DE 10-195 PSNH Petition for Approval of Power Purchase Agreement
with Laidlaw Berlin BioPower, LLC

Office of the Consumer Advocate's Closing Statement
February 14, 2011

This case requires the Commission to consider whether the proposed Purchased Power Agreement (PPA) between Public Service Company of New Hampshire (PSNH) and Laidlaw Berlin BioPower, LLC (Laidlaw) meets the requirements of RSA 362-F:9. It is the OCA's position that based on the evidence and the statute, the PPA does not. Therefore, the Commission must reject it.

RSA 362-F:9, I authorizes the Commission to approve certain multi-year purchase agreements (proposed by electric distribution companies) that provide for the purchase of renewable energy certificates (RECs) from "renewable energy sources." Specifically, the proposed PPA must "meet reasonably projected renewable portfolio requirements and default service needs to the extent of such requirements." Id.

There is not sufficient evidence in the record before the Commission that, over the period of the proposed PPA, it will "meet [PSNH's] reasonably projected renewable portfolio requirements and default service needs." Id. In fact, PSNH has admitted that for some portion of the 20-year PPA term, REC purchases under the PPA will be greater than the Company's default service need. PSNH also testified during the hearings in this docket that the PPA requires default service ratepayers to purchase all of the RECs produced by the Laidlaw plant regardless of default service customers' need for those RECs, and regardless of whether lower cost RECs might be available to the Company.

To merit Commission approval of the proposed PPA, PSNH must satisfy its burden of proving that it is consistent with the public interest, with or without conditions imposed by the Commission. PSNH has failed to sustain its burden.

RSA 362-F:9, II requires that in determining the public interest, the Commission must find that the proposal is, on balance, substantially consistent with five factors:

> a) The efficient and cost-effective realization of the purposes and goals of [the RPS law];
> (b) The restructuring policy principles of RSA 374-F:3;
> (c) The extent to which such multi-year procurements are likely to create a reasonable mix of resources, in combination with the company's overall energy and capacity portfolio, in light of the energy policy set forth in RSA 378:37 and either the distribution company's integrated least cost resource plan pursuant to RSA 378:37-41, if applicable, or a portfolio management strategy for

default service procurement that balances potential benefits and risks to default service customers;
(d) The extent to which such procurement is conducted in a manner that is administratively efficient and promotes market-driven competitive innovations and solutions; and
(e) Economic development and environmental benefits for New Hampshire.

(Emphasis added). This section does not require that ratepayers make a project "financeable" for a private developer; it does not require that the plant be of a certain size, that it use a certain type of fuel (as long as it produces RECs), or even that it be sited within the state; and it also does not elevate economic development and environmental benefits above the other factors, including the "cost effective realization" of the RPS goals, as well as the requirements of the IRP statute. In addition, although there are other statutes related to the role of forestry and wood products in the state, as pointed out by the City of Berlin during the hearings, those do not factor into the PUC's review under RSA 362-F:9, under which the interests of PSNH's default service ratepayers are paramount.

Despite Mr. Sansoucy's testimony to the contrary, it is clear that the principles of least cost planning in RSA 378:38 do apply to any proposed PPA. PSNH also must act prudently on behalf of ratepayers when complying with the RPS law, and it must seek to do so in a manner that results in just and reasonable rates as required by RSA 374:2. The fact that a project may result in significant economic benefit to an area or sector of the state is certainly one consideration under the RPS law, but it is only one of five factors that must be considered within the context of underlying principles of ratemaking and utility regulation.

PSNH admits that there is a risk that the PPA could be over market, but still seeks to bind ratepayers to a 20-year term that could result in significant over payments for RECs and energy. PSNH acknowledges this risk and, in an attempt to mitigate what could be significant over market payments over the term of the PPA, has created the "cumulative reduction fund" (CRF). Unfortunately, the CRF does not mitigate the significant risk to ratepayers that the PPA could be over market or that the payments made pursuant to the PPA could be unnecessary at best. Instead, the proposed PPA amounts to an unlawful pre-payment of funds toward the future purchase of a power generation plant.

