

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DE 10-195**

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

**Petition for Approval of Power Purchase Agreement  
with Laidlaw Berlin BioPower, LLC**

**Order on Pending Motions**

**ORDER NO. 25,171**

**November 17, 2010**

**I. PROCEDURAL HISTORY**

On July 26, 2010, Public Service Company of New Hampshire (PSNH) filed a petition for approval of a Power Purchase Agreement (PPA) with Laidlaw Berlin BioPower, LLC (Laidlaw) for the acquisition of energy, capacity and renewable energy certificates (RECs).

On September 29, 2010, the Commission held a Prehearing Conference and following the hearing issued Order No. 25,158 (October 15, 2010) defining the scope of the proceeding and granting the pending motions to intervene for the following parties: Laidlaw; Concord Steam Corp. (Concord Steam); Clean Power Development, LLC (CPD); Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Springfield Power LLC, Whitefield Power & Light Company, and Indeck Energy -- Alexandria, LLC (collectively, the Wood Independent Power Producers (IPPs)); Edrest Properties, LLC; City of Berlin and New England Power Generators Association, Inc.<sup>1</sup> Order No. 25,158 also approved an accelerated procedural schedule.<sup>2</sup>

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<sup>1</sup> On August 3, 2010, the Office of Consumer Advocate (OCA) filed a letter stating that it would be participating in this docket on behalf of residential ratepayers pursuant to RSA 363:28.

<sup>2</sup> Orders No. 25,158 (October 14, 2010) and 25,168 (November 12, 2010) contain additional procedural history.

Discovery ensued. On October 21, 2010, Laidlaw filed a motion for confidential treatment of a business pro forma it provided to Staff in response to a data request. Concord Steam filed an objection to Laidlaw's motion for confidential treatment and Concord Steam and the Wood IPPs filed a joint motion to extend the procedural schedule. On October 27, 2010, Laidlaw filed a response to Concord Steam's objection as well as an objection to the joint motion to extend the procedural schedule. On the same day the City of Berlin filed a concurrence with Laidlaw's October 27<sup>th</sup> filings. Also on October 27, 2010, the Commission issued a secretarial letter granting Laidlaw's motion for confidential treatment of its pro forma and modifying the procedural schedule to extend the time for discovery.

On October 28, 2010, Laidlaw filed a notice stating that it was withdrawing its intervention in the proceeding.<sup>3</sup> On the same day, Concord Steam filed an objection to Laidlaw's notice of withdrawal and moved to strike all of Laidlaw's data responses from the record. Subsequently, on November 8, 2010, PSNH filed an objection to Concord Steam's objection and motion to strike. On November 2, 2010 the Wood IPPs filed a motion to compel Laidlaw to respond to data requests. On November 5, 2010, the Wood IPPs filed an objection to Laidlaw's notice of withdrawal along with a motion to compel Laidlaw's continued participation in the proceeding. Also on November 5<sup>th</sup>, PSNH filed a response to the Wood IPPs' objection and motion to compel participation.

On October 29, 2010, Concord Steam and the Wood IPPs each filed a motion to compel PSNH to respond to various data requests. On November 2, 2010, Concord Steam filed a motion to dismiss or to summarily deny PSNH's application for approval of its PPA with Laidlaw. On November 4, 2010, PSNH filed an objection to the motion to dismiss. On November 4, 2010, CPD filed a letter with the Commission stating that the focus of proceeding should remain on the

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<sup>3</sup> The notice was filed in this docket on November 1, 2010.

PPA and urging the Commission to maintain the procedural schedule. On the same day, the Wood IPPs filed a second motion to compel PSNH's response to data requests. PSNH's November 5<sup>th</sup> response regarding Laidlaw's participation also objected to the motions to compel responses to discovery requests directed to PSNH.

Laidlaw filed a letter on November 9, 2010 supporting PSNH's objections. On November 9, 2010, Concord Steam filed a motion to continue the procedural schedule, to which PSNH filed an objection on November 10, 2010. On November 15, 2010, the Wood IPPs filed another motion to compel PSNH's response to data requests.

