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September 16, 2010

Thomas S. Burack, Chairman  
N.H. Site Evaluation Committee  
N.H. Department of Environmental Services  
29 Hazen Drive  
Concord, NH, 03302

**Application of Laidlaw Berlin BioPower, LLC for a Certificate of Site and Facility  
for a Renewable Energy Facility in Berlin, New Hampshire**

**SEC Docket No. 2009-02**

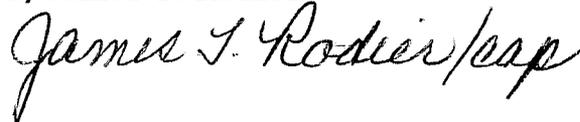
Dear Chairman Burack:

On behalf of Clean Power Development, LLC, I am filing with the Committee an original and 12 copies of a Post-Hearing Brief in this proceeding.

I have sent a copy of this filing to the Parties on the Service List in this proceeding.

Sincerely,

**/s/James T. Rodier**

A handwritten signature in black ink that reads "James T. Rodier/cap". The signature is written in a cursive style and is positioned below the typed name.

STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE

Application of Laidlaw Berlin BioPower, LLC for a Certificate of Site and Facility  
for a Renewable Energy Facility in Berlin, New Hampshire

SEC Docket No. 2009-02

**POST-HEARING BRIEF OF CLEAN POWER DEVELOPMENT, LLC**

**I. PRELIMINARY STATEMENT**

CPD is a New Hampshire limited liability company that focuses on the development of renewable and sustainable wood-fueled biomass-energy facilities. CPD's offices are located at 130 Pembroke Road, Suite 100, Concord, New Hampshire.

CPD plans to construct, own and operate a biomass facility, Clean Power Berlin, LLC ("CPB Facility") located in Berlin, New Hampshire, which will generate electricity and steam through the combustion of forest product biomass chips supplied through local markets. The CPB Facility will be capable of generating not more than 29.5MW gross output of electricity. Normal net generation will usually be in the 15 to 22MWw gross output range based upon thermal load during combined heat and power ("CHP") operation. The CPB Facility can operate with an efficiency of 60% or higher through CHP design.

The site of the CPB Facility is 20 Shelby Street in Berlin, on land adjacent to the City of Berlin Waste Water Treatment Plant. The site of the CPD Facility is on the Androscoggin River, approximately 1 ½ miles downstream from the site of the Laidlaw Project.

On December 16, 2009, Applicant Laidlaw Berlin Biopower, LLC filed an Application with the Site Evaluation Committee for a Certificate of Site and Facility in Berlin, New Hampshire. Hearings were held by the Committee on August 23 through August 27, and on September 10. Clean Power Development, LLC was granted limited intervenor status by the Committee. Order on Pending Motions (March 24, 2010). CPD presented testimony and conducted cross-examination at the hearings. CPD hereby submits its post-trial brief in this proceeding. In this brief, CPD primarily focuses on the key issues which have arisen during the proceeding. By way of supplementation,

appended hereto and incorporated herein is the closing statement of CPD made to the Committee on September 10, 2010. Transcript Day 6 at 85 to 102.

## II. ARGUMENT

### **A. Applicant cannot be granted a Certificate of Site and Approval unless and until the Purchase Power Agreement (PPA) is approved by the New Hampshire Public Utilities Commission (NHPUC).**

The Committee can only issue a Certificate of Site and Facility if it can make a finding that the Applicant has adequate financial capability to assure construction and operation of the facility. *See*, RSA 162-H:16, IV(a). According to Applicant's Testimony, "[u]nder RSA 162-H:16, in order to obtain a Certificate of Site and Facility the Applicant must show that it has adequate financial capability to construct and operate the Project in compliance with the terms and conditions of the Certificate." Testimony of Michael B. Bartoszek at 4. Stated differently, an applicant **cannot obtain** a certificate unless it can show that it has adequate financial capability.

According to Applicant,

[t]he ongoing operations of the Project will largely be supported by the cash flows generated from a long-term Power Purchase Agreement ("PPA") that is being finalized with Public Service Company of New Hampshire ("PSNH") pursuant to an executed Letter of Intent. **The PPA is an essential element of the Project's financial viability and will be the dominant positive factor in securing the debt financing.**

Application at 92 (Emphasis added).

Moreover, the Applicant provided the following response to a data request from Public Counsel:

14. Is a PPA necessary in order to make the Project financially viable?

Response: Yes.

Laidlaw Exh. 17

Pursuant to RSA 362-F:9, the PPA requires approval from the NHPUC before it can become effective. Accordingly, since Applicant has stated that the "PPA is an essential element of the Project's financial viability," the Applicant will not be able to demonstrate "adequate financial capability" unless and until the PPA is approved by the NHPUC.

In its Application, Laidlaw stated that:

Similar to the Committee's course of action in Granite Reliable Power, LLC (Decision Granting Certificate of Site and Facility With Conditions, July 15, 2009, Docket No. 2008-04), the Applicant would be willing to accept a certificate condition that prohibits the commencement of construction until all construction financing is in place.

Testimony of Michael B. Bartoszek at 8.

Laidlaw's reliance on the Committee's Decision in the Granite Reliable Power, LLC proceeding is misplaced. In that Decision, the Committee found that:

**[t]he Applicant has demonstrated, by a preponderance of the evidence, that it has the financial capability to finance, construct and operate the project.** Nonetheless, all parties agree that the current market for financing such projects is challenging. Therefore, the Subcommittee determines that the Applicant must have committed construction financing for the project in place before construction may commence.

Decision, SEC Docket No. 2008-04, at 32 (Emphasis added.)

