

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2017 TERM  
WINTER SESSION

NO. \_\_\_\_\_

APPEAL OF THE CITY OF BERLIN AND THE TOWNS OF GORHAM AND NEW  
HAMPTON (NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION)

**APPENDIX TO PETITION TO APPEAL FROM THE ADMINISTRATIVE DECISION  
OF THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION  
PURSUANT TO NH RSA 541:6 AND SUPREME COURT RULE 10 AND REQUEST  
FOR SUSPENSION OF NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION  
ORDERS 25,967 AND 25,973 PURSUANT TO RSA 541:18**

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**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DE 16-817**

**EVERSOURCE ENERGY AUCTION OF GENERATION FACILITIES**

**Order Approving Auction Design**

**ORDER NO. 25,967**

**November 10, 2016**

In this order, the Commission approves the auction design and process recommended by the Commission's auction advisor, J.P. Morgan, with certain modifications to further accommodate participation by intervening cities and towns.

**I. PROCEDURAL HISTORY**

This docket was established to conduct the sale of the fossil and hydro electric generation facilities (Generation Facilities) owned by Eversource Energy (Public Service Company of New Hampshire) d/b/a Eversource Energy (Eversource) as ordered in Order No. 25,920 (July 1, 2016). Order No. 25,920 approved the 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement filed with the Commission on June 10, 2015, (2015 Settlement) as amended by the Partial Litigation Settlement filed on January 26, 2016 (Litigation Settlement). Order No. 25,920 and the settlements approved in that order require the sale of the Generation Facilities to be conducted by an auction advisor selected by the Commission.

Following a competitive request for proposals (RFP), the Commission selected J.P. Morgan as its auction advisor (JPM or Auction Advisor). The contract with JPM to conduct the sale of the Generation Assets was approved by the Governor and the Executive Council on

September 7, 2016. On September 12, 2016, JPM filed a description of the proposed auction process with the Commission. On October 17, 2016, JPM filed a modification to the proposed auction process to facilitate municipal participation in the auction. On November 4, 2016, JPM filed additional comments on the auction design. The proposed auction process, together with all other filings in this docket, except for any information for which confidential treatment has been requested of or granted by the Commission, are posted to the Commission's website at <http://www.puc.nh.gov/Regulatory/Docketbk/2016/16-817.html>.

The Commission issued an order of notice on September 7, 2016, and held a prehearing conference on September 19. The Office of Consumer Advocate (OCA) filed its notice of participation on September 13, 2016, and the following parties sought intervention: the Towns of Gorham, Bristol and New Hampton, the Cities of Berlin and Concord, the Sierra Club, the Conservation Law Foundation (CLF), the Office of Energy and Planning (OEP), and the International Brotherhood of Electrical Workers Local 1837 (IBEW).

All parties present at the prehearing conference questioned JPM about the proposed auction process. Following the hearing, during a technical session, parties had further opportunity for questions and discussions with JPM. Commission Staff (Staff) filed a letter on September 21, 2016, summarizing the parties' discussions at the technical session. The Commission granted all intervention requests by Secretarial Letter on September 22, and required JPM to respond to follow-up questions from parties. The Town of New Hampton submitted a question to JPM on September 21, and JPM responded on September 29. The parties filed written comments on September 30, 2016, and additional comments on October 21, 2016. The Commission issued Order No. 25,954 (October 18, 2016) denying a motion to designate certain Commission Staff as staff advocates, and Order No. 25,956 (October 21, 2016)

requiring Eversource to remove two legacy mercury boilers and associated equipment from the Schiller generating station. This order will consider the remaining auction process and design issues raised by various parties in written comments and by JPM in its auction design, and its comments on auction design.

## II. POSITIONS OF THE PARTIES

### A. J.P. Morgan

#### 1. Initial Auction Design September 12, 2016

In its proposed auction design filed on September 12, 2016, JPM described a broad two round auction process in which a wide range of potential bidders, after signing confidentiality agreements, would be given access to a confidential information memorandum (CIM) and certain third party engineering and market analyses of the Eversource portfolio of hydro and fossil Generation Facilities offered for sale. Such potential bidders would be allowed to submit non-binding indicative bids on single facilities or groups of facilities in Round 1 of the auction. A smaller group of qualified bidders in Round 1 would then be selected to participate in Round 2 in which those potential bidders would be given the opportunity to conduct detailed due diligence on the facilities. Round 2 bidders would be given access to an electronic data room containing information on each of the facilities and provided the opportunity to visit the facilities in person, including receiving a comprehensive business, operational, and financial presentation from management on those facilities. Round 2 bidders would then be invited to submit final binding bids at the end of Round 2. From the group of potential bidders that elected to submit such final binding bids, JPM would then select a winning bid, or combination of bids, and begin negotiating final terms of sale.

