

STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

In re: Petition for Approval of Power Purchase Agreement) Docket No. DE 10-195
with Laidlaw Berlin BioPower, LLC)

**WOOD-FIRED IPPs' OBJECTION TO
PSNH'S MOTION FOR REHEARING**

Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Springfield Power LLC, DG Whitefield, LLC d/b/a Whitefield Power & Light Company, and Indeck Energy-Alexandria, LLC (collectively the "Wood-Fired IPPs") object to the motion for rehearing filed by Public Service Company of New Hampshire ("PSNH"). The Wood-Fired IPPs' state the following in support of their objection:

The Commission should not reconsider its decision to make public the pricing terms and cost of PSNH's power purchase agreement with Laidlaw Berlin BioPower, LLC ("Laidlaw"). The Commission applied the correct legal standard, and then properly balanced the public's interest in disclosure against PSNH and Laidlaw's interests in confidentiality when the Commission made its initial determination. The Commission neither overlooked any fact nor mistakenly conceived Mr. Long's testimony. Even considering PSNH's new arguments and Mr. Long's altered testimony, the Commission's original determination that the scales tip in favor of public disclosure in this particular instance was the correct one.

The public's interest in disclosure of the pricing terms and cost of the PPA require that the PPA and Mr. Lebreque's related testimony be made public. The public's interest in disclosure, even of confidential and commercially sensitive information, is measured by the

purpose of the Right-to-Know Law, RSA 91-A. *Lamy v. N.H. Publ. Utils. Comm'n*, 105 N.H. 106, 111 (2005). The Right-to-Know Law is intended to ensure that the public is informed "about the activities of their government" and "to provide *the utmost information* to the public about what its government is up to." *Id. citing Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476-77 (1996). Emphasis supplied. The Commission therefore applied the appropriate standard when it defined its inquiry as "whether the disclosure of the information would inform the public of the Commission's conduct of its authority." Order 25,158 at 12.

As detailed by the Commission in Order 25,158, the Commission has been asked to conduct its authority under RSA 362-F:9 and approve a 20 year contract for RECs in conjunction with a power purchase agreement under a number of statutorily defined public interest factors. The pricing terms and cost of the PPA will be at the core of the Commission's review under RSA 362-F:9. Absent knowledge of pricing terms and cost, the public simply will not understand how the Commission came to either approve or disapprove this PPA, on balance, as a cost-effective realization of the purposes and goals of RSA 362-F, as a way to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost, or as being consistent with portfolio management that balances the benefits and risks to default service customers. Certainly the public will need pricing and cost information to understand how the Commission reconciles and balances these statutory public interest factors with the frontloaded cost of the PPA to PSNH ratepayers. Additionally, PSNH has asked the Commission to "approv[e] and allow[] full cost recovery of the rates, terms and conditions of the PPA." Petition at 2. If considered by the Commission, this secondary request would of course also require determinations focused on the pricing terms and cost of the PPA. Public understanding of the Commission's handling of these

matters will only be accomplished by allowing a "fully transparent review of the costs of the PPA." Order 25,158 at 13.

PSNH's justifications for entering into the PPA, if true, only validate the public's interest in understanding the Commission's actions here. In his prefiled testimony, PSNH President Gary A. Long argued that "collectively and individually" a number of state public policies "instruct" PSNH to "seriously and affirmatively take action" that is "inherently" long term, and cause PSNH to adopt a strategy of "entering into strategic renewable resource based power purchase agreements." Long (7/26/10) at 3-4. According to Mr. Long, PSNH intends to further the public policies behind RSA 374-F:3, RSA Chapter 362-F, RSA 125-O:19, and "The New Hampshire Climate Action Plan" by entering into this PPA. Long (7/26/10) at 3. PSNH cannot claim to be the instrument of a statewide public policy and ask the Commission to approve its implementation of those statewide public policies on one hand, and then claim that the public has no interest in the cost of that implementation.