Granite Reliable Power, LLC was able to satisfactorily demonstrate to the Committee that it had the present capability to finance, construct and operate its project, based in large part on its experience in developing a number of other wind power projects. In contrast, based upon its Application and Testimony, Laidlaw Berlin Biopower, LLC (or NewCo. – see argument below), an entity that has not developed other biomass projects, will not possess, as it must, the requisite financial capability to finance, construct and operate its proposed project unless and until the PPA is approved by the NHPUC.<sup>1</sup> While the NHPUC has opened this docket, there has not yet been a prehearing conference, the deadline for the submission of interventions has yet to come, and no schedule has yet been set for the docket. It is likely to take at a minimum, a number of months to resolve.

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<sup>1</sup> PSNH's 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. Petition for Approval of Power Purchase Agreement between Public Service Company of New Hampshire and Laidlaw Berlin BioPower, LLC at ¶5, Docket No. DE 10- 195.

**B. RSA 162-H: 16, IV requires that the Committee must consider “available alternatives” and, other relevant factors bearing on whether the objectives of RSA 162-H would be best served by the issuance of the Certificate.**

New Hampshire’s siting statute, RSA Chapter 162-H, has as its fundamental purpose the selection and utilization of appropriate sites for new bulk power and energy facilities. In enacting Chapter 162-H, the legislature recognized “that the selection of sites for energy facilities... will have a significant impact upon the welfare of the population, the location and growth of industry, the overall economic growth of the state, the environment of the state, and the use of natural resources.” RSA 162:H-1 (Emphasis supplied). Accordingly, the Legislature determined that it is in the public interest to:

- (a) to maintain a balance between the environment and the need for new energy facilities; (b) to avoid undue delay in the construction of needed facilities and to ensure full and timely consideration of environmental consequences; (c) to ensure that all entities planning to construct facilities provide full and complete disclosure to the public of such plans; and (d) to ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.

Id. (Emphasis supplied.)

New Hampshire’s siting statute also sets forth the framework and criteria to be used by the Site Evaluation Committee in evaluating whether to issue a certificate of site and facility:

The site evaluation committee, after having considered available alternatives and fully reviewed the environmental impact of the site or route, and other relevant factors bearing on whether the objectives of this chapter would be best served by the issuance of the certificate, must find that the site and facility:

- (a) Applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.
- (b) Will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.
- (c) Will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.

RSA 162:H-16, IV (Emphasis added.)

In a recent decision, the Supreme Court explained the well-settled fundamental tenets of statutory construction:

In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. We interpret statutes not in isolation, but in the context of the overall statutory scheme. Our analysis must start with consideration of the plain meaning of the relevant statutes, construing them, where reasonably possible, to effectuate their underlying policies. Insofar as reasonably possible, we will construe the various statutory provisions harmoniously.

In re Pennichuck Water Works, Inc., 160 N.H. 18, 992 A.2d 740 (N.H. 2010).

Accordingly, in deciding whether to issue the proposed Laidlaw project a certificate of site and facility, the Committee must construe the statutory term “after having considered available alternatives”, in a manner consistent with the purposes of the siting statute: to wit, “to maintain a balance between the environment and the need for new energy facilities.” It would be an error of law for the Committee to not consider all available alternatives to the Laidlaw Project to balance environment impact and new energy facilities. One such alternative that should be considered by the Committee is the Clean Power Development project proposed for Berlin on the site of the Berlin Waste Water Treatment Facility. Alternatives such as the Clean Power Development project must be considered and evaluated by the Committee in order for it to determine the optimum balance between the environment and the need to construct new energy facilities.

CPD also submits that as part of this analysis of alternatives, the Committee should consider the alternatives of continuation of existing biomass facilities, as compared with the construction and operation of a new Laidlaw facility, since, as noted below, there was testimony to the effect that construction of the Laidlaw facility will put existing biomass facilities out of business.

**C. Applicant's proposed facility will interfere with the orderly development of the region.**

In deciding whether to issue the proposed Laidlaw project a Certificate of Site and Facility, the Committee must construe the statutory term “orderly development of the region”, in a manner that, inter alia, does not negatively impact the location and growth of industry and ensures that “all environmental, economic, and technical issues are resolved in an integrated fashion.”

**1. The proposed Laidlaw project will negatively impact the existing biomass generating facilities resulting in the loss of jobs and economic activity.**

The central issue in this proceeding was succinctly and accurately articulated in the following brief exchange between Committee member Michael Harrington and Mel Liston, General Manager of CPD:

BY MR. HARRINGTON:

Q. Getting back to a couple specific questions.

It seems as if the testimony we've heard on the availability of wood has been one constant throughout, given by Laidlaw, their experts and yourself, and that is: If you're willing to spend enough money, there's plenty of wood. Do you agree that's correct?

A. That's correct.

Q. So, rather than harp on how much is available and from what mileage, it really comes down to price.

Transcript Day 5 at 116.

CPD repeatedly stated during the hearings that if the Laidlaw project went forward, and the NHPUC approved the proposed PPA between PSNH and Laidlaw, then CPD would be unable to continue with its proposed combined heat and power project to be located in Berlin. CPD's statements were echoed by a number of the existing biomass generating facilities and their representatives:

**Indeck-Alexandria Energy, Alexandria, N.H.**

Indeck's ability to compete as a merchant generating facility in New Hampshire is directly impacted by the development of the Laidlaw project and the purchase power agreement with Public Service

Transcript Day 5 at 175.

**D. G. Whitefield Biomass Power Plant, Whitefield, N.H.**

D. G. Whitefield will be at a competitive disadvantage with this proposed large-scale biomass facility, particularly if the Laidlaw facility benefits from an above-market rate order that includes fuel cost recovery mechanisms. This would effectively allow Laidlaw to pass through regulator-approved fuel costs to captive electricity customers. This presents an unfair competitive advantage that threatens the continued viability of D.G. Whitefield.

