

**THE STATE OF NEW HAMPSHIRE**  
**before the**  
**PUBLIC UTILITIES COMMISSION**

Public Service Company of New Hampshire

Petition for Approval of PPA with Laidlaw Berlin BioPower, LLC

Docket No. DE 10-195

**Objection**  
**of**  
**Public Service Company of New Hampshire**  
**to**  
**Concord Steam Corporation's**  
**Motion to Dismiss**

November 4, 2010

Pursuant to N.H. Code Admin. Rules Puc § 203.07(e), Public Service Company of New Hampshire ("PSNH" or the "Company") hereby objects to Concord Steam Corporation's ("CSC") Motion to Dismiss dated November 2, 2010. PSNH can sum up CSC's Motion to Dismiss in one word – absurd.

In support of this Objection, PSNH states as follows:

1. In 2007 N.H. Laws, Chapter 26, the General Court enacted the state's "Electric Renewable Portfolio Standard" ("RPS"), codified as RSA Chapter 362-F. That law found that it is "in the public interest to stimulate investment in low emission renewable energy generation technologies in New England and, in particular, New Hampshire, whether at new or existing facilities."<sup>1</sup> To further this public interest finding, the Legislature created a series of escalating annual requirements beginning in 2008 and continuing to increase until 2025, mandating that the electricity sold to retail customers within the state be

---

<sup>1</sup> RSA 362-F:1.

composed of certain percentages of various types, or classes, of renewable energy.<sup>2</sup> All “providers of electricity” – meaning an electric distribution company providing default service or an electricity supplier as defined in RSA 374-F:2,II – must comply with this renewable portfolio standard requirement.<sup>3</sup> In 2025, the RPS requires 23.8% of the energy sold to be from designated renewable sources.<sup>4</sup>

2. To comply with the RPS law, PSNH negotiated and ultimately entered into a Power Purchase Agreement (the “PPA”) with Laidlaw Berlin BioPower, LLC. That PPA was executed on June 8, 2010, following comprehensive, detailed, and lengthy arm’s-length negotiations. That agreement would provide PSNH with, *inter alia*, Class I RECs necessary to comply with the RPS law.

3. The RPS law provides a mechanism for the state’s electric distribution companies to enter into multi-year purchase agreements with renewable energy sources.<sup>5</sup> An electric distribution company may request that the Commission find such a power purchase agreement to be in the public interest. The RPS law sets forth various factors to consider in balancing the public interest.<sup>6</sup>

4. On July 26, 2010, PSNH petitioned the Commission for approval of the Laidlaw PPA pursuant to RSA 362-F:9. In that Petition, PSNH noted that its obligation to begin the purchase of the Project’s output under the PPA is contingent upon, *inter alia*, receipt from this Commission of a final, nonappealable decision approving and allowing for full cost recovery of the rates, terms and conditions of the PPA. A redacted copy of the PPA

---

<sup>2</sup> In lieu of meeting the portfolio requirements of RSA 362-F:3, a seller may make alternative compliance payments to the Commission, pursuant to RSA 362-F:10,II.

<sup>3</sup> In essence, all sellers of electricity are subject to the RPS requirement, except for the state’s five municipal electric providers.

<sup>4</sup> The 23.8% requirement in 2025 substantially fulfills Governor Lynch’s commitment of New Hampshire meeting 25 percent of the state’s energy needs from renewable energy resources by 2025. *See* 2007 N.H. Laws, 26:1,VI.

<sup>5</sup> RSA 362-F:9,I.

<sup>6</sup> RSA 362-F:9,II.

was appended to PSNH's prefiled testimony accompanying its Petition.<sup>7</sup>

5. The General Court contemplated that the state's electric distribution companies seeking approval of "multi-year purchase agreements with renewable energy sources for certificates, in conjunction with or independent of purchased power agreements from such sources" pursuant to RSA 362-F:9, I would require a cost recovery mechanism for such agreements. Hence, as part of the enactment of the RPS law, the legislature provided for such cost recovery. 2007 N.H. Laws, 26:4 amended RSA 374-F:3, V(c) to include the following provision:

Any prudently incurred costs arising from compliance with the renewable portfolio standards of RSA 362-F for default service or purchased power agreements shall be recovered through the default service charge.