JPM indicated in the technical session on September 19, 2016, that municipalities would be allowed to submit final binding bids in Round 2 without non-binding proposals in Round 1. At the technical session JPM and Eversource also agreed to give the intervening municipalities a draft confidentiality agreement by September 23, 2016, and once signed, to allow municipalities access to the data room for their respective hydro facilities in November 2016. *See Staff Letter September 21, 2016.* Under the September 12, 2016, JPM auction design, Round 1 of the auction process would take place during November and December 2016 and Round 2 would start in January 2017. Final binding bids would be due in late February or early March.

## 2. Amended Auction Design October 17, 2016

After receiving the written comments from Berlin, Gorham, Bristol, and New Hampton (the Municipalities), which are described below, and conducting telephone conferences on October 6 and 13 with the Municipalities, JPM proposed a number of timing and design changes to facilitate the Municipalities' participation in the auction process. *See Staff Letter October 17, 2016, enclosing JPM amendments to its September 12, 2016, Auction Design.*

The amended proposed auction process would allow the Municipalities, once they have signed a confidentiality agreement, access to the electronic data room for their respective hydro facilities, in November 2016.<sup>1</sup> The Municipalities would also be given access to the independent market analysis and the independent engineering analysis for their respective hydro assets as soon as those reports become available, estimated to be in late November 2016.

Under the amended process, the auction schedule would be extended approximately two months. As a result, other interested bidders would be qualified to participate in Round 1 in mid-to late November, and would be given confidentiality agreements in mid-December. A CIM

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<sup>1</sup> The hydro facilities hosted by the Municipalities are, Smith Hydro in Berlin, Gorham Hydro in Gorham, and Ayers Island Hydro in Bristol and New Hampton.

would be circulated to all qualified Round 1 bidders and to the Municipalities in early January 2017. Preliminary non-binding bids would be due in mid- to late February from all bidders, except the Municipalities, which would not be required to submit preliminary non-binding bids, but would have the option of giving JPM their indication of value for their respective hosted local hydro facilities. The Municipalities electing to submit indications of value would then receive, on a confidential basis, information from JPM on how their values relate to the range of Round 1 bids on their hosted facilities. Final binding bids would be due from all bidders including the Municipalities in early to mid-May 2017. Further, in order to address municipal needs for specific price allocation to their respective hydro facilities, in its amended auction design JPM proposed to require all Round 1 and Round 2 bidders to allocate bid value among any hydro facilities included in their bids.

### 3. Comments on Auction Principles and Process Criteria November 4, 2016

On November 4, 2016, JPM filed comments describing the guiding principles for designing an auction process for the Generation Facilities that maximizes total transaction value. JPM observed that creating competition among bidders is a key driver of value. The rules of the auction process must be transparent and the process must be consistent with industry practice. JPM described the need to have fairness among bidders including equal access to information to evaluate the facilities. Finally, JPM stressed the need for process continuity and setting an appropriate pace for the auction, allowing enough time for data analysis while keeping bidders engaged.

JPM noted that the financing and power markets are supportive of a sale of the Generation Facilities at this time, but warned that further delay in the auction process creates a risk that these favorable conditions will lapse.

JPM described in more detail the criteria for selecting potential bidders for Round 2. Criteria include: bid price relative to other bidders, assets included in the bid, ability to finance, commitment to the transaction, reputation in the market, and ability to support Round 2 due diligence.

JPM stressed the need for final binding bids without financing contingencies at the end of Round 2. Round 2 bids need to be binding and financed so that the seller<sup>2</sup> knows that the bid is final and not subject to further contingencies. Without binding final bids, it is not possible for the seller to judge the best offer.

