

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Petition for Approval of PPA with Laidlaw Berlin BioPower, LLC

Docket No. DE 10-195

Objection
of
Public Service Company of New Hampshire
to
Wood-Fired IPPs' Motions to Compel

November 5, 2010

Pursuant to N.H. Code Admin. Rules Puc § 203.07(e), Public Service Company of New Hampshire ("PSNH" or the "Company") hereby objects to the Wood-Fired IPPs'¹ Motions to Compel dated October 29, 2010 ("M1") and November 3, 2010 ("M2"). In M1, the Wood-Fired IPPs have identified as questions in contention its data request numbers 1-1, 1-2, 2-2, 2-3, 2-4, 2-5, 2-6e, 2-6g, 2-6h, 2-9, 2-10, 2-11, 2-15, 2-16b, 2-16c, 2-19, 2-41, 2-42, 2-53, 2-54, and 2-71;² it also seeks to compel access to confidential information provided to Staff in response to Staff data request numbers 1-11, 1-15, 1-17, 1-18, and 1-32. In M2, the Wood-Fired IPPs have identified all or portions of data requests numbers 2-7, 2-12, 2-22, 2-25, 2-28, 2-39, 2-45, 2-46, 2-47, 2-48, 2-49, 2-50, 2-56, 2-58, 2-59, 2-62, 2-67, 2-72, 3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, 3-9, 3-13, 3-14, 4-1, 4-2, 4-3, 4-4, 4-5, 4-6, 4-7 as questions in contention.

The Wood-Fired IPPs, all competitors to PSNH and Laidlaw in the energy, REC, and biomass markets, primarily ask the Commission to provide them with confidential, commercial, financial information that neither PSNH, Laidlaw, nor any other participant in the competitive free market,

¹ The "Wood-Fired IPPs" include Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Springfield Power LLC, Whitefield Power & Light Company, and Indeck Energy -- Alexandria, LLC.

² The first digit refers to which set of data requests the question is in (i.e., set 1, set 2, set 3 or set 4) of the five sets propounded on PSNH by the Wood-Fired IPPs to date.

would provide to such competitors. PSNH presently purchases energy, capacity and RECs from some of the Wood-Fired IPPs.³ Many, if not all of the Wood-Fired IPPs seek to have PSNH voluntarily or involuntarily purchase energy, RECs, and perhaps other products from their own biomass-fired facilities.⁴ Providing the Wood-Fired IPPs with confidential information from PSNH when they have expressed their own desires to sell to PSNH would distort the full and fair competition principle of the restructuring law⁵ by giving unregulated competitive market participants access to PSNH's fuel, energy, capacity, REC, planning, analytical, and forecasting documents, while PSNH would have no access to identical information from them. PSNH must deal with these same entities as both potential suppliers of energy, capacity, and RECs, and potentially compete with them for fuel in the open marketplace. Such a situation would ultimately cause harm that would be borne by retail consumers in the form of higher costs.⁶

In support of this Objection, PSNH states as follows:

1. During the September 29, 2010 prehearing conference in this docket, the Wood-Fired IPPs stated repeatedly that they needed "full and fair discovery."⁷ The Wood-Fired IPPs' data requests have certainly been "full" - - to date they have propounded five sets of discovery requests on PSNH, including 123 numbered questions and approximately 200 individual subquestions. But, as noted by the questions that are the subject of this objection, many of the questions asked by the Wood-Fired IPPs are far from "fair." PSNH has diligently responded to appropriate questions in an expedited manner, per the procedural schedule adopted for this proceeding.⁸

³ See *Re Public Service Company of New Hampshire* (Petition for Approval of Power Purchase Agreements with Pinetree Power, Inc. and Pinetree Power-Tamworth, Inc.), Docket No. DE 07-125.

⁴ See Affidavit of Richard C. Labrecque attached hereto as Attachment 1.

⁵ RSA 374-F:3, VII

⁶ *Re Public Service Company of New Hampshire*, Order No. 25,061, December 31, 2009 (PSNH's internal power purchase guidance, including the 2008 memorandum regarding power purchases for 2010; revenue requirements for Newington Station; power supply and coal supply contracts, including the over-market calculation for the 2008 strips of energy purchased for 2010 and mark-to-market information on PSNH power purchases; specific information regarding planned maintenance outages for PSNH generating units; and price information regarding PSNH's purchases and sales of RECs provided confidential treatment, "...**given that confidentiality helps produce lower rates.**" (Emphasis added).)

⁷ Transcript, September 29, 2010, p. 36 and 37.

⁸ See Order No. 25,158.

2. But, it is plainly apparent that the Wood-Fired IPPs have gone beyond “full and fair” discovery, and instead have entered the realm of impairing the orderly and prompt conduct of the proceedings. Such conduct will harm the very public interest objectives that RSA 362-F seeks to fulfill. PSNH will diligently continue to participate in this proceeding, recognizing that the Company and its shareholders stand to neither gain nor lose a single penny from this particular proceeding.⁹ If this proceeding does get derailed, it is the people seeking jobs in Berlin; the loggers; the City of Berlin; PSNH’s energy service customers, and the state’s Renewable Portfolio Standard goals that will suffer. If PSNH’s confidential, commercial or financial information must be disgorged to its competitors, it is retail consumers of electricity who will suffer.¹⁰

3. The Commission’s decision regarding this Motion to Compel will go far beyond deciding an evidentiary dispute. The real issue is whether the Commission will allow competitors such as the Wood-Fired IPPs to hijack this proceeding for their own private interest - - not the public interest that is the statutory purpose of this proceeding.¹¹ The conduct of the competitive intervenors in this proceeding borders on the reprehensible. Their “due process” demands for PSNH’s and Laidlaw’s confidential information are beyond the pale of the “principles of reasonableness and common sense” that the Commission has stated control the discovery process.¹²

4. The Wood-Fired IPPs own and operate existing wood-fired plants that have a total generating capacity of approximately 94 MW.¹³ Over the course of time, PSNH has purchased the output from every one of the Wood-Fired IPPs. These purchases have occurred primarily as a result of rate orders issued by the Commission pursuant to the Public Utility Regulatory

⁹ Transcript, September 29, 2010, p. 13.

¹⁰ See fn. 6, *supra*.

