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
WOOD-FIRED IPPs'
MOTION TO DISMISS

December 23, 2010

Pursuant to N.H. Code of Admin Rule Puc 203.07(e), Public Service Company of New Hampshire ("PSNH") hereby objects to the Wood-Fired IPPs' Motion to Dismiss ("Motion") dated December 13, 2010.[1] The Motion asserts "the Commission lacks authority to grant the relief that PSNH seeks."[2] This assertion is incorrect, and therefore, the Motion should be denied.

If the Motion to Dismiss was granted, the Commission would essentially be eliminating any realistic possibility for investments in new renewable power generation in the state. Moreover, by granting the Motion to Dismiss, the Commission would be signaling that it could never approve a utility entering into, and recovering costs under, a wholesale power sales arrangement falling under FERC jurisdiction.

In support of this objection, PSNH states:

BACKGROUND

1. In 2007 N.H. Laws, Chapter 26, the Legislature enacted the state's "Electric Renewable Portfolio Standard" ("RPS"), codifed as RSA Chapter 362-F. That law

[1] Although the Motion was dated December 13, 2010, it was not docketed with the Commission until December 15, 2010. Per Rule Puc 202.05, the date of filing is deemed to be December 15, 2010.

[2] Motion, at 1.

stated as one of its purposes 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." RSA 362-F:1. In addition, in 2007 N.H. Laws, 26:1, the Legislature also found:

> I. New Hampshire's electric utility restructuring policy principles in RSA 374-F:3, IX recognize that increased use of renewable resources can provide environmental, economic, and energy security benefits.
>
> II. In 2005, 2.3 million megawatt hours of electricity was generated from renewable energy facilities, including hydroelectric, biomass, and landfill gas power plants, with a combined generating capacity of 576 megawatts. This equaled 10 percent of the total electricity generation and 20 percent of the total retail electricity sales in New Hampshire in 2005.
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> III. The 2002 state energy plan prepared by the governor's office of energy and community services pursuant to 2001, 121 recommended establishing a renewable portfolio standard to support indigenous renewable energy sources such as wood and hydroelectric, to encourage investments in new renewable power generation in the state, and to allow New Hampshire to benefit from the diversity, reliability, and economic benefits that come from clean power.
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> IV. The state energy policy commission, established by 2006, 257:1 identified in its December 1, 2006 interim report principles that the governor and general court should use to evaluate any new energy policy initiative. One principle is to increase the state's fuel diversity by reducing the fossil fuel component of the state's energy mix and promoting use of renewable energy resources to buffer against global instability.
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> V. The energy planning advisory board established by 2004, 164:2 received extensive comments supporting establishment of a state renewable portfolio standard during a stakeholder forum on energy policy held June 23, 2006.
>
> VI. Governor Lynch has committed New Hampshire to a goal of meeting 25 percent of the state's energy needs from renewable energy resources by 2025. Enactment of a renewable portfolio standard in New Hampshire will be an important step in meeting this goal.

2. To further these public interest findings, the Legislature created a series of escalating minimum annual requirements beginning in 2008 and continuing to increase until 2025, mandating that the electricity sold to retail customers within the state be composed of not less than certain percentages of various types, or classes, of

renewable energy. 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 these minimum renewable portfolio standard requirements. In 2025, the RPS requires at least 23.8% of the energy sold in the state to be from designated renewable sources.

3. The RPS law created four classes of renewable generation. Of these classes, so called "Class I" will ultimately be the largest, with a requirement that by 2025, 16% of the electricity sold to retail consumers be from Class I renewable sources. Class I generation includes, *inter alia*, "eligible biomass technologies" that began operating after January 1, 2006. That is a sixteen-fold increase from the 2010 requirement of 1%. Future increases in the state's electric sales would also correspondingly increase the actual number of RECs required.

4. PSNH is an electric distribution company, and is a provider of electricity that must comply with the requirements of the RPS.

5. To comply with the RPS law, PSNH negotiated with, 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 arms-length negotiations. That agreement would provide PSNH with, *inter alia*, Class I RECs necessary to comply with the RPS law.

6. The RPS law provides a mechanism for the state's electric distribution companies to enter into multi-year purchase agreements with renewable energy sources. 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.

7. On July 26, 2010, PSNH petitioned the Commission for approval of the Laidlaw PPA pursuant to RSA 362-F:9.

8. On September 29, 2010, the Commission held a prehearing conference in this docket. During that proceeding, the Commission granted intervenor status to several parties,

including the Wood-Fired IPPs.[3] The Commission also adopted a procedural schedule which included a comprehensive discovery process.