Regarding the addition of a third round of bidding following binding and fully financed bids in Round 2, JPM stated that such a structure would create uncertainty for bidders and is not commercially standard. An additional Round 3 would create a higher risk of a broken deal and would discourage bidders from expending the funds needed to complete due diligence and enter binding Round 2 bids. Based on JPM's experience, a Round 3 process would suppress bidder interest in the auction.

Finally, JPM explained that accommodations it has designed for the municipal bidders in its amended auction design are non-standard for commercial auctions. Nonetheless, it believes it can effectively manage any negative impact of the favorable treatment for that group of bidders.

## **B. City of Berlin and Towns of Gorham, Bristol and New Hampton**

### **1. September 30, 2016, Written Comments**

Berlin hosts the Smith Hydro facility, which has a nameplate capacity of 15.2 megawatts (MW) and a current city tax assessment of \$56.5 million. Gorham hosts the Gorham Hydro facility with a nameplate capacity of 2.1 MW and a current town tax assessed value of \$3.9

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<sup>2</sup> In this case, unlike conventional auction sales, the Commission and Auction Advisor will evaluate final bids to ensure highest total transaction value.

million. Bristol and New Hampton jointly host the Ayers Island Hydro facility, which has a nameplate capacity of 8.4 MW and a tax assessed value of \$6.7 million for the portion located in Bristol. Bristol described the purpose of its intervention to be:

a) to ensure that the Town's tax base is protected by this process which should be implemented in order to produce the highest sale price possible; and b) provide an opportunity for the residents of Bristol to participate in a possible purchase of Ayers Island if such sale is in the best interest of the Town.

Bristol Comments at 2. Similar to Bristol, New Hampton stated that its, "main interest in participating in the auction process is to ensure that the sales price is indicative of what the town believes is fair market value." New Hampton Comments at 8.

Berlin described its participation in the 2015 Settlement and the Litigation Settlement approved by the Commission in Order No. 25,920 and described the procedural steps leading to Berlin and Gorham's intervention in this docket. Berlin and Gorham claimed that the auction schedule proposed by JPM on September 12, 2016, was unworkable because it does not allow for participation by the Municipalities and is therefore inconsistent with the letter and spirit of the 2015 Settlement, Section IV. B. Bristol and New Hampton joined in Berlin and Gorham's comments and added further timing and process concerns in their comments.

Berlin and Gorham claimed that given the statutory notice requirements of RSA Ch. 38 to approve a municipal purchase of generation facilities, the Municipalities could not participate in an auction process like the one in JPM's initial proposal. Berlin Comments at 8. The Municipalities claimed that their decision to move forward would have to be made before they had adequate time to analyze data, educate citizens on the advantage of acquiring such facilities, and file the requisite notices of meetings. The Municipalities also asserted that there was not sufficient detail concerning how prices for individual assets will be allocated when assets are

grouped in bids. Finally, the Municipalities discussed the need to coordinate efforts among themselves potentially causing additional delay in reaching decisions on pursuing bids in the proposed auction.

According to Berlin, the City Council must approve the decision to acquire the generation facility by two thirds vote. Berlin Comments at 5-6. The City Council vote must be confirmed by a majority vote of the qualified voters at a regular or special election held within one year of the City Council vote. RSA 38:3, Berlin Comments at 6. A second vote by two thirds of the qualified voters at an election must occur within 90 days of the final determination of price for the assets, to authorize the purchase and bonding of the acquisition. RSA 33-B and RSA 38:13, Berlin Comments at 6.

Gorham and Bristol maintain a traditional form of town meeting. Gorham and Bristol's next annual town meeting is March 14, 2017. The last date for those towns to post the warrant and budget for the town annual meeting is February 27, 2017. Berlin Comments at 6. Thus, if Gorham or Bristol wishes to present a question of purchasing hydro facilities at the March 14, 2017, annual town meeting, the towns must analyze data, educate selectmen and citizens, and post a warrant before February 27, 2017. New Hampton, unlike Gorham and Bristol, has voted to conduct its town meeting over two-sessions. *See* RSA 40:13. The first is a deliberative session which, for the annual meeting in 2017, must be held between February 4 and February 11. New Hampton must post its warrant and budget for the first deliberative session of its annual meeting by January 30, 2017. The second session of the New Hampton annual town meeting, where articles are voted on, must be held on March 14, 2017. New Hampton Comments at 3.

