STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

In re: Petition for Approval of Power Purchase Agreement)
with Laidlaw Berlin BioPower, LLC) Docket No. DE 10-195

WOOD-FIRED IPPS' CLOSING STATEMENT

The Wood-Fired IPPs' respectfully request that the Commission deny PSNH's petition in its entirety. In the alternative, the Wood-Fired IPPs request that the Commission condition its approval in accordance with the law as discussed below and in their separately filed Motion to Dismiss, Reply to PSNH's Objection to Wood-Fired IPPs' Motion to Dismiss, and Motion for Rehearing.

RSA 362-F:9, I and RSA 374-F:3, V(c) empower the Commission to authorize entry into, and to grant recovery for the prudently incurred costs of, contracts for certificates that are necessary for a distribution utility to meet its reasonably projected New Hampshire renewable portfolio standard ("RPS") requirements and default service needs, to the extent of those requirements. While these provisions grant the Commission its authority, the plain wording of these provisions also strictly confines that authority. The Commission may only authorize entry into a contract that is designed to meet a reasonable projection of the purchasing utility's New Hampshire RPS compliance need as a function of the utility's reasonably projected default service load and the percentage compliance requirements explicitly set forth in RSA 362-F:3, and the Commission may only pre-approve prudently incurred costs incurred in meeting that compliance need.

The limitations contained in RSA 369-F:9, I and RSA 374-F:3, V(c) present four hurdles that PSNH must clear at the outset. PSNH has stumbled over all four. First, as detailed in the Wood-Fired IPPs' filings, the contract term goes beyond 2025, the last year in which there is a statutory requirement to purchase compliance certificates for the New Hampshire RPS program. After 2025, there is no requirement for a utility to "project." Consequently, it is of no import that Mr. Long assumes that the New Hampshire compliance requirements will not ultimately drop to zero in 2026. Under RSA 362-F:9, I, even if a distribution utility makes an assumption that the legislature will eventually require ratepayers to purchase compliance certificates after 2025, the distribution utility may not require its ratepayers to bear the risk of that assumption. That risk

must be borne by the utility or the developer. The Commission has no authority under RSA 362-F:9, I to place such risk on ratepayers.

The second hurdle is that the PPA must be to meet a reasonable projection. Not only has PSNH failed to make a reasonable projection of its renewable portfolio requirements and default service needs for the period up to and including 2025 (the Commission will remember the rather tortuous review of data requests to demonstrate that PSNH's calculations all contain erroneous assumptions and arithmetic errors which PSNH has never corrected) but PSNH also failed to provide the Commission with any projection of its renewable portfolio requirements and default service needs whatsoever for a significant portion of the term of this PPA. Again, the Commission will remember from the Wood-Fired IPP's review of data requests that all of PSNH's calculations ended in 2025, coincident with the end of the RPS program. One of the main points of that review, of course, was to demonstrate that PSNH is fully aware that it was not reasonable to project a New Hampshire compliance requirement beyond the end of the New Hampshire program. However, the review also demonstrated that PSNH failed to provide any projections whatsoever for the period 2026 through 2034. No such projection exists in this record. A reasonable projection though 2034 that includes an integrated working forecast of market dynamics, pricing, cost, migration, and resulting default service need over the twenty-year term of the PPA was too bothersome for PSNH to prepare. Unfortunately, it was PSNH's burden to do so.

The third statutory hurdle in RSA 362-F:9, I is that, separate and apart from the "2025 issue," any projection must be limited to the percentage requirements stated in RSA 362-F:3. PSNH attempted to extract a concession on this legal point from Mr. McCluskey, a non-lawyer, that RSA 362-F:3 provides a minimum purchase requirement that an energy provider may exceed. However, a requirement is a requirement; a requirement is not the excess over minimum. Stated practically, in years when the statute states a 1% minimum requirement, PSNH is not required to purchase 2%. Additionally, PSNH's cross examination missed the fundamental legal point that, although a utility may exceed the statutory requirements in any one of the years listed in RSA 362-F:3, the plain wording of RSA 362-F:9, I prevents the Commission from authorizing entry into a multi-year contract to exceed those minimum statutory requirements and from placing the associated costs in rates. The multi-year contract provision of the statute plainly says "to meet" and "to the extent of" the requirements, it does not

say "to exceed those requirements." This is a fundamental rate-payer protection that the legislature built into the explicit wording of the multi-year contract provision of the statute and which the Commission may not ignore.

