

**THE STATE OF NEW HAMPSHIRE**

**PUBLIC UTILITIES COMMISSION**

**DE 16-817**

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

**Auction of Electric Generation Facilities**

**JOINT MOTION FOR RECONSIDERATION AND STAY**

NOW COME Interveners the City of Berlin (“**Berlin**”), the Town of Gorham (“**Gorham**”), and the Town of New Hampton (“**New Hampton**”) (collectively referenced herein as “**Municipal Interveners**”) in the above-captioned Docket and file this Motion for Reconsideration<sup>1</sup> and Stay with regard to this Commission’s Order No. 26,967 (“**Order**”) pertaining to the auction design and process (“**Auction Design and Process**”) to be employed to sell the generation assets owned by Public Service Company of New Hampshire d/b/a Eversource Energy (“**PSNH**”) including significant assets located within the taxing jurisdictions of the Municipal Interveners. In support thereof the Municipal Interveners state as follows:

**I. HISTORY AND INTRODUCTION**

1. The Municipal Interveners were granted full Intervener status in this Docket at the Commission’s Pre-Hearing Conference held on September 19, 2016. This Docket springs from the Commission’s prior Docket DE 14-238, which concerned whether PSNH should divest its generation assets (“**the Divestiture Docket**”). In opening the Divestiture Docket, the Commission identified one of the issues as “the status of the 1999 restructuring settlement agreement with PSNH in Docket No. DE 99-099, and its application to issues in this docket.” The settlement agreement from Docket No. DE 99-099 contains, among other things, a

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<sup>1</sup> Although captioned as a motion for reconsideration, the purpose of this Motion is to, in part, fully comply with RSA 541:3, related to the filing of motions for rehearing. As no hearing was actually held on the Auction Design and Process, a motion for reconsideration was a more accurate caption than a motion for rehearing.

preference for certain municipalities with respect to the acquisition of PSNH's hydro facilities, with express recognition that any offer made by a municipality was subject to the qualification that such offer required ratification under RSA 38:13.

2. Berlin was granted full Intervener status at the beginning of the Divestiture Docket pursuant to the Commission's Order No. 25,733, dated November 6, 2014, following the October 2, 2014 Pre-Hearing Conference. Gorham became a full intervener in the Divestiture Docket pursuant to the Commission's Order issued during the July 9, 2015 Pre-Hearing Conference, as reflected in the Commission's Secretarial Letter dated July 17, 2015. New Hampton would later become an intervenor in this docket pursuant to the Commission's Order during the September 19, 2016 prehearing conference, as reflected in the Commission's Secretarial Letter dated September 22, 2016.

3. Berlin is the host community for the PSNH Smith Hydro facility, which has a nameplate capacity of 15.2 MW and is currently assessed by Berlin at approximately \$56.5 Million. Gorham is the host community for the PSNH Gorham Station Hydro facility, which has a nameplate capacity of 2.1 MW and is currently assessed by the Town at approximately \$3.9 Million. New Hampton is the host community for a portion of the Ayer's Island Hydro facility, which has a nameplate capacity of 8.4 MW and is currently assessed by New Hampton at approximately \$14.77 Million. As such, these facilities are major portions of the tax bases of the Municipal Intervenors.

4. Berlin actively participated in the negotiations resulting in the 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement dated June 10, 2015 ("**the 2015 Agreement**"), which was filed with the Commission in the Divestiture Docket on that same date. Berlin also actively participated in the negotiations resulting in the

Amendment to the 2015 Agreement dated January 26, 2016 (“**the 2016 Amendment**”), and the Partial Litigation Settlement also dated January 26, 2016, which were both filed with the Commission in the Divestiture Docket on that same date. Gorham and New Hampton were not signatories to the 2015 Agreement and were thus not considered a “Settling Party” under the 2016 Amendment or Partial Litigation Settlement.

5. The Commission approved the Settlement Agreements in the Divestiture Docket on July 1, 2016 through its Order No. 25920.

6. Pursuant to Section IV(B) of the 2015 Agreement, as amended by the 2016 Amendment:

“The structure and details of the auction process(es) shall be established by the auction advisor under the oversight and administration of the Commission and subject to the additional expedited adjudicatory proceedings requested in Section X below, with the Commission retaining such direction and control as it deems necessary. This expedited adjudicative proceeding shall include the design and approval of the auction process, the selection of any asset groupings, the approval of any final bids for the generation assets, and any other issues deemed appropriate by the Commission.”

(Emphases added.) See also Section X of the 2015 Settlement Agreement (requesting that “the Commission open a docket with appropriate ongoing proceedings to address the administration of the divestiture auction”).

7. Furthermore, pursuant to Paragraph 25 of the Partial Litigation Agreement, “the Settling Parties and Staff agree that the issue of specific auction design(s) shall be presented in a separate adjudicatory docket to be opened by the Commission rather than in the February hearings in [the Divestiture Docket].”

8. In negotiating the 2015 Agreement, the 2016 Amendment, and the Partial Litigation Agreement, Berlin specifically agreed to the Company and Advocate Staff’s request to bifurcate the issue of the auction design from the issue of divestiture, and negotiated reservation

of the auction design issue for a separate adjudicatory hearing, in order to allow the issue of divestiture, stranded costs, and other matters to come to an expeditious resolution in the Divestiture Docket. In agreeing to such a bifurcated system, Berlin frequently stressed the need for a full adjudication of the auction design sufficient to preserve Berlin's rights.