Gorham, Bristol, and New Hampton asserted that due to a lack of administrative resources, the complexity of the issues concerning a bid on the hydro facilities, and an already full agenda for the annual meeting, they cannot present the auction questions to voters at the annual meeting. As a result, Gorham, Bristol, and New Hampton stated that they will have to hold a special meeting to deal with the decision on purchasing the hydro facilities. Berlin Comments at 7, and New Hampton Comments at 3. If Gorham, Bristol, or New Hampton wishes to hold a special meeting to consider whether to bid on the hydro generation assets, none of these towns can schedule such a meeting on biennial election-day (November 8, 2016) and they cannot schedule a special meeting within 60 days prior to an annual meeting. As a result, this year a special meeting must be held before January 13, 2017, for Gorham and Bristol and before December 5, 2016, for New Hampton, or else sometime after the annual meeting. Berlin Comments at 6.

Gorham or Bristol voters, by two thirds vote, at either an annual or special meeting, must vote that it is expedient to acquire the generation facility, and then within 90 days of the final price determination, the Gorham or Bristol voters by two thirds vote must approve the purchase and bonding of the acquisition. Berlin Comments at 6.

The Municipalities all voiced concerns with their ability to participate in a non-binding Round 1 bid process, but they accepted the alternative arrangement for Round 1, offered by JPM at the Municipalities' request. *See* JPM Response to New Hampton Question filed September 29, 2016. Under that alternative arrangement, at the conclusion of the Round 1 non-binding bids, the Municipalities would have the option of giving JPM their indication of value for their respective hosted local hydro facility. The Municipalities would then receive, on a

confidential basis, information from JPM on how their values relate to the range of Round 1 bids on their hosted facility.

The Municipalities expressed concerns over the failure to allocate prices to specific generation assets in both the Round 1 and Round 2 bids on groups of assets. If they are not bidders on the generation assets, the Municipalities also requested information on all final bid allocations on asset groupings at the end of Round 2 whether or not those allocations are winning bids.

The Municipalities acknowledged that JPM has committed to giving them access to the electronic data room for the hydro assets in early November to allow them to begin their analysis of facility value. They also confirmed receipt of confidentiality agreements from Eversource, which are currently under negotiation, and receipt of an index to a sample CIM on an electric generating asset.

The Municipalities asked that the Commission take administrative notice of testimony filed in Docket No. DE 14-238, by George E. Sansoucy dated July 16, 2015, on behalf of Berlin; Leszek Stachow dated September 18, 2015, and supplemented on January 26, 2016, on behalf of Non-Advocate Staff; and Dr. Peter Cramton dated September 18, 2015, and revised September 28, 2015, on behalf of Non-Advocate Staff. Berlin Comments September 30, 2016, at 9. Those three witnesses testified concerning an “ascending clock” auction process.<sup>3</sup> The Municipalities suggested that an ascending clock auction is a more transparent, fair, simple and efficient auction process than the process proposed by JPM. The Municipalities claimed that because, in the JPM process, bidders do not know the level of competing bids, it is not possible

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<sup>3</sup> Ascending clock auction refers to an auction in which a group of bidders begin simultaneously bidding up the price of an item offered for sale until no further bids are received. At that point the bidding is closed and the final highest bid is the winning bid.

for bidders to bid up assets and that some value may be lost due to the lack of transparency of other competing bids. *Id.* at 10-11.

The Municipalities requested that the fully populated electronic data room be made available to them by November 1, 2016. They asked that the auction be postponed to start at the conclusion of the on-going sale of TransCanada's 583 megawatt hydro facilities located on the Connecticut and Deerfield Rivers. Alternatively, they suggested that the auction process should be delayed seven months so that Round 1 would begin on May 1, 2017, or that the auction of the fossil generation facilities proceed on the schedule proposed by JPM, and that the auction of the hydro facilities be delayed until after the fossil auction is completed. As an additional option, the Municipalities proposed that they be allowed to participate in Round 2 without participating in Round 1 and that Round 2 be delayed so that it begins on May 1, 2017. Finally, the Municipalities proposed that the auction of the hydro facilities be run as a "reserve auction" with the reserve price set at the 2016 municipal tax assessed value of each of the hydro generating facilities.<sup>4</sup>

The Municipalities also requested further options for discovery, testimony and a hearing on the auction process proposed by JPM. The Municipalities argued that the current procedural schedule in this docket is too short to allow meaningful participation by them in the design of the auction process.

