

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 10-195

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

**Petition for Approval of a Long-Term Power Purchase Agreement with
Laidlaw Berlin BioPower, LLC.**

Order on Pending Motions

ORDER NO. 25,192

January 14, 2011

I. PROCEDURAL BACKGROUND

On July 27, 2010, Public Service Company of New Hampshire (PSNH or Company) filed a petition for approval of a power purchase agreement (PPA) between PSNH and Laidlaw Berlin BioPower, LLC (Laidlaw). With its petition, PSNH filed a motion for confidential treatment of detailed pricing terms and certain other information made with its filing. On October 14, 2010, the Commission issued a prehearing conference order (Order No. 25,158) which denied PSNH's motion for confidential treatment except insofar as it related to the value of property to be protected by title insurance.¹ The Commission issued Order No. 25,171 on November 17, 2010, which accepted Laidlaw's notice of withdrawal, granted the motion to strike any information provided by Laidlaw in discovery from the record, and denied Concord Steam's motion to dismiss.

On November 24, 2010 the Commission issued Order No. 25,174 that disposed of PSNH's motion for confidentiality regarding its responses to data requests as well as the pending

¹ See Order No. 25,158 (October 14, 2010) and Order No. 25, 174 (November 24, 2010), for additional procedural history and a list of intervenors in this docket.

motions to compel filed by the Wood-Fired IPPs². On December 8, 2010, PSNH filed unredacted copies of the testimony of Mr. Labrecque and the PPA. On December 2, 2010, the Wood-Fired IPPs filed an objection to the statement of Clean Power Development (CPD) filed on November 18, 2010. CPD responded to the objection on December 13, 2010. The Wood-Fired IPPs filed a Motion to Dismiss PSNH's petition for approval of the PPA on December 15, 2010.

On December 17, 2010, testimony was filed as follows: Thomas C. Frantz and George R. McCluskey on behalf of Staff; Mark E. Saltsman, Robert J. Berti, James C. Dammann, and John Dalton, on behalf of Concord Steam; and Kenneth E. Traum on behalf of the Office of Consumer Advocate (OCA). The OCA included a separate filing of confidential information on December 17, 2010 and the Staff filed a confidential attachment to Mr. McCluskey's testimony on December 20, 2010. The City of Berlin filed the testimony of George E. Sansoucy on December 20, 2010.

The Commission issued a secretarial letter on December 22, 2010 re-scheduling the hearing in this docket to January 24, 2011. Also on December 22, 2010, PSNH filed a motion to strike the testimony of Mr. Saltsman and the joint testimony of Messrs. Berti and Dammann on behalf of Concord Steam. On December 23, 2010, PSNH filed an objection to the Wood-Fired IPPs' Motion to Dismiss. Edrest Properties filed an objection to PSNH's motion to strike on December 27, 2010 and Concord Steam also filed an objection to PSNH's motion to strike on December 28, 2010. Finally, on January 10, 2011, the Wood-Fired IPPs filed a reply to PSNH's objection to the Wood-Fired IPPs' Motion to Dismiss.

² See Order No. 25,158 for a list of the entities referred to as the Wood-Fired IPPs.

II. PENDING MOTIONS AND COMMISSION ANALYSIS

We will address three pending motions in this order: (1) the Wood-Fired IPPs' Motion to Strike Statement on behalf of CPD; (2) the Wood-Fired IPPs' December 15, 2010 Motion to Dismiss PSNH's petition; (3) and PSNH's December 22, 2010 motion to strike certain of Concord Steam's prefiled testimony.³

A. Wood-Fired IPPs' Motion to Strike Statement on behalf of CPD

We have reviewed the statement of Mel Liston filed by CPD, the Wood-Fired IPPs' objection and CPD's response. The Wood-Fired IPPs stated that, as a full party intervenor in the docket, CPD must conduct itself in accordance with the procedural schedule in this docket and Commission rules, which authorize public statements by those who are not intervenors. CPD responded to the Wood-Fired IPPs' objection by stating that it is allowed to make a public comment pursuant to N. H. Code of Admin. R. Puc 203.18, which does not prohibit and intervenor from making a public statement in lieu of testimony. Puc 203.18 reads as follows:

“Puc 203.18 Public Comment. Persons who do not have intervenor status in a proceeding but having interest in the subject matter shall be provided with an opportunity at a hearing or prehearing conference to state their position.”

