

**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 PARTIALLY ASSENTED TO MOTION FOR PROTECTIVE
ORDER AND CONFIDENTIAL TREATMENT FOR CERTAIN
CONFIDENTIAL, COMMERCIAL AND FINANCIAL DOCUMENTS**

Background

On December 16, 2009, Laidlaw Berlin BioPower, LLC (Applicant) filed an Application for a Certificate of Site and Facility (Application). The Applicant proposes to site, construct and operate a renewable energy facility (Facility) in Berlin, Coos County, New Hampshire. The Applicant proposes to convert and upgrade a pre-existing industrial site to develop a biomass fueled energy generating facility nominally capable of generating 70 megawatts (MW) of electric power.

The Application was accepted as administratively complete on January 26, 2010, and a subcommittee of the Site Evaluation Committee (Committee) was designated to review the Application pursuant to RSA 162-H:6-a.

On April 6, 2010, I issued a Report of Prehearing Conference and Procedural Order. The Procedural Order scheduled a technical session concerning the Applicant's witnesses and testimony for May 5, 2010. The Procedural Order also required the Applicant to provide answers to any unanswered technical session data requests by May 17, 2010. The technical session was held as scheduled. At the technical session, Counsel for the Public requested certain information that the Applicant believes constitutes confidential, commercial and financial documentation which may be treated confidentially pursuant to RSA 91-A. The information sought by Counsel for the Public includes the Applicant's business plan, financial model and information pertaining to firms expressing interest in providing debt and equity financing for the proposed Project.

The City of Berlin also made a request at the technical session for documents pertaining to ownership interests and relationships amongst the various entities owning the Project. The Applicant indicated that it was amenable to providing its business plan and financial model, as well as information pertaining to firms expressing interest in providing debt and equity financing to counsel for the public, subject to confidential treatment. Likewise, the Applicant indicated that it was amenable to providing to Counsel for the Public and the City of Berlin documents demonstrating the ownership interests and relationships amongst the various entities in the project, subject to

confidential treatment under the exemptions to the Right to Know Act. See, RSA 91-A:5.

On May 17, 2010, the Applicant filed a Motion seeking confidential treatment for the above referenced information. The Applicant asserts that Counsel for the Public, the City of Berlin, and Clean Power Development, an intervenor, all assent to the confidential treatment of the information. The Motion asserts that the New Hampshire Sierra Club did not assent to the relief requested, and that the intervenor, Wagner Forest Management, could not be reached. As of the date of this Order, no objection to the Applicant's Motion has been received from any party. See, New Hampshire Administrative Rules Site 202.14(f) (requiring objections to written motions to be filed within ten days). However, the lack of a written objection does not, in and of itself, constitute grounds for granting a motion. See, New Hampshire Administrative Rules Site 202.14(g). A ruling on a motion by the presiding officer requires consideration of all objections and all other factors relevant to the Motion. See, New Hampshire Administrative Rules Site 202.14(h).

Discussion

The New Hampshire Right to Know Act generally provides that the public has the right to inspect all Governmental records¹ in the possession, custody or control of a public body or agency. See, RSA 91-A:4, I. However, the Right to Know Act does contain exemptions from disclosure, including exemptions that pertain to confidential, commercial and financial information. See, RSA 91-A: F, IV. The Applicant's business plan and financial model, as requested at the technical session, although not currently in the possession of the Committee, is likely to come into the possession of the Committee during the course of the hearings in this proceeding. Business plans and financial models clearly fit within the definition of commercial and financial information. Moreover, this commercial and financial information pertains to the internal policies and financial information of a private company. Therefore, the Applicant's business plan and financial model are exempt from public disclosure pursuant to RSA 91-A:5, IV.

The Applicant also seeks confidentiality for information pertaining to firms expressing interest in providing debt and equity financing for the Project. Again, this information is not yet within the possession of the Committee but is likely to come into the Committee's possession in the near future. The relationship between borrowers and lenders does fit within the definition of commercial information and is information which is typically kept confidential. Therefore, this information appears to be confidential commercial information within the scope of the exemption provided from disclosure at RSA 91-A:5, IV.

The Applicant is a limited liability company owned by other entities. The relationship amongst those entities is confidential commercial information that is subject

¹ A Governmental record is any information created, accepted, or obtained by, or on behalf of any public body or any public agency in furtherance of its official function. See, RSA 91-A:1-a, III.

to RSA 91-A:5, IV. Such information is traditionally kept confidential by privately held commercial entities.

All of the records referenced in the Applicant's Motion pertain to categories of confidential, commercial or financial information that are exempt from public disclosure pursuant to RSA 91-A:5, IV. See, *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 NH 540, 553 (1997). Such records are not exempt from public disclosure on a *per se* basis. 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 interest in protecting confidential information. In this case, the information sought, if made publically available, could be commercially damaging to the Applicant. Disclosure of the information could negatively affect the Applicant's competitive position in the renewable energy market by exposing otherwise confidential financial information and alerting competitors to financing entities with whom the Applicant is in negotiations. Therefore, the above referenced information, should it come into the possession of the Committee, will be treated as confidential documents.

The confidential documents shall be made available to the Committee, if otherwise admissible, as evidence in this proceeding. If received, the Committee will maintain the documents under seal and shall not redistribute them to any person or party without further hearing and order.

Counsel for the Public has an important statutory role in the proceedings before this Committee. Full and vigorous participation of Counsel for the Public is necessary to insure the goals of RSA 162-H. Therefore, the aforementioned confidential information shall be also be disclosed to Counsel for the Public. However, Counsel for the Public shall not further disclose such information without a further Order from the Subcommittee.

The information pertaining to the ownership interests and relationships amongst the various entities in the Project was requested by the City of Berlin. The Applicant asserts that it has no objection in providing this information to the City of Berlin on a confidential basis. Therefore, the information pertaining to ownership interests and relationships amongst the various entities in the Project also shall be provided to the City of Berlin and Counsel for the Public on a confidential basis and shall not be redistributed to any person or party without further Order from the Subcommittee.

Conclusion and Order

Based upon the foregoing it is hereby:

ORDERED: that the Applicant's Partially Assented Motion for Protective Order and Confidential Treatment for Certain Confidential, Commercial and Financial Documents filed on May 17, 2010, is granted, and it is

FURTHER ORDERED: that the information sought by Counsel for the Public shall be disclosed to counsel for the public on a confidential basis and shall not be further disclosed without further order of the Subcommittee; and, it is

FURTHER ORDERED: that the information requested by the City of Berlin shall be provided to the City of Berlin and Counsel for the Public and shall not be disclosed to any other person or parties without further order of the Subcommittee.

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

A handwritten signature in dark ink, reading "Thomas S. Burack". The signature is written in a cursive style with a horizontal line underneath the name.

Thomas S. Burack, Chairman
NH Site Evaluation Committee