9. The initial discovery period has been completed, with PSNH responding to over three hundred separately numbered data requests, and multiple hundreds of individual subparts therein. The Commission has expeditiously dealt with myriad confidentiality and discovery disputes. Staff and intervenor testimony has also been filed.[4]

10. The Wood-Fired IPPs now contend that the Commission must dismiss PSNH's petition "as a matter of law."[5] The Wood-Fired IPPs base their legal conclusion on two factors: i) the RPS law has established minimum standards for renewable energy supply only through year 2025. Hence, the Wood-Fired IPPs claim the Commission cannot approve cost recovery for purchases of Renewable Energy Certificates ("RECs") after year 2025, because such approval would "usurp the legislature's prerogative to end or otherwise modify the RPS requirement in 2025… ."[6]; and, ii) approval of the PPA would impact the Commission's authority under RSA 365:28 to later "alter, amend, suspend, annul, set aside, or otherwise modify" the authorization it granted pursuant to RSA 362-F:9.

THE COMMISSION HAS AUTHORITY TO APPROVE THE PPA

11. The Wood-Fired IPPs begin their argument by quoting from *Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062, 1066 (1982): "The [Commission] is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute." PSNH contends that its Petition for Approval of the PPA is precisely what the Legislature had in mind when it enacted the RPS law in general, and RSA 362-F:9, specifically. Hence, the

[3] The Wood-Fired IPPs are 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

[4] Notably, the Wood-Fired IPPs did not file any testimony.

[5] Motion, at 2.

[6] *Id.*

Commission indeed has the authority necessary to review the PPA under RSA 362-F:9 and to authorize PSNH to enter into that agreement.

12. As noted earlier, the Legislature made a number of "findings" and expressed their intended "purpose" when it enacted the RPS law. One of the express purposes of the RPS law is "to stimulate investment in low emission renewable energy generation technologies in New England and, in particular, New Hampshire, whether at new or existing facilities."[7] Approval of the PPA in this proceeding would meet this stated purpose, as it would result in the investment in, construction of, and jobs created by Laidlaw's new biomass generating facility in Berlin.

13. The Legislature found that enactment of the RPS law was consistent with the Governor's commitment to have 25 percent of the state's electric energy needs supplied from renewable sources by 2025.[8] A fair implication of this desire to meet the Governor's commitment to the use of renewable energy is that it is in the best interest of the state to continue the use of renewable energy beyond the year 2025 at levels at least equaling that required in 2025. Any other inference one might make would be unreasonable.

14. The Legislature found that in 2005, all of the renewable energy generating facilities in the state combined only generated enough electricity to meet 20 percent of that year's total retail electricity sales.[9] Even if the entire output of all of those renewable energy facilities remained available in the future, and sold the entirety of their renewable attributes to satisfy New Hampshire's RPS requirements, and if there was no increase in retail electricity sales in the future, there still would not be sufficient renewable generation to meet the "25 by 25" goal. Clearly, the Legislature "expressly granted or fairly implied by statute" the need and desire for additional renewable energy generation to be built within the state.

[7] RSA 362-F:1.

[8] 2007 N.H. Laws, 26:1, VI.

[9] *Id.* at II.

15. The Legislature also found that "establishing a renewable portfolio standard to support indigenous renewable energy sources such as wood and hydroelectric, to encourage investments in new renewable power generation in the state, and to allow New Hampshire to benefit from the diversity, reliability, and economic benefits that come from clean power" was consistent with the 2002 state energy plan.[10] Approval of a PPA such as the one in this proceeding was clearly what was anticipated by the Legislature when it made this finding.

16. Finally, the Legislature created a specific process for the Commission to review and authorize electric distribution companies to enter into PPAs - - RSA 362-F:9. RSA 362-F:9, I reads:

> 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 with renewable energy sources for certificates, in conjunction with or independent of purchased power agreements from such sources, to meet reasonably projected renewable portfolio requirements and default service needs to the extent of such requirements, if it finds such agreements or such an approach, as may be conditioned by the commission, to be in the public interest.

17. The Wood-Fired IPPs argue that because the twenty year term of the PPA would extend beyond the RPS minimum purchase requirements that are enumerated only until 2025, the PPA as a matter of law cannot be approved by the Commission. They claim that the Commission may only approve a PPA that supplies RECs "to the 'extent' of 'renewable portfolio requirements.'"[11]

18. First, contrary to the Wood-IPPs' assertion, it is not at all clear that the phrase "to the extent of such requirements" found in the statute applies to an electric distribution company's "renewable portfolio requirements." In light of the earlier inclusion in that sentence of the words "reasonably projected" prior to "renewable portfolio requirements," it would be meaningless to have both modifiers (i.e., "reasonably projected" and "to the extent of such requirements") apply to both "renewable

[10] *Id.* at III.

