a state with retail competition, as defined at N.J.A.C. 14:4-1.2; and

¹ In the Matter of the Authorization to use Class I and Class II Renewable Energy Certificates Issued by PJM-Environmental Information Services, Inc., for Compliance with New Jersey’s Renewable Portfolio Standards, Non-Docketed (July 6, 2005).

² “EY” or Energy Year is defined in N.J.S.A. 48:3-51 as the 12-month period from June 1 to May 31, numbered according to the calendar year in which it ends.

³ Upon learning that Covanta was unable to sign the requisite affidavit, Board Staff reached out to those supplier/providers that had purchased Class II RECs from Virginia Electric and advised them that these RECs would not be accepted for compliance with New Jersey’s RPS.

2. NJDEP makes an environmental compliance determination, stating that the facility meets or exceeds all NJDEP requirements that would apply to the facility if it were located in New Jersey, or meets equivalent environmental requirements.

The facility operator must request and obtain this environmental compliance determination prior to generation of the energy. N.J.A.C. 14:8-2.6(d), (f). In addition, the facility operator must provide an annual affidavit certifying that: 1) the facility "has not violated its Federal or State environmental permits in the previous year"; and 2) "it continues to operate in conformity with the request and documentation originally provided to DEP." N.J.A.C. 14:8-2.6(g)(iii).⁴

Petitioners did, as asserted in the petition, submit a request for an Environmental Compliance Determination to the Office of Clean Energy and the NJDEP on October 1, 2013. The OCE has since received a memo from the NJDEP stating that the Covanta Facility does not meet the environmental standards required for an out-of-state resource recovery facility to generate energy eligible to form the basis for a Class II REC that may be used to meet the New Jersey RPS. (Attachment A). More specifically, the NJDEP concluded that the Covanta Facility is not the equivalent of New Jersey municipal solid waste facilities from an air pollution control perspective, and that significant additional data would be needed to determine that it met the standards for solid and hazardous waste management.

Briefly stated, Covanta failed to receive the necessary Environmental Compliance Determination. Staff believes that fact moots Covanta's request for retroactive application as the determination does not support the use of EY2013 Class II RECs to demonstrate compliance with New Jersey's RPS. Staff recommends that the Board deny the petition.

DISCUSSION AND FINDINGS

The Board has reviewed the record in this matter and the recommendation of Staff. While the Board does not disagree with Staff's conclusions and recommendation, the Board will address the claims made by Petitioners more fully. In support of their request for a retroactive waiver of these rules, Petitioners cite N.J.A.C. 14:1-1.2(b)(1). This rule provides that:

[t]he Board shall, in accordance with the general purposes and intent of its rules, waive section(s) of its rules if full compliance with the rule(s) would adversely affect the ratepayers of a utility or other regulated entity [or] the ability of said utility or other regulated entity to continue to render safe, adequate and proper service, or the interests of the general public.

In other words, Petitioners have the burden of demonstrating that requiring full compliance with N.J.A.C. 14:8-2.6(c)-(g) would: 1) thwart the general purpose and intent of the rule; and 2) that such compliance would adversely affect either:

- the ratepayers of a regulated entity;
- the ability of that regulated entity to provide safe, adequate, and proper service; or,
- the interests of the general public

⁴ Staff notes that no one at the Covanta Facility was willing to sign the affidavit even to go so far as attesting that it "has not violated its Federal or State environmental permits in the previous year." N.J.A.C. 14:8-2.6 (d).

As noted by Staff, to be eligible to generate energy on which Class II RECs may be based, facilities located outside of New Jersey must receive from the NJDEP an environmental compliance determination that the facility either meets or exceeds New Jersey environmental requirements or meets equivalent environmental requirements; in addition, this determination must be made prior to the generation of the energy on which Class II RECs are intended to be based. N.J.A.C. 14:8-2.6(c)(2), - (f). The general purpose and intent of these provisions is to ensure that when Class II RECs are based on energy generated out of state, that energy meets New Jersey's criteria for Class II renewable energy.

Petitioners have acknowledged that they became aware of the need to submit an annual affidavit when the providers/suppliers to whom Petitioners had sold Class II RECs informed them of this requirement. Petitioners also admit to lacking not only the environmental compliance determination but any record that a request for such a determination was ever made. (Petition at 4). It appears that Petitioners were not familiar with the applicable New Jersey law prior to entering into the New Jersey Class II REC market.

