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The Northeast Utilities System

Robert A. Bersak
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April 28, 2009

Ms. Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 Fruit Street, Suite 10
Concord, New Hampshire 03301-2429

Re: Docket No. DE 09-067
Complaint of Clean Power Development, LLC



Dear Secretary Howland:

Pursuant to the Commission's Secretarial Letter, dated April 14, 2009, Public Service Company of New Hampshire ("PSNH" or the "Company") provides this response to the Complaint of Clean Power Development, LLC ("CPD").

CPD's filing of April 7, 2009, contains three enumerated complaints involving PSNH. In summary, these complaints are:

- I. Whether PSNH gave good-faith consideration to CPD's proposal to sell the output of its proposed Berlin-based biomass facility ("CPD Berlin");
- II. Whether the PSNH's 2007 Least Cost Integrated Resource Plan ("LCIRP") filed on September 28, 2007, was accurate; and,
- III. Whether PSNH has violated RSA sections 362-F:1, 378:37, 38 or 39.

PSNH denies any allegations of wrongdoing. As will be demonstrated below, PSNH gave CPD an opportunity to present a *bona fide* proposal to sell the output from its proposed CPD Berlin facility. CPD failed to provide such a proposal. PSNH's LCIRP, filed over a year and a half ago, and prepared in the weeks and months prior to its actual filing date, accurately portrayed PSNH's then-current resource needs and plans. And, PSNH has not violated RSA sections 362-F:1, 378:37, 38 or 39.

By certified mail letter dated February 10, 2009, CPD wrote to PSNH in reference to its proposed CPD Berlin facility. (Attachment 1). The gist of that letter is contained in its final

sentence, “Accordingly, CPD respectfully requests that PSNH make the exact terms and conditions offered to Laidlaw also available to CPD for review and consideration related to our Berlin energy project, subject to an appropriate confidentiality agreement.”

A few days after receiving that February 10, 2009, letter, PSNH received a copy of an ISO-New England letter to CPD dated February 16, 2009, regarding CPD Berlin (Attachment 2). By that letter, ISO-NE informed CPD that, “...ISO-NE deems that the Interconnection request for the Project is withdrawn based on failure to adhere to all requirements of the LGIP as specified in Section 3.6 of Schedule 22 of the OATT.” Despite ISO’s withdrawal of the CPD Berlin Interconnection request, per the OATT CPD had 15 business days to cure all the deficiencies cited by ISO. As a result of the deemed withdrawal by ISO-NE of the CPD Berlin Interconnection request, PSNH delayed responding to CPD’s February 10, 2009, letter awaiting a resolution.

On March 9, 2009, CPD sent an email to PSNH demanding serious discussions with PSNH concerning CPD Berlin “that can lead to a definitive agreement related to a PPA for our Berlin project, [or] CPD will be forced to file a complaint with the NH PUC.” (Attachment 3). A draft of the threatened complaint was attached to that email. (Attachment 4).

I was informed by an internal PSNH e-mail dated Thursday, March 12, 2009, that CPD had cured the deficiencies noted in the ISO-NE letter. By letter dated Monday, March 16, 2009, I responded to CPD on behalf of PSNH. (Attachment 5). In that letter, PSNH responded to CPD’s allegations of illegality, and to its threat to file a complaint with the Commission. PSNH reminded CPD that unless CPD chose to assert rights as a qualifying facility under PURPA, no utility or other market participant had a legal mandate to enter into a power purchase agreement with CPD or with any other merchant generator. PSNH noted that given the current economic situation and the status of both PSNH’s and New England’s power supply options, the company has chosen not to enter into discussions regarding CPD Berlin.

However, I closed my March 16 letter to CPD by stating:

Of course, you are always free to unilaterally propose a power purchase agreement for PSNH’s consideration. Should the terms, prices, and conditions of such a proposal be of interest to us, we would respond accordingly.

On March 17, 2009, CPD issued a media release regarding the two biomass power generation facilities proposed for the City of Berlin. (Attachment 6). In that media release, CPD was highly critical of PSNH’s alleged commercial relationships with both the Lempster wind facility and the competing Laidlaw biomass proposal. CPD also noted its concerns regarding the availability of biomass fuel in the region, and the upward pressure on costs of increased demand for such fuel.

On March 23, 2009, CPD (by and through its counsel, Attorney Rodier) responded to my March 16 letter. (Attachment 7). That letter purported to be responsive to my offer that PSNH would consider the terms, prices, and conditions of any unilateral power purchase proposal by CPD. A

review of CPD's response will reveal that it begins with veiled threats, continues by noting vagaries in what the proposed CPD Berlin facility might have for sale, and ends with a pricing component stating "it would be appropriate for PSNH to pay CPD an amount equivalent to the prices that PSNH has agreed to pay Laidlaw for the output of Laidlaw's Berlin project...." This pricing was proposed by CPD notwithstanding CPD's allegations of impacts on the sustainability of the biomass wood supply and resulting higher rates to PSNH's customers allegedly caused by that very pricing proposal in its media release less than a week earlier.