## **II. MOTIONS/PLEADINGS, POSITIONS OF THE PARTIES AND COMMISSION ANALYSIS**

### **A. Notice Of Withdrawal, Motion To Compel Laidlaw's Participation, And Motion To Strike Laidlaw's Responses**

#### **i. Laidlaw Berlin BioPower, LLC**

Laidlaw stated that it had intervened to assist the Commission in its analysis of the PPA and to advocate for an expedited schedule. Laidlaw argued that it had been subjected to numerous overly broad and inappropriate discovery requests from other intervenors and that such requests had led to time consuming discovery disputes. Laidlaw determined that rather than requiring the Commission to commit time and resources to resolving these disputes, it would simply withdraw from the proceeding. Laidlaw claimed that it is not a necessary party and that the Commission has considered and approved other proposed purchase power agreements pursuant to RSA 362-F:9 without making the power producers parties to those dockets.

#### **ii. Concord Steam Corporation**

Concord Steam objected to Laidlaw's withdrawal from this proceeding, stating that Laidlaw should not be allowed to participate in this docket by providing confidential information

not available to all parties, requesting expedited treatment, and then refusing to answer discovery relating to adverse impacts of the PPA. Concord Steam asked that the Commission strike all data responses from Laidlaw to Commission Staff from the record and prohibit parties from using that information in this docket.

**iii. Wood IPPs**

The Wood IPPs requested that the Commission deny Laidlaw's notice of withdrawal and compel Laidlaw to participate in this docket and to submit to discovery. The Wood IPPs argued that in exchange for its request to expedite this proceeding and hold a final hearing before year end, Laidlaw agreed to participate and to submit to discovery. According to the Wood IPPs, allowing Laidlaw to get the benefit of expedited treatment without providing the information it promised denies the parties and the Commission access to information needed to assess the risks that the PPA imposes on ratepayers. According to the Wood IPPs, those risks include potential over market prices that are not trued up by any type of market adjustment and over market payments not paid back to customers and not secured by a letter of credit or other similar measure to protect ratepayers from Laidlaw's lack of creditworthiness in the future.

The Wood IPPs also argued that allowing Laidlaw to withdraw denies the Wood IPPs due process, by denying them an opportunity to fully explore through further discovery the information already submitted by Laidlaw, and to cross examine Laidlaw on that information.

**iv. Clean Power Development**

Clean Power asserted that the focus of the proceeding should remain on the terms of the PPA and that confidential information relating to Laidlaw should not have any bearing on this docket. As a result, Clean Power did not object to Laidlaw's withdrawal and urged the Commission to move the docket to a rapid conclusion.

**v. Public Service Company of New Hampshire**

PSNH argued that it is the only mandatory party in this proceeding and that Laidlaw, as a voluntary intervenor, is free to withdraw at will. PSNH pointed out that the Wood IPPs wanted to be treated as voluntary participants in this docket and not subject to discovery, while insisting that Laidlaw, another voluntary party, be subject to discovery and not be allowed to withdraw.

PSNH pointed to the recent approval of the Lempster wind project purchase power agreement with PSNH as evidence that intervenors may withdraw without Commission approval. According to PSNH, in that docket Constellation New Energy, Inc. and Constellation Commodities Energy Group, Inc. withdrew from the docket and the Commission took no action to either approve or deny the withdrawal request. *See* Order No.24,965 (May 1, 2009).

**vi. Commission Analysis**

PSNH is the petitioner in this docket and has requested our approval of its proposed PPA with Laidlaw. As the moving party, PSNH bears the burden of proof with regard to whether the proposed PPA is in the public interest pursuant to RSA 362-F:9. *See* N.H. Code of Admin. R. Puc 203.25. Analysis of the proposed PPA pursuant to RSA 362-F:9 does not require that Laidlaw participate as a party. The terms of the PPA speak for themselves and, to the extent we have questions concerning the reasons for, or the meaning or effects of those terms, PSNH, the petitioner and a party to the contract, is available to provide evidence on those issues. Further, PSNH is available to provide evidence necessary for us to consider the criteria set forth in RSA 362-F:9, II. In reviewing those criteria: (1) efficient and cost effective realization of policy goals; (2) restructuring policy principles of RSA 374-F:3; (3) resource mix; (4) PSNH's integrated least cost resource plan under RSA 378:37-41; (5) procurement which promotes innovative and market driven solutions; and (6) economic and environmental benefits, it is not

necessary to require an unregulated counter-party to the PPA to remain a party to this docket. As a result, we will take no action relative to Laidlaw's proposed withdrawal from this docket and permit that withdrawal to take effect.