The rules governing the New Jersey RPS were promulgated, in significant part, to ensure that the energy upon which a REC was based, be it solar, Class I, or Class II, did in fact constitute clean energy as defined at N.J.S.A. 48:3-51 and as implemented through the Board's rules. "Class II renewable energy' means electric energy produced at a resource recovery plant . . . provided . . . that the [NJDEP] has determined that such facility meets the highest environmental standards and minimizes any impacts to the environment and local communities." N.J.S.A. 48:3-51; N.J.A.C. 14:8-2.6 (c). See also N.J.A.C. 14:8-2.1(a): "This subchapter is designed to encourage the development of renewable sources of electricity and new, cleaner generation technology; minimize the environmental impact of air pollutant emissions from electric generation; reduce possible transport of emissions and minimize any adverse environmental impact from deregulation of energy generation[.]"

As noted by Staff, Petitioners did not receive a favorable Environmental Compliance Determination from the DEP and their request for retroactive application of that determination to allow RECs from the Covanta Facility to be used for compliance with the New Jersey RPS is therefore moot. The timely submission of the documentation on which an Environmental Compliance Determination can be based is one important means of ensuring that the promotion of clean energy by the RPS is not compromised.

Petitioners also argue that, since the Board has designated GATS as the entity charged with issuing RECs, all RECs issued by GATS are "pre-authorized" and automatically eligible for use for compliance with New Jersey's RPS. Ibid. The Board does not find this novel argument convincing. Petitioner's interpretation would render superfluous and meaningless not only the Board's rules on the eligibility requirements for Class II RECs but the statutory definition quoted above, which requires a determination from the NJDEP. The annual certification requirement underscores the need for each facility to continue to meet the standards on an ongoing basis.

In consideration of the foregoing, the Board **FINDS** that the Covanta Facility generated energy during Energy Year 2013 and sold that energy to Virginia Electric. The Board **FINDS** that Virginia Electric subsequently sold Class II RECs based upon this energy to supplier/providers required to comply with the New Jersey RPS. The Board **FURTHER FINDS** that neither the Covanta Facility nor Virginia Electric was able to produce the documentation of the environmental compliance determination required for out-of-state resource recovery facilities from the NJDEP for EY 2013. The Board **FINDS** that after Petitioners submitted a request for an environmental compliance determination to the NJDEP in October 2013, the NJDEP denied the request and determined that the Covanta Facility did not meet the NJDEP's standards.

Finally, the Board **FINDS** that the Class II RECs based upon the energy generated at the Covanta Facility during EY 2013 were not eligible for demonstrating compliance with the New Jersey RPS.

Therefore, the Board **HEREBY DENIES** Petitioners' request for a retroactive waiver of the requirements of N.J.A.C. 14:8-2.6 (c)-(g) for RECs based on energy generated by the Covanta Facility during EY 2013.

DATED: 6/18/14

BOARD OF PUBLIC UTILITIES
BY:


DIANNE SOLOMON
PRESIDENT


JEANNE M. FOX
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER


MARY-ANNA HOLDEN
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

Finally, the Board **FINDS** that the Class II RECs based upon the energy generated at the Covanta Facility during EY 2013 were not eligible for demonstrating compliance with the New Jersey RPS.

Therefore, the Board **HEREBY DENIES** Petitioners' request for a retroactive waiver of the requirements of N.J.A.C. 14:8-2.6 (c)-(g) for RECs based on energy generated by the Covanta Facility during EY 2013.

DATED: 6/18/14

BOARD OF PUBLIC UTILITIES
BY:


DIANNE SOLOMON
PRESIDENT



JEANNE M. FOX
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER


MARY-ANNA HOLDEN
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities


IN THE MATTER OF THE PETITION OF COVANTA FAIRFAX, INC. AND VIRGINIA
ELECTRIC POWER COMPANY - FOR PARTIAL WAIVER OF N.J.A.C. 14:8-2.6(C)-(G)
DOCKET NO. QO13100908

SERVICE LIST

James L. Neal, Director
Power Generation Regulated Operations
5000 Dominion Boulevard
Glen Allen, Virginia 26060

Caroline Vachier, DAG, Section Chief
Department of Law & Public Safety
Division of Law
124 Halsey Street
Post Office Box 45029
Newark, NJ 07101-45029