6. The legal basis for CSC's Motion to Dismiss is summed up in paragraph 17 of that Motion:

[I]t is unnecessary for the Commission to consider any of the evidence in this case because PSNH is asking the Commission to approve aspects of the PPA that exceed the scope of RSA 362-F:9. PSNH's Petition is not, simply put, a multi-year contract "for certificates" or for "default service" as allowed by RSA 362-F:9. It is a PPA that requires pre-approval of its cost recovery provisions and Cumulative Reduction payments toward an unknown purchase price of a generating facility over a 20 year period. No legal authority has been cited for approval of cost recovery or payments toward the purchase of the Laidlaw facility PSNH. None exists. The Commission should therefore summarily deny approval and dismiss PSNH's Petition.

7. CSC's Motion contains a number of other erroneous factual allegations. But, for purposes of a Motion to Dismiss at this stage of the proceeding, those factual allegations may be disregarded.<sup>8</sup> Unless and until additional testimony is presented, the only

---

<sup>7</sup> Attachment GL-1 to the prefiled testimony of Mr. Gary A. Long (BATES 19).

<sup>8</sup> PSNH feels it is necessary to correct one misstatement of fact contained in CSC's Motion to ensure that the Commission is aware of the correct facts. In paragraph 10 of the Motion, commenting on the Cumulative Reduction mechanism (which is described in more detail later in this Objection) CSC states, "Even more troubling, the PPA allows PSNH to transfers its rights under its option to purchase to any third-party, in which case PSNH's customers will receive no benefit at all." In his prefiled testimony, Mr. Labrecque stated, "One other way to create value from the option would be to transfer the option, for a price, to an affiliate or third party. In any scenario, PSNH envisions some form of regulatory settlement

evidence to date in this proceeding is that contained in PSNH's prefiled testimony. In past situations involving motions to dismiss, the Commission has stated, "The traditional rule in considering such motions in the New Hampshire Courts is that the evidence should be viewed in the light most favorable to the non-moving party who, of course, is generally also the party with the burden of proof. *See e.g., Foss v. Byrnes Chevrolet, Inc.*, 119 N.H. 808, 809 (1979)."<sup>9</sup> As PSNH is the non-moving party, and as there are no facts of record whatsoever to counter the prefiled testimony submitted by PSNH, the Motion to Dismiss cannot be granted based upon CSC's factual allegations. Therefore, CSC's factual allegations may be disregarded for purposes of considering its Motion.

8. The reasoning behind the sole legal (as opposed to factual) basis for Concord Steam Corporation's Motion to Dismiss is fundamentally flawed, factually incorrect, and legally in error. Hence, the Motion to Dismiss should be denied.

9. CSC posits in paragraph 2 of its Motion that PSNH is asking the Commission to approve "full cost recovery of the rates, terms and conditions of the PPA' which includes above-market 'Cumulative Reduction' payments that will be applied to the purchase price of Laidlaw's facility over a twenty year period." CSC's characterization of the "Cumulative Reduction" factor is not accurate, nor is its allegation that the RPS law does not allow utilities to seek pre-approval for cost recovery.

10. As noted earlier, in paragraph 5 above, the General Court as part of the RPS legislation amended RSA 374-F:3, V(c) to provide a cost recovery mechanism for utilities that enter into RPS-related power purchase agreements. Without the ability of the Commission to grant such cost recovery approvals, the purpose of the RPS law would

---

proceeding would be required ***to ensure that the net economic benefits associated with the POA would be provided to customers.***" Prefiled Testimony of Richard C. Labrecque, p. 11 (BATES 100). In response to Staff Q-1-040 (copy attached hereto as Attachment 1), PSNH clearly states even in the event of a transfer of the purchase option right, the benefit of the Cumulative Reduction fund will enure to customers, not PSNH. Even more surprising, in response to one of CSC's own data requests (CSC Q-1-022) (attached hereto as Attachment 2), PSNH provided a similar response. If the parties are not reading the data request responses, PSNH wonders why they asked them in the first place.

<sup>9</sup> *Re Pinetree Power*, 71 NH PUC 638, 643 (1986).

be frustrated - - why would a utility enter into a RPS-related power purchase agreement if the recovery of costs was unknown.

