

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

DE 10-195

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Approval of Power Purchase Agreement with
Laidlaw Berlin BioPower, LLC

OBJECTION
of
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
to
PETITIONS TO INTERVENE

September 28, 2010

Pursuant to RSA 541-A:32, N.H. Code of Admin Rule Puc 203.07, and the Order of Notice issued in this proceeding, Public Service Company of New Hampshire (“PSNH”) hereby objects to the Petitions to Intervene (“Petition”) filed in this proceeding by Clean Power Development, LLC (“CPD”); Concord Steam Corporation (“Concord Steam”); Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Springfield Power LLC, Whitefield Power & Light Company, and Indeck Energy -- Alexandria, LLC (the “Wood IPPs”); the New England Power Generators Association, Inc. (“NEPGA”); and Edrest Properties, LLC (“Edrest”) (collectively, the “Petitioners”). The Petitioners have not met the standards of RSA 541-A:32 to be granted intervenor status.

Overview

On July 26, 2010, Public Service Company of New Hampshire (PSNH) filed a petition for approval of a power purchase agreement (PPA) with Laidlaw Berlin BioPower, LLC (Laidlaw) for the purchase of energy, capacity and renewable energy certificates (RECs) pursuant to RSA 362-F:9. The Commission issued an “Order of Notice” on September 1, 2010, initiating this proceeding. The “Order of Notice” stated, “The filing raises, inter alia, issues related to the terms and conditions of the PPA, how the costs of the PPA will be recovered, and whether the

PPA meets the requirements of RSA 362-F:9 and is in the public interest. Each party has the right to have an attorney represent them at their own expense.” The “Order of Notice” required any party seeking to intervene in the proceeding to submit a Petition to Intervene on or before September 24, 2010, such Petition stating the facts demonstrating how its rights, duties, privileges, immunities or other substantial interest may be affected by the proceeding, as required by N.H. Admin. Rule Puc 203.17 and RSA 541-A:32,I(b).” Objections to such Petitions were required to be filed on or before September 29, 2010.

Clean Power Development

Clean Power Development filed its “Petition for Intervention” on September 24, 2010. In that Petition, CPD alleged the following as the facts demonstrating how its rights, duties, privileges, immunities or other substantial interest may be affected by the proceeding:

4. CPD is a New Hampshire limited liability company that focuses on the development of renewable and sustainable wood-fueled biomass-energy facilities. CPD has biomass energy projects under development in Berlin, NH and Winchester, NH. CPD has a Complaint pending before the Commission in DE-09-067 that raises issues related to PSNH’s willingness to discuss a power purchase agreement with CPD.

5. Accordingly, CPD has a substantial interest that will be affected by the Commission’s deliberations in this proceeding.

CPD has failed to state rights, duties, privileges, immunities or other substantial interest necessary to be granted intervenor status. As noted in the “Order of Notice,” the purpose of this proceeding is to investigate “issues related to the terms and conditions of the PPA, how the costs of the PPA will be recovered, and whether the PPA meets the requirements of RSA 362-F:9 and is in the public interest.”

CPD has alleged that it is a developer of renewable and sustainable wood-fueled biomass-energy facilities, with projects under development in Berlin and Winchester. That alone does not establish any basis for intervention in this proceeding. The New Hampshire Supreme Court has held that the allegation of increased competition alone is not typically deemed to be a legal harm conferring standing on a party. *Nautilus of Exeter v. Town of Exeter*, 139 N.H. 450 (1995).

In *Nautilus*, the Supreme Court rejected a property owner’s denial of standing to participate in a town zoning board proceeding. The standard set forth in RSA 676:5 for participation in such zoning matters is similar to the RSA 541-A:32 standard applicable in this proceeding. RSA

676:5,I allows appeals to be taken “by any person aggrieved.” This standard is substantially similar to that in RSA 541-A:32,I,(b), requiring the demonstration “that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding.”

