

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2011-01

**Joint Motion of Laidlaw Berlin Biopower, LLC, and Berlin Station, LLC, for
Transfer and Amendment of the Certificate of Site and Facility Issued to Laidlaw
Berlin Biopower, LLC, and Notice of Change of Major Contractor**

October 11, 2011

**ORDER ON MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL
TREATMENT OF DOCUMENTS REQUESTED BY COMMITTEE IN ORDER AND
AMENDED CERTIFICATE OF SITE AND FACILITY WITH CONDITIONS**

Background

On November 8, 2010, the New Hampshire Site Evaluation Committee (Committee) issued a Certificate of Site and Facility (Certificate) to Laidlaw Berlin BioPower, LLC, for the siting, construction, and operation of a 70 MW biomass fueled electric power facility located in Berlin, Coos County, New Hampshire (Facility). On March 9, 2011, Laidlaw Berlin BioPower, LLC, and Berlin Station, LLC (Joint Applicants), filed a joint motion to amend the Certificate, to transfer the Certificate to Berlin Station, LLC, and to notify the Committee of a change in major contractors (Joint Motion).

On July 12, 2011, the Committee issued an Order and Amended Certificate of Site and Facility with Conditions approving the Joint Motion of Laidlaw Berlin BioPower, LLC and Berlin Station, LLC subject to the following relevant conditions:

Further Ordered that the Applicant shall not commence construction, as "commencement of construction" is defined in R.S.A. 162-H:2, III, until such time as construction financing is completely in place. The Applicant shall notify the Committee when construction financing is in place and shall provide its financial closing package to the Committee . . .

Further Ordered that the Applicant shall not commence construction until such time that it has filed, with the Committee, a signed Fuel Supply Agreement with Richard Carrier Trucking, Inc., materially consistent with Ex. Applicant 3, CONFIDENTIAL . . .

Further Ordered that the Applicant shall not commence construction until such time that it has filed, with the Committee, a signed EPC Contract with Babcock & Wilcox Construction Co., Inc., that is materially consistent with Ex. Laidlaw 61 CONFIDENTIAL . . .

Further Ordered that the Applicant shall not commence construction until such time that it has filed, with the Committee, a signed Operations and Maintenance Contract with DPS Berlin, LLC . . .

Further Ordered that the Applicant shall not commence construction until such time that it has filed, with the Committee, a signed Master Services Agreement with Waldron Engineering & Construction, Inc. and a Consulting Contract with Stone & Webster, Inc. . . .

Further Ordered that the Applicant continue to cooperate with the requirements of ISO-New England and obtain all ISO approvals necessary to a final interconnection agreement for a gross until rating of up to 75 MW. Said interconnection agreement shall be filed with the Committee prior to the commencement of construction

See, Order and Amended Certificate of Site and Facility with Conditions, Docket No. 2009-02 (issued July 12, 2011).

Subsequently, on September 26, 2011, Berlin Station, LLC, filed a Motion for Protective Order and Confidential Treatment of Documents Requested by Committee in Order and Amended Certificate of Site and Facility with Conditions requesting the Committee to grant a protective order and confidential treatment to the following documents:

- Financial Closing Package.
- Executed Richard Carrier Trucking Biomass Fuel Supply Agreement;
- Executed Engineering Procurement and Construction (“EPC”) Agreement with Babcock & Wilcox Construction Co., Inc.;
- Executed Operations and Maintenance Agreement with DPS Berlin, LLC (Delta Power);
- Executed Master Services Agreement with Waldron Engineering & Construction, Inc. (“Waldron”);
- Executed Consulting Contract with Stone & Webster, Inc.; and
- ISO New England In. and Berlin Station, LLC Large Generator Interconnection Agreement.

To date, no party has objected to the relief requested in the September 26, 2011, Motion.

Standard of Review

RSA 91-A is the state's Right-to-Know law. In general, RSA 91-A provides that governmental proceedings and governmental records must be open and available to the public. The Right-to-Know law does contain exemptions from the public availability requirement. RSA 91-A: 5, IV, in pertinent part, exempts records that contain "confidential, commercial or financial" information.

In *Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106 (2005), the New Hampshire Supreme Court described the three-step analysis used to determine whether information should be protected from public disclosure pursuant to the Right-to-Know law, RSA 91-A. The first prong of the analysis is to determine if the Applicant has identified a privacy interest. If a privacy interest is invoked, then the agency must assess whether there is a public interest in disclosure. Disclosure should inform the public of the activities and conduct of the government. If disclosure does not serve that purpose, then disclosure is not required. Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. See also, *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 553 (1997) (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 its confidential, financial and commercial information.)

Financial Closing Package

Berlin Station, LLC seeks confidentiality for the Financial Closing Package containing the following documents:

- Berlin Station Note Purchase Agreement;
- Berlin Station Depository & Security Agreement;
- Collateral Agency, Subordination and Intercreditor Agreement;
- Berlin Station Pledge and Security Agreement;
- Berlin Station Security Agreement;
- Burgess BioPower, LLC Security Agreement;
- Burgess BioPower, LLC Pledge and Security Agreement;
- Burgess BioPower, LLC Depository and Security Agreement;
- Cooperation Agreement; and
- Burgess BioPower, LLC Collateral Agency Agreement.

The information contained in the agreements regulating the relationship between borrowers and lenders does fit within the definition of commercial information and is information which is typically kept confidential. In addition, the agreements include documents upon which the Joint Applicants and their lenders made their projections

regarding the future financial status of the Joint Applicants. These documents are the kind of documents that are normally considered to be confidential. They clearly contain financial and commercial information. If made publicly available, this information could be commercially damaging to the Joint Applicant. Disclosure of the information could negatively affect the Applicants' competitive position in the renewable energy market by exposing otherwise confidential financial information. It is unclear that there is any public interest in disclosure of these documents but, to the extent there may be such an interest, it is outweighed by the privacy interest of the Joint Applicants and their lenders. The Motion for Protective Order and Confidential Treatment of Financial Closing Package is granted.