## 2. October 21, 2016, Written Comments

Berlin and Gorham filed additional comments on the amended auction design filed by JPM on October 17, 2016. They stated that the amended auction design did not address municipal concerns and that the additional two months of delay in the Round 1 and Round 2

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<sup>4</sup> A reserve auction refers to an auction in which there is a reserve price which serves as a minimum price. If no bid is received above the reserve price the item is not sold.

process still would not allow municipalities sufficient time to coordinate necessary educational sessions with voters, hold votes or negotiate agreements for operation, maintenance, and marketing of the multi-million dollar facilities. Berlin Comments at 5. They claimed, as a consequence, that they were effectively frozen out of the bidding process. *Id.* Berlin and Gorham were also concerned that the amended auction's emphasis on: having as little conditionality as possible, ability to consummate a transaction, and fully financed offers, in the selection of winning bids in Round 2, creates a presumption against municipal bids because the municipalities must wait for a bid to be accepted as a winning bid by JPM before taking it back to the voters for a second vote to bond the purchase pursuant to RSA 38:13. *Id.* at 5-6. Berlin and Gorham requested that the Commission expressly rule that the fact that "a municipality with the higher bid must go through the RSA 38 process is not grounds for rejection of that municipal bid" in Round 2. *Id.* at 6. They requested rights to review the full bidding process results as part of a final adjudicatory proceeding concerning the Commission's approval of the final bids and the allocations associated with the sale of the Eversource assets. *Id.*

As a solution to all of their concerns, Berlin and Gorham suggested the use of a third round of bidding after the Round 2 bidding, scheduled for mid-May 2017 in the amended auction design. If the highest Round 2 bid does not exceed the municipal bid, or some other lower benchmark chosen by the municipality, then the municipality could force a third round where the bidders could potentially "bid up" the price to acquire the asset. *Id.* at 6-7. Berlin and Gorham claimed that the responses in the JPM amended auction design to various municipal suggestions, including ascending clock auctions, the suggested delay until the conclusion of the TransCanada sale, the methods for selecting group bids, or the undesirability of separating the fossil and hydro assets into separate auctions, are not sufficiently detailed and require further discovery. *Id.*

at 7-8. Berlin and Gorham argues that the Commission should allow additional time for data requests, technical sessions, pre-filed written testimony from JPM, Staff and other parties, and hearings, to allow all of these issues to be adjudicated before the Commission. *Id.* at 8.

Bristol reiterated that its “primary purpose in participating in this case is to protect its tax base.” Bristol October 21, 2016, Comments at 1. Bristol claimed that JPM’s October amendments failed to ensure that the Municipalities would be able to protect their tax bases. *Id.* Although JPM offered the Municipalities the ability to test their facilities’ value against the indicative bids in Round 1, Bristol observed that there is no guarantee that final binding bids will come in as high as earlier indicative bids. *Id.* at 2. Therefore, according to Bristol, the Municipalities must bid in the second binding bid round in order to protect their tax base. Bristol asserted that even with the Round 2 bids due in mid-May rather than early March, there is not time for multiple board of selectmen meetings to analyze the burdens and benefits of a purchase of Ayers Island Hydro, and additional meetings with the public to educate residents prior to a vote. *Id.* at 3; RSA 38:4 and :13.

New Hampton stated that issues remain with the timing of release of confidential information, insufficient time to educate the public and hold required special town meetings, the Municipalities’ access to information regarding submitted bids so that municipal governing boards can timely determine whether it is necessary to submit a bid in order to protect the municipal tax base which requires bidder approval, and finally the need for municipal input on allocation of sales price to facilities located within the Municipalities. New Hampton October 21, 2016, Comments at 1.

New Hampton stated that a May 15, 2017, deadline for final bids proposed in JPM’s amended auction design would require notice of the special meeting by March 18, 2017, for a

deliberative session April 1, 2017, and a vote on May 2, 2017. New Hampton claimed that such a schedule would not allow sufficient time for meaningful opportunity to educate the voters regarding these multi-million dollar facilities. *Id.* at 4. New Hampton also asserted that the amended auction design does not provide the Municipalities with the CIM until January, which delays the Municipalities analysis of data until January which is a time when selectmen are busy getting ready for the annual town meeting. *Id.* at 4. New Hampton claimed that a New Hampton selectman will testify that New Hampton cannot hold the vote to authorize a purchase of the Ayers Island Hydro facility before the end of July 2017. *Id.* New Hampton asserted that JPM has provided no evidence that extending the bidding deadline or separating the fossil and hydro assets is unacceptable. *Id.* at 6. Finally, New Hampton asked that the Commission require JPM to accept bids by the Municipalities in the final round of bidding without regard to the fact that those bids will need to be ratified and bonding approved by the voters in a subsequent town meeting. According to New Hampton, the Municipalities are legally prohibited by RSA 38:13 from submitting bids with financing pre-approved. *Id.* at 7.