9. This current Docket is the "separate adjudicatory docket" referenced in Paragraph 25 of the Partial Litigation Agreement and Section IV(b) of the 2015 Agreement and 2016 Amendment.

10. This Commission Staff appointed JP Morgan ("**JPM**") as the Commission's Auction Advisor for the purposes of the divestiture of PSNH's assets, which was subsequently approved by the Governor and Executive Council on September 7, 2016, which is reflected in an order of this Commission on that same date.

11. The Commission issued its Order of Notice in this Docket on September 7, 2016 setting September 12<sup>th</sup> as the deadline for JPM to file its recommendations on Auction Design and Process, September 15<sup>th</sup> as the deadline for Petitions to Intervene, September 19<sup>th</sup> for a Pre-Hearing Conference and a Technical Session, and September 30<sup>th</sup> as the deadline for Written Comments on Auction Design and Process. Thus, there was approximately one week between the time JPM filed its recommendations on the Auction Design and Process and the Pre-Hearing Conference and initial Technical Session.

12. The Municipal Intervenors participated in the Pre-Hearing Conference and initial Technical Session on September 19, 2016; and on September 30, 2016, the Municipal Intervenors timely filed their Comments to the original Auction Design and Process memo tendered by JPM and Staff in this current docket ("**the Original Design**").

13. The attorneys of record for the Municipal Intervenors participated in two conference calls with JPM representatives, Staff, and representatives of PSNH on October 6<sup>th</sup> and October 13<sup>th</sup> in an effort to help all parties understand the concerns of the Municipal Intervenors. However, not all questions were answered, let alone answered to the satisfaction of the Municipal Intervenors.

14. On October 17, 2016, JPM submitted an Amendment to the Auction Design and Process filed September 12, 2016.

15. Berlin and Gorham, together, and New Hampton, separately filed Comments with regard to JPM's Amendment to the Auction Design and Process on October 21, 2016.

16. On November 10, 2016, the Commission issued the Order, whereby the Commission established the two-round Auction Design and Process recommended by JPM with minor modifications. At no time prior to the issuance of the Order did the Commission or Staff ever indicate that there would not be a hearing on the Auction Design or Process.

17. The Auction Design and Process approved by the Commission established the following timetable:

- a. Mid-to-late November, 2016: JPM will initiate the "request for qualification process for Round 1 bidders."
- b. Mid-December 2016 to early-January 2017: circulation of confidentiality agreements to qualified Round 1 bidders.
- c. Early January 2017: circulation of confidential information memorandum to qualified Round 1 bidders.
- d. Mid-to-late February 2017: Submission of preliminary non-binding offers.
- e. Early-to-mid March 2017: Selection of Round 2 bidders, with Round 2 bidders being given access to due diligence material and tours of PSNH's facilities.
- f. Early-to-mid May, 2017: Submission of bids from Round 2 bidders.

See Order at 20-22.

18. In approving the above-described Auction Design and Process, the Commission dismissed the concerns raised by the Municipal Intervenors and rejected various proposed alternatives submitted by those parties. See Order at 18-33.

19. The Commission also rejected Berlin and Gorham's request that the Commission allow sufficient time for pre-filed testimony, data requests, technical sessions, and other normal mechanisms used in Commission adjudicatory proceedings to ensure that JPM's proposed Auction Design and Process was best suited for the divestiture of PSNH's assets. See Order at 32-33.

20. For the reasons set forth below, the Municipal Intervenors respectfully request that this Commission reconsider its denial of the Municipal Intervenors' requests that this Commission comply with the terms of the 2015 Agreement, the 2016 Amendment and the Partial Litigation Settlement and order a full adjudicatory hearing on the Auction Design and Process, including allowing pre-file testimony, data requests, technical sessions, and the ability to cross-examine JPM's witnesses as they relate to the various representations and assertions made regarding the Auction Design and Process.

21. Additionally, the Municipal Intervenors respectfully request that this Commission reconsider its decision on the Auction Design and Process and adopt the Auction Design and Process suggested by the Municipal Intervenors, specifically, hold a third round of bidding to allow for meaningful municipal participation in compliance with the statutory requirements of RSA chapter 38. Alternatively, the Municipal Intervenors request the Commission adopt the third round process either for all of the hydro-electric assets or at least for the hydro assets located in the Municipal Intervenors' jurisdictions.

## II. STANDARD OF REVIEW

22. Pursuant to RSA 541:4, a motion for rehearing<sup>2</sup> must "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." "Pursuant to RSA 541:3, the Commission may grant a rehearing when the motion states good reason for such relief. Good reason may be shown by identifying specific matters that were either overlooked or mistakenly conceived by the deciding tribunal." See also In re Public Service Company of New Hampshire, 2009 N.H. PUC LEXIS 52, \*11-12 (Order No. 24,982) (June 25, 2009).

23. "Upon the filing of such motion for rehearing, the commission shall within ten days either grant or deny the same, or suspend the order or decision complained of pending further consideration, and any order of suspension may be upon such terms and conditions as the commission may prescribe." RSA 541:5.

## III. TRUE ADJUDICATORY PROCEEDINGS ARE NECESSARY

24. The Commission should reconsider its Order with regard to its refusal to order a true adjudicatory proceeding with pre-filed testimony, data requests, additional technical sessions, and other proceedings consistent with an adjudicatory proceeding because such an adjudicatory proceeding is (a) required by the 2015 Agreement, 2016 Amendment, and Partial Litigation Settlement and (b) necessary and proper for the determination of the Auction Design and Process.

