

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DE 17-124**

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE  
d/b/a EVERSOURCE ENERGY**

**Sale of Generation Facilities**

**Order Denying Motion for Rehearing and Stay**

**ORDER NO. 26,063**

**October 11, 2017**

In this order, the Commission denies rehearing of Order No. 26,057 (September 19, 2017), because the Municipal Intervenors did not cite facts not considered by the Commission in its initial decision and did not identify any error of law; however, through this order the Commission allows parties that sign a nondisclosure agreement additional access to confidential documents to aid their presentations at hearing only.

**I. PROCEDURAL HISTORY**

The Commission opened this docket with an order of notice on August 3, 2017, and held a prehearing conference on August 18, 2017.<sup>1</sup> Following written comments on confidential treatment of various categories of auction data, the Commission issued Order No. 26,057 on September 19, 2017 (Confidentiality Order). On September 28, 2017, the City of Berlin and the Towns of New Hampton and Bristol (Municipal Intervenors) filed a joint motion for rehearing of the Confidentiality Order and stay of the proceeding. On October 4, 2017, the Conservation Law Foundation (CLF) filed a letter supporting the Municipal Intervenors' arguments.

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<sup>1</sup> For a more detailed description of the procedural history, see Order No. 26,057 (September 19, 2017).

## **II. POSITIONS OF THE PARTIES AND STAFF**

### **A. Municipal Intervenors**

The Municipal Intervenors objected to the confidential treatment of bidder identities, bid amounts, and bid allocations of losing bidders. The Municipal Intervenors also objected to the Commission's restriction on their ability to copy confidential documents for use in pre-filed testimony, hearings, or other related litigation and appeals.

The Municipal Intervenors' arguments on rehearing can be summarized as follows:

(1) the Commission overstated the confidentiality interests of participants in the auction process and understated the public's interest in disclosure, and thereby failed to properly balance those interests under RSA 91-A:5, IV; (2) the Confidentiality Order is contrary to Part I, Article 8, of the New Hampshire Constitution, which the Municipal Intervenors claim requires openness of records in administrative proceedings; and (3) the limitations that the Commission placed on the copying and use of confidential documents at hearing violate the Municipal Intervenors' due process rights, and the spirit and intent of the settlement agreements in Docket No. DE 14-238.

The Municipal Intervenors contend that the Commission erred in its assessments that:

(a) a robust commercial auction process that maximizes auction value depends upon the confidential treatment of bidder communications, identities, and bid terms; (b) if the process were not protected from disclosure, J.P. Morgan Securities, LLC (J.P. Morgan or JPM) would risk less participation in future auction processes and a diminution of its business activity; (c) the bidding strategy and business goals of participating bidders are proprietary and competitively sensitive; and (d) Eversource and prospective owners of the generation assets being sold would

be harmed in competitive energy markets by disclosure of the generation assets' financial and operational data.

The Municipal Intervenors argue that the bid process cannot be harmed at this point, because final, binding bids have already been submitted. They assert that confidentiality must not be important to the process, because confidentiality agreements were not entered into prior to bidding and confidentiality was not sought until after bids were tendered. They also believe that JPM has no interest in confidentiality, because the company was hired to assist a government agency and there is no basis in the law to deny disclosure based on JPM's business interests. Even if JPM does have such interests, the Municipal Intervenors argue that they should have been addressed at the outset of the process rather than at the end. The Municipal Intervenors find it difficult to ascertain what financial harm might befall Eversource given the relatively short time that Eversource is expected to continue to own generation assets. With regard to the interests of bidding parties, the Municipal Intervenors argue that because the bidding parties have not been named, the bidding parties' interests are merely theoretical. Also, the Municipal Intervenors argue that municipalities are not competitors in electricity markets and therefore cannot exploit the bidders' information for any business advantage. Further, the Municipal Intervenors claim that they can sign a non-disclosure agreement and accordingly will protect the confidential information.