[11] Motion, at 4.

portfolio requirements" and "default service needs" as they impart similar, yet different, restrictions (e.g., consider what would be meant by an electric distribution company's "reasonably projected…default service needs to the extent of such requirements.") In *West v. Turchioe*, 144 N.H. 509, 516 (1999), the Court quoting from 4 W. Jaeger, *Williston on Contracts* § 601, at 310 (3d ed. 1961) said ("[T]o ascertain and to give effect to the true intention of the parties the courts will examine and consider the entire writing, seeking as best they can to harmonize and to give effect to all the provisions of the contract so that none will be rendered meaningless.")[12] To best "harmonize and give effect" to both the "reasonably projected" and "to the extent of such requirements" modifiers found in the statute, the former would apply only to "renewable portfolio requirements" and the latter only to "default service needs."

19. Nonetheless, for sake of argument, even if both modifiers were deemed to be applicable to an electric distribution company's renewable portfolio requirements, the Wood-Fired IPPs interpretation of the statute would lead to nonsensical results. The legislation included an express and unambiguous goal for the RPS law to support indigenous renewable energy sources such as wood and hydroelectric, and to encourage investments in new renewable power generation in the state. The Wood-Fired IPPs interpretation of that law would eliminate any realistic possibility for investments in new renewable power generation to occur. "The Commission has recognized…that many developers need the assurance of a long term rate in order to obtain financing for their projects."[13] The PPA before the Commission in this

[12] Interpretation of contracts and statutes are both questions of law, which the Supreme Court reviews *de novo*. *Gulf Ins. Co. v. AMSCO, Inc.* 153 N.H. 28, 34-35 (2005) ("The interpretation of a contract is a question of law, and thus we review the trial court's decision *de novo. Sherman v. Graciano*, 152 N.H. 119, 121, 872 A.2d 1045 (2005)."); *Billewicz v. Ransmeier* 2010 WL 4868179, 4 (N.H.) (N.H.,2010) ("The interpretation of a statute is a question of law, which we review *de novo. Kenison v. Dubois*, 152 N.H. 448, 451 (2005)."); *Porter v. Town of Sandwich* 153 N.H. 175, 178 (2006) ("The interpretation of a contract is a question of law. *Dillman v. N.H. College*, 150 N.H. 431, 434 (2003); *Erin Food Servs., Inc. v. 688 Props.*, 119 N.H. 232, 235 (1979). Statutory interpretation is also a question of law. *Pennelli v. Town of Pelham*, 148 N.H. 365, 366 (2002).")

[13] *Re Thermo-Electron Energy Systems*, 70 NH PUC 763, 765 (1985). *See also Re Minnewawa Hydro Company, Inc.,* 74 NH PUC 368, 371 ("The Commission has recognized however, that many developers need the assurance of a long term rate in order to obtain financing for their projects."); *Re Concord Regional Waste/Energy Company*, 70 NH PUC 736, 738-9 (1985); *Re Fuel Adjustment*

proceeding has a term of 20 years - - the same duration that the Commission has historically deemed necessary and adequate to provide that assurance developers need to obtain financing.[14]

20. If the Wood-Fired IPPs' argument that any PPA must as a matter of law end on or before 2025, no new developer would have the 20-year rates necessary to obtain financing. In light of the fact that it will be 2011 in a matter of days, and it would take some time to build any new generating facility, the Wood-Fired IPPs argument would limit the availability of rates for a RPS-related PPA to perhaps 10 to 12 years at best. There can be little doubt that such a limitation as endorsed by the Wood-Fired IPPs would be inconsistent with the legislative findings and purpose of the RPS law.

21. The RPS law specifically allows the Commission to authorize PPAs "to meet reasonably projected renewable portfolio requirements."[15] As noted earlier, it would be unreasonable to project that the renewable portfolio requirement would totally disappear after 2025. A reasonable projection would be that the requirement would continue at the same, or higher, minimum levels after 2025. Had the Legislature intended to limit an electric distribution company's ability to purchase RECs to precisely what was required by the RPS law, it would not have included the "reasonably projected" standard in the law (leaving the law to read "to meet renewable portfolio requirements"). Moreover, the Legislature would have specifically included that limitation in the language of the law by inserting the words "until 2025" to modify the description of reasonably projected renewable portfolio requirements. Furthermore, the Legislature would not have described the law's requirements as the *Minimum* Electric Renewable Portfolio Standards, with an obligation for electricity providers to *meet or exceed* the requisite percentages.[16]

Charge, 66 NH PUC 581, 583 (1981) ("During recent months, the commission has noted that many hydroelectric developers and other small power producers often were unable to secure project financing without long-term power sales contracts with the company.")