Fuel Supply Agreement

On May 27, 2011, the Committee issued an Order on Motions for Protective Order and Confidential Treatment (Interconnection Request and Fuel Supply Agreement). That Order found that the public interest in disclosure of the Fuel Supply Agreement was outweighed by the private interests of the Joint Applicant. The Committee's Order dated May 27, 2011 remains in effect. Further Order is not required.

ISO New England Inc. and Berlin Station, LLC Large Generator Interconnection Agreement

ISO-New England is the regional transmission organization and independent system operator for the New England electricity grid. ISO-New England is responsible for the continuous reliable operation of New England's bulk electric power system and the wholesale electricity marketplace. ISO-New England oversees the transmission of electric energy throughout the New England grid and regulates the interconnection of electric generation sources to the system. In order to deliver electricity to the system, a generator must enter into an agreement with ISO-New England. The agreement contains specifications and engineering details that are required for the safe, secure and reliable operation of the transmission system. The required information pertains to critical energy infrastructure. Maintaining the security of this infrastructure is an important public policy. The agreement also contains confidential commercial information about various aspects of the electric generator's equipment, specifications and operation plans.

Given the importance of the security of critical energy infrastructure information, Berlin Station, LLC has demonstrated a privacy interest in the interconnection agreement. Disclosure of the interconnection agreement will do little, if anything at all, to inform the public about the activities and conduct of government. Any benefit in public disclosure is vastly outweighed by the security needs of the public-at-large, ISO-

New England and Berlin Station, LLC. The Motion for Protective Order and Confidential Treatment of the Interconnection Agreement is granted.

Agreements with Contractors

Berlin Station, LLC seeks confidential treatment of the following contracts: (i) EPC Agreement with Babcock & Wilcox Construction Co., Inc.; (ii) Operations and Maintenance Agreement with DPS Berlin, LLC (Delta Power); (iii) Master Services Agreement with Waldron; and (iv) Consulting Contract with Stone & Webster, Inc.

These agreements outline the terms and conditions of the contractors' involvement in construction, operation, management, maintenance, and servicing of the Project. Each contract contains the terms of compensation of the contractors as well as their liabilities in case of their breach. The contracts contain important financial and commercial information. Contracts containing important commercial and financial terms clearly fit within the exemption to the Right-to-Know law. See, RSA 91-A: 5, IV. These terms, if disclosed to the public, could damage the competitive interests of both the contractors and the Berlin Station, LLC. Thus, an important privacy interest has been established by the Joint Applicants. On the other hand, public interest in the details of these contracts is not high. The disclosure of this information will not inform the public of the activities and conduct of the government. There is little if any public interest in the disclosure of this type of information and the threat of financial harm to the Applicant is great. The public interest in disclosure of these commercial documents is substantially outweighed by the privacy interests of Berlin Station, LLC and its contractors. Therefore, the Motion for Protective Order and Confidential Treatment of the EPC Agreement with Babcock & Wilcox Construction Co., Inc., Operations and Maintenance Agreement with DPS Berlin, LLC, Master Services Agreement with Waldron, and Consulting Contract with Stone & Webster, Inc. is granted.

Conclusion and Order

Based upon the foregoing is hereby:

ORDERED: that the Motion for Protective Order and Confidential Treatment of Documents Requested by Committee in Order and Amended Certificate of Site and Facility with Conditions for the Financial Closing Package containing Berlin Station Note Purchase Agreement, Berlin Station Depository & Security Agreement, Collateral Agency, Subordination and Intercreditor Agreement, Berlin Station Pledge and Security Agreement, Berlin Station Security Agreement, Burgess BioPower, LLC Security Agreement, Burgess BioPower, LLC Pledge and Security Agreement, Burgess BioPower, LLC Depository and Security Agreement, Cooperation Agreement, and Burgess BioPower, LLC Collateral Agency Agreement is granted; and it is,

FURTHER ORDERED: that the Motion for Protective Order and Confidential Treatment of Documents Requested by Committee in Order and Amended Certificate of Site and Facility with Conditions for the ISO New England Inc. and Berlin Station, LLC Large Generator Interconnection Agreement is granted; and it is,

FURTHER ORDERED: that the Motion for Protective Order and Confidential Treatment of Documents Requested by Committee in Order and Amended Certificate of Site and Facility with Conditions for the executed Engineering Procurement and Construction ("EPC") Agreement with Babcock & Wilcox Construction Co., Inc. is granted; and it is,

FURTHER ORDERED: that the Motion for Protective Order and Confidential Treatment of Documents Requested by Committee in Order and Amended Certificate of Site and Facility with Conditions for the executed Operations and Maintenance Agreement with DPS Berlin, LLC is granted; and it is,

FURTHER ORDERED: that the Motion for Protective Order and Confidential Treatment of Documents Requested by Committee in Order and Amended Certificate of Site and Facility with Conditions for the executed Master Services Agreement with Waldron Engineering & Constriction, Inc. is granted; and it is,

FURTHER ORDERED: that the Motion for Protective Order and Confidential Treatment of Documents Requested by Committee in Order and Amended Certificate of Site and Facility with Conditions for the executed Consulting Contract with Stone & Webster, Inc is granted; and it is,

FURTHER ORDERED: that each of the foregoing documents shall be maintained in the records of the Committee UNDER SEAL and shall not be publicly disclosed without further order by the Committee or a court of competent jurisdiction.

SO ORDERED this 11th day of October, 2011.



Thomas S. Burack, Chairman
NH Site Evaluation Committee