¹¹ *Nautilus of Exeter v. Town of Exeter*, 139 N.H. 450 (1995) (increased competition alone is not typically deemed to be a legal harm conferring standing on a party); *Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541, 545 (1979) (“[I]njury resulting from competition is rarely classified as a legal harm but rather is deemed a natural risk in our free enterprise economy.”)

¹² *City of Nashua*, Docket No. DW 04-048, Order No. 24,654 (August 7, 2006), *slip op*, at 3.

¹³ ISO-NE “2010-2019 Forecast Report of Capacity, Energy, Loads, and Transmission,” revised as of May 18, 2010.

Policies Act of 1978 (“PURPA”).¹⁴ Although those PURPA-mandated purchases were priced at PSNH’s forecast long-term avoided cost rate, retail customers ultimately were required to pay approximately \$2 Billion above the market price for the products received.¹⁵ Some of the Wood-Fired IPPs continue to sell their output to PSNH today, and some (Pinetree Power, Inc. and Pinetree Power-Tamworth, Inc.) have recently attempted to use external pressure to seek additional near-term PPAs with PSNH.¹⁶

5. On October 13, 2010, the Wood-Fired IPPs issued their first set of data requests on PSNH. That set included 2 questions. Set 2 was issued on October 18, 2010, and consisted of 72 numbered questions, and over 120 individual subquestions. Set 3 was issued on October 22, 2010, consisting of 14 numbered questions and 26 individual subquestions. Set 4 was issued on October 25, 2010, consisting of 7 numbered questions. And, finally (as of the date of this objection), set 5 was issued on November 1, 2010, consisting of 28 numbered questions and 40 individual subquestions.

6. PSNH provided timely responses or objections to the Wood-Fired IPPs’ questions pursuant to the expedited procedural schedule adopted for this proceeding by the Commission in Order No. 25,158.

7. The Wood-Fired IPPs identified responses to eighteen of their numbered questions as disputed in M1 and an additional 36 questions in M2. They also seek to compel the release of

¹⁴ 16 U.S.C. § 824a-3(m).

¹⁵ See e.g. *Public Service Company of New Hampshire*, 91 NH PUC 431, 449 (2006). (Discussing the Pinetree Power Tamworth, Inc. (Pinetree) and Bridgewater Power Company LP (Bridgewater) PURPA rate orders, the Commission noted, “we are mindful of the fact that over the course of the long-term rates at issue PSNH’s customers have paid significantly more to Pinetree and Bridgewater than they would have paid had PSNH been acquiring the power through various other means over the years. In this sense, customers have paid too much for the power, as the result of the Commission’s approval, in 1984, of what turned out to be over projections of PSNH’s long-term avoided costs. . . It is worth noting that a key objective of PURPA as enacted in 1978 was to encourage the development of alternative sources of electricity by replacing investor risk with certainty and opening the power generation market to independent power producers. This case illustrates both the success of that policy strategy, as evinced by the development and subsequent operation of Pinetree and Bridgewater for nearly two decades, and the significant cost of that policy strategy, as implemented in New Hampshire, in the form of retail rates that are higher than they otherwise would have been.”)

¹⁶ See Affidavit of Richard C. Labrecque attached hereto as Attachment 1.

certain confidential material provided by PSNH in response to data requests asked by Commission Staff. They appended to their Motions copies of PSNH's responses to most of these questions.¹⁷

8. The Wood-Fired IPPs' Motions in great part address issues regarding the handling of information for which PSNH has a reasonable basis to seek confidential treatment. Their question 1-1 requested copies of responses to all data requests submitted to PSNH in this proceeding by any other party, Commission Staff, or the OCA. Question 1-2 requested copies of the redacted information that is the subject of PSNH's "Motion for Confidential Treatment Pursuant to RSA Chapter 91-A and N.H. Code Admin. Rules Puc § 203.08" dated July 26, 2010 and PSNH's Motion for Rehearing dated October 22, 2010. The Wood-Fired IPPs also complain in M1 that PSNH withheld information provided to Staff in response to Staff questions 1-11, 1-15, 1-17, 1-18, and 1-32 for which PSNH claimed it has a good faith basis for seeking confidential treatment and for which it intends to submit a motion for confidential treatment pursuant to Rule 203.08(d). Similarly, they complain in M2 that PSNH's responses to their question numbers 2-7b, 2-7c, 2-7i, 2-7l, 2-12, 2-39, 2-45, 2-56, 2-62, 2-67, and 2-72b "merely cross-referenced its [PSNH's] responses provided to the Commission staff, despite the fact that these responses to staff assert claims for confidential treatment and the allegedly confidential material has not been provided to the Wood-Fired IPPs or other intervenors."¹⁸

9. As required by Rule Puc 203.09(d), PSNH routinely serves each party to a proceeding with every response to data requests answered by the Company. However, to the extent that certain information is the subject of a protective order issued by the Commission, such information will be handled in accordance with the terms of the protective order. If confidential materials are provided in response to questions posed by Commission Staff, Rule Puc 203.08 provides that such information may be provided to Staff on an interim confidential basis, pending the filing of a motion for confidential treatment. Rule Puc 203.08(d) provides:

¹⁷ Copies of PSNH's responses to questions 2-16 were not appended M1. In addition, copies of PSNH's responses to questions 2-1 and 2-8 were appended to M1, but were not in any way addressed in that Motion. Similarly copies of PSNH's responses to questions 3-10 and 3-11 were appended to M2, but were not in any way addressed in that Motion.

¹⁸ M2 at para. 26.

(d) In lieu of immediately filing a motion for confidential treatment, a party providing a document to the commission staff in discovery that the party wishes to remain confidential shall accompany the submission with a written statement that:

(1) The party submitting such documents has a good faith basis for seeking confidential treatment of the documents pursuant to this rule; and

(2) Such party intends to submit a motion for confidential treatment regarding such documents at or before the commencement of the hearing in such proceedings.

