

STATE OF NEW HAMPSHIRE  
BEFORE THE  
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

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

**WOOD-FIRED IPPs  
OBJECTION TO MOTION  
FOR CONFIDENTIAL TREATMENT**

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 (collectively, the “Wood-Fired IPPs”) hereby object to the Motion for Confidential Treatment filed on October 19, 2010 by Laidlaw Berlin BioPower, LLC (“Laidlaw”). In support of this Objection, the Wood-Fired IPPs state as follows:

1. In its motion, Laidlaw argues that its financial “pro forma” constitutes “confidential, commercial and financial information that is highly sensitive and would not normally be disclosed to the public” under New Hampshire's Right to Know Law, RSA §91-A. Motion at 1. Additionally, however, Laidlaw seeks a protective order that would restrict access to its pro forma to Commission staff involved in this proceeding, the Commissioners, and the Office of Consumer Advocate (“OCA”). *Id.*

2. The Wood-Fired IPPs object to Laidlaw's request to deny parties access to discovery information, simply because that information may be shielded from Right to Know Law requests. If the Commission were to grant the protective order requested by Laidlaw, then the parties, their potential witnesses, and their counsel would never have the opportunity to analyze and confront information that would be reviewed and potentially relied upon by the Commission in rendering its public interest determination in this docket. That would be a denial

of due process, and Laidlaw has provided no legal argument or justification for limiting parties' access to this discoverable information.

3. Laidlaw's arguments focus on the balancing test set forth in court in *Lamay v. New Hampshire Public Utilities Commission*, 152, N.H. 106 (2005), for determining whether the general public may access private information warehoused in government file rooms. Nothing in RSA 91-A or the *Lamay* balancing test creates a privilege against discovery, and Laidlaw's motion references no law or principle that would authorize the Commission to deny the parties to this docket access to discovery. Contrary to the express requirements of N.H. Admin. Code Rules PUC 203.08(b), Laidlaw's motion does not "reference any specific statutory or common law authority favoring" the heightened level of confidentiality protection that Laidlaw seeks, nor does Laidlaw provide "a detailed statement of the harm that would result from disclosure" to the parties in this docket. The motion asserts only that "[a]nything more than the limited disclosure contemplated herein would likely cause substantial harm to LBB' s competitive position." The Commission's rules specifically contemplate the procedure to be followed when discovery materials are to be protected from distribution to the general public. N.H. Code Admin. Rules PUC 203.08(j) authorizes the Commission to "include in its protective order a directive that all parties receiving the material shall also treat it as confidential."

4. The Commission has not looked favorably on proposals to deny parties access to confidential information, maintaining that "whatever information we might reasonably rely upon in making a decision should be accessible to all Parties . . . and who have sought such information to present their case on the issues they have raised."<sup>1</sup> *North Atlantic Energy Corporation*, 87 NH PUC 396, 399 (2002), cited in *City of Nashua, Petition for Valuation*

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<sup>1</sup> The Wood-Fired IPPs' first data request to Laidlaw asked Laidlaw to provide the Wood-Fired IPPs with answers to data requests made by Commission Staff, OCA, and other parties. Additionally, the Wood-Fired IPPs have made specific data requests for pro formas and draft pro formas.

*Pursuant to RSA 38:9*, Order No. 24,495 (July 29, 2005). The Commission's reluctance to deny parties access to information that the Commission may rely upon reflects important due process considerations in litigation that simply do not arise under standards applicable to public Right to Know Law requests and that are not a consideration in the *Lamay* balancing test. Because Laidlaw's motion fails to provide any legal or factual basis for completely denying parties access to arguably confidential information, the Commission must deny Laidlaw's request for a protective order that prevents the parties to the proceeding from accessing discovery information provided to Commission staff, the OCA, and the Commissioners.

5. The Wood-Fired IPPs also object to Laidlaw's assertion under RSA 91-A:5, IV and the balancing test in *Lamay* that Laidlaw's pro forma is protected from disclosure to the public, generally. The public interest in the disclosure of Laidlaw's financial pro forma outweighs Laidlaw's limited privacy interest. Under the *Lamay* balancing test, the Commission must first determine whether Laidlaw has a privacy interest at stake that would be invaded by disclosure. *Lamay*, 150 NH at 109. The Wood-Fired IPPs do not contest that Laidlaw has a privacy interest in its pro forma. Second, the Commission must assess the public's interest in disclosure, that is, whether the document will "inform[] the citizenry about the activities of [the Commission]" by "provid[ing] the utmost information to the public about what [the Commission] is up to." *Id.* at 111. Here, the Commission will be evaluating Laidlaw's power purchase agreement with PSNH to determine whether that agreement is in the public interest. *See* Motion at 2. Laidlaw asserts, without any legal or logical support, that because the purpose of the proceeding is to evaluate the power purchase agreement, the public has no interest in Laidlaw's pro forma. Laidlaw's assertion, however, overlooks the relationship between its financial projections embodied in the pro forma, the terms of the power purchase agreement, the