### **C. Testimony from Docket DE 14-238 Adopted by the Municipalities**

The Municipalities asked the Commission to take administrative notice of testimony by three witnesses in Docket No. DE 14-238, and the Municipalities relied on that earlier testimony on auction design by Mr. Sansoucy, Mr. Stachow, and Dr. Cramton in their written comments. Berlin and Gorham Comments September 30, 2016, at 9-11.

Mr. Sansoucy is an engineer and an appraiser who has provided services including “valuation of public utility infrastructure, energy projects, and complex industrial properties.” Sansoucy Testimony at 1. Mr. Sansoucy did not claim any direct experience with auction processes or any experience in managing auctions of electric generation facilities.

Mr. Sansoucy's testimony addressed the auction process proposed in the 2015 Settlement and emphasized the need for an open and public auction process supervised by the Commission to prevent the sale of the Generation Facilities at a "fire sale." *Id.* at 2. Mr. Sansoucy claimed that the 2015 Settlement Agreement at Section IV does not provide sufficient detail concerning the auction process or the accommodations needed to allow municipalities to participate in the auction. *Id.* at 5. Mr. Sansoucy asked that the auction be held after the 2016 town meetings to allow towns to authorize bids prior to the bidding in the auction. *Id.* at 6. Mr. Sansoucy also recommended that municipalities be allowed to bid on individual assets. Finally, Mr. Sansoucy recommended that all bids be evaluated in an open and public process with bidder identities kept private. *Id.* at 7.

Mr. Stachow is educated as an economist and has extensive experience in acquisitions and mergers in central Europe. Stachow Testimony Exhibit 1. Mr. Stachow's testimony summarized testimony by other staff members and also discussed the auction process. Mr. Stachow suggested a 6 step process in which the first 4 steps mirror the broad Round 1 and the due diligence portion of Round 2 in the JPM auction design. Mr. Stachow departed from the JPM design at step 5 in which an ascending clock auction would be conducted with the Commission selecting winning bidders in step 6. Stachow Testimony at 16-20.

Dr. Cramton is a professor of economics with extensive research on auction theory and practice. Cramton Testimony at 1. Dr. Cramton recommended the same 6 step auction process described in Mr. Stachow's testimony. Dr. Cramton described the simultaneous ascending clock auction as an auction where all bidders have real time access to competing bid amounts on assets or groups of assets without knowing the identity of the other bidders. Bidding continues until the highest bids are established on individual assets or groups of assets. *Id.* at 3-5. Dr. Cramton

gave examples of how the ascending clock auction design has been used in electricity-related contexts. *Id.* at 6. The examples included numerous sales of purchase power agreements for electricity in Canada, Netherlands, Denmark, Spain, Portugal and Germany. *Id.* According to Dr. Cramton, a similar process has been used to procure default service electricity supply in New Jersey and Pennsylvania and also to procure electricity capacity on an annual basis in the ISO-NE, Midwest ISO, and Texas PUC forward capacity auctions. *Id.* at 7.

#### **D. Conservation Law Foundation**

CLF supported the broad and open auction process recommended by JPM. CLF Comments at 1. CLF stressed the need to complete the sale of the Eversource generation portfolio quickly and to establish a competitive market. *Id.* at 2. CLF noted that the JPM auction design does not describe a separate process in the event a facility does not sell at the end of the auction. CLF cited the Failed Auction section of the 2015 Settlement, Section IV. G, which provides that in the event that a facility does not sell at auction, it be offered for sale in a second auction or retired. *Id.* at 1. CLF argued that if bidders know that there is likely to be a second offering of a facility, they may refrain from bidding in the initial auction. *Id.* at 2. To remedy this concern, CLF suggested that the “Commission should consider making clear, at the outset, that it will proceed directly to the retirement option in the event of a failed auction ....” *Id.* Otherwise, according to CLF, the process leaves open the possibility that there will be a second auction of unsold assets, and increases the likelihood of one or more assets remaining unsold, as well as the likelihood that bidders might approach the upcoming auction strategically, anticipating a potential second auction for unsold assets. *Id.* Further, CLF recommended that the Commission and the Auction Advisor obtain information regarding the cost of retirement of individual facilities for use in analyzing bids on the portfolio. Finally, CLF pointed to the 2015