Because Laidlaw is no longer a party, we will grant Concord Steam's motion to strike all evidence provided by Laidlaw to any party in this docket. Further, we instruct the parties to refrain from using such information as a basis for testimony or other evidence in this docket. Allowing Laidlaw's evidence to form a basis for our decision, without the ability of other parties to conduct discovery or to cross-examine witnesses, would violate our procedural rules and be unfair. *See* Puc 203.23, 203.24, and RSA 541-A:31.

#### **B. Motions To Compel Laidlaw's Responses**

As a result of our ruling on Laidlaw's withdrawal from this docket, all motions to compel Laidlaw to respond to data requests are moot. Laidlaw will not be submitting evidence in this docket and is therefore not subject to discovery. We therefore deny all pending motions to compel responses from Laidlaw.<sup>4</sup>

#### **C. Motion To Dismiss PSNH's Petition**

##### **i. Concord Steam**

Concord Steam's motion to dismiss requested that the Commission dismiss PSNH's petition and summarily deny pre-approval of cost recovery and approval of the purchase option agreement included in the PPA and recovery of any portion of energy payments made pursuant to such option. Concord Steam maintained that it is unnecessary for the Commission to consider any of the evidence in this case because, in Concord Steam's view, PSNH is asking the Commission to approve two aspects of the PPA that exceed the scope of RSA 362-F:9.

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<sup>4</sup> We will rule on the pending motions to compel PSNH to respond to data requests in a separate order. We will also rule separately on Concord Steam's pending motion to continue the procedural schedule.

Concord Steam stated that PSNH's petition requested the Commission to approve "full cost recovery of the rates, terms and conditions of the PPA,"<sup>5</sup> which includes above-market "Cumulative Reduction" payments that will be applied to the purchase price of Laidlaw's facility over a twenty year period. Concord Steam argued that RSA 362-F:9 is the only statute cited by PSNH as authority for the Commission's approval and that it does not allow PSNH to obtain pre-approval for cost recovery, nor does it authorize PSNH to make payments toward the purchase price of the Laidlaw facility under the option to purchase included in the PPA.

Concord Steam further argued that there is no statutory basis for PSNH to use RSA 362-F:9 to expand its portfolio of generating stations and hinder the development of "fully competitive and innovative markets" under RSA 374-F:3, II. Concord Steam also noted that a single contract for PSNH to meet all its REC requirements, to the exclusion of all others, undermines the purpose of "fuel diversity" mentioned in RSA 362-F:1.

**ii. Public Service Company of New Hampshire**

In its objection, PSNH asked the Commission to deny Concord Steam's motion to dismiss and consider necessary and appropriate conditions on Concord Steam's participation in this docket as permitted by RSA 541-A:32, III.

PSNH pointed out that RSA 362-F provides a mechanism for the state's electric distribution companies to enter multi-year purchase agreements with renewable energy sources and that an electric distribution company may request that the Commission find such a power purchase agreement to be in the public interest. PSNH noted that its obligation to begin the purchase of the Laidlaw project's output under the PPA is contingent on the Commission's approval of full cost recovery of the rates, terms and conditions of the PPA. PSNH stated that as

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<sup>5</sup> Section 4.1.3 of the PPA states that one of the conditions to PSNH's obligation to make purchases under the PPA is its receipt of a final, nonappealable decision from the Commission "approving and allowing for full cost recovery of the rates, terms and conditions" of the PPA.

part of the enactment of the renewable portfolio standard (RPS) law, the legislature provided for such recovery by amending 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.

PSNH asserted that Concord Steam's motion contains a number of erroneous factual allegations and that these factual allegations may be disregarded for purposes of a motion to dismiss at this stage of the proceeding. PSNH stated that the only evidence to date in this proceeding is that contained in PSNH's pre-filed testimony. PSNH maintained that in ruling on a motion to dismiss, the Commission views the evidence in the light most favorable to the non-moving party, citing *Pinetree Power-North*, Order No. 18,468, 71 NH PUC 638, 643 (1986). PSNH argued that because it is the non-moving party in this case and there are no facts of record to counter its pre-filed testimony, the motion to dismiss cannot be granted based on Concord Steam's factual allegations.