10. As noted earlier, PSNH has a good faith basis to believe that the disputed information requested by the Wood-Fired IPPs in their question number 1-1 that was provided to Commission Staff in response to Staff questions 1-11, 1-15, 1-17, 1-18, and 1-32 is entitled to confidential treatment. The information not provided to the Wood-Fired IPPs by PSNH was provided to Staff pursuant to the procedure set forth in Rule Puc 203.08 (d) and (e). In response to each of the enumerated question asked by Staff that required the provision of confidential materials, PSNH precisely followed the procedure set forth in Rule Puc 203.08(d) by noting in each response:

Pursuant to Rule Puc 203.08(d), PSNH has a good faith basis for seeking confidential treatment of the attachments to this response, and, intends to submit a motion for confidential treatment regarding such documents at or before the commencement of the hearing in this proceeding.

11. When the Rule Puc 203.08(d) procedure is utilized to respond to Staff's questions, Rule Puc 203.08(e) protects such confidential information by requiring that the information "shall be treated as confidential, provided that the party submitting the documents thereafter files a motion for confidential treatment at or prior to the commencement of the hearing in the proceeding."

12. Pursuant to Rule Puc 203.08 (h), if the Commission ultimately determines that the information in question is indeed subject to confidential treatment, PSNH will comply with the conditions the Commission determines are necessary to preserve such confidentiality. If, on the other hand, pursuant to Rule Puc 203.08 (i) the Commission determines that any of the information is not to be treated as confidential, PSNH shall then provide such information as necessary. Therefore, to the extent the Wood-Fired IPPs seek to compel the release of information protected by Rule Puc 203.08(e), their Motion is premature and should therefore be denied.

13. In their first Motion, the Wood-Fired IPPs cite to the Commission's decision in *North Atlantic Energy Corporation*, 87 NH PUC 396, 399 (2002) for the proposition that confidential information in a proceeding should be made available to all parties.¹⁹ Their reliance on that decision is misplaced. Rather, the instant fact situation is better compared to the one, and more recently addressed by, the Commission's decision in *Re Kearsarge Telephone Company*, 92 NH PUC 441 (2007). In *Kearsarge*, the Commission was faced with a nearly identical situation as in this docket. segTEL, Inc., a competitor of petitioner Kearsarge Telephone Co., was granted intervenor status in a Commission adjudicative proceeding. Kearsarge, in response to certain data requests, provided what it deemed to be confidential, competitively sensitive information to Commission Staff, but not to segTEL. segTEL filed a Motion to Compel, asking the Commission to order Kearsarge to provide it with the competitively sensitive data request responses. segTEL complained that it could not participate fully in the proceedings without the information in question. segTEL also cited to the Commission's decision in *North Atlantic Energy Corp.* and similarly invoked its right to due process. The Commission denied the Motion to Compel, distinguishing the *Kearsarge* situation from that of *North Atlantic Energy Corporation*. The Commission stated:

In the North Atlantic Energy Corporation case relied upon by segTEL, the Commission agreed with a citizens' advocacy group, the Campaign for Ratepayers' Rights (CRR), that it was entitled to confidential information of the asset sales manager and auction advisor that assisted the Commission with overseeing the sale of a majority interest in the Seabrook nuclear power plant... .

The situation here differs from the CRR situation in several key respects. First, CRR was in no sense a commercial competitor of any Seabrook owner or anyone with a pecuniary interest in the outcome of the auction. Second, the purpose of CRR's participation was to vindicate the interests of New Hampshire electric consumers who, in the view of CRR, had been ill-served by Seabrook's owners since the facility was first proposed. Third, CRR was apparently content to limit access to its counsel, rather than insisting that others with technical expertise needed to be involved in the review. Finally, segTEL's role in the instant case is not analogous to that of CRR in the Seabrook sale; here, the Office of Consumer Advocate appears as the statutorily authorized advocate for residential customer interests.

92 NH PUC at 443.

¹⁹ Motion to Compel, p. 4.

14. As in the *Kearsarge* case, in the instant proceeding PSNH provided competitively sensitive information to Commission Staff, but withheld that competitively sensitive information from commercial competitor-intervenors. As in *Kearsarge*, the two Motions to Compel (M1 and M2) were filed by commercial competitors of both PSNH and Laidlaw -- the Wood-Fired IPPs (Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Springfield Power LLC, Whitefield Power & Light Company, and Indeck Energy -- Alexandria, LLC).²⁰ As in *Kearsarge*, none of these competitor-intervenors are “citizens’ advocacy groups” -- they are all subsidiaries of large for-profit, commercial competitive entities.²¹ As in *Kearsarge*, the Office of Consumer Advocate is participating in this proceeding, and has been provided with the relevant information pursuant to a confidentiality agreement. The Commission should follow its result in *Kearsarge*, and deny these competitors’ attempts to access competitively sensitive information.

15. The next complaint in the Wood-Fired IPPs’ M1 is that PSNH objected to the provision of documents that were part of the negotiation process or that led up to the execution of the final PPA submitted to the Commission for approval. For example, Wood-Fired IPPs’ question 2-2 included a request for “a complete and detailed description of any and all specific price points in the negotiations and the basis for the changes in the proposed prices during the negotiations.” Question 2-3 requested PSNH to “provide all documents PSNH examined in evaluating or determining to choose to negotiate and execute an option agreement with PJPD Holdings, LLC.” Question 2-5 seeks “all drafts of the PPA.” Question 2-6 seeks “Executed and or draft term sheets...” and “Any drafts of or the final to be executed version of the PPA.” Question 2-53 asks PSNH to “provide a complete and detailed description of any and all specific price points in the negotiations and the basis for the changes in the proposed prices during the negotiations.” Question 2-54 requested “all materials exchanged between PSNH and Laidlaw in relation to the negotiation process.”

²⁰ A similar Motion to Compel was filed by Concord Steam Corporation, another competitor-intervenor in this proceeding.

²¹ Bridgewater Power Co. is a partnership among PSEG Global LLC (40%), Harbert International, Inc. (40%) and other limited partners. Pinetree Power, Inc. and Pinetree Power-Tamworth, Inc. are owned by GDF Suez. Whitefield Power & Light Company is owned by Marubeni Corporation of Japan. Indeck Energy -- Alexandria, LLC is owned by Indeck Energy Services, Inc. Every one of these owning entities individually operate more generating capacity than that owned by PSNH.

16. In response to each such question requesting negotiation documents and similar materials, PSNH stated (or referred back to) this objection:

PSNH objects to this question as the documents requested would not provide or lead to relevant or admissible evidence, because the matter before the Commission relates to the actual agreement reached between PSNH and Laidlaw as opposed to the negotiations that preceded it.

