

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE
Docket No. 2009-02**

**Application of Laidlaw Berlin BioPower, LLC, for a Certificate of Site and Facility
for a 70MW Biomass-Fueled Energy Facility in Berlin,
Coos County, New Hampshire
March 24, 2010**

ORDER ON PENDING MOTIONS

Background

On December 16, 2009, Laidlaw Berlin BioPower, LLC, (Applicant) filed an Application for a Certificate of Site and Facility (Application). The Applicant petitions the Site Evaluation Committee (Committee) for a Certificate of Site and Facility (Certificate) in order to site, construct and operate a renewable energy facility (Facility) in Berlin, Coos County, New Hampshire. The Facility is proposed to be located on the northern side of Community Street, Coos Street and Hutchins Street in Berlin (Site). This location was formerly the site of the Fraser Pulp Mill and was also sometimes referred to as the Burgess Mill.

The Applicant proposes to convert and upgrade the Site and to develop a biomass-fueled energy generating facility nominally capable of generating 70 megawatts (MW) of electric power. In addition, the Applicant proposes renovation of an existing 50,000 gallon fuel tank to store auxiliary fuel, the construction of a new switchyard and the installation of a new electrical transmission line in an existing right of way that will travel both underground and overhead, eventually interconnecting with an existing PSNH sub-station.

The Application was originally determined to be incomplete because certain information required by the Water Division of the Department of Environmental Services (DES) was deficient. However, the Applicant corrected those deficiencies and I found that the corrected Application contained sufficient information for the purposes of RSA 162-H. Therefore, on January 26, 2010, I accepted the Application and deemed it to be administratively complete. Upon acceptance of the Application, I appointed a Subcommittee to review this renewable energy application pursuant to RSA 162-H:6-a.

On March 11, 2010, a pre-hearing conference was held. On March 16, 2010, the Subcommittee held a site visit in Berlin and conducted a public informational hearing consistent with RSA 162-H:6-a.

Since the filing of the Application, a number of motions have been filed. On December 23, 2009, shortly after filing the Application, the Applicant filed a Motion for Protective Order and Confidential Treatment for Appendix Q (Interconnection Feasibility Study) of the Application.

The Subcommittee has also received petitions to intervene from the City of Berlin, the Coos County Commissioners, Clean Power Development, LLC (CPD), Wagner Forest Management Ltd. (WFM), the New Hampshire Sierra Club (NHSC) and Jonathan Edwards of Berlin, New Hampshire.

The purpose of this Order is to address all outstanding motions.

The Motions to Intervene

Standard for Intervention

The New Hampshire Administrative Procedure Act, RSA 541-A, dictates when an administrative agency must allow intervention. See RSA 541-A: 32, I. The statute also sets forth circumstances under which an administrative agency may allow intervention but is not required to do so. See RSA 541-A: 32, II.

RSA 541-A: 32, I, outlines the criteria which require the Committee to grant a petition for intervention and states, in pertinent part, that a person seeking to intervene must establish the following:

“(b) ...facts demonstrating that the petitioner's rights, duties, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervener under any provision of the law; and

(c) ...that the interest of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.” RSA 541-A:32, I (b), (c).

The statute also permits the presiding officer to allow intervention “at any time upon determining that such intervention would be in the interest of justice and would not impair the orderly and prompt conduct of the proceedings.” RSA 541-A:32, II.

Similarly, SEC’s recently promulgated procedural rules provide:

(b) The presiding officer shall grant a petition to intervene if:

(1) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer’s order of notice of the hearing, at least 3 days before the hearing;

(2) The petition states facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests might be affected by the proceeding, or that the petitioner qualifies as an intervenor under any provision of law; and

(3) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.

The administrative rule also provides that the presiding officer shall grant one or more late-filed petitions to intervene pursuant to RSA 541-A:32, II upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the hearings. See New Hampshire Code of Administrative Rules, Site 202.11.

The Administrative Procedure Act and the Committee rules require that a party be allowed to intervene in those cases where the party can establish a right, duty, privilege, immunity or other substantial interest that is implicated by the determination of the issues in the proceeding. The statute and the rules also permit intervention, in the presiding officer’s discretion, in those cases where the proposed intervention is in the interest of justice and does not interfere with the prompt and orderly conduct of the proceeding.