Transcript Day 5 at 209, 210.

### **Concord Steam Corporation**

What we, essentially, what we create, if we allow this to go forward, is one buyer, and I know it's Laidlaw, but, effectively, it's PSNH. We've got one buyer, with two plants, that will control well over 50 percent of the wood supply in the marketplace in New Hampshire. And, allowing them to have a contract with Cousineau throws another monkey wrench in the works. And, I think it's going to create some real problems for us to continue to get wood supply at a reasonable rate. I have ratepayers I have to be concerned for. And, I think this is going to severely affect our ability to protect their interests.

Transcript Day 6 at 15.

### **Robert Berti, North Country Procurement**

So, my thoughts on it, knowing what the present price of electricity is, and what the plants can pay, and what's available, I think that, if that Laidlaw Project goes in, the impacts on two existing will be severe. The impact on two other plants will be moderate to severe. And, two other plants will be slight to moderate. But it will have impacts.

Transcript Day 6 at 29, 30.

### **Bridgewater Power Company, Bridgewater, NH**

We're very concerned that the construction of the Laidlaw facility will further undermine our ability to operate. A 70 megawatt plant will have a reach for fuel well over 100 miles and greatly impact our market. Further, the contract being proposed for the facility, in Section 6.1.2, outlines a fuel adjustment that limits fuel risk to the owners and ties the price of fuel to the price of fuel from Schiller Station. Schiller Station is a rate based plant, and fuel risk at that facility is borne by ratepayers. Therefore, the index that the Laidlaw plant is benchmarked against is a facility that has no fuel price risk. Our facility has no such backstop, and never has. Higher fuel prices and pressure on supply will likely force us out of business. It seems that the certainty of existing jobs and existing facilities should be the number one priority, so that existing jobs and benefits of these facilities are not lost or traded for speculative jobs.

Transcript Day 6 at 32.

In view of the foregoing statements from the existing biomass generating facilities, it is clear that the Laidlaw project will severely disrupt the orderly development of the region and will probably cause a net loss of jobs and economic activity.

**2. The proposed Laidlaw project will result in the curtailment and/or shutdown of existing generation facilities on the Coos Loop.**

Mr. Gabler's testimony on behalf of CPD on the transmission issues was compelling and uncontroverted by Laidlaw:

The System Impact Study done by ISO-New England, which was Laidlaw Exhibit 56, very -- it shows very explicitly that operation of the Laidlaw Project will result in the curtailment and/or shutdown of the existing generation on the Coos Loop. In the base case assumed for the study, Berlin Hydro, Smith Hydro, and the Whitefield biomass plant would be shut down. In reality, it could be any generator, including LBB, that would be shut down on any given day. And, the resulting disorder to the region would bring a future of uncertainty and economic uncertainty, not only to operating power plants, but fuel suppliers for those projects.

\*\*\*\*

The New Hampshire Public Utilities Commission and the North Country Transmission Commission have been studying this issue for about three years, and have heard testimony that a more vibrant upgrade, which would allow operation of all projects, could be in the vicinity of \$100 million or possibly more. KEMA is currently working on a study of those cost allocations for the State of New Hampshire.

That draft report was due out last week. It has been delayed and will be out shortly. However, given the sizable cost, Laidlaw has chosen not to pursue that avenue. They have clearly stated in letters to the Transmission Commission that the addition of such costs could well make their project economically unfeasible.

Transcript Day 6 at 48, 49.

Permitting the construction and operation of the proposed Laidlaw plant will clearly impact the orderly development of the region through the resulting imposition of minimum interconnection standards, otherwise known as "MIS", on the region.

**D. NewCo is the party responsible for constructing and operating the Project, and accordingly, should be the Applicant.**

RSA 162-H:5, I requires that "[n]o person shall commence to construct any energy facility within the state unless it has obtained a certificate pursuant to this chapter. Such facilities shall be constructed, operated and maintained in accordance with the terms of the certificate."

According to Committee Exhibit No. 1, NewCo Energy, LLC currently owns Aware Energy Funding LLC, which in turn owns 100% of PJPD Holdings, LLC. NewCo will also own 100% of Applicant Laidlaw Berlin Biopower, LLC.

The NewCo Management Board consists of Richard Cyr, Keith Mueller, and Michael Ferree. The NewCo Management Board consists of the same individuals as the Laidlaw Berlin Biopower Management Board. Additionally, according to Committee Exhibit No. 1, Laidlaw Berlin Biopower is a mere “development entity.” In this regard, Mr. Bartoszek explained Applicant’s role in the following manner:

So as a project sponsor our job is to assemble the various components that make a project – a project and a project financing viable, including material contracts permits and things of that nature so that the project essentially pencils out and makes sense. **And its not uncommon for then a developer at that stage to make some arrangement to move to the other side as other parties move forward with construction and operation.**

Transcript Day 3 at 144, 145.

Under these facts and circumstances, the issue before the Committee is which of the foregoing “persons” is proposing to “construct” the Laidlaw project in Berlin. In order to resolve this issue the Committee must construe RSA 162-H:5, I in light of its underlying policies. As the Committee well knows, the Laidlaw Project will be owned by PJP. Laidlaw will no longer own the underlying equity in the project. NewCo is the party that will be responsible for the construction and operation of the facility and therefore should be the “person” applying for the Certificate.

Because of the late stage of the proceedings (after discovery was completed by the parties) when the Committee and the parties were notified of this significant change in the Applicant, the Committee should take more time, and should give the parties more time, to obtain information about and analyze the financial, managerial and technical capabilities of the Applicant.