Based on the RSA 676:5 standard for standing, the Court held, “We agree with the trial court that the only adverse impact that may be felt by the plaintiffs as a result of the ZBA's decision is that of increased competition with their businesses. This type of harm alone is insufficient to entitle the plaintiffs to standing to appeal the ZBA's decision: ‘[I]njury resulting from competition is rarely classified as a legal harm but rather is deemed a natural risk in our free enterprise economy.’ *Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541, 545 (1979) (quotation omitted).” *Nautilus* at 452.

CPD’s only other statement of alleged harm is that it has a complaint pending against PSNH before the Commission that raises issues related to PSNH’s willingness to discuss a power purchase agreement with CPD. That statement, while true, does not state sufficient facts to meet the RSA 541-A:32 standard for intervention in this proceeding. The Commission has docketed CPD’s complaint as Docket No. DE 09-067. The Commission has issued an “Order of Notice” and an “Order Commencing Adjudicative Proceeding” in that proceeding to deal with CPD’s complaint. The Commission has determined that in Docket No. DE 09-067, “The complaint involves, as a threshold matter, whether PSNH is obligated to negotiate and contract with CPD for some or all of the output of CPD’s biomass facility, which is proposed to be constructed within PSNH’s service territory.” CPD’s concerns regarding its complaint should be heard in Docket No. 09-067, and not in this or any other Commission proceeding.

Although CPD may have an interest in this proceeding, it has not met the standards of RSA 541-A:32 to warrant the grant of intervenor status. “It should be recognized that merely being interested in such a proceeding is not the same as having a legal interest of some nature that may be affected by the proceeding.” *Re North Atlantic Energy Corporation*, 87 NHPUC 455, 456 (2002). “Merely expressing a concern about a relevant issue, no matter how well-intentioned, does not confer party status.” *Id.* Hence, CPD’s petition for intervention should be denied.

Concord Steam Corporation

Concord Steam Corporation filed its “Petition for Intervention” on September 3, 2010. In that Petition, Concord Steam alleged the following as the facts demonstrating how its rights, duties, privileges, immunities or other substantial interest may be affected by the proceeding:

3. Concord Steam is one of a few wood-fired district-heating plants in the world. It provides District Heating service to the downtown Concord, New Hampshire area.

4. Concord Steam has been developing a wood-fired combined heat and power plant in Concord since 2007. The project has all of the necessary permits and approvals and has financing lined up.

5. As a result of the generous above-market pass-through provisions contained in the PPA with PSNH, the Laidlaw project will have a substantial upward impact on the price of wood that Concord Steam will consume at its wood-fired combined heat and power plant in Concord.

6. In addition, the renewable energy projects that get to deal with PSNH appear to be screened to make sure they fit PSNH’s “business model.” This state of affairs simply cannot be reconciled with the state law or public policy on renewable energy. PSNH does not seem to have consistent rules or formats with which to consider and evaluate renewable energy projects.

For the same reasons stated above for CPD, Concord Steam has failed to state rights, duties, privileges, immunities or other substantial interest necessary to be granted intervenor status. Concord Steam alleges that as a developer of a wood-fired plant it will suffer competitive harm if the Laidlaw project goes forward. As set forth in *Weeks*, this is not a legal harm providing a basis for a grant of intervenor status.

Concord Steam’s other rationale for intervention is that it is unhappy with PSNH’s process for determining how and when to enter into multi-year purchase agreements with renewable energy sources as authorized by RSA 362-F:9. Concord Steam raised this very issue in Docket No. DE 09-067 (the CPD Complaint docket), and sought intervention therein. (Paragraph 5 of Concord Steam’s intervention petition in that docket alleged, “The renewable energy projects that get to deal with PSNH appear to be screened to make sure they fit PSNH’s ‘business model.’ This state of affairs simply cannot be reconciled with the state law or public policy on renewable energy.”) The Commission rejected Concord Steam’s petition, stating, “Whether PSNH is obligated to negotiate with a power producer located in another utility’s service territory is not an issue that needs to be resolved in this docket. We do not find, therefore, that Concord Steam has demonstrated rights, duties, privileges, immunities or other substantial interests that are affected

by this proceeding, as required by RSA 541-A: 32 and will deny the petition to intervene.” That same rationale applies equally here.