As per my offer, PSNH reviewed CPD's March 23 proposal. By letter dated April 6, 2009, I responded on behalf of PSNH. (Attachment 8). In my letter, I noted that CPD's proposal was not deemed a *bona fide* offer. The material terms of the CPD proposal, such as term, output, and facility size, were indefinite. Most important, CPD's pricing offer was not specified, but instead it referred to prices that PSNH may (or may not) have agreed to pay a competing merchant generator. I specifically noted that, "...PSNH is precluded by contractual confidentiality terms from revealing the terms of any agreements it may have with Laidlaw or any other merchant power generator." Both CPD and its counsel are well aware of the confidential nature of competitive merchant pricing information.

The complaint in this proceeding was filed by CPD on April 7, 2009 – one day after PSNH rejected CPD's inadequate proposal. In response to the enumerated complaints of CPD, I will not repeat the contents of the various attached documents. They speak for themselves.

There is no requirement in New Hampshire for any market participant – be it a utility, an unregulated marketer, or an end user -- to enter into a long-term power purchase agreement with any merchant generator. CPD has the legal right and ability to interconnect to the transmission grid and arrange for the sale of its plant's output to utilities, competitive suppliers, or end-users inside, or even outside, New England. Moreover, if it meets PURPA requirements, CPD can assert rights as a qualifying facility to require PSNH to purchase the output from its CPD Berlin facility pursuant to the pricing approved by the Commission in Docket No. DE 09-099.

PSNH has management discretion to assemble a power supply portfolio, including the required number renewable energy certificates, that is subject only to the Commission's after-the-fact analysis of whether the resulting costs charged to customers are actual, prudent and reasonable. PSNH is not a public, governmental agency; it is an investor owned utility. A utility such as PSNH does not surrender its right to manage its own affairs merely by devoting its private business to a public use. *Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062, 1066-67 (1982); *Appeal of Roger Easton*, 125 N.H. 205, 211 (1984).

Despite having no obligation to do so, PSNH made a good faith offer to entertain any unilateral good faith proposal submitted by CPD. CPD chose to respond with a vitriolic correspondence, containing vague, indefinite terms, incorporating a pricing term that less than a week earlier it had criticized, and requiring disclosure of information that (if it exists) is confidential.

CPD complains that PSNH has violated its 2007 LCIRP by deciding not to negotiate with CPD. As noted above, PSNH is not required to enter into a long-term power purchase agreement with

any merchant generator. As the Commission is aware, PSNH's power purchasing activity is dependent on the need for power from third parties; that need varies based upon many factors. One of the factors, the nation's and state's economies, has changed significantly since PSNH's 2007 LCIRP was being prepared in mid-2007. For reference, on the day that the 2007 LCIRP was filed, the Dow Jones Industrial Average was 13,895.63 - - nearly 6,000 points higher than current levels. Many other factors have changed since 2007 - - now a significantly greater portion of PSNH's load moves on and off Default Energy Service rates based upon prices offered by competitive suppliers. Such changes are why the law requires biennial LCIRP filings.

PSNH is confident that it has complied with all applicable laws, including RSA sections 362-F:1, 378:37, 38 and 39. RSA 362-F:1 is captioned "Purpose" and espouses policy principles regarding renewable portfolio standards. As such, it is not capable of being "violated" as alleged in CPD's complaint. PSNH is in full compliance with the RPS requirements set forth in RSA Chapter 362-F.

Furthermore, CPD's allegation that PSNH has violated RSA sections 378:37, 38 or 39 are equally specious. These sections govern the LCIRP process. CPD should be fully aware that the Commission just "ORDERED, that Public Service Company of New Hampshire's revised Least Cost Integrated Resource Plan filed September 28, 2007 and supplemented on March 28, 2008 is accepted" by Order No. 24,945 dated February 27, 2009. (If CPD was not aware of this Commission determination, their counsel certainly is, as he represented two party-intervenors in that proceeding and recently filed a Motion for Rehearing of Order No. 24,945 on their behalf.)

PSNH urges the Commission to see the CPD complaint for what it is - an attempt by a disappointed and disgruntled merchant generator to force its output on an unwilling buyer. Clearly, PSNH has not committed any act "in violation of any provision of law, or of the terms and conditions of its franchises or charter, or of any order of the commission." RSA 365:1. If CPD Berlin truly has an economic product, someone in the marketplace will reach an accord with CPD; if not, then PSNH should not - and cannot - be forced to be the "buyer of last resort."

Sincerely,



Robert A. Bersak
Assistant Secretary and
Assistant General Counsel

Attachments

cc: Attorney James T. Rodier, per Rule Puc 204.02(c)