**E. The Committee is not authorized to issue a Certificate at this time because it cannot comply with RSA 162-H directives.**

The Committee is not authorized to issue a Certificate for the proposed facility at this time because it cannot comply with RSA 162-H directives regarding potential environmental impacts and adverse effects on public health and safety. It is apparent from the scant record on environmental conditions at the site that neither the Committee nor the Department of Environmental Services has made sufficient inquiry into the nature, extent or need to remedy historical contamination that may pose adverse

environmental, public health or safety consequences. As discussed below, issuing a Certificate for siting a 70 MW power plant with associated construction and operational activities, based upon the preliminary and incomplete environmental investigations of the site conducted to date, would be premature, at best, and contrary to this Committee's statutory obligations. Furthermore, any attempt to impose conditions upon the Applicant relating to environmental investigation would be insufficient to address environmental and public health risks, in part because siting a facility of this nature and size in a contaminated area may inhibit future investigation and foreclose the viability of remedial alternatives, including activity and use restrictions. Thus, the Committee should deny the application.

In lieu of denial, the Committee should reopen this proceeding to require the Applicant to conduct and submit additional environmental investigatory information sufficient to assure the Committee that the siting, construction, operation and closure of the proposed facility would not adversely affect public health, safety or the environment.

**1. Full environmental review must precede a Certificate**

Under RSA 162-H:16, IV, the Committee is required to fully review the environmental impact of the site and must find that the site and facility "will not have an unreasonable adverse effect on ... air and water quality, the natural environment, and public health and safety." RSA 162-H, IV(c). A certificate "shall be conclusive on all questions of siting, land use, air and water quality." RSA 162-H, II. The record shows that, despite severe contamination of the entire mill area, very little environmental investigation has been performed on the proposed site. The record also shows that further and more complete environmental study is imminent, but will not necessarily be taken into account before construction of the facility begins. This puts the cart before the horse. Under the statute, a certificate may not issue unless and until further investigation allows the Committee to conclude that issuing a certificate for siting a 70 MW power plant would not create adverse risks to health, safety and the environment.

**2. The record shows that environmental review is incomplete**

The record shows that the proposed project site is contaminated with heavy metals, among other things, and that there has not been a full review of environmental impacts associated with the proposed project. The Applicant's representative, Mr. Frecker, stated

under oath on August 23, 2010, that he was aware of a 2003 investigation conducted by GZA with regard to the site, that 7 of 13 groundwater monitoring wells did not show levels of any metals or organics above groundwater quality standards (which means that 6 did exceed standards) and that GZA recommended additional sampling of groundwater and soil “to determine if levels of mercury which were detected were, in fact, not just associated with natural background because they were only a couple or part per billion above the regulatory standards in the state of New Hampshire.” Transcript of Laidlaw Berlin BioPower, LLC, August 23, 2010, pp 14-15 (hereinafter “Transcript”). A review of the GZA assessment, which was not included in the record as an exhibit, indicates a level of concern far beyond Mr. Frecker’s characterization. *See, e.g.*, GZA GeoEnvironmental, Inc., “Phase II Hydrogeologic Investigation, Burgess Pulp Mill and Cascade Paper Mill, Berlin and Gorham, New Hampshire,” prepared for NHDES, December, 2003 at 27 (“Due to the exceedances of certain AGQS in groundwater samples collected from certain monitoring wells at both sites, and the exceedances of certain S1 soil standards in certain soil samples collected, the Burgess and Cascade Mills should enter the regulatory programs of the New Hampshire Corrective Action process.”)

Mr. Frecker also made reference to the nearby Chlor-Alkali plant where EPA has been doing investigations for mercury contamination, Transcript, pp.12-13, as well as Laidlaw’s intention to “provide a significant level of monetary support and cooperation” in having subsurface and other studies conducted at the site by City of Berlin consultants. Transcript, pp. 11-12. This testimony confirms that the proposed site has not only failed to be included in the state’s corrective action program, as recommended by GZA, but also that further investigation has not been conducted.

These passages raise the issue of whether this Committee can conclude, based upon the current record, that the proposed project will not have an unreasonable effect on public health and safety or the environment. There are at least two investigatory efforts referenced in the record that suggest otherwise, as these efforts would produce the very information that the Committee needs to make the required determination. The first effort is the EPA investigation of hazardous contaminants that have migrated to the site from the upriver Chlor-Alkali plant. According to EPA’s website, these hazards have yet to be fully characterized or assessed in terms of remedial action that might be necessary.

*See* [www.epa.gov](http://www.epa.gov). The Chlor-Alkali site, which has been listed on Superfund's National Priorities List as a result of concerns about mercury, dioxin and other hazards, *see* 70 Fed. Reg. 54286 (September 14, 2005), will undergo years of testing and evaluation that may well result in remediation activities to address health and safety risks. EPA's website states that at least 135 pounds of mercury and mercury-containing sediments were removed from the Androscoggin River and its bank and that "based on results of testing performed on the site during the Summer of 2009, EPA will begin investigating the area surrounding the site in 2010. It is anticipated that sampling to determine the risk to human health and the environment will occur on the 38-acre area that abuts the former cell house area of the site." *See* [epa.gov/rl/npl](http://epa.gov/rl/npl) (Waste Site Cleanup & Reuse in New England). EPA's investigation and subsequent remedial determinations may well extend as far as the proposed facility and may require remediation or activity and use restrictions incompatible with the siting of a 70 MW biomass power plant.