Puc 203.18 applies only to non-intervenors and thus is not applicable to CPD. As a full party intervenor, CPD had an opportunity to file testimony and to submit to cross examination by the other Parties and Staff pursuant to the procedural schedule, which it elected not to do. Given the foregoing, the statement of Mr. Liston filed by CPD on November 18, 2010 does not

³ Concord Steam filed a motion to continue and requested additional time to file testimony given discovery disputes and PSNH's then-pending motion for reconsideration of Order No. 25,158 (October 15, 2010). Concord Steam filed its motion before we issued Order No. 25,168 denying PSNH's motion for reconsideration, Order No. 25,171 on pending discovery motions, and the November 17, 2010 secretarial letter modifying the procedural schedule. These actions render Concord Steam's motion to continue moot.

constitute a public comment under Commission rules nor is it testimony, therefore we will strike it from the record. As a full party intervenor in this docket, however, CPD will be afforded the opportunity to make a closing statement.

B. Wood-Fired IPPs' Motion to Dismiss PSNH's Petition

1. Motion to Dismiss

The Wood-Fired IPPs assert that the Commission lacks authority to approve the PPA because the terms of the PPA, including the obligation to purchase renewable energy certificates (RECs), extends beyond the end of the renewable portfolio standard requirements contained in RSA 362-F and that the authority granted to the Commission under RSA 362-F:9, I to approve such PPAs is only "to the extent of such requirements." The Wood-Fired IPPs state that the PPA has a 20 year term commencing between June 1, 2014 and December 31, 2014, thus extending the PPA and the REC purchase obligations to 2034. Wood-Fired IPPs' Motion at 3. Because the RPS obligations expire in 2025 according to the current law, the Wood-Fired IPPs argue that the Commission lacks authority to authorize PSNH to enter into the PPA and to approve PSNH's request for cost recovery for a non-existent REC obligation for the nine years beyond 2025. *Id.* at 4.

The Wood-Fired IPPs also contend that the operation of RSA 365:28 limits the Commission's ability to approve the PPA. According to the Wood-Fired IPPs, RSA 362-F:9 empowers the Commission to authorize PSNH to enter into multi-year agreements, while RSA 374-F:3, V(c) authorizes cost recovery. The Wood-Fired IPPs assert that RSA 365:28, which empowers the Commission to amend or set aside orders under certain conditions, constitutes a continuing obligation of the Commission to protect the public interest. *Id.* at 6. Read in *pari*

materia with RSA 362-F:9 and RSA 374-F:3, V(c), the Wood-Fired IPPs argue that RSA 365:28 compels the Commission to protect ratepayers with regard to expenditures under contracts such as the PPA. *Id.* at 10. The Wood-Fired IPPs therefore conclude that the Commission may not, through the approval of a private, contractual change in law provisions, waive its authority under RSA 365:28 to modify orders issued pursuant to RSA 362-F:9 and RSA 374-F:3,V(c). As a result, the Wood-Fired IPPs assert that the Commission must dismiss PSNH's petition. *Id.* at 11.

2. Objection of Public Service Company of New Hampshire

In its objection, PSNH states that it entered into the PPA as contemplated by RSA 362-F:9 to help meet its RPS obligations. PSNH Objection at 3. PSNH asserts that its petition for approval of the PPA is precisely what the New Hampshire Legislature had in mind when it enacted the RPS law and, specifically, RSA 362-F:9. *Id.* at 4.

According to PSNH, the Wood-Fired IPPs' interpretation of the law would eliminate any realistic possibility for investments in renewable power generation. PSNH posits that such an interpretation would limit the availability of rates for a RPS-related PPA to perhaps 10 to 12 years at best, and that limitation would be inconsistent with the legislative findings and purpose of the RPS law. PSNH further argues that the RPS law allows the Commission to authorize PPAs to "meet the reasonably projected renewable portfolio requirements," and that it is reasonable to project the continuation of RPS requirements after 2025. *Id.* at 8. According to the Company, the Commission's authority over the PPA is not time-limited. PSNH argues that the reasonableness of the PPA as a whole and the compliance of the PPA with the RPS law's public interest criteria should be the determining factors governing the Commission's approval. *Id.* at 9.