The CRF is also a deferral that may not provide future ratepayers with a benefit commensurate with their pre-payments, depending on the value of the plant when PSNH exercises the proposed option to purchase. If the RPS is no longer in effect at that time, or the plant is worth less than the balance in the CRF, ratepayers may never receive value for their over market payments. How can a PPA requiring

ratepayers to make such a speculative, risky investment be consistent with the public interest? Simply, when viewed with the intention of balancing the interests of ratepayers and PSNH investors, the risks to ratepayers far outweigh any of the purported benefits asserted by PSNH.

With respect to the purchase of RECs beyond PSNH's default service needs, PSNH points to the language in 362-F:3 that states that a utility must "meet or exceed" the RPS requirements for support for the premise that the Company may knowingly purchase more RECs than it needs. This is not a reasonable interpretation of that section. The word "exceed" does not give a utility license to knowingly purchase unnecessary RECs, the costs of which will be passed on to default service ratepayers. Instead, as with all requirements, a utility must prudently seek to comply with the RPS law at the least possible cost, consistent with general ratemaking principles, including those set forth in RSA 374, as well as the least cost planning, or integrated resource planning (IRP) statute, RSA 378:37 et seq.

A related issue that has arisen during these hearings is PSNH's untenable interpretation of the Schiller Modification Joint Motion and Order in DE 03-166 (Schiller Order). The Company testified that it believes that it must sell Schiller RECs even if it does so at a loss for ratepayers. This interpretation of the Schiller Order is not consistent with the intent of the Schiller agreement, nor is it consistent with the Company's duty to provide electric service at just and reasonable rates, and in accordance with RSA 378 and least cost planning principles. If Schiller RECs are available for PSNH's default service customers because they are no longer eligible for another state's RPS, or because they are worth less in other jurisdictions than PSNH must pay for RECs in NH, the Company must use the Schiller RECs to meet its NH RPS requirements. To do otherwise would be, as Staff testified, economically irrational, and it would also be imprudent. In addition, when asked whether PSNH would be willing to factor in Schiller RECs in determining PSNH's need for RECs, Mr. Long responded something to the effect of, "Not at the expense of this project." This response suggests that PSNH is putting its desire to support this project, and own the plant in the future, ahead of the interests of PSNH's default service customers in just and reasonable rates, which simply must be PSNH's number one concern.

The basic flaw in the PPA is the uncompensated **risk** that it creates for default service customers of PSNH. It is important to note that the OCA's testimony did not attempt to predict exactly how much over market the PPA would be; instead it stated that the risk that the PPA could be over market is just too high, even when considered within the context of the purported public interest benefits of the PPA. In fact, as Mr. McCluskey pointed out on the stand, we won't even know for sure how far over market it is until after the fact. However, the structure of the PPA, which fixes prices – the very thing that created

billions in over market costs in the prior wood plant (QF) long term contracts – makes it far too risky for customers and creates the real possibility that customers will not be compensated for this risk.

It is possible that, based upon the various projections in the record, the proposed PPA may be under market during some periods. But if there is any possibility, which we believe has been clearly shown to exist, that the PPA could result in hundreds of millions of dollars in over market payments for energy and RECs, it must be rejected. That is why the OCA advocated for a PPA structured more closely to the Lempster PPA, which did not require complicated projections of future market prices. PSNH also wants the Commission to focus on how the PPA might have hypothetically performed in the past, using fictional wood prices, but this docket is about the future. And as PSNH's counsel said, "past performance is not an indication of future performance." Any PPA approved by the Commission must include real protections for ratepayers in the future. This one does not.

Unfortunately, the potential modifications to the PPA that PSNH proposed at the beginning of these hearings, in PSNH Exhibit 9 Revised, do not reduce the risk that ratepayers could significantly over pay for energy and RECs over the term of the PPA. Simply adding over market payments for RECs to the CRF, or accruing interest on the CRF, does not sufficiently compensate ratepayers for the high level of risk of overpayment presented by the PPA. These late-proposed changes to the PPA could result in an even higher balance in the CRF as ratepayers essentially pre-pay for the plant, and that balance could significantly exceed the fair market value (FMV) of the plant when PSNH exercises its option to purchase the plant. If the CRF does exceed the FMV, ratepayers lose every additional dollar that they have paid into the CRF under the PPA. Such ratepayer costs are inconsistent with the public interest.