[14] *Re Small Energy Producers and Cogenerators*, 69 NH PUC 351 (1984).

[15] RSA 362-F:9, I.

[16] RSA 362-F:3.

THE COMMISSION'S AUTHORITY OVER THE PPA IS NOT TIME-LIMITED

22. The Wood-Fired IPPs argue that RSA 362-F:5, the RPS law's review and reporting provision, evidences the Commission's lack of authority to approve PPA's that extend beyond 2025. RSA 362-F:5 requires periodic reporting by the Commission to the legislature regarding a number of aspects of the RPS law. However, nothing in that section in any way limits the ability of the Commission to approve a PPA that the Commission determines meets the public interest requirements of RSA 362-F:9, II.

23. Approval of the PPA, and its obligation for PSNH to purchase RECs for twenty years, would not "extend the RPS by fiat" as suggested by the Wood-Fired IPPs. If the Legislature decided not to extend the RPS law beyond 2025, the concomitant renewable portfolio standard purchase obligations for this state's electricity suppliers would indeed end, notwithstanding the continuance of any contractual obligations entered into by PSNH, other electric distribution companies, or any of the other providers of electricity to the state's retail consumers. The reasonableness of the PPA as a whole and the compliance of the PPA with the RPS law's public interest criteria should be the determining factors governing the Commission's approval consideration.

RSA 365:28 DOES NOT PROHIBIT THE COMMISSION FROM APPROVING THE PPA

24. The Wood-Fired IPPs' argument that approval of the number of NH Class I RECs to be purchased, the purchase price for those RECs, and the amount of the REC price to be recovered from customers in the future "will abrogate the Commission's authority by insulating PSNH and Laidlaw from the Commission's continuing obligation to protect the public interest under RSA 365:28"[17] is creative, but wrong. If accepted, that argument would prohibit the approval of any PPA that does not provide the

[17] Motion, at 6.

Commission with unlimited authority to change material terms of the agreement (including pricing, quantities, and term). Such unlimited authority to set-aside, alter, or amend the contract would likely make any agreement unfinanceable, contrary to the intent of the RPS law.

25. In addition, the PPA is a FERC-jurisdictional contract. Although this Commission has the authority to determine the prudence of PSNH entering into the PPA, and the PPA's effectiveness is conditioned upon the Commission's approval, once approved the contract would be subject to the filed rate doctrine. "[T]he Supreme Court has ruled that where the FERC has lawfully determined a rate, allocation, or other matter, a state commission cannot take action that contradicts that federal determination. And even without explicit federal approval of a rate, the Court has treated a rate reflected in a FERC tariff as setting a rate level binding on a state commission in regulating the costs of the purchasing utility. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373-74, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-66, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986); *cf. Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52, 71 S.Ct. 692, 95 L.Ed. 912 (1951)."[18]

26. If the Wood-Fired IPPs' argument regarding "abrogation" of RSA 365:28 was accepted, the Commission would be prohibited from approving any FERC-jurisdictional matter due to the constraints of the filed rate doctrine. The negative impact on this state's utilities resulting from such a restriction would extend far beyond this proceeding.

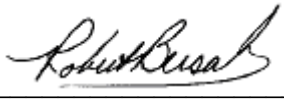
27. The Commission has the ability and authority to review all of the terms of the PPA and make a determination whether, taken as a whole, the agreement is consistent with the RPS law's public interest standard. If so, the Commission would approve the agreement, fulfilling the prerequisite for purchases found in Section 4.1.3 of the PPA.

[18] *Public Service Co. of New Hampshire v. Patch*, 167 F.3d 29, 35 (1st Circ., 1998).

WHEREFORE, the Commission has clear authority to review and approve PSNH's Petition for Approval of the Laidlaw PPA. PSNH respectfully requests this Commission to deny the Wood-Fired IPPs' Motion to Dismiss.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By: 

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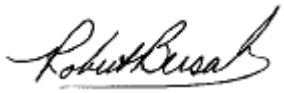
CERTIFICATE OF SERVICE

I hereby certify that I served an electronic or written copy of this filing on the various Petitioners pursuant to Rule Puc 203.11.



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