Mr. Long goes on to state that "PSNH's desire is, of course, to meet these [public policy] goals in a cost competitive manner from a customer's viewpoint. The costs/benefits of the Project must be investigated together and broadly." *Id.* at 4. Even from PSNH's viewpoint, the cost of the PPA is integral to an investigation and balancing of the public benefits of the PPA, and hence integral to the Commission's balancing of the public interest. Consequently, the Commission was also correct when it determined that disclosure of the pricing terms and cost of the PPA "is central to the public's understanding of how the Commission evaluates whether this particular PPA meets the public interest standard." Order 25,158 at 12. Indeed, in this particular instance, it would require several leaps in logic to differentiate review of the effects of a 20-year

PPA on the public interest from the public's interest in knowing the pricing terms and cost of that PPA.

The Commission correctly determined that PSNH's stated interests in keeping the pricing terms and cost of the PPA secret do not outweigh the public's interest in understanding the Commission's conduct in approving or disapproving the PPA. In its original motion, PSNH made only the pat, unsupported arguments that PSNH's "ability to enter into economic contracts can only be assured if potential negotiating partners are confident that their proposals and pricing remain confidential and do not become available, either directly or indirectly, to their competitors. The detailed pricing information contained in the PPA would not have been provided absent the assurance that the information would not be disclosed to the public," and "disclosure would detrimentally impact both PSNH's ability to attract negotiating partners in the future, as well as LLB's competitive position in the market place." PSNH Motion for Confidential Treatment at 2 and 3.

The accuracy of these statements is belied by the PPA's confidentiality provisions. Sophisticated parties to a transaction know that confidentiality is *never* assured in the context of litigation and regulatory oversight, and parties regularly enter into written contracts and put pricing information in those contracts. Right-to-know law exceptions provide some assurance of confidentiality, but *none* in litigation, because exceptions to the Right-to-Know law do not create privileges against discovery. *Verrazzano Trading Corp. v. United States*, 69 Cust. Ct. 307, 308 (Cust. Ct. 1972) ("There is, however, a basic difficulty with the entire premise of [the government's] argument. The difficulty is that . . . the Freedom of Information Act . . . was not enacted to provide discovery procedures for obtaining information during litigation. Put otherwise, the fact that § 552(b) of the Information Act provides specified exemptions from the

Act's public information requirements does not . . . create a judicial discovery privilege with respect to such exemptions."). Moreover, the Right-to-Know Law provides only limited assurance of confidentiality in the regulatory context, because right-to-know law exceptions must be interpreted narrowly and each right-to-know law request is subject to a unique balancing test, the results of which differ in each circumstance. *See, e.g., City of Nashua*, 141 N.H. at 475 (provisions favoring disclosure must be construed broadly and exemptions must be construed narrowly).

It is for these reasons that sophisticated parties agree on how they will conduct themselves when confronted with Right-to-Know Law requests and litigation discovery requests. Indeed, the full text of the PPA's confidentiality provision demonstrates that PSNH and Laidlaw specifically considered that their pricing information might be disclosed through a public records requests or litigation discovery requests.¹ This is a risk that all utilities and power suppliers are

¹ **26.1 Confidentiality.** The terms of this Agreement, and any other information exchanged by PSNH and Seller relating to this Agreement, shall not be disclosed to any person not employed or retained by the PSNH or Seller or their Affiliates, except to the extent disclosure is (1) required by law, required to be made to any governmental authority for obtaining any approval, permits and licenses, or making any filing in connection therewith, required by the Interconnection Agreement or delivered by Seller to ISO-NE or to any Person exercising authority over Seller or the Facility for the purpose of maintaining the safety or reliability of the electric system into which the Energy output is delivered, (2) reasonably deemed by the disclosing Party to be required to be disclosed in connection with a dispute between or among the Parties, or the defense of any litigation or dispute, or any financing related to the Facility, (3) otherwise permitted by consent of the other Party, which consent shall not be unreasonably withheld, (4) required to be made in connection with regulatory proceedings (including proceedings relating to FERC, the United States Securities and Exchange Commission or any other federal, state or provincial regulatory agency) or pursuant to the rules or regulations of any stock exchange to which a Party or any of its Affiliates are bound. In the event disclosure is made pursuant to this provision, the Parties shall use reasonable efforts to minimize the scope of any disclosure and have the recipients maintain the confidentiality of any documents or confidential information covered by this provision, including, if appropriate, seeking a protective order or similar mechanism in connection with any disclosure. This provision shall not apply to any information that was or is hereafter in the public domain (except as a result of a breach of this provision). The Parties specifically agree that any press release or other public statement that addresses specific commercial terms of this Agreement shall be mutually agreed upon and the text thereof approved by the Parties.

