

Before the New Hampshire Public Utilities Commission

DE 10-195

Petition for Approval of Power Purchase Agreement with
Laidlaw Berlin BioPower, LLC

**OFFICE OF CONSUMER ADVOCATE'S MOTION *IN LIMINE*
TO STRIKE PORTIONS OF CITY OF BERLIN'S REBUTTAL TESTIMONY**

NOW COMES the Office of the Consumer Advocate (OCA) and moves to strike the Testimony of George Sansoucy submitted on behalf of the City of Berlin, and in support thereof, states as follows:

1. On December 20, 2010, the City of Berlin filed 12 pages of the Direct Prefiled Testimony of George E. Sansoucy, P.E. ("Sansoucy Direct").¹ The stated purpose of the Sansoucy Direct Testimony was to "support the advocacy of the City of Berlin to urge the PUC to approve the PPA entered into between Public Service of New Hampshire and Laidlaw Berlin BioPower, LLC." See Sansoucy Direct Testimony at p. 2.
2. The December 20, 2010 is largely consistent with its stated purpose of "advocacy" and lacks any supporting analysis, schedules or other documentation.
3. The procedural schedule in this docket allowed for rebuttal testimony to be filed on January 18, 2011. On that day, seemingly in an effort to overcome the lack of analysis and the lack of discussion of several issues in its Direct Testimony, the City submitted 47 pages of testimony of Mr. Sansoucy ("Sansoucy Rebuttal"). The Sansoucy Rebuttal

¹ The December 17, 2010 Testimony was sent by email but not delivered to the Commission until Monday December 20, 2010. Under the Commission's rules, Puc 202.05, a document is "deemed to have been filed on the date the commission receives a complete executed paper filing with the required number of copies." The December 17, 2010 Sansoucy Testimony was not filed with the Commission until December 20, 2010.

states that it is submitted for two purposes.²

4. First, Mr. Sansoucy states: “[the] Purpose of my testimony is to support the City of Berlin’s position that the PPA between Laidlaw and Public Service Company of New Hampshire is in the public interest, should be approved, and represents a good deal.” Sansoucy Rebuttal at p. 2. Most of his January 18, 2011 testimony is for this purpose. This statement is an admission that a significant portion of his testimony is not for the purpose of rebuttal.
5. Second, Mr. Sansoucy states: “Also, the purpose of my testimony is to rebut Staff, OCA, Concord Steam, and the Wood Fired IPP’s testimony in this case that the project is not in the public interest, should not be approved, and is not a good deal.” (emphasis added) Sansoucy Rebuttal at p. 2. This statement shows that rebuttal is only the secondary purpose of the testimony.
6. Rebuttal testimony is not intended to allow a party to submit new testimony or support for its position that does not respond directly to prior testimony.
7. The Sansoucy Rebuttal includes new information which supplements the City’s case in chief and should have been provided to the Commission and the parties in the Sansoucy Direct Testimony, if at all. This new information is not properly provided to the Commission and the parties on rebuttal, as it raises new issues not raised in order to rebut issues raised in the testimony of Staff, the OCA or Concord Steam. This information includes:

- a. On p. 3, at line 18, Mr. Sansoucy is asked “Do you believe the siting of the plant in Berlin is appropriate, in the public interest and good for ratepayers?” That

² The testimony was not provided to parties electronically until 4:47 PM and, once again, not filed with the Commission until the following day, January 19, 2011. That same day, the testimony was re-submitted with two pages of errata to correct mistakes, along with two new attachments.

question is followed by “Have you provided information regarding siting already in this case?” and “Could you please provide the same testimony herein in order to bind the information into the record?” (emphasis added). Mr. Sansoucy then states “Yes, my original testimony, plus proofing is as follows,” and proceeds to provide revised direct testimony. He does so for eight pages, also raising new issues that are not proper rebuttal of raised in the testimony of other parties. This testimony must be struck as it is not rebuttal.

- b. On p. 12, Mr. Sansoucy is asked the question “The Staff’s testimony is silent on capacity. Do you believe that is appropriate?” followed by “Why?” It is not proper rebuttal to raise an issue that the witness believes is not addressed in another party’s testimony. Mr. Sansoucy then proceeds to provide new information related to capacity for five pages, as well as new exhibits. If Mr. Sansoucy wished to provide testimony on capacity, an issue raised in PSNH’s original filing, he should have done so in his direct testimony.
- c. Similarly, on p. 17 Mr. Sansoucy is asked the question “What areas in the energy pricing do you think the Commission should consider that Staff and OCA have not?” He goes on to address this issue for two pages. Again, proper rebuttal does include raising issues *not* raised by other parties. These issues should have been raised in direct testimony.
- d. On p. 27, Mr. Sansoucy begins a three page section that is comprised of quoted bullet points from a report prepared by a firm called “Energy Solutions.” The parties have not had the opportunity to review the report referred to by Mr. Sansoucy because the City is seeking confidential treatment of the materials and

has stated that it does not have permission to release it. This new information that is not Mr. Sansoucy's analysis, and which has not be subject to discovery or even reviewed by the parties, must be struck.