Mr. McCluskey demonstrated that PSNH does not require any New Hampshire compliance certificates from this project to meet any reasonable projection of PSNH's New Hampshire compliance requirements until 2016 and that PSNH will not require the full number of the New Hampshire compliance certificates that the Laidlaw facility is likely to produce until at least 2023, and maybe later in time given PSNH's ever-rising migration rate. After 2023, Mr. McClusky merely assumed that PSNH would require all of the RECs produced by Laidlaw, but did not project that PSNH would. Mr. McCluskey did not identify a mere tens of thousands of excess RECs that might be banked or hedged on a short-term basis against spikes in demand, as in the case of PSNH's contract with Lempster in Docket DE 08-077. Here, the evidence demonstrates that PSNH would be purchasing nearly one half million excess RECs per year at the very outset.

The environmental attributes to be purchased under the Laidlaw PPA are clearly to be used to speculate in, and arbitrage among, the various RPS programs in New England or as yet unknown markets for such attributes. The limitations in RSA 362-F:9, I forbid such speculation at ratepayer risk. Our statute's multi-year contracting provisions are for the purpose of compliance with New Hampshire RPS requirements, nothing more. This is so even if a private developer might require a utility's ratepayers to bear the risk of such speculation for the private developer to obtain construction financing. That is why the limitations appear in RSA 362-F:9, I, rather than among the factors to be balanced under RSA 362-F:9, II. That is why RSA 374-F:3, V(c) limits cost recovery to prudently incurred costs arising from compliance with New Hampshire RPS percentage requirements. These are threshold protections against improvident and excessive long-term contracting and public policy determinations by the legislature that the Commission may not overturn in its balancing of interests under 362-F:9, II.

New Hampshire's RPS program does not authorize the Commission to approve PPAs that force ratepayers to bear the cost of meeting New Hampshire RPS requirements that do not exist -- either because the legislature repeals the RPS, revises the classes, changes eligibility requirements, or changes the level of the alternative compliance payment. However, this is the effect of the PPA's change in law provisions. For better or worse, neither our statute nor our

Commission's rules promise that Class I requirements or the level of alternative compliance payments will remain static, that the Commission will not revisit its orders, or that contracts for certificates will remain valid even if the RPS requirements terminate. Quite the opposite. Our statute promises instead that the Commission will investigate and report to the legislature on perceived successes and failures of the program as designed, and that the Commission will make recommendations for change as appropriate. Our statute, unlike the Massachusetts program, does not provide for the continued validity of certificate contracts or orders approving the pass-through of costs in the event of changes in law. Instead, our statute leaves in place the Commission's continuing jurisdiction and only provides for the pass-through of prudently incurred costs of actual compliance.

The New Hampshire RPS statute does not permit PSNH and Laidlaw, or the Commission, to obligate PSNH ratepayers to make secure, never changing subsidy payments through 2025, divorced from legislative changes or Commission review under 365:28, and does not allow PSNH and Laidlaw to obligate ratepayers to pay any subsidy after 2025. It is not permissible for PSNH and Laidlaw to redesign the New Hampshire RPS program by contract to suit Laidlaw's desires, or to fix some aspects of a changeable legislative design in stone through change in law provisions that make New Hampshire's RPS program seem less risky to financiers, all at ratepayer expense. More importantly, it is not permissible for the Commission to authorize and pre-approve a contract for pass-through that attempts to do so.

PSNH's fourth hurdle emanates from RSA 374-F:3, V(c). This statute not only required PSNH to demonstrate that the costs associated with this PPA are necessary to comply with New Hampshire's percentage requirements, but also required PSNH to demonstrate that the details of this transaction do not exhibit inefficiency, improvidence, economic waste, abuse of discretion, or action inimical to the public interest (as generally defined, not as specifically defined in RSA 362-F:9, II). At a minimum, PSNH was required to demonstrate that the rates in the PPA are reasonable and cost-effective from a ratepayer's perspective in light of the alternatives available in the market. This was PSNH's burden, but PSNH failed to provide the Commission with any information upon which to base its necessary findings.

PSNH did not conduct a competitive solicitation to determine market pricing. Having failed to hold a competitive solicitation, PSNH then ignored all other methods for determining the cost-effectiveness and reasonableness of the PPA's pricing. PSNH readily admitted that it

conducted no tests to determine whether the PPA is cost effective. PSNH did not base pricing upon unsolicited offers for the same products. PSNH made no effort to base pricing on the developer's rate of return. PSNH shunned long-term pricing forecasts available in the market for benchmarking prices for electricity, capacity, or RECs. PSNH did not even consider, let alone explore, the costs and benefits of any other alternative for acquiring compliance RECs, whether by short-term or long-term methods.

These are common and accepted tools for testing whether pricing of products is cost-effective, reasonable, and prudent. Using these tools, Commission Staff and the Office of Consumer Advocate have demonstrated that -- looking at long-term, not short-term indicators -- the pricing in the PPA is not competitive, not cost-effective, not reasonable nor prudent over the 20-year term, for any of the PPA's products.