The second investigatory effort is contained in the City of Berlin's proposed certificate conditions and a Scope of Work submitted by its consultant. *See* Exh. Berlin 1 (Proposed Certificate Conditions) and Exh. Berlin 1D (Scope of Work for Subsurface Investigation). One condition would require Laidlaw to fully fund the Scope of Work for a Phase II Environmental Site Characterization dated August 10, 2010 but would also allow for construction of the facility while the investigation proceeds. *See* Exh. Berlin 1, p. 8, par. 13 ("Performance of the Scope of Work shall be conducted, to the greatest extent possible, so as not to interfere with construction of the facility ..."). The August 10, 2010 Scope of Work states that "the City of Berlin currently lacks sufficient information regarding the nature and extent of contamination at the site which may affect potential re-use scenarios." *See* Exh. Berlin 1D, p.1. Allowing reuse of the site for construction of a 70 MW power plant before the necessary studies are conducted makes little sense.

Thus, the record of this proceeding demonstrates that issuance of a certificate is premature because the Committee cannot fully review the risks of developing this site, as proposed, nor can it impose appropriate conditions with regard to construction, development or closure until all appropriate investigations and remedial recommendations are completed. *See* 162-H:16, VI ("A certificate of site and facility

may contain such reasonable terms and conditions as the committee deems necessary ...”). *See also* RSA 147-F:12, IV (“The department shall impose such conditions on the redevelopment and use of the property as it finds necessary or proper to assure that the contamination on the site does not pose an unacceptable risk to human health and the environment ...”). The City of Berlin’s proposal to require investigation as a condition of approval by this Committee, even while construction proceeds, ignores that the approval itself would foreclose future investigatory or remedial activities that may become necessary. More importantly, the studies may suggest that reuse of the proposed site for construction of a large power plant on contaminated soil and groundwater is inappropriate. Furthermore, the Committee is currently incapable of assessing the risks of actual construction of the project, which could result in exacerbation or additional releases of mercury and other contamination that already exists. *See, e.g.,* Transcript, pp. 9-10 (“you’re not going to really puncture into contaminants that much ... correct?”).

It is incumbent upon this Committee to seek, review and assess, through authorized state agencies, the results of subsurface investigations and remedial recommendations, including EPA feasibility studies for the Chlor-Alkali plant areas, before issuing a certificate in this proceeding.

### **3. The Committee should require additional record submissions.**

RSA 162-H:10, IV and V authorize the Committee and public counsel to require or to conduct studies deemed necessary and to employ consultants, as appropriate, at the Applicant’s expense. As the proposed project site has not been fully investigated and no plan for remedial action or use restrictions (“remedial action plan” or “RAP”) has been developed under the state’s corrective action programs, it is appropriate for the Committee and public counsel to require the Applicant to fund these efforts and to submit the studies for the record before a final decision is made on the application. *See, e.g.,* RSA 147-F:11, VII (“A remedial action plan shall describe in detail a remedial strategy for the property that shall ensure protection of human health and the environment ... .”) The Committee should also reopen the record to allow for submission of documents related to environmental concerns for the proposed site, including but not limited to the GZA report, EPA studies and the City of Berlin’s January 13, 2010 Notice of Intent to Sue PJPD Holdings, LLC under the Resource Conservation and Recovery Act, all of

which are referenced in testimony or exhibits but not made part of the record. *See, e.g.*, Exh. Berlin 1, p. 9 (referencing notice of intent to file a citizens' lawsuit under imminent hazard provisions of RCRA).

Testimony and related exhibits regarding liability protection that the Attorney General's Office or the City of Berlin might offer the Applicant is irrelevant to this Committee's statutory obligations and should be disregarded by this Committee in determining whether the proposed project would adversely affect public health, safety or the environment. *See, e.g.*, Transcript, pp. 17-21 and Exh. PC 1 and PC 4; *see also* Exh. Berlin 1, p.9. Any covenants not to sue issued by the Attorney General's Office or the city relate only to liability issues and not to the risks presented by this site, which this Committee is obligated to review.

That the liability covenant referenced by public counsel was issued outside of the auspices RSA 147-F, which would normally require RAP approval and subsequent completion of remedial activities before liability protection can extend to the current owner, *compare* Exh. PC 1, RSA 147-F:12, V and RSA 147-F:13, IV, illustrates that the proceedings conducted to date on environmental issues have been misdirected and wholly inadequate. For these reasons, the record should be reopened and supplemented to allow the Committee to perform a full environmental review before acting on the application.

### III. CONCLUSION

For all of the foregoing reasons, the Committee should not grant a Certificate of Site and Facility to Applicant.

Respectfully submitted,  
CLEAN POWER DEVELOPMENT,  
LLC  
By its Attorney,

Dated: September 16, 2010

/s/ James T. Rodier  
1500A Lafayette Road, No. 112  
Portsmouth, NH 03801-5918  
603-559-9987

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Respectfully submitted,  
CLEAN POWER DEVELOPMENT,  
LLC

By its Attorney,

  
/s/ James T. Rodier

1500A Lafayette Road, No. 112  
Portsmouth, NH 03801-5918  
603-559-9987

Dated: September 16, 2010

**Certificate Of Service**

I hereby certify that I have provided a copy of this Motion for Clarification and/or Rehearing to the Parties on the Service List in this proceeding.

**/s/ James T. Rodier**

1 your --

2 MR. NEEDLEMAN: Mr.

3 Chairman --

4 CHAIRMAN BURACK: I would

5 certainly, yes, excuse these witnesses.

6 (Witnesses excused.)

7 CHAIRMAN BURACK: Gentlemen,

8 thank you very much. I want to say thank you to  
9 all the witnesses for all of the parties for  
10 their participation in this process. It's very  
11 helpful to the Subcommittee, and we appreciate  
12 their efforts, just as we appreciate the efforts  
13 and the attention of all of the counsel and their  
14 assistants throughout this process. So, thank  
15 you all very much.