The Municipal Intervenors claim that the Commission made only a cursory finding that the public has an interest in disclosure. The Municipal Intervenors claim that the public interest in disclosure is extremely high given the major impact that this proceeding can have on electric rates and the direct impact that it may have on the tax rates for the host communities.

The Municipal Intervenors conclude that the Commission failed to properly balance the public interest in disclosure with the privacy interest because the Commission failed to “strike the proper balance” under RSA Chapter 91-A in favor of disclosure. They also conclude that the Commission did not “pursue the least restrictive means available to protect” the privacy interests at stake because restrictions on access and copying only serve to prohibit the Municipal Intervenors’ meaningful participation in this proceeding. Finally, the Municipal Intervenors argue that the Commission erred by failing to provide a date by which confidential treatment of the auction data will sunset.

The Municipal Intervenors argue that Part I, Article 8, of the New Hampshire Constitution guarantees the public availability of information in quasi-judicial proceedings. They contend that the Commission did not place the burden of proof on the party seeking non-disclosure, did not properly weigh the private and public interests associated with disclosure, and imposed restrictions that are not necessary to safeguard the protected information.

Finally, the Municipal Intervenors argue that they cannot effectively participate in the proceeding and protect their interests because the Commission restricted their ability to copy confidential documents. They also note that other parties such as JPM and Eversource will have full access to all confidential documents at hearing while they will not. Instead, the Municipal Intervenors believe they will be limited to their notes on the confidential documents for use in technical sessions and at hearing. They maintain that this type of disparate treatment is without basis and unfair, particularly because, in their view, they have a “preferred status in this docket pursuant to the [settlement] Agreements [in Docket No. DE 14-238].”

**B. Conservation Law Foundation**

CLF takes the position that the Municipal Intervenors raised valid and important concerns in their motion regarding their ability to cross-examine witnesses and effectively participate in these proceedings. CLF asked for a reasonable accommodation to copy confidential documents, subject to a confidentiality agreement.

**C. Eversource**

Eversource states that the Municipal Intervenors have merely repeated the written and oral statements they previously provided. Eversource argues that the Municipal Intervenors' motion should be denied on that basis alone.

Eversource also argues that the Municipal Intervenors mistakenly conflate their privileged position in the bidding process, which was contemplated by the settlement agreements in Docket DE 14-238, with a privileged intervenor status in this docket, which status Eversource states does not exist. Eversource characterizes the Municipal Intervenors' desire to both participate in the bidding process and to learn the details of the losing bidders' confidential bid information as "outrageous."

Eversource points out that the primary goals of RSA 369-B:3-a, II and the settlement agreements were twofold: (1) to maximize the transaction value of divestiture and minimize stranded costs for the economic benefit of Eversource retail customers; and (2) to finish the process of establishing a competitive energy market, while providing enumerated employee and host community protections. According to Eversource, the host community protections offered municipalities the ability to participate in the auction as bidders and to receive tax stabilization payments in the event the sales price of an asset is less than that asset's assessed tax value. Eversource points out that the settlement agreements do not call for the maximization of

municipal property tax bases. Tax bases are protected for all municipalities through maximization of transaction value without giving any one municipality a special preference for the maximization of its tax base.

Eversource maintains that there is an absolute need to prevent losing bid information from entering the public domain. According to an Eversource witness in Docket DE 14-238, “Bidders must be afforded confidential treatment and know that the competitive advantage they bring to the table will not be shared with other bidders.” Eversource Objection at 12 (quoting Direct Testimony of John J. Reed dated July 6, 2016, Docket No. DE 14-238, “Determination Regarding PSNH’s Generating Assets,” at p. 16).

Eversource distinguishes the Municipal Intervenors’ argument under Part I, Article 8, on the basis that the documents the Commission has determined to be exempt from disclosure are not “governmental records,” but business records relating to a private sale by a private company. The company also notes that the Supreme Court has recognized, in discussing Part I, Article 8, that confidential, commercial, and financial information have historically not been open to the public.