Although Concord Steam may have an interest in this proceeding, it has not met the standards of RSA 541-A:32 to warrant the grant of intervenor status. “It should be recognized that merely being interested in such a proceeding is not the same as having a legal interest of some nature that may be affected by the proceeding.” *Re North Atlantic Energy Corporation*, 87 NHPUC 455, 456 (2002). “Merely expressing a concern about a relevant issue, no matter how well-intentioned, does not confer party status.” *Id.* Hence, Concord Steam’s petition for intervention should be denied.

New England Power Generators Association, Inc.

NEPGA filed its “Petition for Intervention” on September 24, 2010. In that Petition, NEPGA alleged the following as the facts demonstrating how its rights, duties, privileges, immunities or other substantial interest may be affected by the proceeding:

...NEPGA’s member companies have a specific interest in ensuring that PSNH’s solicitation process in this proceeding was fair and open to all willing participants in order to procure the most reliable and cost-effective electricity available.

The power purchase agreement that is the subject of this proceeding was entered into by PSNH under the auspices of the state’s Renewable Portfolio Standard law, RSA Chapter 362-F. Under the RPS law, PSNH will ultimately be obligated to ensure that 16% of its total megawatt-hours of electricity is supplied from so-called “Class I” electric renewable energy sources. RSA 362-F:3. Upon information and belief, none of NEPGA’s members have generation that qualify as New Hampshire Class I renewable generation.

In Docket No. DE 08-077, the Commission discussed the process utilized by PSNH for a similar renewable generation power purchase agreement:

It has been proposed in this proceeding that PSNH must issue an RFP to obtain the best market prices for RECs. While we agree that an RFP is one method to acquire RECs, the Legislature did not specify a particular solicitation method for distribution companies such as PSNH to enter into multi-year purchase agreements with renewable energy sources for certificates. Rather, the statute provides that we consider “(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.” RSA 362-F:9, II (d)-(e).

Re Public Service Co. of New Hampshire, Docket No. DE 08-077, Order No. 24,965, May 1, 2009, *slip op.* at 18-19. Thus, in the most recent RSA 362-F:9 proceeding, the Commission previously reviewed and approved the process used by PSNH to enter into RPS PPAs. As will be discussed later, the Commission similarly noted use of this same procurement process in its approval of two earlier RPS PPAs in Docket No. DE 07-125.

Moreover, the interest expressed by NEPGA in PSNH's solicitation process is substantially identical to the interest posed by Concord Steam. For the same reasons set forth in the discussion of Concord Steam's petition, above, NEPGA's petition fails to allege a sufficient basis for the granting of intervenor status. Hence, NEPGA's petition for intervention should be denied.

Wood IPPs

The Wood IPPs (Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Springfield Power LLC, Whitefield Power & Light Company, and Indeck Energy -- Alexandria, LLC) filed their "Petition for Intervention" on September 24, 2010. In that Petition, the Wood IPPs set forth the following issues deemed relevant to this RSA 362-F:9 proceeding as those impacting their rights, duties, privileges, immunities or other substantial interest:

(a) whether approval of the PPA will further the purposes and goals behind the creation of Class I in a cost-effective manner given that no RFP was issued and procurement was not conducted in a competitive manner; and whether approval of the PPA will further the purposes and goals behind the creation of Class I at the expense of the purposes and goals of Class III (which applies to existing wood-fired power plants);

(b) whether, combined with PSNH's option to purchase such a large generation facility, the restructuring principles of "fully competitive and innovative markets" and "market competition" with "minimal economic regulation" of generation will be accomplished (see RSA 374-F:3, II and III);

(c) whether diversity and its benefits and the goals of RSA 378:37 are better achieved through purchases from one large generation facility rather than from a number of smaller facilities; and whether approval of the PPA will actually harm diversity available to PSNH and within New England by adversely affecting smaller scale generators such as the Wood-Fired Plants;

(d) whether the procurement was conducted in a competitive manner given that no RFP was issued; and whether the purchase option is a market driven competitive solution; and

(e) whether there will be any (and, if so, what level of) net economic benefit as the result of the PPA if the PPA adversely affects the Wood-Fired Plants, the associated plant and fuel procurement jobs, and the communities that benefit economically from the Wood-Fired Plants' continued operation.