Regarding the Wood-Fired IPPs argument pertaining to RSA 365:28, PSNH states that, if that argument were to be accepted, the Commission would have unlimited authority to change material terms of approved PPAs, including pricing, quantities and term. PSNH asserts that such unlimited authority to set-aside, alter or amend the PPA would likely make any agreement unfinanceable, contrary to the intent of the RPS law. *Id.* at 9-10. PSNH further argues that the PPA is a contract subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) and, once approved, would be subject to the filed rate doctrine. If the Wood-Fired IPPs' argument regarding "abrogation" of RSA 365:28 were accepted, PSNH states that the Commission would be prohibited from approving any FERC-jurisdictional matter due to the constraints of the filed rate doctrine. *Id.* at 10. PSNH concludes by stating that the Commission has the ability and authority to review all of the terms of the PPA and to make a determination whether, taken as a whole, the PPA is consistent with the RPS law's public interest standards. *Id.*

3. Commission Analysis

The Wood-Fired IPPs' motion to dismiss essentially asserts that PSNH's petition for approval of the PPA fails to state a claim for which relief can be granted when it argues that the Commission lacks authority to approve the proposed PPA. When reviewing a motion to dismiss, we assume that PSNH's factual allegations are true and that all reasonable inferences therefrom are construed in favor of PSNH. Order No. 25,171 (November 17, 2010) at 9. *See also Southern New Hampshire Water Company, Inc.*, Order No. 19,826, 75 NH PUC 282 (1990) and *Mountain Springs Water Company, Inc. v. Mountain Lakes Village District*, 126 N.H. 199, 200-201 (1985).

Consistent with these standards, in order to grant the motion to dismiss, we must be persuaded that we have no authority to approve the long term PPA under RSA 362-F.

It has long been established that the Commission is a “creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute.” *Appeal of Public Service Co. of New Hampshire*, 122 N.H. 1062, 1066 (1982) (citing *Petition of Boston & Maine R.R.*, 82 N.H. 116, 129 A. 880 (1925)). See also *Public Service Co. of New Hampshire*, 86 NH PUC 407 at 410, Order No. 23,734 (June 28, 2001). The Commission has statutory authority under RSA 362-F:9 to authorize an electric distribution company to enter into multi-year purchase agreements with renewable energy sources for RECs “in conjunction with or independent of purchased power agreements from such sources, to meet the reasonably projected renewable portfolio requirements and default service needs to the extent of such requirements,” provided that the Commission finds such agreements to be in the public interest. RSA 362-F:9, I. The statute further allows the Commission to condition such agreements as part of its review and approval. *Id.* The criteria by which the Commission evaluates public interest are set out in RSA 362-F:9, II.

PSNH filed the proposed long-term PPA with Laidlaw for the purchase of power, RECs and capacity under RSA 362-F:9 and has asked the Commission to approve the PPA under the authority granted to the Commission by the Legislature. The Wood-Fired IPPs’ argument is that the Commission’s authority is limited to PPAs with terms that expire on or before 2025 because RSA 362-F does not require REC purchase obligations after 2025.

The Commission has authority under RSA 362-F:9 to consider any properly filed petition seeking approval of a long-term PPA between an electric distribution utility and a renewable

energy source. Inasmuch as we have before us a properly filed petition and a proposed PPA, we will deny the motion to dismiss. We will review the PPA to determine whether it meets the public interest consistent with the statute and will also consider whether we should exercise our authority under RSA 362-F:9, I to place conditions on our approval of the PPA. We will consider the individual criteria and other arguments at hearing. The existence of contractual terms that may conflict with statutory requirements or authority is not a basis for dismissal before the facts and arguments in the case are fully developed, rather it is a factor to be considered in our public interest review of the PPA, especially in light of the conditioning authority granted to the Commission under RSA 362-F:9, I.

