

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 NOTICE OF WITHDRAWAL
AND MOTION TO COMPEL PARTICIPATION**

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 notice of withdrawal filed by Laidlaw Berlin BioPower, LLC ("Laidlaw") and move to compel Laidlaw's participation. The Wood-Fired IPPs' state the following in support of their objection and motion:

1. In this proceeding, Public Service Company of New Hampshire ("PSNH") has petitioned the Commission for approval under RSA 362-F:9 of a 20-year long-term contract for the purchase of RECs in conjunction with the purchase of energy and capacity (the "PPA"). Laidlaw is PSNH's counterparty to the PPA, and one of several developers of a 70 MW biomass facility in Berlin, New Hampshire. Counterparties to PSNH contracts are not usually required to participate in approval proceedings; however, Laidlaw agreed to participate and provide discovery as part of an agreement to obtain expedited review. Having received the benefit of its bargain, Laidlaw should not be permitted to withdraw.

2. The Commission should compel Laidlaw's participation, because Laidlaw agreed to participate in return for expedited review of its PPA, and in fact was ordered to participate in discovery. The Commission's rules require that any person who appears before the Commission shall adhere to "[a]ny orders of the commission or agreements between the parties in the docket."

N.H. Admin. Rules § 203.16(b)(2). Unlike most counterparties to PSNH REC contracts, Laidlaw sought and was granted full party status, and has thus "appeared" before the commission. Notice of Withdrawal at 1 (no other counterparties participated as full party intervenor). While a party to the docket, Laidlaw sought and was granted preferential treatment in the form of expedited review. Order 25,158 at 8, 9, and 14. To obtain agreement of all other parties in the expedited review, Laidlaw convinced Staff, OCA and other parties that it would participate in the proceeding by subjecting itself to discovery without blanket objections. Transcript 9/29/10 at 109. When Laidlaw tried to back out of its commitment, Laidlaw was ordered by the Commission to respond to reasonable discovery requests. Transcript 9/29/10 at 109-110. Laidlaw then represented on the record that it would not make blanket objections to discovery. Transcript 9/29/10 at 111.¹

3. By intervening as a party and then promising to provide the other parties discovery in return for expedited review, Laidlaw was able to obtain a hearing within three months of the prehearing conference. By comparison, the nominal 24 MW Lempster wind project required twelve months of discovery, motion practice, and hearings from filing to determination. Transcript 9/29/10 at 65. Although Laidlaw complains that disputes over discovery would have lengthened the proceeding, (Notice of Withdrawal at 2-4), it was actually Laidlaw's participation and full responses to discovery that would have helped the parties and the Commission to investigate and make fully informed conclusions regarding the public interest in such a short period of time as three months. Laidlaw's participation was, in that sense, necessary to make truncated review meaningful to ratepayers, parties, and the public. Laidlaw's agreement to participate and subject itself to discovery was the quid pro quo for the parties' agreement to an

¹ Contrary to its representation at hearing, Laidlaw breached this agreement and made a blanket objection to 45 data requests propounded by the Wood-Fired IPPs and all 18 data requests propounded by Concord Steam Corporation.

expedited schedule. The Commission's rules require Laidlaw to continue to honor that agreement. The Commission should therefore compel Laidlaw's continued participation and enforce its order requiring Laidlaw to answer discovery requests.

4. The extraordinary nature of the PPA also requires Laidlaw's participation. First, the PPA will be with the largest biomass facility in all of New England. Second, the PPA extends over a 20-year period. Third, there are numerous provisions in the PPA that impose significant risk on rate payers that are different from those in any other REC agreement reviewed and approved by the Commission to date. Without Laidlaw's participation, the Commission is left to wonder:

- Why should ratepayers be subjected to potentially over-market energy prices² for a period of 20 years without:
 - a true payment tracking account, with an absolute requirement for Laidlaw to repay over-market payments and with carrying charges that compensate ratepayers for the use of their money over the 20-year period?
 - a letter of credit to provide full security for any over-market payments should Laidlaw or a subsequent owner prove not creditworthy, or the Facility prove to be of less value than the value of the over-payments?
- Why should ratepayers be subjected to over-market prices for capacity without any repayment mechanism whatsoever?
- Why should ratepayers be subjected to over-market prices for RECs without any repayment mechanism whatsoever?
- Why should ratepayers guarantee a "floor payment" for RECs, at set percentages of the alternative compliance payment stated in the RPS statute as it exists today, adjusted for inflation, *even if the Legislature were to repeal the RPS statute in its entirety the day after the Commission approves the PPA?*
- Is it necessary under this PPA and reasonable in this instance for ratepayers to bear the risk of rising costs in the wood-fuel market for a 20-year period?
- Why should ratepayers risk paying Laidlaw higher prices for energy based upon rising fuel prices at Schiller Station, even if fuel prices at the Laidlaw facility go

² The Wood-Fired IPPs can only assume that prices are over-market, because PSNH has kept these prices from the parties to the docket as well as from the public.

down, something which even PSNH states is a troubling possibility; Labrecque (7/26/10) at 4?³

5. Prudence would dictate that a utility would mitigate some of these risks to ratepayers by using a payment tracking account that has a carrying charge. This would reimburse ratepayers for the over-payments and also compensate them for the use of their money over time. The "Cumulative Reduction" mechanism in Article 6.1.3 of the PPA does not do this.

6. Pursuant to normal and customary business practices, utility and non-utility counterparties in power contracts would be expected to require security for the repayment usually in the form of an irrevocable letter of credit, maintained on a continuous basis, in the amount of any positive outstanding balance in the Cumulative Reduction account. This is one of the few features that would protect ratepayers in the event that Laidlaw becomes insolvent. The Cumulative Reduction mechanism does not require a letter of credit as security. Instead, the only "security" provided is the reduction in the purchase price in nominal dollars of the Facility, which may not equal or exceed the over-market payments, and which may never be exercised, depending on the economics of the Facility.

7. PSNH ratepayers are being asked to bear the costs and risks of these features of the PPA for the benefit of the Facility's private developers. Laidlaw should be required to remain in the proceeding, if for nothing else, to submit to discovery and explain why these features of the PPA are necessary for the development of the Facility, and why the risks must be borne by ratepayers instead of Laidlaw's developers, even though these features and their associated risks cut decisively against the public interest.

³ "PSNH was also concerned that biomass fuel prices could decline during the twenty-year term of the deal. This would result in PSNH's customers being asked to pay higher prices for purchases from the Project and thus contributing to a higher profit margin for LBB." Labrecque (7/26/10) at 5.

8. Allowing Laidlaw to withdraw at this point would also deny intervening parties due process. Laidlaw intervened in this docket because it has a unique interest in the outcome of the Commission's review of the PPA, and Laidlaw wanted to affect that review. Laidlaw then sought and received the benefit of expedited review of the PPA -- based upon its representation that it would answer discovery posed by the other parties whose interests will also be affected by the outcome. However, Laidlaw did not do that. Instead, Laidlaw answered only a select number of Staff's discovery requests, and much of the information provided to Staff was withheld from the other parties on a claim of confidentiality. When the other parties whose interests will be affected by the outcome sought discovery, Laidlaw made a blanket objection, contrary to the representations that it made at hearing, and then attempted to exit the proceedings before motions to compel could be decided. If Laidlaw is permitted to withdraw, it will not only receive the benefit of an expedited schedule, but also the benefit of providing only the data that supports its cause. The parties will have no method for testing the information that Laidlaw has so far provided, and no way to determine whether Laidlaw holds information that supports contrary public interest findings. If Laidlaw is permitted to withdraw prior to providing the discovery it promised, the parties ability to present their cases will be substantially diminished, and the risk that the Commission will reach an erroneous result substantially increased. *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 to proceedings before the Commission).

Wherefore, the Wood IPPs respectfully request that the Commission compel Laidlaw to participate in this docket as a full party and to submit to the discovery it promised in return for the parties' agreement to expedited review of its PPA.

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

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the attached Objection to Notice of Withdrawal and Motion to Compel Participation to be filed electronically and via U.S. Mail, first class 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: November 2, 2010

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