Long (7/26/10), Attachment GL-1 at 29. Emphasis supplied.

subject to, and neither the risk nor the eventuality of disclosure prevents parties from negotiating, placing their pricing terms in their contracts, or placing their pricing terms into issue in administrative proceedings.

Not surprisingly, PSNH abandoned its original unfounded arguments that parties would never negotiate, and if they did, would not include pricing terms in their contracts. Instead, PSNH's motion for rehearing is based upon the sole argument that the Commission "misinterpreted" the prefiled testimony of PSNH's president, Gary Long. Mr. Long stated in his prefiled testimony that "[a]t this time, PSNH's interest in entering into long term power purchase agreement is highly limited." Motion for Rehearing at 14; Long (7/26/10) at 5. The Commission cited this testimony and observed that "approval of a PPA of this size could make future PPAs less likely." Emphasis supplied. Order 25,158 at 13-14. PSNH argues that "Mr. Long did not intend his testimony to mean that PSNH would not be in the competitive energy market for power purchase agreements at all," and faults the Commission for "misinterpreting" Mr. Long's testimony in that manner. Motion for Rehearing at 6.²

PSNH's assumption that the Commission misinterpreted Mr. Long's testimony cannot be correct given the Commission's conditional language noted above and its experience in its oversight of PSNH. PSNH would have the parties believe that the Commission which has continuously reviewed PSNH's least cost integrated plans in numerous dockets, PSNH's purchasing strategies in numerous energy service rate cases, and the resulting expected need for electric power in ensuing years would construe PSNH's agreement to purchase 65 MW of power to be the last of PSNH's wholesale power purchases. The Commission simply has too much

² Following the Commission's order, Mr. Long changed his testimony by affidavit to state: "At this time, and assuming the contract with LBB is approved, PSNH's interest in entering into additional long term power purchase agreements to fulfill the Company's Class I Renewable Portfolio Standard obligation is highly limited." Motion for Rehearing at 7.

experience to have misinterpreted Mr. Long's testimony in that manner and in fact it did not misinterpret the testimony.

Moreover, PSNH has failed to make a case that public disclosure of the pricing terms and cost of the Laidlaw PPA would have a detrimental effect on its ability to negotiate its next power purchase. PSNH has not stated the size of its potential purchase from HQ Hydro Renewable Energy, the duration of the potential power purchase agreement, the start date for that purchase, the dates of the forward price curves being used to structure the two agreements, or any other factors that might relate the pricing terms and cost of the Laidlaw PPA to the HQ negotiations. The fact remains, and Mr. Long has reiterated, that PSNH is unlikely to negotiate a power purchase similar to the one it has presented in this docket. Consequently, PSNH's use of its negotiations with HQ Hydro Renewable Energy to illustrate its point is unavailing.

Lastly, PSNH makes the argument that the Commission overlooked the fact that the PPA might not be approved. The Commission's order makes clear however, that the Commission had already considered this because the Commission considered the "possibility" of harm to Laidlaw and likelihood of future PPAs in conditional, not absolute terms: "We do not find that the *possibility* of harm outweighs the public interest . . . as . . . approval of a PPA of this size *could* make future PPAs *less likely*." Emphasis supplied. Order 25,158 at 13-14. Consequently, even considering PSNH's altered evidence and new argument, the Commission's original balancing of interests remains the correct one.

Likewise, the Commission should not reconsider its order requiring PSNH to provide the unredacted PPA and testimony of Mr. Lebreque to the parties in this docket. The parties to this docket have all of the same interests in disclosure as members of the general public, and there is no basis for making the pricing and cost of the PPA public while withholding that information

from the parties. However, even if the Commission reconsiders its decision relative to the general public, the Commission should not reconsider its decision with regard to the parties.