11. Moreover, RSA 362-F:9 itself would be rendered meaningless if CSC's interpretation was adopted. RSA 362-F:9, I starts by stating "***Upon the request of one or more electric distribution companies*** and after notice and hearing, the commission may authorize such company or companies to enter into multi-year purchase agreements..." (emphasis added). The emphasized words indicate that Commission authorization for a utility to enter into an RPS-related power purchase agreement is not necessarily required. But, a utility may "request" such authorization from the Commission if it so desired. If that Commission authorization was meaningless, there would be no reason for a utility, such as PSNH, to spend the time, effort, and resources, to go through the necessary hearing process.<sup>10</sup> This very issue of the meaning of RSA 362-F:9, I has been previously dealt with by the Commission during its proceeding regarding PSNH's power purchase agreement with Lempster Wind, LLC. In Order No. 24,965 dated May 1, 2009 in Docket No. DE 08-077, *slip op.* at 17-18, the Commission held:

We agree with Staff that the reason the statute requires our approval of these multi-year agreements is to allow the petitioning utility to recover the prudently incurred costs of such agreements in its energy service rates. If PSNH had intended to use the agreements "below the line," the Company would not have had to seek the Commission's approval. Therefore, we disagree that PSNH was required to seek approval from the Commission before it could enter into the subject agreements. If for some reason we were to find that the contracts were not in the public interest, PSNH would still be bound by the contracts, but would not be allowed to recover the associated costs from its customers.

---

<sup>10</sup> The procedural wrangling of this docket is indicative of the difficulties involved in fulfilling the RPS statute's goals. In addition, see the Wood-Fired IPPs' "Objection to Notice of Withdrawal and Motion to Compel Participation" dated November 2, 2010 in this proceeding, in which those Wood-Fired IPPs remind us that "the nominal 24 MW Lempster wind project [Docket No. DE 08-077] required twelve months of discovery, motion practice, and hearings from filing to determination." PSNH sincerely doubts this is what the Legislature intended, in light of the stringent time frames imposed on the Site Evaluation Committee for review of such renewable energy facilities under RSA 162-H:6-a.

12. Therefore, CSC is just plain wrong regarding the legal authority for approval of cost recovery of the RPS-related PPA with Laidlaw.

13. CSC is also wrong in its interpretation of the Cumulative Reduction mechanism.

14. In the prefiled testimony of PSNH, Mr. Richard C. Labrecque, PSNH's Supplemental Energy Sources Manager, explains the basic terms of the PPA:

Under the terms of the PPA, PSNH will purchase 100% of the output of the Project for a term of twenty (20) years. The PPA includes separate pricing terms related to the purchase of: i) the energy output of the Project, ii) the capacity of the Project, and iii) the Renewable Energy Certificates (RECs) and other environmental attributes of the Project. The PPA also includes a "Right of First Refusal" by which PSNH has a limited right to purchase the Project during the twenty year term and a "Purchase Option Agreement" that provides PSNH, its successors and assigns with the right, but not the obligation, to purchase the Project at the conclusion of the PPA term.<sup>11</sup>

15. Mr. Labrecque provided details regarding the pricing terms of the PPA:

As described in ARTICLE 6, the PPA provides for three separate payments to be made via each monthly invoice: an energy payment, a capacity payment, and a REC payment.<sup>12</sup>

16. Mr. Labrecque also provided details concerning the PPA's "Cumulative Reduction" mechanism.

**Q. Does the PPA contain any provisions designed to protect PSNH's customers from paying contract prices that exceed the market price?**

A. Yes. The PPA includes a mechanism referred to as the "Cumulative Reduction" as described in ARTICLE 6.1.3 which is designed to calculate and track any energy payments made that exceed the ISO-NE spot market energy price.

**Q. Please describe the Cumulative Reduction.**

A. For each MWH of Energy delivered under this Agreement, a negative or positive adjustment shall be determined. When the contract energy

---

<sup>11</sup> Prefiled Testimony of Richard C. Labrecque, p. 2 (BATES 91).

<sup>12</sup> *Id.*

payment rate set forth above (\$/MWH) exceeds the ISO-NE Day-Ahead hourly Locational Marginal Price (LMP) at the delivery point, the hourly negative adjustment shall equal the delivered MWH multiplied by the difference between the LMP and the contract energy rate. When the contract energy payment rate (\$/MWH) is less than the LMP, the hourly positive adjustment shall equal the delivered MWH multiplied by the difference between the LMP minus the contract Energy rate. These negative and positive adjustments shall be continuously aggregated over the twenty year term of the PPA. If, at the termination of the PPA, the aggregate balance is negative, that quantity shall be the “Cumulative Reduction” for the purposes of reducing the purchase price of the Project as provided in the Purchase Option Agreement (and described below). If the aggregate balance is positive (that is, over the term of the PPA customers did not pay over-market prices), it shall have no further bearing on the administration of the PPA.