This question asks for negotiation documents. The Commission has had several recent opportunities to rule upon similar requests for negotiation documents. On each occasion, the Commission has rejected such requests.

In *Public Service Co. of New Hampshire*, 89 NH PUC 226 (2004), the Commission refused to compel the production of documents related to negotiations between an electric utility and the contractor it selected to build a wood yard (in connection with plans to convert a coal-fired boiler to one capable of burning wood). The Commission ruled that, as to such confidential and competitively sensitive negotiations, and "[i]n contrast to the results of any such negotiations, we can conceive of no circumstances in which we would deem the information [to be] admissible."

Similarly, in *City of Nashua*, Order No. 24,654 (August 7, 2006), *reh'g denied*, Order No. 24,671 (Sept. 22, 2006), the Commission refused to compel the City of Nashua to produce information concerning negotiations leading up to an agreement with an outside contractor for the operation of the water utility system the City is seeking to municipalize pursuant to RSA 38. In that decision, the Commission noted that the standard for allowing discovery in Commission proceedings is a liberal one but is still subject to "principles of reasonableness and common sense." Order No. 24,654, slip op. at 3. The Commission observed that, "the facts that drive the Commission's ultimate decision relate to the costs themselves, as fixed by the contracts in question, regardless of how the contracting parties may have regarded them during contract negotiations and regardless of whether the assumptions that drove such negotiations are at variance with public statements." *Id.* at 4.

In *Verizon New England Inc.*, Order on Motions to Compel Discovery Submitted by the Office of Consumer Advocate, Order No. 74,767, June 22, 2007, the Commission noted it is an established principle that the Commission will not compel the discovery of information simply to shed light on the thinking of parties that enter into contracts subject to our review. The rule applied in these situations is that parties are entitled to obtain information in discovery if the information is "relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence." Order No. 24,654 at 3. But, because the matter before the Commission relates to the actual agreement of the joint petitioners as opposed to the negotiations that preceded it, "[w]e do not perceive circumstances

in which information about the negotiations . . . would become part of the record in this proceeding." *Id.*

17. The Commission's cited rulings regarding requests to obtain negotiation documents and similar materials as part of the discovery process are clear and unambiguous. The Wood-Fired IPPs' motions to compel the release of such information in light of these precedents is demonstrative of their misuse of the discovery process. The Commission should follow its "established principle that the Commission will not compel the discovery of information simply to shed light on the thinking of parties that enter into contracts subject to our review"²² and deny the Motions to Compel.

18. The Wood-Fired IPPs next complain that PSNH objected to certain questions because the information being sought was deemed to be outside the scope of this proceeding.²³ Questions 2-9, 2-15, 2-19 and 2-71 fall into this category.

a. Question 2-9 asked PSNH to "provide the name and address of all proposed biomass suppliers to the Facility and identify any that are known to also be suppliers to Schiller Station Unit 5."²⁴

b. Question 2-15 requested information regarding whether PSNH's Schiller Station Unit 5 biomass participated in the Biomass Crop Assistance Program.²⁵

c. Question 2-19 requested "all documents evaluations, testimonies, reports, evaluations and analyses prepared by and on behalf of PSNH or its affiliates or in their possession regarding 'customer migration' or the loss of demand for end-use sales in New Hampshire by PSNH and the amount and timing of any subsequent return of or increases in said demand for all years comprising the term of the PPA."²⁶

²² *Verizon New England Inc., Id.*

²³ Recall that during the prehearing conference in this docket, PSNH requested the Commission to provide some boundaries regarding the scope of this proceeding. Transcript, September 29, 2010, pp. 111-113. The Commission noted, "we'll have to wait and see what the discovery looks like before we can formulate a response on some of those issues." It appears that day of reckoning has arrived.

²⁴ PSNH responded: "PSNH objects to this question as it relates to a matter that was considered by the Site Evaluation Committee and is outside the scope of this PUC proceeding. Notwithstanding this objection, PSNH states: PSNH does not have in its possession any materials related to Laidlaw's biomass fuel suppliers."

²⁵ PSNH responded: "PSNH objects to this question as it is not relevant or likely to lead to the discovery of admissible evidence on the issues to be decided by the Commission in this proceeding. This docket is not an examination of Schiller 5 wood procurement practices."

²⁶ PSNH responded: "PSNH objects to this question on the basis that it is outside of the scope of this docket and more appropriately considered in Docket DE 10-160."

d. Question 2-71 requested all assumptions, workpapers, evaluations and analyses and sensitivities analyses pertaining to the forecast for Class I NH RECs.²⁷

19. PSNH stands by its objections to these questions. The materials requested have no relevance to the determination that the Commission is required to make under RSA 362-F:9. As noted in PSNH's objections to these questions, they seek information that is not a subject of this proceeding; they are overly broad and unduly burdensome; they are clearly intended to impair the orderly and prompt conduct of the proceedings; and the information sought would not provide or lead to relevant or admissible evidence. Therefore, the Wood-Fired IPPs' Motion to Compel responses to these questions should be denied.

20. The next issue raised by the Wood-Fired IPPs in M1 deals with their requests in questions 2-41 and 2-42 to:

Please calculate the difference that the over-market or under-market cost of the PPA will make on the yearly bill of each of the 20 largest customers in the GV general delivery class for each of the 20 years that the Laidlaw PPA is expected to be in effect, and provide the net present value of that over or under-market cost. Please account for the effects of customer migration. Please describe all assumptions made, and provide all work papers, projections, analyses, and documents relied upon. Please explain PSNH's choice of discount factor and reasons for rejecting others.²⁸

PSNH responded to these two questions as follows:

PSNH objects to this question as it requires speculation, is vague, is overly broad, and requests calculations that are hypothetical and have not and cannot be performed. PSNH cannot predict the over-market cost, the under-market cost, the underlying energy service rate, which customers will be the 20 largest in the [GV] [LG] class, the rates of customer migration, etc. for each of the 20 years of the Laidlaw PPA's effectiveness.