cost of the power purchase agreement, the cost-effective realization of the purposes and goals of RSA 362-F, and whether this procurement is consistent with PSNH's most recent least cost resource plan.

6. For example, PSNH has asserted that the power purchase agreement insures ratepayers against over-market pricing through the operation of Article 7, which provides PSNH with a right of first refusal (exercisable whenever triggered) and a purchase option to buy the Facility (exercisable at the end of the 20-year term). *See Long (7/26/10)* at Attachment GL-1, 12 (unredacted). Over market costs are to be tracked in the "Cumulative Reduction" described in Article 6.1.3 and then credited against the fair market value of the Facility when the right of first refusal or purchase option are exercised, as described in Article 6.1.3. *See id.* at 11. Mr. Labrecque states in his unredacted testimony that "The Cumulative Reduction is a unique and important feature of this PPA that was essential to PSNH in order to protect customers from unknown future market energy prices." *Labrecque (7/26/10)* at 8. Because Laidlaw may sell the Facility at any time, the projected Facility revenues and expenses contained in the pro forma are highly relevant to the Commission's public interest review of PSNH's agreements with Laidlaw, and the public is entitled to know what will underlie the Commission's conclusions. What is the financial health of the Facility that PSNH proposes to use as insurance against paying Laidlaw energy prices that are above market? How will projected revenues and expenses translate into fair market value for the Facility if PSNH were to be required to consider exercising its right of first refusal early in the life of the agreement? How will the projected revenues and expenses of the Facility translate into tax assessment value for determining the tax benefits and hence the economic benefits (in part) for the City of Berlin? Will it be cost-effective for PSNH or a third party to operate this plant? Will anyone else purchase the Facility given its projected revenues

and expenses? What affect will this have on the value of the purchase option if the Facility were sold in the early years of its operation and PSNH could not purchase the Facility directly? The Commission's ability to address these questions requires review of the pro forma by the Commission and, hence, disclosure.

7. Additionally, the Wood-Fired IPPs assume, but cannot say because they have not yet seen or been able to conduct discovery on the pro forma, that the pro forma contains projections of both wood costs and revenues from electricity over the term of the power purchase agreement. Under the wood price adjustment clause contained in Article 6.1.2 of the power purchase agreement, projections of revenues from energy are a function of projections of increases and/or decreases in wood prices at Schiller Station Unit 5. It can only be assumed that the pro forma contains projections of wood prices that Laidlaw expects will prevail in the North Country over the term. The difference between projections, in addition to discovery obtained from PSNH regarding projected wood prices, should provide the Commission with some indication of the level of subsidy that ratepayers would be expected to provide to Laidlaw through the wood price adjustment clause. This information, presumably set forth in the pro forma, is particularly relevant to the issue PSNH has itself raised: how to protect ratepayers from “contributing to a higher profit margin for LLB.” Labrecque (7/26/10) at 4-5 (unredacted). Accordingly, the public's interest in the financial pro forma outweighs Laidlaw's privacy interest, and the Commission should therefore deny Laidlaw's motion for confidential treatment.

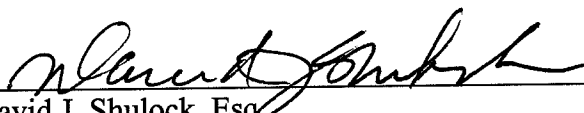
WHEREFORE, the Wood-Fired IPPs respectfully request that the Commission deny Laidlaw's Motion for Confidential Treatment or, in the alternative, grant the motion in part but require Laidlaw to provide unredacted copies of its financial pro forma to all parties in this proceeding.

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

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the attached Objection to Motion for Confidential Treatment to be filed in hand and electronically 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: October 26, 2010

  
David J. Shulock, Esq.

**SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED**

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**Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.**

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**FILING INSTRUCTIONS:**

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:
- DEBRA A HOWLAND  
EXEC DIRECTOR & SECRETARY  
NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.