- e. Similarly, analysis from a firm called "Ventyx" appearing on pages 30-32 also has not been provided for similar reasons and therefore must also be struck.
 - f. On p. 32 Mr. Sansoucy is asked the question "What is your opinion of the REC prices in the contract proposed in the PPA?" Again, this is direct testimony that should have been provided in Mr. Sansoucy's direct testimony, as it based on the company's original filing.
 - g. Similarly, on p. 34 Mr. Sansoucy answers a question related to the cumulative reduction fund. This is also direct testimony that is not properly addressed in rebuttal.
 - h. On pages 34 and 35 Mr. Sansoucy discusses why PSNH should be able to purchase the full capacity of the plants, and goes on to opine on why PSNH should be allowed to purchase all of the RECs generated. Again, this is all more properly direct testimony and is simply not rebuttal.
8. In addition, several of the exhibits attached to the Sansoucy Rebuttal contain new direct evidence, and/or were developed to support the new direct testimony in the Sansoucy Rebuttal. Therefore, all but Exhibit 8, which provides a chart of natural gas price and volatility, must also be excluded because they do not constitute rebuttal. Finally, two new exhibits are presented in the "corrected" version of the Sansoucy Rebuttal that was filed on January 19, 2011. They also must be struck because they are a late attempt to supplement his rebuttal, and also constitute direct testimony.

9. The Commission should not allow the City's attempt to present its case through rebuttal.³ The Commission also should not consider this new evidence in determining whether the PPA as proposed meets the requirements of statutes including RSA 362-F, and results in just and reasonable rates for PSNH customers.
10. Because nearly all of the January 18, 2011 testimony is admitted to be primarily for the improper purpose to advocate "that the PPA between Laidlaw and Public Service Company of New Hampshire ... represents a good deal," it must be struck. It is unfair and contrary to the established schedule to allow a party to provide no analysis in its Direct Testimony and later submit its entire case as rebuttal, without any discovery.
11. In a similar situation, the Commission granted a Motion to Strike, finding that new analysis provided in rebuttal "would have been more properly filed as supplemental direct testimony and goes beyond what would normally be considered 'rebuttal' testimony."⁴ As the Commission noted in that Order, "'rebuttal evidence' is defined as 'evidence given to explain, repel, counteract or disprove facts given in evidence by the adverse party.'"⁵
12. As a result, the Commission should strike the following pages of the Sansoucy Rebuttal, as well as Attachments 1-7 and 9-10:
- a. Page 3 lines 4-9 and 11-15 which refer to improper exhibits;
 - b. Page 3 lines 18 through page 12 line 5 which seeks to revise and supplement his direct testimony;
 - c. Page 12 line 7 through page 17 line 48 related to capacity;
 - d. Page 17 line 21 through 20 line 2 related to issues that Mr. Sansoucy states that

³ Re Public Service Co. of New Hampshire, 71 N.H. P.U.C. 547, 549 (1986).

⁴ Order No. 25,103 in DT 07-027 (May 14, 2010) at p. 18.

⁵ Id. at p. 5, footnote 3 (citation omitted).

the OCA and Staff did not raise;

- e. Page 27 line 8 through page 32 line 8 related to studies on natural gas and electric markets;
 - f. Page 32 line 10 through page 34 line 4 related to RECs;
 - g. Page 34 line 6 through page 34 line 18 related to the cumulative reduction fund;
 - h. Page 34 line 20 through page 35 line 12 related to the output of the plant; and
 - i. Page 35 line 14 through p. 36 line 16 related to RECs.
13. Although the City may claim that the Sansoucy Rebuttal is proper rebuttal, creating new evidence to support the City's case in chief is simply not proper rebuttal. New analysis and new testimony are improperly introduced on rebuttal.
14. There may be other areas of Mr. Sansoucy's testimony that include impermissible new evidence, but due to time constraints the OCA has focused on the sections identified in this Motion.

WHEREFORE, the OCA respectfully requests the Commission:

- A. Strike the improper portions of the Sansoucy Rebuttal Testimony as set forth above;
- B. Or, in the alternative, give the sections described above no weight during the Commission's consideration of issues in these proceedings; and
- C. Grant such other relief as justice may require.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

January 23, 2011



Meredith A. Hatfield