As noted above, the Laidlaw PPA will provide Class I RECs needed by PSNH under the requirements of RSA Chapter 362-F. The RPS law will ultimately require suppliers, such as PSNH, to provide 23.8% of the electricity supplied to be from renewable sources. Of that, 16% will have to come from Class I resources. Of the six Wood IPP petitioners, only Indeck Energy - Alexandria, LLC's facility is fully eligible to provide Class I RECs; 2 MW of Springfield Power LLC's 18 MW facility are Class I eligible; Bridgewater Power Company, L.P. and Whitefield Power & Light Company are not REC eligible facilities under RSA Chapter 362-F. Thus, the Wood IPPs have limited ability to provide Class I RECs and could not provide the number of Class I RECs necessary for PSNH's RPS compliance.

The Wood IPPs further claim that the procurement process used by PSNH was unfair, and that the existence of a "Wood Price Adjustment" mechanism "impacts the competitive wholesale market for all generators." As the Commission may recall, two of the Wood IPP petitioners have willingly benefitted from similar arrangements. In Docket No. DE 07-125, the Commission reviewed and approved two power purchase agreements for the purchase of energy, capacity and New Hampshire RECs entered into by PSNH with Pinetree Power, Inc. and Pinetree Power-Tamworth, Inc. *Re Public Service Company of New Hampshire*, (Order No. 24,839), 93 NHPUC 155 (2008). As with the Laidlaw PPA, the agreements with the two Pinetree plants were negotiated bilaterally, without an RFP process. The Commission's Order notes, "Further, PSNH said that since the contracts were negotiated with market participants, they are market-driven competitive solutions to PSNH's need for renewable energy." *Id.* at 158. As with the Laidlaw PPA, those contracts also contain a fuel adjustment provision that is designed to cause buyer and seller to share the effects of any changes in the price of wood fuel from prevailing 2007 levels. Therefore, it is disingenuous for the Wood IPPs to raise these issues as harms entitling them to intervenor status in this proceeding. The Wood IPPs cannot legitimately claim harm as a result of PSNH using the procurement process two of its members supported and benefitted from. Nor

can they legitimately claim harm as a result of the existence of a wood price adjustment mechanism, which their own contracts also contained.

The Wood IPPs attempt to shoehorn themselves into this proceeding as aggrieved ratepayers. They claim that, “Each of the Wood-Fired Plants buys back-up power supply from PSNH.” PSNH has not investigated whether this is true, or whether any or all of the Wood IPPs purchase their energy needs from suppliers other than PSNH’s default energy service. But, given that the Wood IPPs have the ability to choose an energy supplier other than PSNH’s default energy service, any impact of the Laidlaw PPA on these Wood IPPs could be entirely avoided. As a result, the Wood IPPs do not meet the standing requirement that they have “suffered or will suffer an injury in fact” as the Supreme Court spelled out in its *Appeal of Richards*, 134 N.H. 148 (1991) and *Appeal of Stonyfield Farm, Inc.*, 159 N.H. 227 (2009) decisions.

Similar to CPD, Concord Steam, and NEPGA, the remainder of the Wood IPPs interests center on the issue of general competitive harm. Again, such “[I]njury resulting from competition is rarely classified as a legal harm but rather is deemed a natural risk in our free enterprise economy.” *Weeks, supra*.