Importantly, the Administrative Procedure Act and the Committee's rules also allow the Presiding Officer to place limits upon the authority of a party to intervene. See RSA 541-A: 35, II; New Hampshire Code of Administrative Rules, Site 202.11 (d). The presiding officer may limit the issues pertaining to a particular intervenor, limit the procedures in which a particular intervenor may participate or combine intervenors and other parties for the purposes of the proceeding, so long as the limitations placed on intervenors do not prevent the intervenor from protecting an interest that formed the basis of intervention. Id.

Clean Power Development and Wagner Forest Management

Clean Power Development, LLC (CPD) and Wagner Forest Management, Ltd. (WFM) have both filed Motions to Intervene in this docket. Both CPD and WFM assert that they have substantial interests that may be affected in this docket.

CPD is in the process of developing a 29 MW biomass-fueled project located at 20 Shelby Street in Berlin, approximately 1 ½ miles downstream from the proposed site in this docket. In Docket No. 2009-03, the New Hampshire Site Evaluation Committee determined that the CPD project did not require a Certificate of Site and Facility. In light of that determination, the CPD facility is subject to local land use planning statutes and ordinances, and state agency jurisdiction pertaining to environmental laws and other matters. CPD asserts that its plant will consume approximately 340,000 tons of biomass per year, harvested from working forests within a 30-mile radius of Berlin. CPD alleges that if the Laidlaw Project goes forward, there will not be enough biomass available within the region on a sustainable basis and at reasonable prices. CPD also asserts that to the extent there may be subsurface contamination on the proposed site that enters into the Androscoggin River during construction, such contamination might adversely affect CPD's ability to operate its facility and to co-locate its facility with various other uses. Finally, CPD asserts that the proposed project and its facility both plan to interconnect with the existing 115 KV transmission loop known as the Coos County Loop and that both facilities may have to compete for transmission capacity to market. CPD also asserts that it has questions regarding the ownership of Laidlaw and suspects that Public Service Company of New Hampshire (PSNH) may be indirectly involved with the Project with some contingent ownership rights to PSNH which might adversely affect CPD's ability to compete with the Laidlaw Project.

WFM is based in Lyme, New Hampshire. WFM provides timberland investment management services to clients and asserts that it manages over 2.7 million acres of timberland in both the United States and Canada, including 692,000 acres of timberland within a 100-mile radius of the proposed Project. In addition, WFM asserts that it is in the early stages of planning an industrial wind farm in northern Coos County. The wind project is identified as "North Country Wind" and has filed with the Independent System Operator – New England (ISO) for a queue position for transmission capacity and presently holds queue position no. 280 with ISO. WFM asserts that the North Country Wind project will be a 180 MW facility that will connect to the Coos loop. WFM also asserts that it has a substantial interest in the sustainability of the biomass fuel that will be needed for the operation of the Laidlaw facility.

The Applicant has responded to both CPD and WFM's Motions to Intervene and asserted that neither CPD nor WFM has asserted a substantial interest that may be affected by the petition because the issues raised by each entity deal only with a competitive interest. Citing, Valley Bank v. State, 115 NH 151, 154 (1975), the Applicant asserts that a competitive interest cannot be the basis for granting a petition for intervention. The Applicant claims that the motions for intervention filed by CPD and WFM are based solely on a competitive interest and,

therefore, neither CPD nor WFM have identified a right, duty, privilege, immunity or other substantial interest that can support a petition to intervene in these proceedings. The Applicant also asserts that any claim of environmental harm does not affect CPD or WFM any differently than it does the general public and, therefore, that interest is solely represented by counsel for the public.

Having reviewed the pleadings, I find that both CPD and WFM have identified substantial interests which may be affected by the outcome of this docket. Specifically, the issue of sustainability of the biomass fuel on an ongoing basis is an issue that will substantially affect both WFM and CPD. The sustainability of the northern forest affects WFM in its capacity as a manager of logging lands within the forest. Increased capacity for the burning of biomass fuel will, likely, have some effect on the availability of biomass fuels and the sustainability of the northern forest. However, at this stage in the docket, the Committee cannot determine what that affect may be. However, the Project may certainly have an affect on WFM.

Similarly, CPD, as a developer and operator of an electric generating facility, also has a substantial interest in the sustainability and availability of biomass fuel from the northern forest. Thus, CPD has a substantial interest that may be affected by this docket.

Similarly, both WFM and CPD, as developers of electric generating facilities, have a substantial interest in the transmission capacity of the Coos transmission loop. Although it is unclear what authority the Site Evaluation Committee may have with regard to the issue of transmission capacity – an issue that is generally dictated by ISO-New England – it is certainly likely that the development of new electric generating projects in the North Country will substantially affect the access of all electrical generators to the transmission loop.