As noted above, determinations made under the balancing test applied under the Right-to-Know Law do not create privileges against the discovery of otherwise confidential information in litigation. *Verrazzano Trading Corp.*, 69 Cust. Ct. at 308. The Commission may not, therefore, deny a party access to information provided to Commission staff or the OCA in discovery simply because the information is protected under the Right-to-Know law. The Commission should treat proposals to deny parties access to confidential information with disfavor, and has done so in the past, maintaining that "whatever information we might reasonably rely upon in making a decision should be accessible to all Parties . . ." *North Atlantic Energy Corporation*, 87 NH PUC 396, 399 (2002), cited in *City of Nashua, Petition for Valuation Pursuant to RSA 38:9*, Order No. 24,495 (July 29, 2005). The Commission's reluctance to deny parties access to information that the Commission may rely upon reflects important due process considerations. *See, e.g.*, N.H. Const. Pt. 1, Art 15 (right of due process established); N.H. Code Admin Rules Puc 203.09(a) (establishing intervenors' right to discovery); RSA 541-A:33, IV and N.H. Code Admin. Rules Puc 203.24 (establishing right to full and effective cross examination for full and true disclosure of the facts); *Appeal of Office of Consumer Advocate*, 134 N.H. 651, 659-60 (1991) (applying N.H. Const. Pt. 1, Art 15 due process of law provisions apply to proceedings before the Commission).

Intervenors in this docket are entitled to full discovery to defend their interests by effectively cross examining witnesses. All parties -- whether government agencies, existing and potential electric power generators, municipalities, or public utilities -- are entitled to litigate the standards that the Commission is required to apply by statute. The Wood-Fired IPPs have the

same right as the next party to the information required to cross examine PSNH witnesses relative to the standards to be addressed. The Wood-Fired IPPs should not have to make a different showing of entitlement to that information, and denying the Wood-Fired IPPs access to such information would deny them due process.

The Wood-Fired IPPs are fully aware of the sensitivity of confidential commercial information. But there simply is no basis for entirely denying parties to a docket access to such information. If the Commission finds that the dissemination of the pricing terms and cost of the PPA will have any of the harmful effects claimed by PSNH, then the Commission has the tools necessary to limit disclosure and to prevent that harm -- protective orders and confidentiality agreements. *See, e.g.*, N.H. Code Admin. Rules § 203.08(h) and (j) (authorizing the Commission to impose conditions and order parties to treat information as confidential). The Wood-Fired IPPs have, since the day of the prehearing conference, been willing to sign an appropriate confidentiality agreement in order to obtain the information necessary to protect their interests, and would be willing to enter a confidentiality agreement that prohibits distribution of confidential information to the Wood-Fired IPPs' competitive employees and that limits distribution of confidential materials to counsel and consultants..


Wherefore, the Wood-Fired IPPs respectfully request that the Commission deny PSNH's motion for rehearing in its entirety, or in the alternative, order PSNH to provide the intervening parties in this docket with unredacted versions of the PPA and Mr. Lebreque's testimony subject to any necessary and appropriate restrictions on further disclosure pursuant to N.H. Admin. Rules § 203.08(h) and (j).

Respectfully submitted,

BRIDGEWATER POWER COMPANY, L.P.,
PINETREE POWER, INC.,
PINETREE POWER-TAMWORTH, INC.,
SPRINGFIELD POWER LLC,
DG WHITEFIELD, LLC d/b/a WHITEFIELD POWER &
LIGHT COMPANY, and
INDECK ENERGY-ALEXANDRIA, LLC

By Their Attorneys,

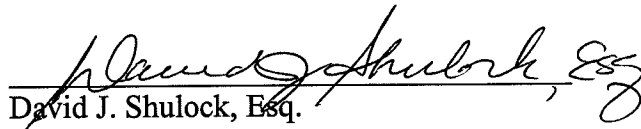
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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the attached Objection to Motion for Confidential Treatment to be filed in hand and electronically to the Commission and electronically, or by U.S. Mail, first class, to the persons identified on the attached Service List in accordance with N.H. Admin. Code Rules PUC 203.11(a).

Date: October 29, 2010


David J. Shulock, Esq.

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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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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:
- DEBRA A HOWLAND
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CONCORD NH 03301-2429
- 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.