Although the Wood IPPs may have an interest in this proceeding, as discussed earlier, “merely being interested in such a proceeding is not the same as having a legal interest of some nature that may be affected by the proceeding.” *Re North Atlantic Energy Corporation, supra*. “Merely expressing a concern about a relevant issue, no matter how well-intentioned, does not confer party status.” *Id*.

Edrest Properties, LLC

Edrest Properties filed its “Petition for Intervention” on September 24, 2010. In that Petition, Edrest alleged the following as the facts demonstrating how its rights, duties, privileges, immunities or other substantial interest may be affected by the proceeding:

4. Edrest properties LLC (sic) owns and/or leases properties with electric heat and services that can be substantially impacted by rate increases substantially triggered by competitive bidding absence.

5. Edrest Properties LLC recognizes testimony through the NHSEC from third party testimony that pass through costs inherent to this docket power purchase agreement can have significant threat to the continued operation of numerous north country biomass companies that support the backbone of Coos County. This in turn can lead to the downward spiral of significant tax revenue through closure

of these facilities that provide a significant portion of north country revenue through taxes and jobs. This can lead to the downward spiral of existing real estate value which can directly impact Edrest Properties LLC in addition to rising electrical rates.

Edrest's first allegation of rights, duties, privileges, immunities or other substantial interest may be affected by the proceeding is perplexing. It states that it "owns and/or leases properties with electric heat and services that can be substantially impacted by rate increases substantially triggered by competitive bidding absence." According to the New Hampshire Secretary of State's office, Edrest Properties LLC was just formed on August 23, 2010. A review of property records at the Coös County Registry of Deeds reveals no ownership of real property by Edrest as of this date (September 28, 2010 -- four days after the filing of Edrest's intervention petition). Moreover, PSNH has no record of any retail electric customer accounts held by Edrest Properties LLC. Thus, Edrest's claim that its rights, duties, privileges, immunities or other substantial interest may be affected by this proceeding because it "owns and/or leases properties with electric heat and services that can be substantially impacted by rate increases substantially triggered by competitive bidding absence" is unfounded and unpersuasive.

Edrest's second basis for showing that it is entitled to intervenor status is incomprehensible. As best PSNH can interpret it, Edrest claims standing based on "third party testimony" before the Site Evaluation Committee alleging that the Laidlaw PPA might have an impact on existing "biomass companies" which could reduce tax revenues and jobs which may lead to a reduction of real estate values that might impact Edrest. This tenuous and indirect chain of events set forth by Edrest is the antitheses of the "direct affect" standard espoused by the New Hampshire Supreme Court for standing:

A party's standing is a question of subject matter jurisdiction, which may be addressed at any time. *Libertarian Party of N.H. v. Sec'y of State*, 158 N.H. 194, 195 (2008). To have standing to appeal an administrative agency decision to this court, a party must demonstrate that his rights "may be directly affected by the decision, or in other words, that he has suffered or will suffer an injury in fact." *Appeal of Richards*, 134 N.H. 148, 154 (quotations and citations omitted), cert. denied, 502 U.S. 899 (1991); see RSA 541:3 (2007).

Appeal of Stonyfield Farm, Inc., 159 N.H. 227, 231 (2009). Edrest's claimed harm fails to meet the Court's "directly affected" and "has suffered or will suffer an injury in fact" tests.

WHEREFORE, PSNH respectfully requests this Commission to deny the Petitions to Intervene filed by the Petitioners and order such further relief as may be just and equitable.

Respectfully submitted this 28th day of September, 2010,

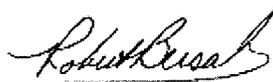
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CERTIFICATE OF SERVICE

I hereby certify that this 28th day of September, 2010, I served an electronic or written copy of this filing on the Service List and the various Petitioners pursuant to Rule Puc 203.11.



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Docket #: 10-195-1 Printed: September 28, 2010

FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:

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EXEC DIRECTOR & SECRETARY
NHPUC
21 S. FRUIT ST, SUITE 10
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- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.

- c) Serve a written copy on each person on the service list not able to receive electronic mail.

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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