16 Attorney Rodier, please.

17 CLOSING ARGUMENT

18 MR. RODIER: Thank you, Mr.

19 Chairman.

20 In my experience, usually in  
21 large -- I would say this was a large hearing --  
22 in the end it boiled down to a few conceptually,  
23 I think, simple issues, but are probably  
24 factually difficult. And I think, you know, what

1 I'm going to do here is address three or four  
2 issues that I feel are determinative. I think  
3 there's a multitude of things you got to address  
4 in the order. But I don't think there's too many  
5 that really are in the category, at this point,  
6 of being determinative. So that's what I'm going  
7 to focus on.

8                   The first one is granting the  
9 certificate. It is CPD's view that a certificate  
10 can only be granted if the Applicant demonstrates  
11 that it is financially capable to construct and  
12 operate the plant. I think that's a pretty good  
13 paraphrase of the law. But there's another, I  
14 would say, pretty good summation of this point in  
15 Mr. Bartoszek's testimony, Page 4 in his prefiled  
16 testimony, where he says, "Under RSA 162-H:16, in  
17 order to obtain a certificate of site and  
18 facility, the Applicant must show it has adequate  
19 financial capability to construct and operate the  
20 project in order to obtain the certificate."  
21 That means you can't obtain a certificate if you  
22 can't show -- they have the burden of proof.  
23 They must show adequate financial capability.  
24 Without belaboring the record here, I think it's

1 very clear from the record that there is no  
2 financial capability at this motion -- at this  
3 moment. It doesn't exist. And why is there no  
4 financial capability? Because the PPA is an  
5 essential element of their financial ability.  
6 And I think one of the Applicant's data responses  
7 that I referred to someplace says, "no PPA  
8 approved, no financing." What do they mean by  
9 "no PPA approved"? Well, it's over at the PUC  
10 now, as you all know. They're saying -- the  
11 Applicant is saying we need a final, unappealable  
12 order by November 14th. Presumably, that's a  
13 reference to the fact that not only does the PUC  
14 have to conduct hearings similar, if not greater  
15 in magnitude than we just went through here for  
16 the last nine months, but you've got to write out  
17 the motions for rehearings and any possible  
18 appeals. Just like this Committee, go back and  
19 see what a typical proceeding of this kind might  
20 take at the PUC, and it's going to take a year or  
21 it could take two years. So that's really the  
22 context that the Committee is operating under.

23 I know very much that the  
24 Committee wants to do its job. You want to

1 render a decision within the statutory framework.  
2 But this project is at a dead stop unless and  
3 until the PUC and the courts sign off on that  
4 PPA. So that is really what my first point here  
5 is on the financing and on the so-called timeline  
6 in the context of these hearings.

7           Now, one other thing they told  
8 the PUC in their filing over at the PUC was that  
9 it's critical for the financing to have a  
10 decision by November 14th. Critical for the  
11 financing. It's got to be by November 14th. So,  
12 I think that's another thing in assessing the  
13 mandate here in 162-H:16.

14           Now, the Applicant has said in  
15 its filing, well, this is what we'll do: We'll  
16 take the same deal that the Committee gave to  
17 Granite Reliable. You get a certificate, but  
18 your construction can't start until Granite  
19 Reliable had to come back and show it had its  
20 financing in place. This is different. In the  
21 Granite Reliable proceeding, the Commission found  
22 that they were financially capable. But because  
23 of the current turmoil in the markets, they said,  
24 well, look we're going to award you the

1 certificate. You can obtain the certificate, but  
2 you cannot commence construction. You have to  
3 come back, and we have to sign off on your  
4 financing package. So we disagree with the  
5 Applicant that the Granite Reliable decision in  
6 any way would set a precedent to be applied in  
7 this case.

8                   The second matter that I want  
9 to address is another point of law, RSA 162-H:64.  
10 Now, this statutory provision requires that the  
11 Committee consider available alternatives in the  
12 context of the objectives of 162-H. Now, I would  
13 concede in prior decisions of this Committee,  
14 they have construed this provision to just ask  
15 the Applicant, Have you looked at alternative  
16 sites? Typically, they say, yeah, we looked at  
17 this and we looked at that. But the statute says  
18 the Committee must consider available  
19 alternatives. It doesn't just say sites. It  
20 says you must consider available alternatives to  
21 carry out the purposes of 162-H.

22                   So, here we are. We've got  
23 two projects. You're considering one. And we  
24 believe that, by law, you're required to consider

1 available alternatives to that. Now, I don't  
2 think, in my mind, anyway, there's any question  
3 that if CPD somehow had the PPA with Public  
4 Service, that everybody in the North Country, you  
5 know, who's in favor of the Laidlaw project,  
6 would be supporting CPD, because that's what it's  
7 all about: It's the guy who has the deal with  
8 the PSNH.

9                   You've got the record on the  
10 CPD project. CPD was in here in, I guess it was  
11 Docket 2009-03. So you have the information on  
12 that. You recently got some information today.  
13 For example, without getting into it, you heard  
14 today, CPD is a highly efficient plant, going to  
15 have much less impact on the neighboring projects  
16 and on the transmission limitations.

17                   So that is our contention,  
18 that the law would require for the Committee to  
19 consider available alternatives to achieve state  
20 energy policy and to balance energy supply and  
21 demand I believe is one of the purposes of the  
22 statute.