25. As stated above, the 2015 Agreement, as amended by the 2016 Amendment provides that the details of the auction process to be established by JPM would be "subject to the additional expedited adjudicatory proceedings requested in Section X" of the 2015 Agreement. The expedited adjudicatory proceedings were to address "the design and approval of the auction

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<sup>2</sup> See Footnote 1 on Page 1 of this Motion.

process, the selection of any asset groupings, the approval of any final bids for the generation assets, and any other issues deemed appropriate by the Commission.”

26. Similarly, the Partial Litigation Settlement provides: “In order to simplify the issues presented at hearing, and in recognition of the above stipulated agreements and the amendments to the Settlement Agreement, the Settling Parties and Staff agree that the issue of specific auction design(s) shall be presented in a separate adjudicatory docket to be opened by the Commission rather than in the February hearings in” Docket 14-238. Paragraph 25 of the Partial Litigation Settlement.

27. The requirements of an adjudicative proceeding are set forth in Part 203 of the Administrative Rules of the Commission, which include the ability to propound discovery, to present and rebut evidence and arguments, and to cross-examine witnesses, as well as the requirement that the Commission’s decisions be based on findings of fact grounded on evidence submitted upon oath and affirmation.

28. Rule 203.09 provides parties, including intervenors, “the right to conduct discovery in an adjudicative proceeding,” which includes the ability to serve data requests, as well as the ability for the Commission to authorize “technical sessions, depositions, and any other discovery method permissible in civil judicial proceedings before a state court, when such discovery is necessary to enable to parties to acquire evidence admissible in a proceeding.”

29. Under these circumstances, pre-filed testimony, data requests, technical sessions, and even depositions are necessary to fully vet and understand the appropriateness of JPM’s proposed Auction Design and Process, as approved by the Commission, particularly where the Auction Design and Process will involve the sale of multi-million dollar assets in several communities.

30. Such additional discovery is necessary because, thus far, JPM has only provided conclusory and unsupported assertions in support of its proffered Auction Design and Process for why the various alternative auction design processes proposed by the Municipal Intervenors are not suitable for the divestiture of PSNH's assets. Those conclusory assertions include, but are not limited to:

- That an ascending clock auction “is neither advisable nor standard” and will “discourage participation by potential bidders.”
- That JPM “has never conducted an auction for assets like the Portfolio” by ascending clock auction.
- That bifurcation of the fossil assets from the hydro assets, to allow the Municipal Intervenors the requisite time to hold required votes to legally bid, should not be accommodated because “based on [JPM’s] experience and judgment” it is “unlikely to enhance the transaction value.”
- That waiting until May 1, 2017 to allow the Municipal Intervenors to bid will be “unlikely to enhance transaction value . . . and introduces material risks to the auction process.”
- That setting a reserve price “could have a negative impact on maximizing value.”
- That allowing the Municipal Intervenors to participate in final negotiations will “have a negative impact on the process by creating uncertainty and confusion for the bidders.”

See JPM’s October 17, 2016 Amendment to the auction and design process filed September 12, 2016 at 2-4.

31. The Commission adopted the above-referenced comments from JPM in addressing the Municipal Intervenors’ suggested revisions, despite the fact that JPM provided no evidence which would support these assertions. See Order at 20-32.

32. Considering that JPM’s comments led this Commission to adopt an Auction Design and Process in a non-adjudicatory manner that will effectively freeze the Municipal Intervenors out of the auction process, the Municipal Intervenors must be afforded the right to

obtain discovery related to JPM's assertions to ensure that such assertions are grounded in fact. The Commission's refusal to allow such discovery has materially harmed the interests of the Municipal Intervenors by imposing an Auction Design and Process without the previously agreed upon and ordered adjudicatory proceedings.

33. An additional component of an adjudicatory proceeding is the ability to "respond and present evidence and argument on all issues involved." See RSA 541-A:31, IV; RSA 541-A:33, I (requiring testimony to be provided upon oath and affirmation by the presiding officer). Intervenors are entitled to respond to and present evidence and argument in an adjudicatory proceeding. RSA 541-A:31, IV; N.H. CODE OF ADMIN. R. PUC. 203.23. An intervenor's ability to respond and present evidence necessarily includes the right of cross-examination, which is critical for a "full and true disclosure of the facts." See RSA 541-A:33, IV; see also N.H. CODE OF ADMIN. R. PUC. 203.24 ("any persons granted intervenor status may conduct cross-examination of a witness in order to develop a full and true disclosure of the facts"). Any resulting decision that may be adverse to a party must be based upon findings of fact, and those findings of fact must be "based exclusively on the evidence and on matters officially noticed in accordance with RSA 541-A:33, V." See RSA 541-A:32, VIII; RSA 541-A: 35.

34. Here, the 2015 Agreement, the 2016 Amendment, and the Partial Litigation Settlement require that the Auction Design and Process and asset groupings be subject to an adjudicatory proceeding. However, despite this requirement, the Commission has determined the Auction Design and Process in a non-adjudicatory manner: (a) without JPM submitting any evidence; (b) without allowing the Municipal Intervenors the opportunity to submit any evidence, either at a hearing on this matter or in the form of pre-filed testimony; and (3) without

the Municipal Intervenors having the opportunity to conduct discovery and cross-examine JPM with regard to the various assertions it has made in its suggested Auction Design and Process.