Finally, we disagree with the Wood-Fired IPPs' argument regarding the interplay of RSA 365:28 and RSA 362-F:9. If we were to claim unlimited authority to revise contractual obligations such as those contained in the PPA after we approved them, the resulting uncertainty would halt the use of PPAs for the procurement of power and RECs. Such uncertainty would be harmful to both utilities and their customers, and would ultimately be detrimental to the development of renewable energy facilities in New Hampshire.

C. PSNH Motion to Strike Concord Steam Testimony

1. PSNH Motion to Strike

In its motion to strike, PSNH points out that it filed the petition pursuant to RSA 362-F, and that RSA 362-F:9, II states five criteria that the Commission must consider in determining whether the proposed PPA with Laidlaw is in the public interest. PSNH argues that the testimony of Mr. Saltsman and the joint testimony of Messrs. Berti and Dammann relate to the

impact that the PPA would have on the region's wood supply and the resulting cost of wood. PSNH Motion at 2.

PSNH states that the Commission had considered the scope of the proceeding at the prehearing conference. According to PSNH, Commissioner Ignatius referred to the concern expressed by counsel for the Wood-Fired IPPs about the size of the plant and asked if those issues are in the Site Evaluation Commission proceeding or in the instant proceeding. PSNH notes that its counsel, later in the prehearing conference, asked the Commission whether the issue of wood supply would be part of this docket and the Commission responded by saying that it would wait and see what the discovery looks like before formulating a response to the question. *Id.* at 3.

According to PSNH, the purpose of the Site Evaluation Commission is to review certain characteristics of a proposed energy generation facility or transmission facility subject to its jurisdiction. The review includes the evaluation of, among other things, the selection of sites for energy facilities, including the routing of high voltage transmission lines, that will have a significant impact on the welfare of the population, the environment of the state and the use of natural resources, citing RSA 162-H:1. PSNH points out that the Site Evaluation Committee had reviewed the proposed Laidlaw facility in its Docket No. 2009-02 and issued a decision to grant a Certificate of Site and Facility to Laidlaw on November 8, 2010. PSNH states that the decision included detailed considerations of the potential impact of the Laidlaw facility on the region's wood supply. *Id.*

According to the Company, the Commission has recognized that certain issues are within the jurisdiction of the Site Evaluation Committee and would not be part of a proceeding before

the Commission (citations omitted). *Id.* at 5. PSNH argues that the issues surrounding the region's wood supply and related matters have been fully heard, considered and ruled upon by the Site Evaluation Committee. PSNH states that Concord Steam had the opportunity to seek intervenor status in that proceeding and that Mr. Saltsman was present for much of that proceeding. *Id.*

PSNH asserts that if the Commission were to review wood supply issues in the instant docket, it would "undertake a colossal duplication of administrative resources" already expended by the Site Evaluation Committee. *Id.* at 6. PSNH claims that a Commission review of the wood supply issue would intrude into the jurisdiction of the Site Evaluation Committee and that wood supply is not a component of the requisite public interest finding. For these reasons, PSNH moves to strike the pre-filed testimony of Messrs. Saltsman, Berti and Dammann. *Id.*

2. Objection of Edrest Properties, LLC

Edrest Properties, LLC (Edrest) states in its objection that the Commission can benefit by collecting information pertinent to wood supply as it becomes available. According to Edrest, the issue of fuel price is one before the Commission in this docket. Edrest argues that the issue merits more investigation than that conducted before the Site Evaluation Committee. Edrest opined that Commissioner Below's synopsis of biomass within New Hampshire⁴ clearly shows that PSNH "is bringing into question whether or not they are truly working towards the State's 2015 initiative when most of these currently operating biomass facilities are not operating with

⁴ The synopsis Edrest refers to is apparently a power point presentation made by Commissioner Below at the July 2010 meeting of the Energy Resources & Environment Committee of the National Association of Regulatory Utility Commissioners (NARUC) as part of a panel on biomass generators. The power point visually supported a summary of the history of the development and regulation of biomass power in New Hampshire. The presentation can be found at www.narucmeetings.org/Presentations/CB%20Biomass%20ERE%207-20-10_updated.pdf

PPAs with PSNH.” Edrest objection at 1. Edrest expressed concern that PSNH’s proposed PPA with Laidlaw would monopolize wood fuel. *Id.* at 2.