Eversource points to a case cited by the Municipal Intervenors<sup>2</sup> for the proposition that the information protected by the Confidentiality Order is a trade secret, protected from disclosure under RSA 350-B:2, I and RSA 91-A:4, I. Eversource argues that losing bidders have a reasonable expectation of confidentiality, and that it was not necessary for them to seek or to be promised confidentiality because disclosure of trade secrets, including contract bids, is prohibited.

Eversource argues that the Municipal Intervenors are competitors in the electric markets as evidenced by their desire to participate in the bidding process, a New Hampshire statute

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<sup>2</sup> *CaremarkPCS Health, LLC v. New Hampshire Dep’t of Admin. Servs.*, 167 N.H. 583, 590 (2015).

giving them a mechanism to purchase generation assets, and a history of obtaining valuations of facilities as a prelude to the municipal purchase of such assets. Eversource also points out that the Municipal Intervenors have made it clear that their motive is to maximize property tax revenues from assets within their borders, which they can do by either having access to confidential bid information or by delaying the sale of those assets.

Eversource argues that the Commission has broad discretion and the authority to determine the procedures that govern hearings, the types of evidence it will entertain, and the degree of protection to be provided to confidential materials. According to Eversource, the Municipal Intervenors' claims of prejudice are speculative and hypothetical, and that the procedures imposed by the Commission do not violate due process.

Last, Eversource objects to any stay of the proceedings. Eversource claims that a delay in the process may result in the need to repeat the auction process because bidders cannot be expected to hold their pricing through an appeal. Delay would also cost ratepayers, as the price paid for assets would diminish over time, and ratepayers would have to pay material and significant carrying costs. In addition, a stay would delay the refinancing of stranded costs, resulting in consumers paying additional tens of millions of dollars. Eversource argues that delay would be contrary to the legislative finding that "time is of the essence" with respect to this divestiture.

### **III. COMMISSION ANALYSIS**

The Commission may grant rehearing or reconsideration for "good reason" when the moving party demonstrates that the decision is "unlawful or unreasonable." RSA 541:3, RSA 541:4; *see Rural Telephone Company*, Order No. 25,291 at 9 (November 21, 2011). Good reason exists if there are matters that the Commission "overlooked or mistakenly conceived in

the original decision,” *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotation and citation omitted), or if the movant presents new evidence not previously available, *Hollis Telephone, Inc.*, Order No. 25,088 at 14 (April 2, 2010). A motion for rehearing that merely restates prior arguments and asks for a different outcome will fail. *Public Service Co. of N.H.*, Order No. 25,168 at 10 (November 12, 2010).

The Municipal Intervenors essentially repeat their prior arguments regarding the confidentiality of auction-related information or raise issues that they could have raised in the first instance. We understand that they have multiple disagreements with our factual conclusions regarding the interests involved and our conclusion regarding their relative weight. We are not, however, persuaded to reconsider our decision that the public’s interest in the disclosure is outweighed by the interest in protecting the “confidential, commercial, and financial” information of auction participants. The Municipal Intervenors overlook that this proceeding may yet result in a failed auction of one or more assets, and that JPM and all bidders may need to continue the auction process for some time to come. They also overlook that all harm that will flow from the disclosure and delay they request would be visited on Eversource customers. Unnecessary delay alone could result in tens of millions of dollars in costs to Eversource customers.

We will not endanger JPM’s and Eversource’s ability to attract robust bids from a wide pool of participants during this process or to exchange information freely with bidders to refine and improve upon those bids. Given the overlay of state regulation on this otherwise private sale, we find that the auction information we found to be confidential in Order No. 26,057 is exactly the type of confidential information that RSA 91-A:5, IV was designed to protect. *Cf. Hampton Police Assoc. v. Town of Hampton*, 162 N.H. 7, 14 (2011) (confidential information



should not be disclosed when it would: (1) impair the information holder's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained); *see also Granite State Electric Company d/b/a National Grid*, Order No. 24,764 (June 22, 2007) (where disclosure of commercially sensitive bid information could harm customers, balance tips away from public's interest in disclosure and in favor of protecting bid information.).