23                   Moving on. We get to this  
24 issue of -- I'm on the third of my four points,

1 by the way, if anybody's following, the orderly  
2 development. You know, we think the proposed  
3 facility, the Applicant's proposed facility's  
4 going to interfere with the orderly development  
5 of the region. And the reason that we say that  
6 became apparent today. This is why we have  
7 hearings, by the way. Because, for example, if  
8 you consider Applicant's prefiled testimony on  
9 transmission, everyone was fine. There's no  
10 issues whatsoever, okay. Turns out there are  
11 issues, okay. How powerful the testimony you  
12 heard today is something that you're going to  
13 have to evaluate. But there are transmission  
14 issues that came to the floor today through Mr.  
15 Gabler's testimony. I don't have to repeat it.  
16 But there are going to be impacts on not just  
17 CPD, perhaps on Laidlaw itself, but also on these  
18 other plants, like the Brookfield Hydro project  
19 in Berlin, Whitefield and the Smith Hydro. Those  
20 are going to be real impacts. And again, there's  
21 a bigger picture here. The bigger picture is  
22 that the legislature's been laboring on all these  
23 issues for years. And I forget what somebody  
24 said earlier. I guess there's going to be -- the

1 big report's going to come landing in probably  
2 right in the middle of your deliberations on how  
3 to allocate the cost of these needed transmission  
4 upgrades and to eliminate the constraints that  
5 are going to exist under this MIS system.

6                   With regard to biomass, you  
7 know, Mr. Harrington really boiled it down well  
8 when he said we don't have to harp on a lot of  
9 this other stuff, like rules of thumb and some of  
10 these other things, because it really comes down  
11 to price. Availability of biomass comes at a  
12 price. I think both Mr. Liston and Mr. Richmond,  
13 they both conceded, yeah, you could build one of  
14 these plants in Boston if you're willing to pay  
15 for the wood. You know, you can get it -- if you  
16 can somehow pay for it, you had customers for  
17 your electricity, that you could get it done. So  
18 it's really about ability to pay. And, as we  
19 were discussing earlier today, what the  
20 difference here is, is that you got these other  
21 guys -- and I'll put CPD in that category. CPD,  
22 to some extent, has its nose up against the  
23 window as well. It doesn't have a PPA like this  
24 project has, okay. And not speaking for CPD, but

1 I'm pretty sure these other guys -- I don't know.  
2 You're heard from four or five plants so far.  
3 You've also heard from Bob Berti of North Country  
4 Procurement. He's a very large organization in  
5 this state. He told me he's got a bigger  
6 operation than Cousineau. You know, you've heard  
7 these people are going to be put in jeopardy.  
8 It's not just because there's not enough wood,  
9 it's that -- Mr. Berti said this was a very, very  
10 large plant. It's too large. If you -- in and  
11 of itself, that's not the only factor here. It's  
12 the factor that they jumped into the pool with  
13 the 800-pound gorilla, okay. And if it raises  
14 the market price, it raises the market price for  
15 Schiller. But the Laidlaw project recoups their  
16 cost of fuel at whatever the cost of fuel is at  
17 Schiller.

18 By the way, I remind you, it  
19 took a long time for the Laidlaw witness to  
20 surface this issue. We got to the point where I  
21 had to get out the testimony filed with the PUC  
22 and have it read into the record before he'd even  
23 give some kind of concession about this index of  
24 the cost of what PSNH would pay Laidlaw, based

1 upon the cost of fuel at Schiller. So, be  
2 mindful of that.

3                   So, we really believe that  
4 there's a good chance that jobs are going -- more  
5 jobs are going to be lost than are going to be  
6 created. Now, yeah, the jobs are going to be  
7 created in Berlin. So I think the people in  
8 Berlin -- and I would certainly, if I was out of  
9 work, you know, I'd say, Hey, I will take the job  
10 and I won't worry about the guy over in  
11 Whitefield or Bridgewater or Alexandria. You  
12 know, he's got to keep his own nose above water.  
13 That's kind of the way people think. I certainly  
14 can understand that. But you're supposed to be  
15 looking at what is the greater good here.

16                   People asked CPD, Well, have  
17 you done any studies on this? And no. They  
18 don't have the burden of proof. It's not CPD's  
19 job to really do this. I think CPD has done a  
20 really good job surfacing the issue. It is  
21 somebody else's job to do this. And at this  
22 point, that somebody else should be the PUC. PUC  
23 has expertise, has resources, has the ability to  
24 study all these issues, it has a staff. It can

1 tell PSNH to pay for such a study done by a  
2 consultant for the state. I think this is a  
3 critical issue here of whether or not the Laidlaw  
4 project is going to disrupt the public good or  
5 the orderly development of the region, which I  
6 say is another reason I would suggest the  
7 Committee say, well, nothing's going to happen  
8 until the PUC makes a decision, anyway. Let's  
9 let the PUC and its experts deal with the PPA and  
10 deal with the effect. They have jurisdiction  
11 over all these existing biomass producers.

12                   Somebody has said at one  
13 point, biomass facilities -- somebody said that  
14 right until the end none of these guys showed up.  
15 Why didn't they show up until now? Well, they  
16 didn't really know about these hearings. But  
17 beyond that, the PPA wasn't out in the open. Do  
18 you recall when the PPA was first filed with this  
19 Committee? It was subject to a motion for  
20 protective order. It wasn't until two weeks  
21 later that it was available on the PUC Web site.  
22 That's when everybody first got it and said, my  
23 God, look at the pass-through feature, the  
24 pricing power, the ability to set the market

1 here, control the market on the price of wood  
2 that's going to result from this. That's when --  
3 and that was probably three weeks ago that this  
4 first became available, and that's why you're  
5 seeing people. I believe they would have  
6 intervened earlier, when they're coming out of  
7 the woodwork now. That, plus the fact that  
8 anybody who's still trying to get a deal out of  
9 Public Service at this point is not going to show  
10 their face over here and say something critical  
11 of what's going on here. What you're saying is  
12 the projects that are coming in here are the ones  
13 that are saying it's useless. We're not going to  
14 get any kind of a deal out of PSNH. We have  
15 nothing to lose now by going over and saying  
16 really how we feel about this thing and what it's  
17 going to do to us if it gets approved, if it gets  
18 constructed.

