

**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

June 9, 2010

**ORDER ON CLEAN POWER DEVELOPMENT'S CONTESTED MOTION
FOR CLARIFICATION AND/OR REHEARING**

Background

On December 16, 2009, Laidlaw Berlin BioPower, LLC (Applicant) filed an Application for a Certificate of Site and Facility (Application). The Application seeks the approval of the Site Evaluation Committee (Committee) for a Certificate of Site and Facility (Certificate) in order to site, construct and operate a renewable energy facility (Facility) in Berlin, Coos County, New Hampshire. The Facility, as proposed, is a biomass fueled energy generating facility nominally capable of generating 70MW of electric power. The site for the proposed Facility is the former site of the Fraser Pulp Mill, an industrial facility which the Applicant proposes to convert and upgrade. On January 26, 2010, the Application was accepted as administratively complete and a subcommittee was designated to hear this matter pursuant to RSA 162-H: 6-a, III.

On February 19, 2010, Clean Power Development, LLC (CPD) filed a Motion to Intervene in this docket. CPD is a company that focuses on the development of biomass fueled facilities. CPD plans to construct, own and operate its own biomass energy facility in Berlin. CPD's proposed facility will generate electricity and steam through the combustion of whole tree chips supplied through local markets. CPD's facility will have a maximum electric generating capacity of 29 MW. The site of the CPD Facility is on the Androscoggin River, approximately 1 ½ miles "downstream" from the site of the Facility proposed in this docket. Due to the relatively small size of the CPD facility (29 MW) and the fact that CPD had already obtained most of the required state permits for its facility, the Site Evaluation Committee declined to take jurisdiction over the CPD facility when petitioned to do so by local residents. See, Site Evaluation Committee, Docket No. 2009-03, Petitions of Michael Laflamme and Howard Jones *et. al.*¹ The Applicant objected to CPD's Motion to Intervene and CPD filed a response to that objection on March 3, 2010.

On March 24, 2010, CPD was permitted to intervene in this docket. However, CPD's intervention in the docket was limited to issues pertaining to the sustainability of

¹ The Site Evaluation Committee has discretion to exercise jurisdiction over the siting, construction and operation of energy facilities and renewable energy facilities with less than 30 MW of capacity when petitioned to do so by either local residents or municipalities. See, RSA 162-H: 2, VII and XII.

the Northern Forest and the availability of transmission capacity. See, RSA 541-A: 32, III (a)(permitting limitations on the scope of intervention.)

On April 12, 2010, CPD filed a Motion for Rehearing and/or Clarification. The Applicant objected to the Motion on the same day. Thereafter, the Applicant and CPD attempted to resolve disagreements underlying CPD's Motion for Rehearing and/or Clarification. Counsel for the Committee was advised that CPD believed that a resolution of the issues may occur that would make resolution of the Motion unnecessary. On several occasions, counsel for the Committee was advised that the Motion may be withdrawn. On May 13, 2010, counsel for the Committee was advised that an agreement could not be reached between the Applicant and CPD. However, some discussions continued. Unfortunately, as of this date the parties have not been able to reach an agreement.

Positions of the Parties

CPD asserts that the limitation of its intervenor status is improper because it is in a competitive position with the Applicant. Because of its competitive position, CPD claims that, as an intervenor, it should be able to address issues pertaining to (1) the negotiation of a purchase power agreement between the Applicant and potential purchasers of electricity from the Applicant; and (2) the ownership structure of the Applicant's limited liability company. CPD asserts that there is a power purchase agreement between Public Service Company of New Hampshire (PSNH) and the Applicant. CPD is concerned that a power purchase agreement may have a "fuel adjustment clause" under which PSNH will pass any cost of the power purchased from the Applicant on to its ratepayers. CPD is concerned that such an advantageous contract with PSNH would put CPD at a disadvantage in the marketplace for the purposes of selling power generated from its proposed facility, as well as purchasing bio-fuel in local markets.

In addition, CPD claims that the Application is insufficient in that it does not contain any information pertaining to entities known as PJP, LLC, Aware Energy, LLC, Richard Seare, Newco, LLC or Cage Street Capital, LLC. CPD suggests that PSNH may have some interest in one or all of these entities and that the Applicant has failed to provide sufficient information concerning the ownership of the Project to the Committee.

