

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

August 19, 2010

ORDER ON PENDING MOTIONS

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 in this docket was deemed administratively complete on January 26, 2010, and a Subcommittee of the Site Evaluation Committee was designated to review the Application pursuant to RSA 162-H:6-a. Adjudicatory hearings are scheduled to commence in this docket on August 23, 2010.

As a result of various filings in this docket, there are currently five motions pending. The pending motions are:

1. Applicant's Partially Assented to Motion for Protective Order and Confidential Treatment for Power Purchase Agreement and Steady State System Impact Study;
2. Clean Power Development's Motion for Protective Order and Confidential Treatment (System Impact Study);
3. Applicant's Motion in Limine to Exclude Certain Testimony of Melvin Liston Regarding Fuel Availability; and,
4. Applicant's Amended Motion for Protective Order and Confidential Treatment for Power Purchase Agreement.
5. Clean Power Development's Motion for Ruling of Law.

The Motions Concerning Confidentiality

On July 9, 2010, the Applicant filed a Partially Assented to Motion for Protective Order and Confidential Treatment for System Impact Study and Purchase Power Agreement. On that same date, Clean Power Development (CPD) filed a Motion for Protective Order and Confidential Treatment of the System Impact Study.

On July 19, 2010, CPD filed a Partial Objection to the Applicant's Motion for a Protective Order. CPD specifically objected to a protective order pertaining to the Power Purchase Agreement.

Thereafter, on August 6, 2010, the Applicant filed an Amended Motion for Protective Order and Confidential Treatment for Power Purchase Agreement. Each of these motions and objections concern the same documents. The Applicant proposes to file a Power Purchase Agreement (PPA) between itself and Public Service Company of New Hampshire (PSNH) under seal and available only to the Committee. In addition, the Applicant proposes to file, under seal, its draft System Impact Study (SIS), last revised on May 21, 2010. The Applicant and CPD agree that the SIS should be exempt from public disclosure and only available to the parties in this proceeding at a closed hearing.

The SIS has been prepared for ISO New England and contains critical energy infrastructure information and is, therefore, considered to be confidential and should not be released publically. The SIS contains confidential information which could cause concerns for the security and safety of the public if made publically available. No party objects to the confidential treatment of the SIS in this docket.

However, CPD did object to the Applicant's initial motion seeking confidential treatment of the PPA. After CPD objected, PSNH has publically filed a redacted version of the PPA with the New Hampshire Public Utilities Commission seeking approval of the PPA by that agency. Since that filing, the Applicant has filed an Amended Motion for Protective Order in this docket asking for continued confidential treatment of the unredacted PPA and the SIS, but allowing disclosure of the redacted version of the PPA which was filed at the New Hampshire Public Utilities Commission. No party has objected to the amended motion. Therefore, the redacted version of the PPA which was attached to the Applicant's motion will be available as a public record in this docket.

However, the unredacted version of the PPA will be deemed confidential and subject to the protective order of the Committee. The unredacted version of the PPA will remain confidential because it contains information which is exempt from disclosure under RSA 91-A: 5, IV. The PPA contains information that qualifies as confidential, commercial and financial 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. However, such records are not automatically 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 interests in protecting its confidential, financial and commercial information. See, Union Leader Corp. v. New Hampshire Housing Finance Authority, 142 NH 540, 553 (1997). In this case, the information contained within the unredacted PPA is precisely the type of information which, if made publically available, could cause commercial damage to the Applicant's business relationships and could put the Applicant at a competitive disadvantage in its industry. Therefore, the unredacted PPA shall be considered by the Committee as confidential and shall not be publically disclosed without a further order from the Committee.

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

Having considered the issues pertaining to the need for confidentiality of both the unredacted PPA and SIS, it is determined that the Applicant's Amended Motion for Protective Order will be granted.

The Motion in Limine

The Applicant has also filed a Motion in Limine to Exclude the Testimony of Melvin Liston pertaining to fuel availability. CPD has objected to this Motion. The Applicant asserts that the Committee does not have the authority to regulate pricing competition between competing facilities and, therefore, substantial portions of Mr. Liston's prefiled testimony are irrelevant. CPD objects to the motion and asserts that all of Mr. Liston's prefiled testimony is, in fact, rebuttal testimony to the prefiled testimony provided by the Applicant's witness, Louis Bravakis, and to rebut assertions contained within the Land Vest Report – Biomass Supply Study.

A review of Mr. Liston's prefiled testimony does reveal substantial testimony concerning fuel availability and its relationship to the pricing of the electrical output of the proposed facility. However, it is clear that Mr. Liston's testimony is not offered for the purposes of requesting the Committee to regulate the competition between or among various electricity producers. Mr. Liston's testimony appears to be offered for the purposes of assisting the Subcommittee in determining issues that are relevant to its statutory mandate. Specifically, Mr. Liston's testimony is relevant to determine whether or not the proposed Facility will have an unreasonable adverse impact on the natural environment, the sustainability of the northern forest, and the impacts that the proposed Facility may have on the orderly development of the region. In addition, CPD is correct in asserting that Mr. Liston's testimony offers rebuttal to the prefiled testimony of Mr. Bravakis and certain portions of the Land Vest Study. Therefore, the Motion in Limine to exclude Mr. Liston's testimony will be denied and the Committee will consider Mr.

Liston's testimony and determine the appropriate weight to be given thereto during the course of deliberations in this docket.

Motion for Ruling of Law

CPD has filed a proposed Ruling of Law asserting that RSA 162-H: 16, IV (a) does not provide the Committee with the authority to issue a Certificate of Site and Facility to the Applicant until the PPA has been approved by the New Hampshire Public Utilities Commission. The Applicant has objected to this proposed ruling of law and asserted that if the Subcommittee determines that the existence of the PPA is required for the Applicant to demonstrate its financial abilities to construct and operate the project, that the Public Utilities Commission's approval of the PPA could be a condition precedent to the issuance of a Certificate of Site and Facility.

The ruling of law sought by CPD is a matter that must be considered by the full Committee. It would be premature to rule on CPD's request for a ruling of law at this time and the matter will be deferred for resolution as part of the Subcommittee's final decision on the Application or a Certificate of Site and Facility.

Conclusion and Order

Based upon the foregoing, it is hereby:

ORDERED that the Applicant's Amended Motion for a Protective Order and Confidential Treatment of the Purchase Power Agreement and System Impact Study is hereby granted; and,

FURTHER ORDERED, that the unredacted Purchase Power Agreement shall be filed with the Committee under seal and shall not be publically disclosed; and,

FURTHER ORDERED, that the redacted version of the Purchase Power Agreement shall be a public record of the Committee; and,

FURTHER ORDERED, that the draft System Impact Study prepared for ISO New England shall remain a confidential document and shall not be disclosed to the public, but shall be available to the parties in a closed hearing and shall not be copied or re-disclosed; and,

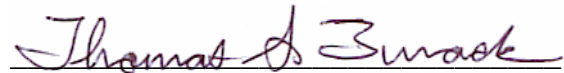
FURTHER ORDERED, that Counsel for the Public shall be provided with a copy of the unredacted Purchase Power Agreement and System Impact Study, but shall not further disclose those documents; and,

FURTHER ORDERED, that the Motion in Limine to exclude the testimony of Melvin Liston is hereby denied; and,

FURTHER ORDERED, that the request of Clean Power Development for a ruling of law is deferred until a final determination is made on the Application for a Certificate of Site and Facility.

SO ORDERED.

Date: August 19, 2010


Thomas S. Burack, Presiding Officer