35. Moreover, the Commission's Order establishing the Auction Design and Process, which is predicated upon various factual findings as to the advisability of suggested auction procedures, was issued without any evidence sworn under oath or affirmation and without any vetting that would occur through cross-examination of the witnesses providing such evidence.

36. Indeed, had the Commission ordered discovery in this matter and conducted an adjudicatory proceeding, as required, the Municipal Intervenors would have submitted pre-filed testimony from members of various governing bodies that would expand upon the Municipal Intervenors' concerns that the proposed Auction Design and Process makes municipal participation practically impossible. Additionally, the Municipal Intervenors, and possibly other intervenors, could have submitted pre-filed testimony from individuals familiar with various auction procedures that could be used in these circumstances or the market conditions surrounding this divestiture.<sup>3</sup> Moreover, absent discovery and the ability to cross-examine witnesses, the parties are placed in the untenable position of having to accept JPM's bare representations as to the advisability of various auction proceedings, without any meaningful opportunity to challenge those bare representations.

37. The Municipal Intervenor's respectfully assert that the Pre-Hearing Conference of September 19, 2016 and the single, short-noticed technical session with one member of the JPM team that afternoon does not satisfy the criteria for an adjudicative proceeding. Moreover, by its very name, a Pre-Hearing Conference implies that there will be a hearing – something that did

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<sup>3</sup> The Sierra Club certainly voiced its interest in soliciting an auction expert to provide an opinion as to the auction process at the Pre-Hearing Conference held on September 19, 2016.

not occur in this case. See N.H. CODE OF ADMIN. R. Puc. 203.15 (discussing function of a pre-hearing conference).

38. In light of pre-filed testimony of George E. Sansoucy, Leszek Stachow, and Dr. Peter Cramton in Docket No. DE 14-238, all of which suggest a different Auction Design and Process, and which this Commission pulled into the record in this Docket through the Order at the request of the Municipal Intervenors, the Commission should allow for further vetting of JPM's proposed Auction Design and Process to ensure that the process proposed does, in fact, reflect the most advisable design that will safeguard members of the public from undue stranded costs and protect the tax bases in the host municipalities.

39. In the Commission's Order, the Commission stated that the Municipal Intervenors were offered sufficient process in the form of being able to informally ask JPM questions, adopt pre-filed testimony from other dockets, and present comments to the Commission. See Order at 32-33. However, this is not the process to which the parties agreed. The parties agreed to full, albeit expedited in time, adjudicatory proceedings, which necessarily entails formal discovery, i.e. pre-filed testimony, data requests and technical sessions, and a hearing during which evidence and testimony is presented and subject to cross-examination. The process which has been employed by the Commission to date has materially fallen short of this requirement, frustrates the parties negotiated, contractual expectations, and results in the decision of this Commission on the Auction Design and Process being decided in a non-adjudicatory manner.

40. As such, the Commission's Order establishing the Auction Design and Process was in violation of the 2015 Agreement, the 2016 Amendment, and the Partial Litigation Settlement and, as such, is unlawful and unreasonable. Therefore, the Commission should reconsider and rescind its Order and schedule the Auction Design and Process for a full

adjudicatory hearing with cross-examination of witnesses, including ordering a reasonable time for pre-filed testimony, data requests, and technical sessions. The Commission's refusal to do so will materially deprive the Municipal Intervenors of a contractual and ordered right for which it specifically negotiated through the 2015 Agreement, 2016 Amendment, and Partial Litigation Settlement.<sup>4</sup>

41. Indeed, full adjudicatory proceedings required by the above-referenced agreements were included, in part, to allow this Commission to resolve Docket No. DE 14-238 in an expedited manner without being delayed by considerations of the Auction Design and Process or the final sales price of the Assets.<sup>5</sup> Indeed, had the Municipal Intervenors not agreed to the 2016 Amendment or the Partial Litigation Agreement, the Auction Design and Process issues would have been fully litigated in the DE 14-238 with any appeals of that process further delaying the ultimate decision on whether to divest PSNH's generation assets. The Commission's Order essentially nullifies this contracted-for and previously ordered procedure to the detriment of the Municipal Intervenors and deprives the Municipal Intervenors of their day in court in violation of N.H. Constitution Part I, Article 14 and in the basic principles of due process and fundamental fairness owed to the Municipal Intervenors.

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<sup>4</sup> To the extent that the Commission or any of the parties posit that an adjudicatory proceeding could be held on the Auction Design and Process at the conclusion of the auction, when the Commission is considering approving the ultimate sale, such an interpretation would similarly amount to a deprivation of the Municipal intervenors' contractual rights. It would be a gross waste of administrative resources to evaluate an Auction Design and Process after the auction was completed. Indeed, such a schedule would raise the question as to how much meaningful review and scrutiny would be applied to the Auction Design and Process. It defies logic to think that the Commission would nullify any resulting auction if, during a post-auction adjudicatory hearing, it determined that the Auction Design and Process was not suitable under these circumstances: the costs incurred by the parties would practically foreclose such a possibility.

<sup>5</sup> It is noteworthy that the expedited adjudication of Docket No DE 14-238 took over eighteen months — far longer than any auction process proposed by any party in this Docket.

#### **IV. AUCTION DESIGN AND PROCESS MUST ACCOUNT FOR MUNICIPAL COMPLIANCE WITH RSA CHAPTER 38**

42. The Commission should also reconsider its Order with regard to the Auction Design and Process because the Commission has misinterpreted the relevant provisions of RSA chapter 38, causing the Commission to adopt an Auction Design and Process that effectively precludes any meaningful participation of the Municipal Intervenors.

