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February 26, 2010

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

Re: Laidlaw Berlin BioPower, LLC – SEC Docket No. 2009-02

Dear Chairman Burack:

Pursuant to Committee rules, I have enclosed an original and eighteen (18) copies of Laidlaw Berlin BioPower's Objection to Petition for Intervention of Clean Power Development, LLC for filing in the above matter.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry Needleman".

Barry Needleman

BN:cb
Enclosure
cc: Service List

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

SEC 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**

**OBJECTION TO PETITION FOR INTERVENTION OF
CLEAN POWER DEVELOPMENT, LLC**

NOW COMES the Applicant, Laidlaw Berlin BioPower, LLC (“Laidlaw”), and submits this Objection to Petition for Intervention of Clean Power Development, LLC (“CPD”) and states as follows:

Introduction

1. On December 16, 2009, Laidlaw filed an Application with the Site Evaluation Committee for a Certificate of Site and Facility for a 70 MW Biomass Fueled Energy Facility in Berlin, New Hampshire.
2. CPD seeks to intervene in this proceeding. CPD plans to construct and operate a 29 MW wood-fueled biomass facility one and a half miles from the Laidlaw site.

Standard for Intervention

3. The standard for intervention is set forth in the New Hampshire Administrative Procedure Act and the New Hampshire Code of Administrative Rules. RSA 542-A:32, I and Site 202.11.
4. Pursuant to RSA 541-A:32 and Site 202.11, the requirements for intervention are (1) the petitioner must properly file a petition, (2) the petitioner must establish that it has a right, duty, privilege, immunity or other substantial interest that may be affected by the determination of the issues in the proceeding, and (3) the petitioner must show intervention will not impair the interests of justice and the orderly and prompt conduct of the proceedings.

5. Here, CPD does not meet the second and third requirements of RSA 542-A:32, I and Site 202.11. Therefore, its Petition for Intervention should be denied.

CPD Does Not Have a Substantial Interest Which May be Affected by this Proceeding

6. CPD claims it has a right to intervene based on the following four (4) interests:
- A. Laidlaw’s financing and power purchase agreement with PSNH;
 - B. Whether there is enough affordable fuel supply in the region to support both facilities;
 - C. That it competes with Laidlaw for access to the Coos Transmission Loop; and
 - D. Due to Laidlaw’s construction of its facility on a Brownfields site and CPD being downstream from the Laidlaw site.

7. As set forth in its Petition, CPD seeks to construct and operate a wood burning biomass facility in Berlin, New Hampshire. Thus, at its heart, CPD’s interest here is purely one of a Laidlaw business competitor.

8. A competitive interest cannot be the basis for granting a Petition for Intervention. This is a proceeding about the issuance of a Certificate under RSA 162-H. It is not a process designed to decide which business gets to prevail in a competitive market.¹ “[I]njury resulting from competition is rarely classified as a legal harm but rather is deemed a natural risk in our free enterprise economy.” *Cf. Valley Bank v. State*, 115 N.H. 151, 154 (1975) (holding that a “grandfather clause in a statute regulating branch banking does not violate the equal protection

¹ To the extent Laidlaw and CPD are competing for fuel, the region’s timber market will resolve that issue. Similarly, to the extent the parties are competing for access to and space on the Coos Transmission Loop, ISO-NE will resolve that issue. But this Committee should not arbitrate disputes among business competitors. For this reason, Laidlaw did not intervene in the recent CPD proceedings before this Committee (although Laidlaw strongly supported the Committee considering whether CPD should be subject to its jurisdiction).

clause of the Constitutions of the United States and New Hampshire) (citing 1967 C.J.S. Competition (1967, Supp. 1974); W. Prosser, Law of Torts, 130, at 954-62 (1971)). As such, a competitive interest is not a right, duty, privilege, immunity or other substantial interest that can support a Petition to Intervene in these proceedings.

9. Notwithstanding that point, the alleged interests CPD asserts here are insufficient for granting its Petition.

10. CPD first claims that it has an interest in Laidlaw's financing which entitles it to intervene here. Petition at ¶¶ 11-13. CPD has no such interest. Whether Laidlaw has the financial capability to build and operate this facility has no impact whatsoever on CPD other than in a purely competitive manner. CPD therefore has not and will not suffer the requisite injury necessary to confer standing with respect to the financing issue. *Blanchard v. Railroad*, 86 N.H. 263, 264 (1933); *Appeal of Richards*, 134 N.H. 148, 156 (1991). Moreover, since it is certain the Committee will fully explore Laidlaw's financial capability to build and operate the facility, CPD's participation on that issue would be repetitive and interfere with the orderly and prompt conduct of the proceedings.