21. In M1, the Wood-Fired IPPs admit that to respond to these questions, "PSNH presumably would make a number of reasonable assumptions as to costs of the PPA, the underlying energy service rate, which customers will be the 20 largest in the applicable rate class, the rates of

²⁷ PSNH responded: "The questions are seeking 'all assumptions' and 'all work papers' related to the PSNH's sales forecast. PSNH's sales forecasting practices are not a subject of this proceeding. PSNH objects to these questions as they are overly broad and unduly burdensome, and clearly intended to impair the orderly and prompt conduct of the proceedings. PSNH further objects to this question as the documents requested would not provide or lead to relevant or admissible evidence."

²⁸ Question 2-42 is identical, except it requests information for PSNH's rate LG customers.

customer migration and other relevant factors for each of the 20 years during which the PPA will be in effect.” These 20-year assumptions concerning the many variables that would need to be considered in producing such a long-range response would combine to create margins of error in the ultimate calculations that render any such exercise meaningless.

22. The discovery process is not intended to require parties to waste time and resources on such exercises in futility. The mere fact that the Wood-Fired IPPs are even pursuing these two questions in their Motion to Compel can only lead to the conclusion that they are intentionally seeking to impair the orderly and prompt conduct of the proceedings, contrary to the dictates of RSA 541-A:32. As such, the Commission should reconsider whether the grant of intervenor status to the Wood-Fired IPPs should be revoked, or whether their continued intervenor status should be conditioned pursuant to the authority contained in RSA 541-A:32,III.

23. The Wood-Fired IPPs next complain about PSNH’s response to question 2-6e, which asks “Whether Schiller Station Unit 5 biomass can comply with the proposed biomass eligibility requirements for efficiency and fuel harvesting practices as set forth in the draft proposed Massachusetts RPS Class I Regulations (225 CMR 14.00) released on or about September 17, 2010 prepared by the Massachusetts Department of Energy Resources.” PSNH objected to this question “as it is not relevant nor likely to lead to the discovery of admissible evidence on the issues to be decided by the Commission in this proceeding. The Laidlaw PPA was executed on June 8, 2008, more than two months prior to the ‘draft proposed’ Massachusetts regulation. Thus, they could not have been considered when the PPA was agreed to.” PSNH stands by its objection to this question.

24. The Wood-Fired IPPs next seek the Commission to compel PSNH to respond to question 2-11, which asks:

Is it PSNH's position that once the NHPUC approves the PPA, the NHPUC could not subsequently order a revision to the PPA inclusive of its pricing terms, or order the termination of the PPA? If so, please provide the reference to the PPA provisions that so provide and the citation to the authority of the NHPUC to issue such an approval under state law.

PSNH responded that it “objects to this question as it seeks a legal conclusion and not facts subject to discovery.” PSNH interposed similar objections to Wood-Fired IPP questions 3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, 3-13, and 3-14a, which are included in the questions disputed in M2.

25. As the New Hampshire Supreme Court has noted on many occasions, the interpretation of a contract is a question of law.²⁹ The Court treats the interpretation of a contract in the same manner as it interprets statutes.³⁰ This question not only would require PSNH to provide a legal conclusion regarding what the Court deems to be “a question of law,” but also would require PSNH to delve into the restrictions of the federal PURPA law³¹ the FERC’s implementing regulations,³² and judicial decisions.³³ The Commission is no doubt aware that these very same Wood-Fired IPPs have challenged the ability of the Commission to cast asunder any such PURPA-related enforceable obligation.³⁴ It is unreasonable for them to now insist that PSNH provide what amounts to legal responses to such questions.

26. The next question for which the Wood-Fired IPPs demand a response is particularly abhorrent. Question 2-10 reads:

Please provide a list of all contracts, or other form of arrangement entered into by PSNH for a term in excess of 3 years for the purchase of energy, capacity (whether or not such energy or capacity is renewable generation) or RECs or any combination of the foregoing. In said list please identify the following for each such contract or arrangement:

²⁹ See e.g., *One Beacon Ins., LLC v. M & M Pizza, Inc.*, ____ NH ____, (August 19, 2010) (“Because the interpretation of a contract is a question of law, we review the trial court’s interpretation *de novo*. In the Matter of *Taber-McCarthy & McCarthy*, 160 N.H. 112, 115, 993 A.2d 240 (2010).”); *Czumak v. New Hampshire Div. of Developmental Services*, 155 N.H. 368, 373 (2007) (“The interpretation of a contract is a question of law, which we review *de novo*. *Barclay Square Condo. Owners’ Assoc. v. Grenier*, 153 N.H. 514, 517 (2006)”).

³⁰ See e.g., *Coco v. Jaskunas*, 159 N.H. 515, 518 (2009) (“‘The interpretation of a statute is a question of law, which we review *de novo*.’ In the Matter of *Liquidation of Home Ins. Co.*, 154 N.H. 472, 479 (2006)”).

³¹ 16 U.S.C. § 824a-3(m).

³² 18 C.F.R. § 292.314.

³³ See, e.g., *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of the State of New Jersey*, 44 F.3d 1178 (3rd Cir. 1995); *Re Connecticut Valley Electric Company*, 86 NH PUC 67 (2001).

³⁴ *Public Service Company of New Hampshire*, 91 NH PUC 431, 445 (2006).

- a. The name of the contracting counterparty.
- b. The term of the contract or arrangement.
- c. The “products” and amount of products to be sold under the contract or arrangement and whether or not said products are renewable generation under any New England renewable portfolio standard law, and if so, identify which one or ones.
- d. The pricing terms for each product of each contract or arrangement.
- e. Provide a copy of each such contract or other form of arrangement.

This question asks PSNH to provide a listing of every contract the Company has entered into for a term of three years or longer for the purchase of energy, capacity RECs, or any combination thereof. Not only do the Wood-Fired IPPs demand a listing of these contracts, they also seek the pricing terms of each such contract, as well as copies of the contracts themselves.

27. PSNH responded to this question as follows:

PSNH objects to this question as it is overly broad and unduly burdensome, and clearly intended to impair the orderly and prompt conduct of the proceedings. PSNH further objects to this question as the documents requested would not provide or lead to relevant or admissible evidence. Moreover, most if not all of any responsive documents would be confidential and the subject of protective orders issued by the Commission.