Babette Tenzer, DAG
Department of Law & Public Safety
Division of Law
124 Halsey Street
Post Office Box 45029
Newark, NJ 07101-45029

Tricia Caliguire, Esq.
Counsel's Office
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625

Rachel Boylan, Esq., Legal Specialist
Counsel's Office
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625

Jake Gertsman, Esq., Legal Specialist
Counsel's Office
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625

Nancy Tammi, Esq., Vice President and
Associate General Counsel
Covanta Energy Corporation
445 South Street
Morristown, New Jersey 07960

Kristi Izzo, Secretary
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625

Elizabeth Ackerman, Acting Director
Division of Economic Development
and Energy Policy
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625

Benjamin Hunter, Renewable Energy
Program Administrator
Office of Clean Energy
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625

Allison E. Mitchell, AA1
Office of Clean Energy
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625



State of New Jersey

DEPARTMENT of ENVIRONMENTAL PROTECTION

Chris Christie
Governor
Kim Guadagno
Lt. Governor

Sustainability and Green Energy
401 E. State Street, P.O. Box 402, Mail Code 401-07E
Trenton, NJ 08625-0402

Bob Martin
Commissioner

January 6th, 2014

MEMORANDUM

TO: Ronald Jackson, Research Scientist
NJBPU – Office of Clean Energy (OCE)

FROM: Ravi Patraju, Research Scientist
NJDEP - Sustainability and Green Energy (SAGE)

SUBJECT: Covanta Fairfax, Inc.
Request for Class II REC Environmental Compliance Determination

NJDEP's Division of Air Quality (DAQ) and Solid and Hazardous Waste Management Program (SHWMP) conducted the appropriate environmental compliance determination of Covanta's Fairfax, Inc. application for Class II RECs. The results of the environmental reviews are as follows:

Comments from Division of Air Quality (DAQ)

"Air pollution control technology and emission test results for the referenced facility with all five NJ RRF facilities and with USEPA emission guidelines and standards for municipal solid waste combustion units. Based on the test report submitted, nitrogen oxides emissions do not meet the highest environmental standards required of New Jersey facilities, namely New Jersey Reasonably Available Control Technology (RACT) at N.J.A.C. 7:27-19.12, requiring a maximum allowable emission concentration of 150 ppmvd at seven percent oxygen. On the basis of emissions of nitrogen oxides, the Covanta Fairfax municipal solid waste facility is not equivalent to the NJ facilities from an air pollution control perspective."

Comments from Solid and Hazardous Waste Management Program (SHWMP)

"The Bureau of Landfill and Hazardous Waste Permitting (Bureau) has reviewed the "1st 2013 Semi-Annual TCLP Ash Sampling and Test Report" submitted by Covanta for its Fairfax, VA, MSW incineration facility in support of Covanta's application to NJBPU for Class II renewable energy credits (RECs). The data suggest that the ash residue that were sampled and analyzed is not a toxicity characteristic (TC) waste. The sampling occurred over a seven-day period between May 28 and June 11, 2013.

Based on the review, the Bureau needs additional clarification that:

- The ash sampling and monitoring would continue at the facility;
- The ash sampling plan including but not limited to sampling frequency, location, compositing of samples, test parameters, monitoring and reporting requirements, etc.

would meet at a minimum the requirements of the June 1995 Guidance for the Sampling and Analysis of Municipal Waste Combustion Ash for the Toxicity Characteristic (EPA Pub No.: EPA530-R-95-036) and/or the regulatory standards at the NJ solid waste regulations. Note that, in addition to TCLP analysis, periodic tests are required for dioxins and furans during stack tests at the NJ facilities;

- Any disposal of ash residue would occur at a RCRA Subtitle D Landfill (double lined or equivalent); and
- Any beneficial use of the residual ash would meet the New Jersey standards specified at N.J.A.C. 7:26-1.7(g).

Also, unlike New Jersey facilities, which go through an involved permit application and review process prior to being authorized to operate, the Fairfax, VA, facility operates under Permit-by-Rule #545. Therefore, the sampling plan including the frequency of sampling, test parameters, monitoring, and reporting requirements, etc. must be vetted and determined adequate.”

Therefore, based on the above analyses, this facility does not meet the NJDEP’s regulatory requirements that would apply to a similar facility located in New Jersey. To satisfy regulatory compliance, the above deficiencies must be addressed. Please feel free to contact me at (609) 292-0125 if you have any questions.