43. The Commission interpreted the phrase “final determination of price to be paid” in RSA 38:13 to mean a bid proffered by the municipality, regardless of whether that bid is accepted. See Order at 28-29.

44. The Commission further stated that “if the municipal bid in Round 2 is accepted, the municipality will be obligated to purchase at the price it bid.” See Order at 29.

45. The Commission concluded that “the governing body of a municipality can approve a final bid amount pursuant to RSA 38:8 and then citizens may vote on financing that bid, pursuant to RSA 38:13 and RSA 33-B, prior to submitting the bid as a binding bid in the auction process.” See Order at 29.

46. The Commission’s interpretation, however, is inconsistent with RSA chapter 38 because (a) the interpretation ignores the Municipal Intervenors’ obligations under RSA 38:3 and RSA 38:4, which require a separate vote before a city or town can even bid in the auction process, and (b) the interpretation of “final determination of price to be paid” cannot be reasonably interpreted to mean the submission of a final, binding bid by a municipality during Round 2.

47. Additionally, the Commission should reconsider its Order on the Auction Design Process because the approved Auction Design and Process effectively precludes the Municipal Intervenors from participating in the auction of PSNH’s assets.

a. *The Commission's Interpretation of RSA 38:13 Was Unlawful and Unreasonable.*

48. The Commission should order a rehearing on the Auction Design and Process because it misinterpreted RSA 38:13 when it stated that the Municipal Intervenors “can approve a final bid amount pursuant to RSA 38:8 and then the citizens may vote on financing that bid, pursuant to RSA 38:13 and RSA 33-B, prior to submitting the bid as a binding bid in the auction.” Order at 29.

49. RSA 38:13 provides:

Within 90 days of the final determination of the price to be paid for the plant and property to be acquired under the provisions of RSA 38:8, 38:9 or 38:10 and any consequential damages under RSA 38:33, the municipality shall decide whether or not to acquire the plant and property at such price by a vote to issue bonds and notes pursuant to RSA 33-B as may be necessary and expedient for the purpose of defraying the cost of purchasing or taking the plant, property, or facilities of the utility which the municipality may thus acquire. The municipality is authorized to hold a special meeting, if necessary, to take such vote without having to petition the superior court for permission to do so. An affirmative vote under RSA 33-B shall constitute ratification on the part of the municipality of the final determination of the price to be paid for the plant and property under the provisions of RSA 38:8, 38:9, or 38:10 and any consequential damages under RSA 38:33. If the money is so raised it shall immediately be paid to the utility, which shall thereupon execute a proper conveyance and surrender the plant and property to the municipality. If the ratifying vote provided for in this section shall be in the negative, no other action under this chapter shall be had during the ensuing period of 2 years.

50. In short, the Municipal Intervenors must follow the procedure set forth in RSA chapter 38 and are not legally authorized to follow the procedure as ordered by the Commission. “As subdivisions of the State, [municipalities] have only such powers as are expressly or impliedly granted to them by the legislature.” JTR Colebrook, Inc. v. Town of Colebrook, 149 N.H. 767, 772-73 (2003) (quotations omitted); see also Public Serv. Co. v. Hampton, 120 N.H. 68, 70-72 (1980).

51. Pursuant to the provisions of RSA chapter 38, the legislature enacted a clear statutory scheme through which municipalities may acquire electric generation facilities. Pursuant to RSA 38:3, a city may establish an electric generating facility after two-thirds of the members of its city council have voted that it is expedient to do so.<sup>6</sup> Similarly, RSA 38:4 allows towns to establish an electric generating facility “after two-thirds of the voters present and voting at an annual or special meeting, duly warned in either case, have voted by ballot with the use of the checklist that it is expedient to do so.”

52. Per the statutory scheme set forth in RSA 38:3 through RSA 38:13, only after the municipality complies with RSA 38:3 or RSA 38:4 can the municipality begin to engage in substantive discussions with the utility as to the acquisition of the facility — i.e., in this instance, active participation in the auction process. RSA 38:6 through RSA 38:13 provide the mechanisms through which the municipality is to notify the utility of the municipalities’ determination that it is expedient to acquire the subject plant, negotiate a sales price or determine a condemnation value, and ultimately ratify, approve, and finance the resulting price to be paid by the municipality. In sum, RSA chapter 38 provides a required, statutory process for municipal acquisition of privately-owned electric generation assets which cannot be sidestepped to satisfy JPM’s aggressive Auction Design and Process despite any proffered allegations of convenience or industry custom.

53. The Commission’s interpretation of RSA 38:8 and RSA 38:13, i.e. that the municipalities only need to conduct one public vote to submit a binding bid during Round 2, does not appropriately recognize the process that must be followed by the Municipal Intervenors, and therefore, the approved Auction Design and Process is predicated upon an inaccurate

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<sup>6</sup> The City Council’s authority also must be ratified by a majority vote of the voters within one year of the Council’s vote.

interpretation of the applicable laws.<sup>7</sup> The Commission's interpretation of RSA 38:13 effectively removes the clause "within 90 days from the final determination of the price to be paid" contrary to basic rules of statutory interpretation." Appeal of Town of Nottingham, 153 N.H. 539, 546-47 (2006) (stating that in statutory interpretation, Court "will not consider what the legislature might have said or add words that the legislature did not include"); Appeal of Derry Educ. Ass'n, 138 N.H. 69, 71 (1993) (stating that "[b]asic statutory construction rules require that 'all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words'").

