

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

October 21, 2010

**ORDER ON APPLICANT'S EXPEDITED MOTION FOR LIMITED RELEASE  
OF CONFIDENTIAL TRANSCRIPTS TO THE NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION DOCKET NO. 10-195**

On December 15, 2009, Laidlaw Berlin BioPower, LLC (Applicant) filed an Application for a Certificate of Site and Facility in order to site, construct, and operate a 70 megawatt biomass fueled energy generating facility in Berlin, New Hampshire, at the site of the former Fraser Paper Mill.

During the course of the proceedings before the Subcommittee, the Applicant filed a number of financial, commercial, and confidential documents. See, Exhibits 38, 38A, 39, 40, 41, 42, 43, 56, 61, 62, 63, 66 and 76A (Exhibits(s)). With regard to each Exhibit, the Applicant represented that the contents were financial, commercial or otherwise confidential information and exempt from the public disclosure requirements of the Right to Know law. See, RSA 91-A:5, IV. With respect to each Exhibit, the Subcommittee found that the Exhibit contained financial, commercial or confidential information. Additionally, with respect to each of the non-public Exhibits, the Subcommittee determined that the public interest in disclosure of the information contained in the Exhibit was outweighed by the likelihood of substantial harm to the competitive position of the Applicant in its industry. Therefore, the Subcommittee granted confidential treatment to each of the aforementioned Exhibits and they were not disclosed to the public.

During the course of the adjudicatory hearings in this matter, the Applicant chose to provide testimony pertaining to the confidential Exhibits. The Applicant asked that the Subcommittee permit testimony about the confidential Exhibits in non-public session. In each case, a Motion was made, a roll call vote was taken, and the Subcommittee voted affirmatively to enter into a non-public session for the purpose of inquiring into the confidential Exhibits. A verbatim transcript of each non-public session was made. At the conclusion of each non-public session, a motion was made to maintain the transcripts of the non-public sessions under seal. In each case, the Subcommittee voted unanimously to seal the transcripts of the non-public sessions.

The Applicant now requests that the Subcommittee release the transcripts of the non-public sessions. However, the Applicant does not request that the transcripts be released to the public. The Applicant requests that the transcripts of the non-public sessions of the Subcommittee be released only to the New Hampshire Public Utilities

Commissioners, the New Hampshire Public Utilities Commission staff, and the Office of the Consumer Advocate.

The decisions to allow confidential treatment of the Exhibits and to discuss the Exhibits in non-public sessions were undertaken only after serious consideration of the nature of the Exhibits. The decisions to exempt the Exhibits from public disclosure were made only after the public's interest in the documents was weighed against the harm that might occur to the Applicant if disclosed publicly. See, Lamy v. Public Utilities Commission, 152 NH 106, (2005). The Subcommittee did not take this process lightly and acted in good faith to limit the extent of the non-public sessions. Decisions to exempt records and to conduct non-public sessions are serious acts. The motion filed by the Applicant seeking limited disclosure of the transcripts of the non-public sessions undermines the integrity of the process. Moreover, the Applicant has not cited to any statutory provision in RSA 91-A or elsewhere that would authorize the Site Evaluation Committee to release the transcripts of non-public sessions on a piecemeal basis to limited parties. Likewise, the Applicant does not identify any authority for the Site Evaluation Committee to enforce a limited disclosure order.

The process of exempting confidential Exhibits and going into non-public session is not a process that is undertaken for the convenience of the Applicant, despite the fact that the Applicant has a major interest in that decision. The purpose of deeming Exhibits to be confidential and non-public, and the purpose of entering into non-public session in order to inquire further into such documents, concerns the right of the public to know the contents of Exhibits and whether or not the public interest in such knowledge is outweighed by the interests of the Applicant. The New Hampshire Supreme Court has stated: "Information that is subject to disclosure under the Right-to-Know Law "belongs to citizens to do with as they choose. . . . As a general rule, if the information is subject to disclosure, it belongs to all." Lamy v. Public Utilities Commission, 152 NH 106, 11 (2005) *quoting* National Archives and Records v. Favish, 541 U.S. 157, 124 S. Ct. 1570, 1580, 158 L. Ed. 2d 319 (2004). To date, the Applicant has not informed the Site Evaluation Committee that circumstances pertaining to the issues that were before the Subcommittee in this proceeding have now changed such that the financial, commercial or confidential information contained in the confidential Exhibits or the transcripts of the non-public sessions regarding those confidential Exhibits no longer qualifies for exemption from disclosure under RSA 91-A. The non-public sessions in which further inquiry was made regarding those Exhibits were all premised on the rulings made by the Site Evaluation Committee which found that the Exhibits were entitled to exemption from public disclosure under RSA 91-A.

For the reasons stated, I do not find that there has been sufficient cause expressed by the Applicant to permit the limited disclosure of the transcripts of the non-public sessions. Of course, the Applicant may determine that certain of its own documents that it asserted to be confidential under RSA 91-A for purposes of this proceeding are not ones for which it would assert a claim of confidentiality in a different proceeding before a different body. Thus, because the underlying documents remain the property of the Applicant, there would be no impediment to the Applicant taking a

copy of a document that was submitted in this proceeding by the Applicant and providing it to the Public Utilities Commission or other parties, provided the copy so provided or submitted to such other party or parties does not bear any Exhibit numbers or markings from this proceeding before the Site Evaluation Committee. However, the transcripts of the non-public sessions of the Subcommittee of the Site Evaluation Committee in this proceeding will not be released on a limited basis. If the Applicant were to make a showing to the Site Evaluation Committee that all of the Exhibits previously found to be exempt from disclosure under RSA 91-A no longer should be treated as confidential documents, the Site Evaluation Committee would then consider whether to allow disclosure of all such marked Exhibits and the transcripts of the non-public sessions to the public.

Having considered the expedited Motion filed by the Applicant, it is hereby ordered that the Motion is DENIED and the transcripts of the non-public sessions held by the Subcommittee shall not be released on the limited basis requested in said Motion.

SO ORDERED.

Date: October 21, 2010



Thomas S. Burack, Chair  
New Hampshire Site Evaluation Committee