If it is true that a PPA is "necessary" in order to build the Laidlaw plant (i.e., to obtain financing), then perhaps a legislative change of some type should be pursued by the Company. If the RPS law, which already provides a subsidy paid by ratepayers to renewable generators, is not enough to incent new generation, then perhaps it needs to be revisited. Or perhaps we need to let the market work. The Legislature created a market-based framework within which PSNH must operate – including limits on owning generation – and only the Legislature is empowered to further incent renewable generation options in New Hampshire if such a goal is appropriate. To the extent that PSNH finds this legal structure unworkable, PSNH can seek clarification from the Legislature.

The Commission's approval of the proposed PPA is not the appropriate (or the only) option available to PSNH to meet its RPS requirements. Despite the focus on the Laidlaw project being a wood plant,

ratepayers are indifferent to how Class 1 RECs are produced. In addition to purchasing other renewable (i.e., non-wood) generation, PSNH can also comply with the RPS by making alternative compliance payments. Because the RPS law provides other mechanisms for compliance, no individual plant – even the Laidlaw plant – can legitimately be characterized as "necessary." Moreover, to the extent that other lower-cost ways exist for PSNH to meet its RPS requirements, the Company is obligated to utilize them.

It is uncontested that the risk exists that ratepayers could pay hundreds of millions in over market costs as a result of the proposed PPA. It is also uncontested that PSNH lacks the legal authority to directly purchase the proposed Laidlaw plant; that the RPS requirements may expire before the expiration of the REC purchases mandated by the proposed PPA; and that the financial and other forecasts sponsored by PSNH (as well as the Staff and the OCA) are speculative and based upon assumptions that may never come to fruition. Are these risks consistent with the public interest? Are these legal and factual limitations that exist present a legitimate basis upon which to mandate a long-term financial commitment for PSNH's ratepayers (and their children)? The OCA posits that the response to both of these questions is "No."

To support its request for approval, PSNH relies on projected environmental and economic development benefits of the proposed PPA. These purported benefits, however, must be considered and balanced with the remaining factors listed in RSA 362-F:9, II.. PSNH has failed to support any conclusion that when balanced with these remaining policy considerations including "efficient and cost-effective realization of the purposes and goals of [the RPS law]" – this PPA is in the public interest. PSNH has also failed to support the conclusion that a contract that enables it to own additional generation (and may even require that ownership in order to compensate ratepayers for millions in overpayments) is consistent with the "restructuring policy principles of RSA 374-F:3." Further, PSNH has failed to prove that the pricing terms of the PPA, which are not tied temporally or otherwise to market pricing, "promote[ ] market-driven competitive innovations and solutions."

We regret that the proposed PPA, even with the late modifications proposed by the developer (who is not a party to the proceeding), cannot be approved by the Commission under the applicable laws. We understand the strong support for the project in the City of Berlin, and we remain hopeful that the PPA could be revised in order to comply with the RPS law, and in order to reflect proper balancing of the policy objectives espoused in RSA 362:F-9, as well as the risks and benefits to both PSNH shareholders and ratepayers. The interests of merchant developers of renewable generation are simply not appropriately part of the balancing required by the Commission.

Finally, the OCA wishes to remind the Commission that the Energy Facility Site Evaluation Committee (EFSEC) denied Laidlaw's request to release confidential information from the EFSEC docket to OCA and Staff, including "sealed" transcripts of EFSEC hearings. In addition, this Commission did not take administrative notice of that proceeding. Therefore, although many references have been made to the EFSEC process during this Docket, our Office does not have access to much of that information, and has not reviewed what is publicly available. The OCA respectfully requests that in making its public interest determination the Commission give no weight to the partially disclosed record of the EFSEC proceedings.

Respectfully submitted,

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