**Q. What is the ultimate purpose of the Cumulative Reduction?**

A. The Cumulative Reduction is a unique and important feature of this PPA that was essential to PSNH in order to protect customers from unknown future market energy prices. PSNH included this feature to protect PSNH’s customers from the potential of paying over-market energy prices over the term of the PPA. In the event actual hourly ISO-NE energy prices during the term of the PPA are, on average, less than the contract energy prices, a fund of dollars will accrue (the Cumulative Reduction) that can be used as a credit to reduce the purchase price of the Project. This will provide PSNH’s customers with the opportunity to recapture the over market payments, if any, made during the PPA term over a subsequent time frame.<sup>13</sup>

17. As described in Mr. Labrecque’s testimony, the PPA does not include the payment of any “Cumulative Reduction” amounts by PSNH. Mr. Labrecque clearly testifies, and the PPA itself states, that PSNH pays for only three things: an energy payment, a capacity payment, and a REC payment.

18. The Cumulative Reduction concept is merely a tracking mechanism. It is not a “payment” by PSNH as characterized in CSC’s Motion to Dismiss. The Cumulative Reduction concept is what ultimately protects PSNH’s customers from the potential of paying over-market energy prices over the term of the PPA. In a nutshell, at the end of the 20-year term of the PPA, PSNH (or its transferee) has the option to purchase the

---

<sup>13</sup> *Id.* at 7-9 (BATES 96-98).

Facility and all related assets for their fair market value, minus any positive Cumulative Reduction value.

19. PSNH does not submit a separate “Cumulative Reduction” payment to Laidlaw. During the term of the PPA, the Cumulative Reduction value might be negative (meaning that up to that point, the cumulative payments for energy have been below market); it might be zero (meaning that the cumulative payment for energy have equaled the market price); or it might be positive (meaning the cumulative payments for energy have been above market.) The final Cumulative Reduction value will not be known until the 20-year term of the PPA has run.

20. The basic payment mechanism for this PPA is no different from prior power purchase agreements approved by the Commission under the RPS law.<sup>14</sup> PSNH pays the generator for certain products – energy, capacity, and/or RECs. If the products meet the contract requirements and are delivered, the generator gets paid; otherwise they do not. In the two previous proceedings conducted by the Commission under RSA 362-F:9, the Commission found no legal infirmity to the approval of those respective power purchase agreements.

21. In this case, CSC points to the Cumulative Reduction concept as the item that makes the PPA in this docket different, and legally flawed. PSNH agrees that the Cumulative Reduction concept is indeed different from anything included in past power purchase agreements or rate orders. But, that difference does not affect the legality of the agreement under RSA 362-F. It is tantamount to an insurance policy to provide protection over the term of the PPA to consumers from the possibility of over prices.

22. It is rather odd that if the PPA did not include the Cumulative Reduction protection for customers, there would be nothing left of CSC’s legal argument. By providing protection for customers from a reoccurrence of the significant over-market

---

<sup>14</sup> See Commission Docket Nos. DE 07-125 (Pintree and Pinetree-Tamworth) and DE 08-077 (Lempster).

payments required of consumers under PURPA-mandated rate orders,<sup>15</sup> CSC claims that the PPA is so legally flawed that it rises to the level of being summarily dismissed. That argument is absurd.

23. This Motion to Dismiss is just another example of the litany of efforts that the competitor-intervenors have made in this docket to impair the orderly and prompt conduct of the proceeding.<sup>16</sup>

24. Concord Steam Corporation's Motion to Dismiss has no steam – just lots of hot air. When condensed to its fundamental points, there is no substance, as all legal and factual allegations just evaporate.

**WHEREFORE**, PSNH objects to Concord Steam Corporation's Motion to Dismiss.

For the reasons expressed herein, PSNH respectfully requests that the Commission:

- A. deny the Concord Steam Corporation's Motion to Dismiss;
- B. consider necessary and appropriate conditions upon Concord Steam Corporation's participation in the proceedings as permitted by RSA 541-A:32,III; and
- C. grant such other and further relief as justice may require.