28. PSNH has been in existence as a New Hampshire public utility since August 16, 1926. Over the past 84 years, PSNH has undoubtedly entered into hundreds of contracts for the purchase of energy and/or capacity that last for three years or more. As the question also seeks “arrangements” as well as contracts, the listing demanded would include every PURPA rate order or other enforceable obligation that PSNH has entered into. There can be no dispute that this question is overly broad and unduly burdensome, and clearly intended to impair the orderly and prompt conduct of the proceedings.

29. Moreover, even if limited in time, the information that the Wood-Fired IPPs seek in this question has no relevance to the subject of this proceeding. The contracts or arrangements in question are considered confidential, commercial information by PSNH, and, as discussed earlier, should not be provided to competitors such as the Wood-Fired IPPs - - especially as they

continue in real-time to seek contracts with PSNH to sell their own energy, capacity and REC outputs. The Wood-Fired IPPs' Motion to Compel should be denied.

30. The Wood-Fired IPPs' final complaint in M1 regards their question 2-16b. This question asks whether PSNH would hypothetically accept a term in the PPA that does not exist. PSNH objected to this question, stating that "it is hypothetical and speculative in nature and not likely to lead to the discovery of evidence admissible in this proceeding, which is to review the PPA as submitted."

31. The PPA is a bilateral agreement entered into by and between PSNH and Laidlaw Berlin BioPower, LLC. It is that agreement that is before the Commission for approval. Playing a game of "would you accept this limitation" or "would you accept a different price" or "would it be acceptable to change the term" could take on infinite forms, not one of which has any relevance to the subject of this proceeding. As noted in *Verizon New England Inc., Id.*, "the matter before the Commission relates to the actual agreement" – no more; no less. The Wood-Fired IPPs' question 2-16b is absurd, and their motion to compel a response to it should be denied.

33. In M2, the Wood-Fired IPPs continue their litany of complaints. They begin by demanding a different answer to their question 2-22, wherein they asked whether one centralized generating facility is more or less beneficial than smaller, geographically disbursed facilities. PSNH responded by stating, "The question is hypothetical in nature and requires speculation concerning the nature, ownership and operation of unknown smaller renewable generators, located in unspecified areas of the state. Therefore, PSNH cannot respond." The Wood-Fired IPPs are dissatisfied with this response and would like a different answer. If they disagree with PSNH's response, their remedy is not through the submission of a Motion to Compel, but to submit their own testimony regarding this issue, which they describe as one of "great relevance to the Commission's evaluation of PSNH's petition..."³⁵ Therefore, their Motion to Compel should be denied.

³⁵ M2 at para.14.

34. The Wood-Fired IPPs next demand a different response to their question 2-25. In that question, they asked whether PSNH had conducted certain referenced economic modeling, studies or analyses. PSNH replied, “No.” The Wood-Fired IPPs are not satisfied that such modeling, studies, or analyses were not conducted, and demand an answer to why they were not done. Again, the Wood-Fired IPPs are dissatisfied with this response and would like a different answer. If they disagree with this response, their remedy is not through the submission of a Motion to Compel, but to submit their own testimony regarding this issue, which they describe as one of “great relevance to the Commission's evaluation of PSNH's petition.... Therefore, their Motion to Compel should be denied.

35. The next question in dispute in M2 is question 2-28b. In that question, the Wood-Fired IPPs reference Mr. Large’s prefiled testimony and ask, “Is it PSNH’s position that its administrative efficiency outweighs potential savings to ratepayers from requiring potential developers of large blocks of energy supply to compete in a request for proposals process?” Mr. Large responded by stating, “Since PSNH did not conduct a request for proposal process, PSNH has no information that is responsive to the request.” Once again, the Wood-Fired IPPs are dissatisfied with this response and would like a different answer. If they disagree with this response, their remedy is not through the submission of a Motion to Compel, but to submit their own testimony regarding this issue, which they describe as one of “great relevance to the Commission's evaluation of PSNH's petition...”. Moreover, the issue of the efficacy of one method of procuring power over another is the subject of a different, ongoing Commission proceeding and should be addressed there.³⁶ Therefore, their Motion to Compel should be denied.

36. Next, the Wood-Fired IPPs complain about the response to their question 2-46. In that question, they ask for a listing of RECs by number and class that PSNH is entitled to under existing agreements. PSNH responded by referring back to an earlier response to Wood-Fired IPP question 2-10, which sought similar information. PSNH objected to the provision of that information, as discussed earlier in the Objection beginning in paragraph 26.

³⁶ Docekt No. DE 10-160.

37. M2's next item of dispute relates to question 2-47, wherein the Wood-Fired IPPs again query whether PSNH considered conducting a request for proposal process in lieu of the bilateral negotiation process to obtain RECs. PSNH again responded, "No," and also referred back to the response in question 2-28, wherein PSNH stated, "It is PSNH's position that, in this specific case, direct negotiation produced a superior PPA to present to the NH PUC than other alternatives. The negotiation of the real property purchase option agreement which would allow a means to mitigate any over-market energy payments over the life of the PPA was the result of the direct negotiation process." Once again, the Wood-Fired IPPs are dissatisfied with this response and would like a different answer. If they disagree with this response, their remedy is not through the submission of a Motion to Compel, but to submit their own testimony regarding this issue, which they describe as one of "great relevance to the Commission's evaluation of PSNH's petition...". Moreover, the issue of the efficacy of one method of procuring power over another is the subject of a different, ongoing Commission proceeding and should be addressed there.³⁷ Therefore, their Motion to Compel should be denied.

38. The next questions disputed are 2-48, 2-49 and 2-50. In these questions, the Wood-Fired IPPs ask what measures, if any, PSNH took to ensure that the PPA prices were the lowest and the 20-year contract term was the shortest necessary for the Facility to receive financing and operate and maintain the Facility with a reasonable return, and to ensure that PSNH was not committing to purchase more of Laidlaw's output than necessary for the Facility to receive financing. PSNH provided the identical response to each of these three data requests: "The negotiation process between the parties resulted in an interrelated set of terms and conditions that reflect the best efforts of each party to provide for their [sic]³⁸ unique interests." The Wood-Fired IPPs complain that PSNH's reliance upon the bilateral negotiation process was inadequate, and that a different answer is warranted. Once again, the Wood-Fired IPPs are dissatisfied with this response and would like a different answer. If they disagree with this response, their remedy is not through the submission of a Motion to Compel, but to submit their own testimony regarding this issue, which they describe as one of "great relevance to the Commission's evaluation of

³⁷ Docket No. DE 10-160.

