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Admitted in NH

August 4, 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 Motion in Limine to Exclude Certain Testimony of Melvin Liston Regarding Fuel Availability.

If you have any questions, please contact me.

Yours sincerely,

A handwritten signature in black ink, appearing to be "Gregory H. Smith", written over a large, stylized, circular flourish.

Gregory H. Smith

GHS:cb  
Enclosure

cc: Service List

STATE OF NEW HAMPSHIRE  
BEFORE THE  
ENERGY FACILITY SITE EVALUATION COMMITTEE

APPLICATION OF LAIDLAW BERLIN BIOPOWER, LLC FOR A CERTIFICATE OF SITE  
AND FACILITY

DOCKET NO. SEC 2009-02

**MOTION IN LIMINE TO EXCLUDE CERTAIN TESTIMONY OF MELVIN LISTON  
REGARDING FUEL AVAILABILITY**

Applicant Laidlaw Berlin BioPower, LLC (“LBB”), respectfully submits this Motion in Limine to Exclude Certain Testimony of Melvin Liston Regarding Fuel Availability. In support of its motion, LBB states as follows:

1. RSA 162-H clearly defines the criteria an applicant must meet, and the Committee must consider, pertaining to the issuance of a Certificate of Site and Facility. RSA 162-H:16(IV).<sup>1</sup> The statute does not give the Committee authority to regulate competition among energy producing competitors, nor to choose winners and losers in an unregulated market.

2. The Committee recognized this point in this proceeding, stating that it “does not have authority to regulate the competition between [LBB and CPD] should they both be

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<sup>1</sup> Specifically, an applicant must show the following:

- (a) ...adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.
- (b) Will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.
- (c) Will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.
- (d) Operation is consistent with the state energy policy established in RSA 378:37.

constructed and operated.” Order on Clean Power Development’s Contested Motion for Clarification and/or Rehearing at 3. The Committee then further focused this analysis:

[T]he Committee has no authority to regulate competition, *or any of its components such as pricing*, that may exist between competing facilities. ... “*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.*”

*Id.* [emphasis added].

3. Mr. Liston, on behalf of CPD, has submitted testimony in this matter. Significant portions of that testimony contain an irrelevant discussion about fuel availability predicated on pricing. Mr. Liston also acknowledged at the June 25, 2010 Technical Session in Berlin that fuel availability is largely a function of price. *See* Supplemental Testimony of Louis Bravakis at 1 (filed July 9, 2010).

4. Mr. Liston’s entire argument about the availability of LBB’s fuel supply is predicated on the errant assumption that price and availability of fuel must be factors that the Committee considers. Mr. Liston’s testimony regarding fuel availability and pricing should be excluded because it is beyond CPD’s intervention issues (sustainability and transmission) and because it is beyond the scope of the Committee’s jurisdiction.

5. Mr. Liston’s testimony contains multiple examples of his reliance on fuel price and competition arguments. For example:

- When discussing how the CPD facility was developed he focuses on “biomass fuel availability at a reasonable cost....” Liston Testimony at 3, line 38.
- He argues that distance limits fuel availability “at a price that works for the project business model.” *Id.* at 4, lines 21-22.
- He cites a series of articles that tie availability fuel pricing. *Id.* at 4-6.
- He specifically and mistakenly claims the Committee must essentially function as central planning body and substitute its judgment regarding resource allocation for that of the free market. He also argues that it is up to the Committee, not the market, to decide whether the Laidlaw or the CPD project is built: “the SEC must give thoughtful considering to the many smaller industrial and municipal users of biomass, *as well as the*

*numerous alternative proposals of various types that would also depend on this same resource.” Id. at 17, lines 11-14 [Emphasis added].*

- “...it is now much more critical that approval of a Laidlaw project be based upon accurate analysis and assessment of *fuel supply and pricing.*” *Id.* at 24, lines 30-31.
- He devotes an entire section of his testimony to something titled “Price Sensitivity Related to Long Distance Delivery.” *Id.* at 31, line 3. He then provides 5 pages of analysis that all relate to price of fuel/availability.

6. The following portions of Mr. Liston’s testimony relate only to price and availability, and issues of competition, and therefore should be excluded:

- Page 4, line 12 to page 7, line 26.
- Page 13, line 8 to page 24, line 30.
- Page 28, line 24 to page 29, line 2.
- Page 31, line 3 to page 35, line 26.

7. In sum, the majority of Mr. Liston’s testimony has no bearing on the issues to be considered by the Committee and instead relates to business issues between two potential competitors. Those portions of his testimony should therefore be excluded.

WHEREFORE, the Applicant respectfully requests that the Committee:

- A. Exclude Mr. Liston’s testimony relating to issues of price and availability as noted above;
- B. Issue an order prohibiting Mr. Liston and other witnesses from testifying on irrelevant issues of price and availability during the hearing; and
- C. Grant such other and further relief as the Committee deem fair and just.

Respectfully submitted,

Laidlaw Berlin BioPower, LLC

By Its Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,  
PROFESSIONAL ASSOCIATION

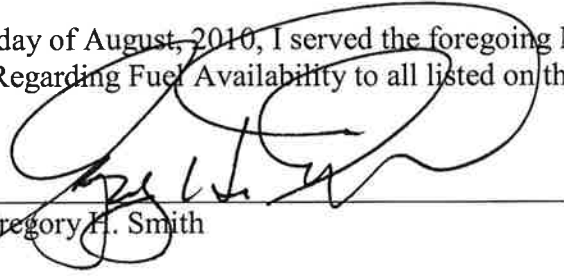
Date: August 4, 2010

By: 

Barty Needleman  
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**Certificate of Service**

I hereby certify that on this 4th day of August, 2010, I served the foregoing Motion in Limine to Exclude Certain Testimony Regarding Fuel Availability to all listed on the Service List for this matter.

  
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Gregory H. Smith