11. CPD's other claimed interests – fuel supply, transmission loop access and supposed adverse down stream impacts originating from the Laidlaw site – also are not sufficient bases for intervention for four reasons.

12. First, CPD has not and cannot allege any specific harm that would provide a basis for standing. *Blanchard v. Railroad*, 86 N.H. at 264; *Appeal of Richards*, 134 N.H. at 156 (where a party is unable to demonstrate an actual or immediate injury, there is no standing).

13. Second, CPD's alleged interest in these proceedings must be different from those interests of the public in order for standing to exist. Standing is conferred only to parties "who

[are] interested in or affected by the proceedings in some manner different from the public, citizens, and taxpayers generally....” *Blanchard*, 86 N.H. at 264 (quoting *Bennett v. Tuftonborough*, 72 N.H. 63, 64 (1903)). Standing does not exist if a party alleges “nothing distinguishing [its] right and interest from that of other citizens and taxpayers.” *Id.*

14. Third, issues such as those dealing with environmental quality² or adequate supply of energy, are precisely within the purview of Public Counsel:

The [Counsel for the Public] shall represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy. The counsel shall be accorded all the rights and privileges, and responsibilities of an attorney representing a party in formal action and shall serve until the decision to issue or deny a certificate is final.

RSA 162-H:9. Where counsel for the public already represents those interests, a party like CPD has no standing. *Appeal of Richards*, 134 N.H. at 156 (1991) (“[n]o individual or group of individuals has standing to appeal when the alleged injury caused by the administrative agency’s action affects the public in general, particularly when the affected public interest is represented by an authorized official or agent of the state”).

15. Fourth, both public counsel and the Committee will undoubtedly explore each issue CPD has raised in great depth. It is their responsibility to do so. Likewise, the City of Berlin may also explore those issues. Thus, CPD’s participation will be entirely repetitive and create significant risk of interference with the orderly conduct of the proceedings.

16. For all these reasons, CPD’s Petition for Intervention should be denied.

² CPD claims that it may suffer harm because contaminants “might enter the Androscoggin river”, CPD “might be adversely affected” and CPD may use the river as a future source of water. Petition at ¶ 14. As alleged, these are purely speculative harms that are insufficient to establish standing under New Hampshire law. *Blanchard v. Railroad*, 86 N.H. at 264; *Appeal of Richards*, 134 N.H. at 156 (where a party is unable to demonstrate an actual or immediate injury, there is no standing).

**Alternatively, If the Committee Grant's CPD's Petition for Intervention,
It Should Limit Its Participation Pursuant to Site 202.11(d)**

17. As an alternative, if the Committee is inclined to allow CPD to intervene, its role should be limited pursuant to Site 202.11(d). Specifically, CPD's participation should be limited only to specific issues where the Committee concludes CPD clearly and unequivocally has standing, and the Committee believes that its own efforts and those of the Public Counsel and the City may not adequately address an issue such that CPD's involvement is necessary, would not be duplicative and would not risk interfering with the orderly conduct of the proceedings.

Conclusion

18. Even if the Committee denies CPD's Petition, CPD will still have the same opportunity to participate as every other member of the public. Thus, its concerns will be heard. But (1) as a business competitor of Laidlaw (2) who does not have standing and (3) who seeks to raise issues that will already be adequately addressed, and are no different from the concerns of the public at large, CPD's Petition for Intervention should be denied. Alternatively, if CPD's Petition is granted, CPD's participation in these proceedings should be limited.

Respectfully submitted,

Laidlaw Berlin BioPower, LLC

By Its Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: February 26, 2010

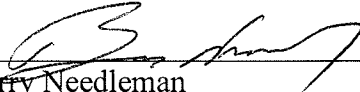
By:



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Certificate of Service

A copy of this Objection to Petition for Intervention of Clean Power Development, LLC has been served by electronic mail this 26th day of February, 2010 to each of the parties on the attached service list and by first class mail to the New Hampshire Attorney General's Office.



Barry Needleman