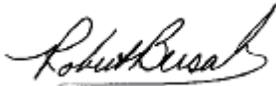
---

<sup>15</sup> See, e.g. *Public Service Company of New Hampshire*, 91 NH PUC 431, 449 (2006). (Discussing the Pinetree Power Tamworth, Inc. (Pinetree) and Bridgewater Power Company LP (Bridgewater) PURPA rate orders, the Commission noted, "we are mindful of the fact that over the course of the long-term rates at issue PSNH's customers have paid significantly more to Pinetree and Bridgewater than they would have paid had PSNH been acquiring the power through various other means over the years. In this sense, customers have paid too much for the power, as the result of the Commission's approval, in 1984, of what turned out to be over projections of PSNH's long-term avoided costs. ... It is worth noting that a key objective of PURPA as enacted in 1978 was to encourage the development of alternative sources of electricity by replacing investor risk with certainty and opening the power generation market to independent power producers. This case illustrates both the success of that policy strategy, as evinced by the development and subsequent operation of Pinetree and Bridgewater for nearly two decades, and the significant cost of that policy strategy, as implemented in New Hampshire, in the form of retail rates that are higher than they otherwise would have been.)

<sup>16</sup> RSA 541-A:32.

Respectfully submitted this 4<sup>th</sup> day of November, 2010.

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

By:  \_\_\_\_\_

**Robert A. Bersak**  
**Assistant Secretary and Assistant General Counsel**  
**Public Service Company of New Hampshire**  
**780 N. Commercial Street**  
**Post Office Box 330**  
**Manchester, New Hampshire 03105-0330**  
**603-634-3355**  
**bersara@PSNH.com**

## CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2010, I served an electronic copy of this filing with each person identified on the Commission's service list for this docket pursuant to Rule Puc 203.02(a).



---

Robert A. Bersak  
Assistant Secretary and Assistant General Counsel  
780 North Commercial Street  
Post Office Box 330  
Manchester, New Hampshire 03105-0330

(603) 634-3355  
bersara@psnh.com

**ATTACHMENT 1**

**PSNH's Response to Staff Data Request Q-1-040**

**Public Service Company of New  
Hampshire  
Docket No. DE 10-195**

**Data Request STAFF-01**

**Dated: 10/08/2010**

**Q-STAFF-040**

**Page 1 of 1**

**Witness: Richard C. Labrecque  
Request from: New Hampshire Public Utilities Commission Staff**

**Question:**

Ref. Labrecque Testimony, page 11. Mr. Labrecque states that PSNH's ability to transfer its purchase option to an assignee "ensures that this benefit will be available regardless of PSNH's own ability to purchase the Project at that time." Staff assumes that the phrase "this benefit" is a reference to the balance in the Cumulative Reduction account at the end of the contract term. If Staff's assumption is incorrect, please elaborate. If its assumption is correct, please respond to the following:

- (a) Describe the mechanism or process that transfers the benefit to customers.
- (b) Does the phrase "ensures that this benefit will be available" mean that customers have a guarantee that they will receive the full value of the Cumulative Reduction?
- (c) If the answer to (b) is no, explain why and specify how much of the Cumulative Reduction balance customers can expect to receive.

**Response:**

- (a) If/when such right materializes in the future, PSNH will determine the prudent course of action to protect the interest of retail customers.
  - (b) The intention is that whatever benefit accrues from the cited provision will be accounted for in a way that benefits retail customers.
  - (c) See response to part (b), above.
-

## ATTACHMENT 2

### PSNH's Response to CSC Data Request Q-1-022

Public Service Company of New  
Hampshire  
Docket No. DE 10-195

Data Request CSC-01

Dated: 10/14/2010

Q-CSC-022

Page 1 of 1

Witness: Richard C. Labrecque  
Request from: Concord Steam Corporation

**Question:**

Reference Page 10 lines 7-8 of the Testimony of Richard C. Labrecque: If PSNH transfers its right to an entity that is legally entitled to own the facility please clarify how that will benefit the rate payers?

**Response:**

See Labrecque testimony at page 11, lines 18 - 20, which states "In any scenario, PSNH envisions some form of regulatory settlement proceeding would be required to ensure that the net economic benefits associated with the POA would be provided to customers".

---