3. Objection of Concord Steam

Concord Steam states that the testimony it provided is relevant because increases to the cost of biomass fuel at PSNH’s Schiller Station will increase the price paid for energy by PSNH’s customers under the Laidlaw PPA. According to Concord Steam, Schiller Station already pays more per ton of biomass fuel than any other facility in New Hampshire. Concord Steam claims that the Laidlaw PPA will further increase prices paid at Schiller Station as suppliers respond to the increases in demand. Concord Steam posits that the increase will be at least as large as occurred when Schiller Station came on line. Concord Steam’s Objection at 1-2. Further, Concord Steam states that the Site Evaluation Committee did not consider the price of biomass fuel because it could not predict prices with any accuracy and that the impact on other facilities was outside of its control. (citations omitted) *Id.* at 2.

Concord Steam also argues that the legislature repealed certain provisions in the Site Evaluation Committee’s jurisdictional statute which, as a result, barred the Site Evaluation Committee from considering the impact of the Laidlaw PPA on the State’s energy policy. According to Concord Steam, the Site Evaluation Committee could only consider whether the Laidlaw project would adversely impact the orderly development of the region. *Id.*

Concord Steam asserts that its testimony is properly before the Commission in its evaluation of the public interest pursuant to RSA 362-F:9 and is relevant to the criteria set forth in RSA 362-F:9, II. *Id.* at 3. Concord Steam goes on to argue that whether or not the issue was considered by the Site Evaluation Committee has no bearing on the instant proceeding because

the Legislature directed the Commission to make its own determination after consideration of both the public interest and specific statutory criteria under RSA 362-F:9,II. According to Concord Steam, there is no legal basis to exclude relevant testimony simply because it may or may not have been considered by a different body applying different criteria. *Id.* Concord Steam concludes by requesting that the Commission deny PSNH's motion to strike Concord Steam's prefiled testimony.

4. Commission Analysis

We have reviewed the arguments presented and deny PSNH's motion to strike the testimony of Messrs. Saltsman, Betri and Dammann. The fact that the Site Evaluation Committee may have considered wood supply and wood fuel price issues for purposes of RSA 162-H does not preclude our consideration of such issues to the extent that they may be relevant to RSA 362-F:9, II, which requires a public interest determination that the proposal is substantially consistent with a number of factors including: the restructuring policy principles of RSA 374-F:3, which includes, among other principles, VII concerning "Full and Fair Competition," VIII concerning "Environmental Improvement," and IX concerning "Renewable Energy Resources;" whether the proposed PPA conforms with the most recently accepted least cost integrated resource plan (LCIRP) filed by PSNH; and the "economic development and environmental benefits for New Hampshire." We therefore deny PSNH's motion to strike.

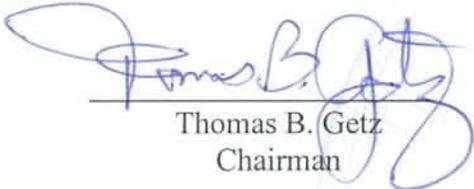
Based upon the foregoing, it is hereby

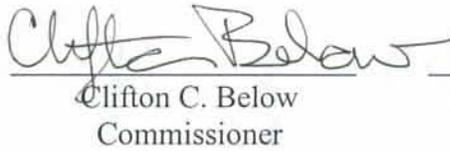
ORDERED, that the Wood-Fired IPPs' motion to strike the statement of Mr. Mel Liston on behalf of CPD is hereby GRANTED; and it is

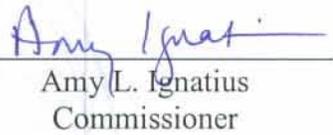
FURTHER ORDERED, that the Wood-Fired IPPs' motion to dismiss the petition of PSNH for approval of a long term purchase power and REC agreement with Laidlaw is hereby DENIED; and it is

FURTHER ORDERED, that PSNH's motion to strike certain testimony filed on behalf of Concord Steam is hereby DENIED.

By order of the Public Utilities Commission of New Hampshire this fourteenth day of January, 2011.


Thomas B. Getz
Chairman


Clifton C. Below
Commissioner


Amy L. Ignatius
Commissioner

Attested by:


Debra A. Howland
Executive Director