Lastly, PSNH's claim that it has resolved market uncertainties through the "structure" of the PPA, that is, through the cumulative reduction mechanism, is baseless. PSNH has ignored the extent of market overpayments. The cumulative reduction account does not create an absolute payment requirement that would bring overpayments within a reasonable approximation of market over the long term. The cumulative reduction account does not compensate ratepayers for the time value of money. The cumulative reduction does not account for overpayments for RECs or capacity. As importantly, the supposed security for the cumulative reduction account is illusory, depending upon on an unknown and dubious fair market value for the facility twenty years from now, and dressing up this uncertainty with priority liens and title insurance does nothing to make the security less illusory. Conservative forecasts of over-market costs for this PPA range from $330 million to $550 million over the 20-year term. PSNH has not introduced evidence that the fair market value of the Laidlaw facility will even approach this amount in 20 years. PSNH has stated only that the fair market value will be determined by market conditions at the time that the option is exercised, and that it cannot predict those conditions twenty years in advance. What we do know today is that adding more over-market costs and interest to the cumulative reduction account will not increase the fair market value of the facility, and therefore will not provide any additional security. It is simply another illusion and only accentuates that the mechanism will not work as promised.

As accurately summarized by Mr. Long, whether the PPA is in the interest of PSNH's ratepayers depends upon the Commission's "guess" where markets will go in future. The

Commission is left to guess because PSNH has not done the difficult analysis necessary to provide reliable evidence upon which the Commission can rely to make findings. Guessing and speculation do not provide a sufficient foundation for burdening ratepayers with the risks associated with a 20-year PPA, either with or without conditions.

As Mr. McCluskey and Mr. Frantz testified, it is absolutely necessary to forecast market prices using a number of fuel and other indicators to create a base case, to conduct sensitivity analyses, and then to use numerous tests for verifying whether forecasted prices are within a reasonable approximation of market. As testified to by Staff, PSNH's approach of "throwing up their hands and doing nothing" was inappropriate. When Mr. Traum and Mr. McCluskey utilized the scant information provided by PSNH to create a simplified price forecast, conducted standard tests of cost-effectiveness, and compared their analyses to the only currently valid, in-depth market forecasts in the record, their analysis showed that the PPA is not cost effective, the rates are not reasonable, PSNH's decision to shun every single method for determining the reasonableness of long-term pricing was not prudent.

Lastly, the Commission should not approve the wood price adjustment clause of the PPA. The testimony demonstrated that Laidlaw is able to manage its own fuel risk and does not require a wood price adjustment. Laidlaw will be a major player in what is claimed to be a prolific wood basket, and will be able to manage its costs through its wood procurement contracts and loans directed at bringing new local fuel providers into business. Because there is no connection between the cost of fuel at Schiller Station and the cost of wood fuel to be paid at the Laidlaw facility, there is little connection between the adjustment and its purpose of compensating Laidlaw for changes in its fuel costs. Moreover, cross examination of PSNH demonstrated that the price of wood fuel at the Laidlaw facility may go down as the price of wood fuel at Schiller Station rises, and that even without this, the conversion factor of the wood price adjustment results in additional profit to Laidlaw at ratepayer expense. Neither has PSNH demonstrated a need for this type of adjustment for a facility of Laidlaw's size or in its location in the North Country. PSNH and Laidlaw have simply passed another risk of private generation onto PSNH's captive ratepayers.

Although the Wood-Fired IPPs comments are directed at legal requirements, they are equally applicable to the public interest standards of cost-effectiveness and efficient and competitive procurement.

Respectfully submitted,

BRIDGEWATER POWER COMPANY, L.P.,
PINETREE POWER, INC.,
PINETREE POWER-TAMWORTH, INC.,
SPRINGFIELD POWER LLC,
DG WHITEFIELD, LLC d/b/a WHITEFIELD POWER & LIGHT COMPANY, and
INDECK ENERGY–ALEXANDRIA, LLC

By Their Attorneys,

BROWN, OLSON & GOULD, P.C.

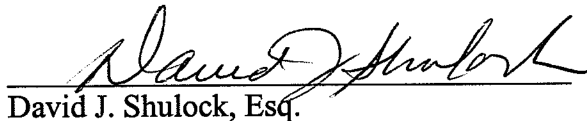
By:

David J. Shulock, Esq.
Robert A. Olson, Esq.
Peter W. Brown, Esq.
David K. Wiesner, Esq.
2 Delta Drive, Suite 301
Concord, NH 03301-7426
(603) 225-9716
dshulock@bowlaw.com
rolson@bowlaw.com
pbrown@bowlaw.com
dwiesner@bowlaw.com

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the attached Closing Statement to be filed electronically and via U.S. Mail, first class to the Commission and electronically, or by U.S. Mail, first class, to the persons identified on the attached Service List in accordance with N.H. Admin. Code Rules PUC 203.11(a).

Date: February 14, 2011



David J. Shulock, Esq.