³⁸ PSNH admits to a grammatical error. The word "their" in this response should have been "its."

PSNH's petition...". Therefore, their Motion to Compel should be denied.

39. The Wood-Fired IPPs' next complaint is in regard to their question 2-58. That question asks PSNH to "identify and explain each factor PSNH examined or otherwise took into account in concluding that Section 6.1.3 of the PPA and the cumulative reduction noted therein will protect PSNH ratepayers from unknown future market energy prices over the term of the PPA." PSNH responded, "PSNH considers the Cumulative Reduction, the Right of First Refusal, and the Purchase Option Agreement to be three of the unique PPA features that enabled the successful negotiation of the PPA." The function of the Cumulative Reduction factor is also described in detail in the prefiled testimony of Mr. Labrecque. Once again, the Wood-Fired IPPs are dissatisfied with this response and would like a different answer. If they disagree with this response, their remedy is not through the submission of a Motion to Compel, but to submit their own testimony regarding this issue, which they describe as one of "great relevance to the Commission's evaluation of PSNH's petition...". Therefore, their Motion to Compel should be denied.

40. M2's next item in dispute is question 2-59. In that question the Wood-Fired IPPs asked PSNH to "calculate or provide in \$/MWH, the amount of the \$/MWH energy price that will cover or equal the biomass fuel cost expense in each year of the term of the PPA. If PSNH has not performed such a calculation or does not otherwise have such data please explain why." PSNH responded, "PSNH has no unique data with which to perform the requested calculation. The requestor need only to assume a fuel price (in dollars per ton), estimate a fuel heat content to enable a \$/MBTU conversion, and assume a facility heat rate to convert the fuel cost into a \$/MWH equivalent." The Wood-Fired IPPs are more than able to perform the calculations that they requested. As noted earlier, the Wood-Fired IPPs operate 94 MW of wood-fired generating capacity, and each one of them is a subsidiary of large national or international companies. They certainly have equal ability to perform the desired calculation. In M2, the Wood-Fired IPPs imply that they are unable to perform these calculations without Facility-specific information such as "fuel heat content and heat rate of the Facility."³⁹ PSNH has already responded that it does not have such data ("PSNH has no unique data with which to perform the requested

³⁹ M2 at para. 22.

calculation.”) Therefore, the Motion to Compel should be denied.

41. The next question in dispute identified in M2 is Wood-Fired IPP question 2-72b. That question asks for “work papers, projections, analyses, and documents” of PSNH relating to other options PSNH had for procuring Class I RECs. In response, PSNH (erroneously) referred to its prior response to Staff Q-1-31. As correctly noted by the Wood-Fired IPPs, the proper reference should have been to the response to Staff Q-1-32. In the response to Staff Q-1-32, PSNH provided confidential analyses to Staff, in reliance upon the procedure set forth in Rule Puc 203.08, which was discussed in detail earlier in this Objection. Hence, the Wood-Fired IPPs’ Motion to Compel regarding this matter is premature, and should be denied.

42. Next comes the Wood-Fired IPPs’ complaint concerning the response to their question 3-9. This question asked, “Referencing page 4 of Mr. Long’s testimony dated July 26, 2010, please describe the factors that PSNH evaluated in reaching its conclusion that the PPA meets the State’s renewable resource, environmental, and climate change goals in a cost competitive manner from a customer’s viewpoint. For each of the factors evaluated, please state and explain PSNH’s conclusion and provide all documents related thereto.” PSNH responded that, “All of the factors are described in the testimony filed in this proceeding.” The Wood-Fired IPPs are dissatisfied with this response. They complain that PSNH must specify where in the prefiled testimony the information is located; then they further complain that the information is not in that prefiled testimony; and they further request documentation of the response. PSNH deems its response to this question to be sufficient. If the Wood-Fired IPPs disagree with PSNH’s conclusion regarding the compliance of the PPA with the public interest standard contained in RSA 362-F:9, they may file testimony stating and supporting their reasoning. Therefore, the Motion to Compel should be denied.

43. The Wood-Fired IPPs’ next dispute involves their question 4-7, wherein they ask for “the estimated percentage of PSNH’s Class I REC obligation that will be met each year with RECs purchases [*sic*] from Laidlaw during the term of the PPA.” PSNH responded by referring to its prior response to Staff Q-1-19, wherein it provided estimates of the “% of Class I Requirement met by Laidlaw” for the years 2011-2015. In a follow-up question, Staff Q-3-12, Commission

Staff queried why the information provided in Staff Q-1-19 ends in 2015. PSNH responded, “The table ended in 2015 to be consistent with PSNH's 2010 Least Cost Integrated Resource Plan filing 5 year time frame.” As with any forecast, the longer out in time one goes, the less reliable the forecast becomes. Any data provided beyond the five-year planning horizon contained in the referenced Least Cost Plan would have far greater margin for error. Therefore, the Motion to Compel should be denied.

44. The next question in dispute is question 3-6. In that question, the Wood-Fired IPPs asked PSNH to speculate on how the contract would be performed if an unspecified and unknown “future law” that might be enacted made generalized changes to the legal environment affecting the PPA’s subject matter. PSNH objected to such questions, noting, “PSNH objects to this question as it seeks a legal opinion, and requires speculation regarding unspecified future legislation. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.” Unless and until any particular law is enacted, it would be impossible to determine what impact, if any, such law may or may not have on the PPA. Moreover, it would be equally impossible to determine whether there are constitutional or federal preemption issues that must be considered along with such future, unspecified law. Therefore, PSNH stands by its objections to this question.