According to PSNH, the erroneous factual allegations relate to Concord Steam's characterization of the Cumulative Reduction factor and the RPS law. First, PSNH maintained that if the Commission were not able to grant cost recovery approvals, the purpose of the RPS law would be frustrated since a utility would not be motivated to enter into an RPS-related PPA if the recovery of costs was unknown. PSNH further maintained that if Concord Steam's interpretation of RSA 362-F:9 were to be adopted, the provision for Commission authorization would be meaningless because there would be no reason for a utility to undertake the effort of going through the hearing process. In this regard, PSNH referred to the Commission's ruling in *Public Service Company of New Hampshire*, Order No. 24,965 at 17-18 (2009), in which the Commission stated that the reason RSA 362-F:9 requires the approval of multi-year agreements



is to allow the petitioning utility to recover the prudently incurred costs of such agreements in its energy service rates.

As to the Cumulative Reduction mechanism, PSNH stated that the PPA does not in fact include the payment of any Cumulative Reduction amounts by PSNH since the PPA provides that PSNH pays for only three things: energy, capacity and a REC payment. According to PSNH, the Cumulative Reduction concept is only a tracking mechanism and is tantamount to an insurance policy to provide protection over the term of the PPA to consumers from the possibility of over-market prices.

No other party submitted a pleading for or against Concord Steam's motion in the ten day period following the filing of the motion to dismiss. Accordingly, a ruling on the motion is now timely. *See* N.H. Code Admin. R. Puc 203.08(e).

### **iii. Commission Analysis**

We are asked to dismiss the petition altogether or, in the alternative, to summarily deny two particular aspects of the PPA transaction, i.e., full cost recovery of the rates, terms and conditions of the PPA and the Cumulative Reduction provision of the purchase option agreement appended to the PPA. At this stage of the proceedings, we have before us only PSNH's petition and supporting testimony and do not have the benefit of any responsive pre-filed or hearing testimony or any briefing of the legal issues involved. For purposes of ruling on the motion to dismiss, we assume that PSNH's factual allegations are true and that all reasonable inferences therefrom must be construed in favor of PSNH. *See Southern New Hampshire Water Company, Inc.*, Order No. 19,826, 75 NH PUC 282, 284 (1990); *see also Mountain Springs Water Company, Inc. v. Mountain Lakes Village District*, 126 N.H. 199, 200-201 (1985).

Applying this standard, we will deny Concord Steam's motion to dismiss. PSNH's supporting testimony addresses the specific public interest factors set forth in RSA 362-F:9, II. For purposes of our ruling, we assume such testimony to be true. Concord Steam's motion challenges the validity of two particular aspects of the overall PPA transaction. Even assuming that the allegations and assertions set forth in Concord Steam's motion are correct as a matter of fact and law, dismissal of the petition is not appropriate at this stage of the proceeding. In addition, it would not be prudent to rule on Concord Steam's request that we address two particular aspects of the PPA transaction in a piecemeal fashion isolated from the development of a complete record. Any party may assert arguments concerning dismissal or denial at the end of the case after the record is closed, if they find that the facts warrant such action. Finally, we will not place any conditions on Concord Steam's participation in this docket as a consequence of Concord Steam's filing the motion to dismiss.

**Based upon the foregoing, it is hereby**

**ORDERED**, that Concord Steam's and the Wood IPPs' objections to Laidlaw's notice of withdrawal are **OVERRULED**; and it is

**FURTHER ORDERED**, that the Wood IPPs' motion to compel Laidlaw's continued participation is **DENIED**; and it is

**FURTHER ORDERED**, that Concord Steam's motion to strike Laidlaw's data responses from the record is **GRANTED**;

**FURTHER ORDERED**, that all pending motions to compel data responses from Laidlaw are **DENIED**; and it is

**FURTHER ORDERED**, that Concord Steam's motion to dismiss or to summarily deny PSNH's application for approval of its PPA with Laidlaw is **DENIED**.

By order of the Public Utilities Commission of New Hampshire this seventeenth day of  
November, 2010.

Thomas B. Getz  
Thomas B. Getz  
Chairman

Clifton C. Below  
Clifton C. Below (KNS)  
Commissioner

Amy L. Ignatius  
Amy L. Ignatius  
Commissioner

Attested by:

Debra A. Howland  
Debra A. Howland  
Executive Director