With regard to the Municipal Intervenors' constitutional argument under Part I, Article 8, of the New Hampshire Constitution, we note that they have placed a constitutional gloss on their argument for the first time on rehearing. Nonetheless, their substantive arguments under Part I, Article 8, are the same on rehearing as in their original comments, rely upon the same case law, and amount to no more than a disagreement with our balancing and conclusion. We therefore deny rehearing as to our decision that the information identified in Order No. 26,057 is protected from public disclosure.

We turn to the Municipal Intervenors' and CLF's argument that the restrictions we placed on the review, copying, and use of confidential information violates their due process rights. We note that the Municipal Intervenors and CLF have not cited to any constitutional provision or case law to support their position, and we remain unconvinced that the limitations we have placed on the review and copying of confidential information deny any party constitutional due process or the ability to "effectively participate" in these proceedings.

We are persuaded, however, that our hearings in this matter will be more efficient if parties that sign nondisclosure agreements are permitted to have and make copies of certain, but not all, materials for the purpose of preparing hearing exhibits prior to hearing. We are also persuaded by the Municipal Intervenors' misunderstanding of the Confidentiality Order that

limited clarification is required.<sup>3</sup> Accordingly, we alter Order No. 26,057 and direct that all parties that sign the attached nondisclosure agreement be provided with one paper copy of bidder instruction letters, if filed; the confidential information memorandum; JPM's first round indicative bid summary; the final bid instruction letters; and JPM's analysis of final bids. Parties may make paper copies of these materials only as necessary to efficiently present their case. Parties may not make electronic copies of confidential materials. All identifying information for losing bidders and final bid packages shall remain subject to the limitations stated in Order No. 26,057. We clarify that one full copy of each final bid package, redacted for identifying information of losing bidders, will be made available to any witnesses questioned on the materials and one copy of the same will be made available to attorneys for their use in the hearing room. If a party wishes to submit portions of a final bid package into evidence, arrangements will be made during the hearing to submit those pages as an exhibit. For purposes of filing motions for rehearing or an appeal, parties may review the bid packages at the Commission's offices and petition to make copies of selected pages for those purposes. We caution all parties that the confidentiality of bidding information is integral to the successful divestiture of Eversource's generation assets, and that the price to be paid by any party that mishandles the information could prove very high indeed.

Last, we deny the Municipal Intervenors' request to place a time limitation on the confidentiality of the information at issue. At this time, we cannot determine when, if ever, the balance will tip back in favor of public disclosure. We will revisit the issue in future whenever we receive a request for the information. We also deny the Municipal Intervenors' request for a

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<sup>3</sup> The Municipal Intervenors misunderstood the Confidentiality Order insofar as they believed that they would have only notes from which to cross-examine JPM witnesses, while those witnesses and their counsel would have full access to all documents. Our intent, which may not have been clear in the Order, was to have full copies of all documents available for use in the hearing room.

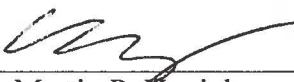
stay of this proceeding. Whether their request is for the purpose of delay or the purpose of protecting their tax bases is immaterial. We remain under legislative and settlement-based directives to expedite this proceeding. We also remain convinced that benefits to ratepayers will be maximized by the prompt divestiture of PSNH's generation assets and securitization of stranded costs.

**Based upon the foregoing, it is hereby**

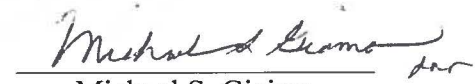
**ORDERED**, the Municipal Intervenor's Joint Motion for Rehearing and Stay is hereby DENIED; and it is

**FURTHER ORDERED**, that parties wishing to view confidential information must first execute the attached non-disclosure agreement and follow the viewing and copying procedures outlined in Order No. 26,057 as clarified and modified by this Order.

By order of the Public Utilities Commission of New Hampshire this eleventh day of October, 2017.

  
Martin P. Honigberg  
Chairman

  
Kathryn M. Bailey  
Commissioner

  
Michael S. Giaimo  
Commissioner

Attested by:

  
Debra A. Howland  
Executive Director

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

**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  
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.**