As such, I find that both WFM and CPD have asserted and demonstrated a substantial interest that may be affected by the outcome in this docket. The Applicant's suggestion that a purely commercial interest does not create a substantial interest justifying intervention is without merit. The Applicant relies upon the Valley Bank case. However, the Valley Bank case was not a case that determined the standards for intervention.

In Valley Bank v. State, 115 NH 151 (1975), the New Hampshire Supreme Court held that the existing statute governing bank branch expansions was constitutional. In recognizing that injuries resulting from competition are rarely classified as legal harm, the Court was referring to a constitutional attack on the existing statute. The Court eventually held that the then existing bank branch expansion statute was neither unreasonable nor arbitrary and, therefore, did not violate the equal protection clause of the state or federal constitutions. The Valley Bank case did not set forth a standard to define what a substantial interest is justifying intervention in a proceeding before an administrative agency. The Applicant stretches the Valley Bank holding in an effort to apply Appeal of Richards, 134 NH 148 (1991) to this docket. However, Appeal of Richards does not pertain to standing to intervene in an administrative proceeding. Appeal of Richards pertains to standing to appeal from an administrative proceeding to the New Hampshire Supreme Court. That standard is a different standard and is set forth at RSA 541:3. The standard to determine whether or not a party should be permitted to intervene in this proceeding is clearly set forth in RSA 541-A:32 and New Hampshire Code of Administrative Rules Site 202.11. In this case, the petitions of both WFM and CPD demonstrate that each of these parties have substantial interests that might be affected by this proceeding. Additionally, I cannot find that the orderly conduct of the proceedings would be impaired by allowing WFM and CPD to intervene in this docket.

However, it is apparent that both WFM and CPD's substantial interests in this docket are, in fact, limited. The substantial interests of both WFM and CPD appear to be limited to the issue of the sustainability of biomass fuel in the northern forest and the ability to use the Coos loop transmission capacity. Therefore, pursuant to RSA 541-A:35, II and New Hampshire Code of Administrative Rules Site 202.11(d), the participation of WFM and CPD will be limited to those two particular issues.

New Hampshire Sierra Club

The New Hampshire Sierra Club (NHSC) is a voluntary nonprofit organization claiming over 4000 New Hampshire members, 420 of whom reside in Coos County. NHSC is an environmental organization. NHSC describes its substantial interest in this docket as being the sustainability of the Applicant's forest management plan and the impacts of that plan on New Hampshire's northern forest. The Applicant does not object to intervention by NHSC, so long as intervention is limited to NHSC's concern about sustainability of the forest management plan.

There being no objection to NHSC's Motion to Intervene, that motion will be granted. However, I find that the prompt and orderly disposition of the proceedings in this docket require that NHSC's participation as an intervener shall be limited to the sustainability of the Applicant's forest management plan and the impacts of that plan on the northern forest.

City of Berlin and Coos County Commissioners

The City of Berlin and the Coos County Commissioners each filed Motions to Intervene in this docket. The Applicant does not object to these motions. The participation of local municipalities and counties is consistent with RSA 162-H:16, IV (b), requiring the Committee to give due consideration to the views of municipal and regional planning agencies and municipal governing bodies with respect to the orderly development of the region. Likewise, RSA 541-A:39 requires an administrative agency to give notice to, and afford all affected municipalities, a reasonable opportunity to submit data, views, or comments with respect to the issuance of a permit, license, or other action within its boundaries that directly affect the municipality. Therefore, the motion of the City of Berlin and motion of the Coos County Commissioners to intervene in this docket are both granted. The City of Berlin and the Coos County Commissioners shall participate fully as intervenors.

Jonathan Edwards

Jonathan Edwards is a citizen and business owner in the City of Berlin. He is a real estate agent and reports that he is actively involved in Berlin's real estate market. He argues that he should be permitted to intervene in this docket because it may impact the quality of life in Berlin, and because he does not believe that the popularly elected officials and City of Berlin and Coos County are truly representing the views of the majority of their constituents. In addition, Mr. Edwards asserts that he is a ratepayer who will be affected by the potential construction of the Project. He also asserts that he has a fiduciary duty to his clients to seek to preserve property values in the City of Berlin.