54. Additionally, contrary to the Commission's ruling, the Municipal Intervenors cannot simply under the statutory scheme of RSA chapter 38 prepare and submit to the voters a pre-approved bid and financing and then tender that bid during Round 2. Such an approach is contrary to the Legislature's statutory scheme and, as such, would be unlawful. Rather, the Municipal Intervenors must obtain approval from the voters to bid in the auction process, whereupon the governing body can submit a non-binding bid, and then, if the Municipal Intervenors are the successful bidder, the City and the Town must submit the "final determination" of the price to the voters for ratification. See RSA 38:4; RSA 38:5; RSA 38:13. Pre-approval is not a statutorily authorized option.

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<sup>7</sup> Although not referenced in the Order, Staff Attorneys for the Commission and the attorneys for PSNH have suggested that the requirements of RSA chapter 38 do not need to be met under these circumstances because the Municipal Intervenors can obtain the proper authorization to acquire these assets by complying with RSA chapter 374-D. That statute, however, is not applicable under these circumstances because the Municipal Intervenors would not be designing, developing, acquiring, or constructing a small sale power facility "at sites owned or leased by [the Municipal Intervenors] or otherwise made available to [the Municipal Intervenors] for a period at least equal to the term of financing to be acquired under RSA chapter 374-D." RSA 374-D:2; see also Forster v. Town of Henniker, 167 N.H. 745, 752 (2015) (in interpreting a statute, the Supreme Court will "construe the general words [in a statute] to embrace only practices similar to those included in the enumerated list"). RSA chapter 374-D clearly applies to circumstances where a municipality seeks to construct a generation facility on land that it already owns or is acquiring separately for development of a new small energy facility, i.e. putting solar panels over the old town landfill, not the acquisition of a pre-existing, privately-owned, electric generation facility which is being offered for sale pursuant to an ordered divestiture, which clearly falls within the provisions of RSA chapter 38.

55. Moreover, the notion that the Municipal Intervenors' submission of a bid during Round 2 of the Auction Design and Process qualifies as a "final determination of price" under RSA 38:13 is contradicted by JPM's proposal that it may select multiple "final" bidders who would then engage in negotiating the final terms of the sale. While it appears that the sales price itself would not likely be subject to negotiation, any change in other requirements as proposed by the Municipal Intervenor which results in an increase in costs associated with the purchase would in turn result in an increase of the "purchase price" which the voters would have to approve.

56. Even assuming that the Municipal Intervenors could legally seek a bid for pre-approval for a final bid amount and bonding, if Gorham or New Hampton were to attempt to deviate from RSA chapter 38 and sought to call a special town meeting to obtain such a pre-approved bid, those municipalities would not enjoy RSA 38:13's exemption from the requirements of RSA 31:5, specifically the requirement for approval from the superior court to hold the special town meeting for an appropriation.<sup>8</sup> As set forth above, RSA 38:13 provides a narrow exception to the requirement to obtain superior court approval prior to calling a special town meeting for an appropriation, but only if the vote follows a final determination of price. Absent the conditions required by RSA 38:18, i.e. the final price being determined, the proposed special town meeting would fall outside the exempting provisions of RSA 38:13, and Gorham and New Hampton would have to obtain superior court approval to hold that special town meeting. Therefore, requiring the Municipal Intervenors to seek a pre-approved bid (even if legally permissible) would impose greater burdens on the Municipal Intervenors by requiring

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<sup>8</sup> Since the municipality must hold two separate votes, the Town would have to hold a special town meeting to ratify the sales price. At best, the municipalities would only be legally authorized to obtain authorization to bid in the auction process during the annual meeting (although, as discussed below, it is practically impossible to pose such questions to the voters during the annual meeting).

them to obtain approval from the superior court to obtain authorization to call the special town meeting, causing further delays and procedural hurdles.

57. An insurmountable problem with the Municipal Intervenor being required to obtain voter approval of the bid amount prior to the submission of the final binding bid is that the bid amount will become public a substantial period of time prior to the other bidders submitting their final binding bids. This creates an unfair advantage for the other bidders. It would also likely result in other bidders submitting a sale price lower than they would have otherwise submitted, had they not known the Municipal' Intervenors' highest bid.

58. Simply put, the Commission's Order establishing the Auction Design and Process is predicated upon an incorrect interpretation of RSA chapter 38, specifically the number of votes that must be obtained by the citizens of the municipality and the timing when those votes must be obtained by the municipality. The Commission should reconsider the Auction Design and Process and rule that the Auction Design and Process must be structured to allow the Municipal Intervenors to first obtain voter approval to bid in the auction process and, only after a final determination of the price, i.e. the selection of a winning bid, submit the winning bid to the voters for ratification.

*b. The Commission's Interpretation Ignores the Municipalities' Obligations set forth in RSA 38:4 and RSA 38:5*

59. The Commission should reconsider its Order on the Auction Design and Process because it is practically impossible for the Municipal Intervenors to bid in the auction of PSNH's assets under the current Auction Design and Process.

60. While Berlin is able to move slightly more quickly due to the powers afforded to the City Council, Gorham operates a "traditional" town meeting, while New Hampshire operates as a "SB2" Town Meeting. Both of these Towns are governed by a Board of Selectmen.