45. Question 3-13 is the next item disputed by the Wood-Fired IPPs. In that question, they ask whether PSNH’s right of first refusal may be exercised to purchase the Facility in the event that there was a stock or membership interest sale of the companies owning the Facility. PSNH responded that it, “... objects to this question as it seeks a legal opinion, and requires speculation regarding an unspecified future transaction. The Commission's discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.” Without knowing the details of any such hypothetical “stock or membership interest sale,” it would be speculative of PSNH to determine whether or not the right of first refusal contained in the PPA is triggered. In M2, the Wood-Fired IPPs argue that a response to this question is “of great relevance” because such a transaction “could have a material and substantial effect on the ability of PSNH to use the right of first refusal mechanism to recover the ‘cumulative reduction’ amount based on any above-market costs incurred by PSNH during the

term of the PPA up to that time.”⁴⁰ The Wood-Fired IPPs’ argument is incorrect. As PSNH noted in the response to Staff Q-1-27, the Cumulative Reduction value would not be deducted from the Facility’s purchase price in the event that the right of first refusal was triggered and exercised.

46. The Wood-Fired IPPs also dispute the responses to question 3-14. In that question, they ask PSNH to provide information concerning unspecified future legislation regarding REC eligibility that might be enacted in various New England states. PSNH responded, “PSNH objects to this question as it seeks a legal opinion, and requires speculation regarding unspecified future legislation. The Commission’s discovery process is primarily an opportunity to develop factual issues rather than to query opposing counsel on the legal support for a position.” Once again, the Wood-Fired IPPs ask about hypothetical and unspecified future legislation that might be enacted in one or more New England states. In this speculative legislation, the categorization of large-scale hydro REC eligibility as Class I, II, III, IV, or perhaps a new REC classification in any or all of the identified New England states is unknown, as is the alternative compliance price, and how much of such REC classification must be included in an energy provider’s sale for each year. As noted earlier, the discovery process is not intended to require parties to waste time and resources on such exercises in futility. PSNH stands by its objection to this question.

47. The final item addressed in the Wood-Fired IPPs’ M2 relates to their question numbers 4-1, 4-2, 4-3, 4-4, 4-5, and 4-6. Each of these questions requests information that was redacted from PSNH’s Petition, and which is the subject of PSNH’s “Motion for Confidential Treatment Pursuant to RSA Chapter 91-A and N.H. Code Admin. Rules Puc § 203.08” dated July 26, 2010 and PSNH’s Motion for Rehearing dated October 22, 2010. The Commission should not rule on these questions until the Motion for Rehearing has been decided.

48. As noted throughout this Objection, the conduct of the competitor intervenors evidenced by their abusive behavior in the discovery process is undoubtedly aimed toward impairing the interests of justice and the orderly and prompt conduct of the proceedings. The Commission should *sua sponte* determine whether continued intervenor status is warranted for the competitor

⁴⁰ M2 at para. 38.

intervenors, including the Wood-Fired IPPs, or whether the imposition of conditions to such intervenor status are warranted pursuant to RSA 541-a:32,III.


WHEREFORE, PSNH objects to both of the Wood-Fired IPPs' Motions to Compel. The Wood-Fired IPPs are competitors of both PSNH and Laidlaw, and, under the *Re Kearsarge Telephone Company* rationale, should not receive confidential, commercial or financial information that would distort the competitive playing field. Their overly broad questions should not be allowed to impair the orderly and prompt conduct of this proceeding. As the Commission noted in *City of Nashua*, Order No. 24,654 (August 7, 2006), *reh'g denied*, Order No. 24,671 (Sept. 22, 2006), the standard for allowing discovery in Commission proceedings is a liberal one but is still subject to "principles of reasonableness and common sense." PSNH urges the Commission to follow those principles of reasonableness and common sense in this proceeding.

For the reasons expressed herein, PSNH respectfully requests that the Commission:

- A. deny the Wood-Fired IPPs' Motion to Compel;
- B. consider necessary and appropriate conditions upon the Wood-Fired IPPs' participation in the proceedings as permitted by RSA 541-A:32,III; and
- C. grant such other and further relief as justice may require.

Respectfully submitted this 5th day of November, 2010.

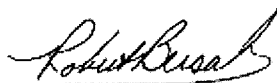
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2010, I served an electronic copy of this filing with each person identified on the Commission's service list for this docket pursuant to Rule Puc 203.02(a).



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Attachment 1

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Petition for Approval of PPA with Laidlaw Berlin BioPower, LLC

Docket No. DE 10-195

Affidavit of Richard C. Labrecque

I, Richard C. Labrecque, being first duly sworn and put upon oath, do hereby state:

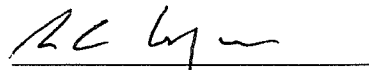
I am Richard C. Labrecque, Supplemental Energy Sources Manager for Public Service Company of New Hampshire ("PSNH").

On July 26, 2010, my prefiled testimony was submitted in the above-captioned proceeding to support the review and approval of a Power Purchase Agreement entered into by and between PSNH and Laidlaw Berlin BioPower, LLC. As stated in that prefiled testimony, my duties as Supplemental Energy Sources Manager include the administration of interconnection agreements and purchase contracts with non-utility generators.


Most all of the non-utility wood-fired generators who sought and were granted intervenor status in Docket No. DE 10-195 have sought, and some continue to seek, binding power purchase agreements with PSNH. The intervenors who have in the recent past sought such PPAs from PSNH include Clean Power Development, LLC, Concord Steam Corporation, Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Bridgewater Power Company, L.P and Indeck Energy-Alexandria, LLC.

Many of these intervenors continue at present to seek PPAs from PSNH. Some, such as Clean Power Development and Concord Steam Corporation, have participated in Complaint proceedings against PSNH in Docket No. DE 09-067. Others have recently contacted state agencies and elected officials to arrange meetings with PSNH regarding the negotiation of new PPAs. Indeed, PSNH has very recently participated in such a meeting with some of the Wood-Fired IPP intervenors, where they were represented by the same outside counsel that seeks access to PSNH's confidential business materials in this proceeding.

Based upon my experience as PSNH's Supplemental Energy Sources Manager, it is my opinion that providing PSNH's confidential, commercial or financial information to non-utility generators who are actively engaged in the competitive energy market would seriously harm PSNH's ability to obtain the best contracts for energy, RECs, and capacity, thereby resulting in increased costs to consumers.


Richard C. Labrecque

SUBSCRIBED AND SWORN TO before me, a Notary Public for the State of New Hampshire, this 5th day of November, 2010, by Richard C. Labrecque, an individual whose identity is personally known to me.


Notary Public