The Applicant objects to Mr. Edwards' petition to intervene. The Applicant asserts that the petition sets forth no substantial interest which would justify Mr. Edwards' petition to intervene. The Applicant asserts that Mr. Edwards' position is no different than that of the public at large. The Applicant points out that counsel for the public has been appointed in this docket and will competently represent the interests of the public at large.

Despite Mr. Edwards claims, I find that he has no substantial interest in this docket that differs from the interests of the public at large. The interests claimed by Mr. Edwards will be adequately represented by counsel for the public. Additionally I reject his claim that, as a real estate broker, he has a fiduciary duty to represent his clients in this matter or to represent future clients. A fiduciary relationship exists "in cases where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." Lash v. Cheshire County Savings Bank, 124 NH 435, 439 (1984) (citations omitted). While real estate brokers have a fiduciary duty to their clients, that duty is circumscribed by the New Hampshire Real Estate Practice Act, RSA 331-A. See Petition of Contoocook Valley Paper Company, 129 NH 528, 532 (1987) (recognizing that the fiduciary relationship between a broker and vendor must be read and applied in the context of the statute). Nothing within RSA 331-A extends the real estate broker fiduciary relationship to require that a broker intervene or otherwise participate in proceedings before local, state or federal agencies that may affect the region generally. This interest is most appropriately within the purview of counsel for the public. I also find that allowing intervention by Mr. Edwards would not be consistent with the prompt and orderly disposition of these proceedings. Therefore, his petition to intervene is denied.

Motion for Confidential Treatment of Appendix Q

The Applicant has filed a Motion for Protective Order and Confidential Treatment for Appendix Q to the Application. Appendix Q consists of an interconnection feasibility study of the proposed Project performed by contractors for ISO-New England. Such studies generally concern the costs and technical feasibility of interconnection of an electric generating facility to the New England electric grid. Such reports contain commercially sensitive information and sometimes also contain information that may affect the security of the region's electric distribution system.

Records pertaining to confidential, commercial or financial information are exempt from public disclosure pursuant to RSA 91-A:5, IV. The information contained in Appendix Q appears to fall within the definition of commercial or financial information, as that term is interpreted in Union Leader Corp. v. New Hampshire Housing Finance Authority, 142 NH 540, 553 (1997). Such records are not exempt from public disclosure on a *per se* basis. The agency must perform a balancing test to determine whether the records should be protected, or if the public's interest in disclosure is outweighed by the Applicant's interests in protecting confidential information. In this case, Appendix Q, if made publicly available, could affect the Applicant's competitive position in the renewable energy market by revealing cost estimates and other information pertaining to the ability to interconnect with the ISO-New England system. On the other hand, the public, at least at this stage of the proceedings, will not benefit from disclosure of such information.

Because the public interest in the disclosure of the requested information is outweighed by the likelihood of substantial harm to the competitive position of the Applicant, the request for confidential treatment Appendix Q is hereby granted. See Union Leader Corp. v. New Hampshire Housing Finance Authority, 142 NH 540, 553-554 (1997). Appendix Q shall be sealed and treated by the Committee as a confidential document. Any party seeking to review Appendix Q should first discuss the matter with the Applicant. A motion for disclosure of Appendix Q should not be brought unless the parties have first tried to resolve the confidentiality issues informally.

Counsel for the public has an important statutory role in seeking to ensure an adequate supply of energy. The feasibility of interconnection is a matter that affects the supply of energy. Therefore, Appendix Q shall be disclosed to counsel for the public. However, counsel for the public shall not further disclose Appendix Q without a further order from the Subcommittee.

Conclusion and Order

Based upon the foregoing, it is hereby:

ORDERED that the Applicant's Motion for Protective Order on Confidential Treatment for Appendix Q is GRANTED, and it is,

FURTHER ORDERED, that the Motions filed by the City of Berlin and the Coos County Commissioners to intervene in this docket are GRANTED, and it is,

FURTHER ORDERED, that the Motions of Wagner Forest Management, Ltd. and Clean Power Development, LLC to intervene in this docket are GRANTED IN PART and LIMITED to the issues of the sustainability of the northern forest and transmission capacity; and it is,

FURTHER ORDERED that the motion of the New Hampshire Sierra Club to intervene in this docket is GRANTED IN PART and LIMITED to the issue of the sustainability of the northern forest; and it is,

FURTHER ORDERED that the Motion of Jonathan Edwards to intervene in this docket is hereby DENIED.



Thomas S. Burack, Presiding Officer