61. Gorham has its annual meeting on March 14, 2017. Gorham must post its warrant for the Town Meeting by February 27, 2017. Prior to that time, Gorham must finalize a budget, hold hearings on bond articles for the acquisition of fire trucks, police cars, and other pieces of municipal equipment, hold hearings on voter checklists, finalize voter checklists, hold hearings on proposed zoning amendments, amongst other business associated with the annual meeting. These acts must occur while Gorham engages in regular town business and during the holiday season.

62. The circumstances surrounding New Hampton make obtaining the required voter approvals even more challenging. New Hampton is an SB2 town meaning that the first session of its annual meeting occurs on between February 4 and February 11, 2017. See RSA 40:13. The earliest date at which New Hampton could seek the required authorization to bid in the auction process is at the second session of its annual meeting on March 14, 2017.<sup>9</sup> See id.

63. The Municipal Intervenors received access to the virtual data room on November 28, 2016, meaning that the Municipal Intervenor's review of the complicated and extensive materials provided must be undertaken during this exceptionally busy time of year. While this is burdensome, the Municipal Intervenors have started that review process.

64. In short, the time-period over which the Commission seeks to have the Municipal Intervenors review the materials in the virtual data room, determine the advisability of participating in the auction process, hold necessary public-education meetings, and obtain voter approval at the March town meeting is practically impossible. The Municipal Intervenors simply

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<sup>9</sup> New Hampton cannot call a special town meeting prior to its annual meeting because the Board of Selectmen would be calling said meeting within sixty days of the annual meeting, which is prohibited by RSA 39:3; the last day New Hampton could do so was December 6, 2016 — only one week after New Hampton obtained access to the virtual data room. The same sixty day prohibition applies to Gorham.

cannot submit to its voters at the annual meeting the question of whether it is in the public good to bid in the auction process.

65. Assuming, without conceding, that Gorham and New Hampton could obtain pre-approval from its voters to submit a “final, binding bid,” Gorham and New Hampton would have to finalize their warrant by February 27, 2017 and January 30, 2017, respectively.. See RSA 39:5; RSA 40:13, II and II-a(d). In other words, Gorham would have just three months to review the materials in the virtual data room, prepare a proposed final bid, hold necessary public information sessions, and prepare the necessary bond articles to obtain voter approval at its annual meeting (all during the holiday season and while holding the required meetings to finalize the Town’s budget and other warrant articles to be addressed at the annual meeting). New Hampton’s position is even more untenable; it would have only two months to undertake all actions necessary to determine a bid for these assets, again while preparing for the annual meeting. Such a requirement is not only practically impossible, but it puts Gorham and New Hampton at a considerable disadvantage when compared to other non-municipal bidders who will have considerably more time to review virtual data room data, prepare their final, binding bids, attend site walks, and conduct sufficient due diligence. Such an arrangement directly contravenes the spirit and intent of the 2015 Agreement and the 2016 Amendment, both of which provide for accommodation of the Municipal Intervenors.

66. Municipal Intervenors would still need to ratify any resulting vote following the final determination of the price.<sup>10</sup> JPM cannot use the Municipal Intervenors’ statutory

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<sup>10</sup> Assuming, without conceding, that the Commission accurately interpreted RSA 38:13 to permit the voters permitting a pre-approved bid, New Hampton would be incapable of submitting such a proposal to its voters at its annual meeting. The latest that New Hampton could post a notice for the required hearing for the requisite bonding of such an acquisition would be January 10, 2017, and such meeting would have to occur by January 17, 2017. There is simply not enough time for New Hampton to undertake the required due diligence associated with preparing a bond article for such a complicated matter.

obligation to obtain voter ratification as a basis for rejecting the Municipal Intervenors' bid or for finding that the Municipal Intervenors' bid is not fully financed through binding commitments.

67. Simply put, it is practically impossible for Gorham or New Hampton to be able to obtain the required authorization from its voters to bid in the auction process under RSA 38:5, let alone obtain approval for a pre-approved, fully-financed bid. Moreover, Berlin and Gorham are considering a joint bid/operation agreement for the facilities in their two communities, which necessary means that Berlin's participation is tied to Gorham's timing restrictions.

68. Therefore, the Municipal Intervenors would have to wait until after March 14, 2017 to call a special town meeting to obtain the requisite authorization under RSA 38:5 to bid in the auction process. If the Boards of Selectmen for Gorham and New Hampton acted diligently in educating the public sufficient to be able to vote to hold a special town meeting after March 14, 2016, the earliest that Gorham and New Hampton could hold the special town meeting is May 1, 2016.

69. This vote is just for the authorization to bid in this process; as stated above, the Municipal Intervenors would still need to submit the final price determination to the voters for ratification and approval of any bonding to be associated with the acquisition, which could not occur until after the Round 2 bidding had taken place.

70. As was stated in the October 21, 2016 Comments of Intervenors City of Berlin and Town of Gorham to JPM's Amendment to Auction Design & Process Memo Dated October 18, 2016, the Municipal Intervenor respectfully request that this Commission modify the Auction Design and Process to include a third round, whereby the First and Second Round of the Auction Design and Process would remain unchanged, but, as to timing, the second round would

not necessarily be final, and an optional third round would exist. The operation of this Third Round would be as follows:

- If the Second Round bids were not competitive with the Municipal Intervenors' assessment of the subject facilities, the Municipal Intervenors could then tender a competitive bid subject to ratification by the voters of the respective Municipal Intervenors.
- JPM could then consider the Municipal Intervenors' bid, which would carry a presumption that the municipal acquisition is in the public good, see RSA 38:3 and RSA 38:4.
- If the Municipal Intervenors' bid is accepted, the Municipal Intervenors would call the special meetings to ratify the sale and approve bonding for the acquisition. If necessary, JPM can delay announcing the winning bid to all other parties until the results of the RSA 38:13 ratification votes are received.