The Applicant objected to the Motion for Rehearing and/or Clarification, asserting that the participation of CPD is unnecessary for the Subcommittee to fully explore Laidlaw's financial, managerial and technical capabilities and its ownership structure. The Applicant argues that the limitation on CPD's role as an intervenor is appropriate under the circumstances.

Discussion

The Request for Clarification

The Order granting limited intervenor status to CPD did not make reference to, nor was it based upon, the existence of a power purchase agreement. The Order limited CPD's intervention role to issues involving the sustainability of the Northern Forest and transmission of electricity issues. The limited role is uniquely fitted to CPD's concerns that are within the jurisdiction of the Committee. CPD's Berlin facility will be purchasing biomass, at least in part, from producers in the Northern Forest and, therefore, sustaining the environmental health of that forest is a legitimate interest for CPD to have in this proceeding. Sustaining the health of the Northern Forest is also within the jurisdictional charge of the Committee. See, RSA 162-H: 1, RSA 162-H:16, IV (c)(requiring the Committee to evaluate impacts to the natural environment). Likewise, transmission capabilities in the North Country, at this time, are limited and CPD and the Applicant will both be seeking transmission capacity from limited resources. Therefore, CPD has an interest in the transmission capacity issue in this proceeding which may be relevant to the orderly development of the region. See, RSA 162-H: 16, IV (b). However, the Committee does not have authority to regulate the competition between these two facilities, should they both be constructed and operated. The issues raised by CPD about the Applicant's purported purchase power agreement with PSNH actually involve expected competition between the two entities and are only tangentially, if at all, related to the sustainability of the Northern Forest or any other issue within the Committee's jurisdiction.

Although CPD has a commercial interest in the sustainability of the Northern Forest and transmission capacity in the North Country, the Committee has no authority to regulate competition, or any of its components such as pricing, that may exist between competing facilities. Therefore, to the extent that CPD's Motion for Clarification seeks a ruling that it may discover information concerning the purported power purchase agreement or litigate issues surrounding the terms of the purported power purchase agreement, the Motion for Clarification must be denied.

It should be noted, however, that this ruling does not limit the ability of Counsel for the Public or any unlimited intervenor from addressing issues that pertain to the purported power purchase agreement, so long as the issues are otherwise relevant to the jurisdiction of the Committee. The fact that one electric producer may be able to command a better fuel price or develop a better output pricing model than another is not within the regulatory authority of the Committee. In fact, regulatory authority, as it pertains to power purchase agreements entered into by a regulated utility like PSNH, rests with the Public Utilities Commission. See, RSA 362-A, RSA 362-F: 9; see *also*, RSA 378:3-a (pertaining to fuel adjustment charges by regulated public utilities purchasing electric power.) That portion of CPD's motion seeking clarification is DENIED.

The Motion for Rehearing

CPD's Motion for Rehearing as to the limited nature of its intervention must also be denied. It is clear that it is CPD's competitive interest that is driving the desire to obtain as much information as possible about the financial and corporate structure of the Applicant and its pricing and power sale negotiations. Such concerns are a distraction to the purpose of Committee review and will deter from the orderly conduct of the proceedings in this docket. Site Evaluation Committee review is focused on reviewing the environmental impact of the site or route and other relevant factors that bear on the objectives of RSA 162-H. Specifically, criteria that are relevant to Site Evaluation Committee review are the financial, technical and managerial capabilities of the Applicant to construct and operate a facility; whether or not the facility will unduly interfere with the orderly development of the region with due consideration being given to views of municipal and regional planning commissions and governing bodies; and, whether or not any proposed facility will have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, or public health and safety. See, RSA 162-H: 16. The ability of one proposed facility to obtain fuel at a better price than another facility, or to price its power output more competitively, is not within the jurisdiction of the Site Evaluation Committee. Therefore, the Order of this Committee limiting CPD's intervention in this docket to the sustainability of the Northern Forest and issues pertaining to electric transmission capacity is both lawful and reasonable. The Motion for Rehearing is DENIED.

It is hereby ordered that Clean Power Development's Motion for Rehearing and/or for Clarification is hereby DENIED.

SO ORDERED, this 9th day of June, 2010.



Thomas S. Burack, Chairman
NH Site Evaluation Committee