19 Finally, who should the  
20 Applicant be? Now, we did have -- there's been a  
21 number of changes here at the eleventh hour. But  
22 beyond the eleventh hour, we have the so-called  
23 NewCo takeover on the eve of the hearings. You  
24 know, what happened here? NewCo did come in and

1 take over this project. Kind of a risky thing to  
2 do on the eve of the hearings. Why did they do  
3 that? There was a very compelling reason to do  
4 that. I think they needed to have control at  
5 this point. But that's just my conjecture,  
6 trying to summarize the evidence.

7                   But in any event, NewCo, they  
8 own Aware Energy. Aware Energy turns around and  
9 owns the PJPD. PJPD is going to own the land and  
10 they're going to own the facility they're going  
11 to lease to Laidlaw. So you remember the chart  
12 that was on the screen there. NewCo owns a  
13 hundred percent of Aware. Aware owns a hundred  
14 percent of PJPD, the asset owner. The asset  
15 owner's, by the way, place of business is a house  
16 in Portsmouth. I don't think that should give  
17 you much comfort, really, about who you're  
18 dealing with here.

19                   The Applicant described these  
20 all as bankruptcy-remote special-purpose  
21 entities. Do you know what those are? If things  
22 go wrong, you're serving a summons on a mailbox,  
23 parcel room or whatever it might be. That's  
24 really what special-purpose bankruptcy-remote

1 entities are, to put firewalls in, in case  
2 anything goes wrong. You know, NewCo's got not  
3 just one entity. They can put a couple in there,  
4 which certainly I would understand gives their  
5 investors great comfort.

6 Now, in addition to that,  
7 NewCo's going to own a hundred percent of  
8 LLB [sic]. And the same three gentlemen that are  
9 on the management board of NewCo are also the  
10 managing members of LLB. They are going to run  
11 LLB. So it's really NewCo. You strip away the  
12 special entities here that are in place as a  
13 firewall in case trouble comes up in the future,  
14 you really get to see -- behind the screen you  
15 really get to see NewCo.

16 Now, in addition, you'll  
17 recall, maybe, when I cross-examined  
18 Mr. Strickler, I had one question. I pointed to  
19 his testimony and said, Look, Mr. Strickler, this  
20 says that Homeland, Carl Strickler, are going to  
21 report directly to NewCo, and you're in charge of  
22 construction and operation. He said that's  
23 right. A couple days later I see that the chart  
24 is different. You may recall I went back and I

1 said -- asked him about this. I had to go up and  
2 show him his testimony and have him read it  
3 again. It was very clear his testimony was that,  
4 after the reorganization, Homeland was under  
5 contract to NewCo, not LLB. That, he said,  
6 subsequently, well, I'm trying to clarify, I  
7 think is what he said.

8                   The substance of it here is  
9 it's NewCo that is running the show, that's going  
10 to make all the decisions. And I don't think New  
11 Hampshire law, when it says, you know,  
12 construction of a project, it's the guy who's  
13 going to be in the construction of the project,  
14 that it has to mean it's LLB. LLB, in that 74,  
15 by the way -- LBB? I'm sorry -- is now described  
16 as a development entity. It's not an owner and  
17 operator of power plants. It's a development  
18 entity. You're looking at the people who develop  
19 a project and sell it. That's typically what  
20 that model is, okay. So you have to ask  
21 yourself: Should we really be dealing with a  
22 development entity whose principals are going to  
23 be gone as soon as the dust clears; or should we  
24 be dealing with the real company that is really

1 in charge of what's going on here, calling all  
2 the shots, and that is NewCo.

3 So, there you have it. Those  
4 are what I believe are the issues that are going  
5 to determine how you come out on this. And I am  
6 comforted by the fact that the way the hearings  
7 have been conducted, that you're going to do your  
8 job well and you're going to do it fairly and  
9 you're going to do it thoroughly.

10 And the last thing I got to  
11 say, I'm going to try to get something written  
12 in, you know, by September 19th maybe, 20. It's  
13 going to be similar to this. I hope you'll take  
14 a look at it. Thank you very much, Mr. Chairman  
15 and Members of the Committee.

16 CHAIRMAN BURACK: Thank you  
17 very much. Attorney Rodier, just to clarify,  
18 again, in terms of what I had indicated  
19 previously in terms of when we would like to see  
20 written closing arguments. I asked you -- I  
21 would ask you to get them to us by a week from  
22 today -- that is, the 17th, not the 19th.

23 MR. RODIER: Sorry. Yeah.

24 CHAIRMAN BURACK: No problem.

1 I just want to make sure we're all clear in our  
2 understandings here. So that would be most  
3 helpful.

4 MR. RODIER: Right.

5 CHAIRMAN BURACK: Again, thank  
6 you very much, Mr. Rodier.

7 Attorney Brooks, do you have  
8 any closing statements?

9 MR. BROOKS: No, thank you.

10 CHAIRMAN BURACK: Okay. Thank  
11 you very much. Attorney Needleman.

12 MR. NEEDLEMAN: Thank you, Mr.  
13 Chair. One housekeeping matter before I do. We  
14 would ask at this point that all of our remaining  
15 exhibits that have not yet been admitted into the  
16 record now be moved in, please.

17 CHAIRMAN BURACK: We will do  
18 that. Is there any objection to that?

19 (No verbal response)

20 CHAIRMAN BURACK: No  
21 objection? Okay. Hearing no objection, I'll  
22 grant that motion, and we will move all those  
23 exhibits into the record.

24