This procedure would ensure that these assets would go for the highest price, without associated stranded costs and without creating an environment where the Municipal Intervenors' tax base will be destroyed.

71. This Third Round allows JPM to generate interest and solicit bids for these assets in an expedited fashion, while providing the Municipal Intervenors with the opportunity to meaningfully inform the public and comply with the requirements of RSA chapter 38. The Commission is simply in error that a Round 2 bid has to be final and binding when this Commission could order a Round 2 that is binding on all parties with a third round that would be final and binding. This proposal for a third round has little downside, primarily where the Municipal Intervenors' involvement will act as a firewall against a depressed sale and will not materially delay the divestiture of PSNH's assets.

## V. CONCLUSION

72. The Municipal Intervenors respectfully request that this Commission reconsider its refusal to hold a true adjudicatory proceeding, including discovery, pre-filed testimony, and

cross-examination of witnesses in this case that would be consistent with the 2015 Agreement, the 2016 Amendment, and the Partial Litigation Settlement. The Municipal Intervenors request that this Commission adopt the following procedure for this matter:

- a. JPM submits pre-filed testimony: fifteen days of the grant of this Joint Motion for Reconsideration;
- b. All intervenors propound data requests upon JPM: at least fifteen days after of the submission of JPM's pre-filed testimony;
- c. JPM responds to data requests: at least fifteen days after parties propound data requests on JPM;
- d. Technical Session on JPM Witnesses: at least fifteen days after JPM's response to data requests;
- e. Intervenors submit pre-filed testimony: at least fifteen days after JPM responds to data requests;
- f. JPM/Staff propound data requests on intervenors submitting pre-filed testimony: at least fifteen days after submission of pre-filed testimony;
- g. Intervenors respond to data requests: at least fifteen days after parties propound interrogatories;
- h. Technical Session on Intervenor Witnesses: at least fifteen days after intervenors' response to data requests;
- i. Full adjudicatory hearing: at least fifteen days after the final technical sessions of the intervenors' witnesses.

73. Additionally, the Municipal Intervenors respectfully request that this Commission reconsider its Auction Design and Process, specifically with regard to the Commission's interpretation of RSA chapter 38 and the Commission's refusal to conduct a third round of bidding. Specifically, the Municipal Intervenors ask that the Auction Design and Process be revised to allow for the Municipal Intervenors to require a third round of bidding on all of the hydro facilities or at the very least on those hydro facilities located within the taxing jurisdiction of the Municipal Intervenors such that the second round of bids would be binding but not final and

that the Municipal Intervenors would not have to bid in the second round but could in the third round if the results of the second round were not at or above the level expected by the Municipal Intervenors.

74. The Municipal Intervenors respectfully urge the Commission to consider the issues raised in this Motion for Reconsideration. The divestiture of PSNH's assets is a matter that has considerable impact on the tax bases of the Municipal Intervenors. An Auction Design and Process that is not properly vetted and carefully considered has the potential to saddle ratepayers with needless stranded costs and further undermine the tax bases in the host municipalities to the detriment of the public.

75. The previously stated concerns over rising interest rates have not materially occurred; and with the new federal administration coming into power, the negative regulation on the fossil plants could well be eliminated. Accordingly, further accommodation of the Municipal Intervenors' required timeline could well have a beneficial result on the price obtained for the fossil facilities to the benefit of the ratepayers.

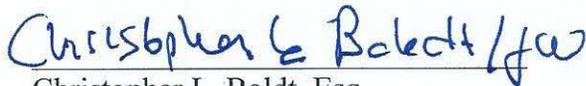
76. Due to the significance of the issues involved in this proceeding and this Motion, the Municipal Intervenors respectfully request that the Commission stay all proceedings in this Docket, including any action by JPM to advertise the Auction Design and Process to interested parties or otherwise publically implement the Auction Design and Process during the pendency of the Commission's consideration of this Motion for Reconsideration.

77. The Municipal Intervenors file this Motion for Reconsideration, not for the purpose of delay, but to protect their respective tax bases and the interests of the ratepayers.

WHEREFORE, the Municipal Intervenors respectfully request that this Honorable Commission:

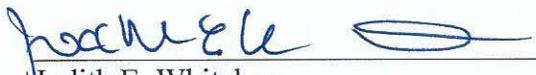
- A. Stay this proceeding and all aspects of the implementation of the Order pending the Commission's ruling on this Motion for Reconsideration;
- B. Grant this Motion for Reconsideration;
- C. Revise the Auction Design and Process to include the third round discussed above;
- D. Order discovery on all issues of the Auction Design and Process as set forth above;
- E. Schedule the issue of the Auction Design and Process for a full adjudicatory hearing; and
- F. Grant such further relief as is just and equitable.

Respectfully submitted,  
DONAHUE, TUCKER & CIANDELLA, PLLC



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**Certificate of Service**

I hereby certify that I served a copy of this Motion for Reconsideration pursuant to Puc 203.11(c) to the current service list in this Docket this 9<sup>th</sup> day of December, 2016.

  
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Judith E. Whitelaw, Esq.