Settlement's goal of achieving the divestiture of the Eversource Generation Facilities expeditiously, and asked that the Commission and the Auction Advisor avoid process changes that create any delay in the divestiture. *Id.*

#### **E. Sierra Club**

The Sierra Club objected to two aspects of JPM's proposed auction design. First, the Sierra Club asserted that there was a lack of criteria for JPM to use in selecting the Round 1 bidders to participate in Round 2. Sierra Club Comments at 3. Second, the Sierra Club disagreed with JPM's recommendation that Eversource remove the two legacy mercury boilers from Schiller station. The issues surrounding the removal of the two boilers were decided in Order No. 25,956 (October 21, 2016). With regard to selection criteria for bidders moving into Round 2 the Sierra Club stated:

Phase II would consist of '[p]arties who continue in the process,' but does not indicate whether or not that population would be self-selected (i.e., whether or not the parties bidding in Phase II would consist of the parties from Phase I less those that decided to drop out). Instead the proposal contemplates '5-10 parties' participating in Phase II, 'depending on the number and quality of preliminary, non-binding bids' and notes that the 'bidders allowed into' Phase II would be 'driven by initial bids, consideration offered, and the ability to move quickly.' This appears to indicate that there would be an element of judgment on the part of the auction manager in determining who gets into the Phase II process and who is excluded, yet the proposal does not identify with any specificity what criteria would be used for such determinations.

Sierra Club Comments at 3.

The Sierra Club argued that this lack of clarity regarding the criteria for selection to proceed to Round 2 bids would cause uncertainty and result in fewer and lower quality bids and would depress sale results. *Id.* at 4. Further, the Sierra Club asserted that allowing JPM too much discretion would undermine the purposes of the auction. Without specific rules spelled out

ahead of time, the Sierra Club maintained that the sale would look less like an auction and more like a brokered sale. *Id.*

### III. COMMISSION ANALYSIS

#### A. Analytical Framework for Auction Design

The framework for our analysis of the auction design proposed by JPM is provided by the 2015 Settlement, the Litigation Settlement, and RSA 369-B:3a. Those settlements, as well as the enabling legislation, direct our supervision of the sale of the Generation Facilities. A key element of the 2015 Settlement is the “[e]xpeditious pursuit of the divestiture of PSNH’s generating plants after a final decision by the Commission approving the settlement set forth in this Agreement.” 2015 Settlement, I at 2. The 2015 Settlement also describes clearly the objective of the auction and the Auction Advisor’s role in designing the auction.

The fossil and hydro auction processes will be conducted by a qualified auction advisor whose primary objective will be to maximize the realized value of the fossil and hydro generation assets. A secondary objective of the auction processes, to the extent not inconsistent with the primary objective, will be to accommodate the participation of the municipalities that host generation assets and to fairly allocate among individual assets the sale price of any assets that are sold as a group ....

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 grouping, the approval of any final bids for the generation assets, and any other issues deemed appropriate by the Commission. Any municipalities providing notice to the Commission of their desire to bid on generating assets shall automatically be qualified to bid on any individual asset or asset package. Prior to any binding bidding phases, the auction advisor shall disclose any agreed-upon asset groupings for bidding, and qualified bidders will be given the opportunity to conduct detailed due diligence, ask detailed questions, visit the sites and submit bids in accordance with the process established for the auction as determined by the auction advisor and approved by the Commission.

2015 Settlement IV. B. As the Commission held in Order No. 25,920:

We have reviewed the technical aspects of the 2015 Settlement Agreement and the 2016 Litigation Settlement and find that their provisions properly address the need to manage the divestiture process in an efficient and reasonable manner. We believe that it is wise to defer the questions related to the auction design to a separate proceeding, as informed by the advice to be provided by the Auction Advisor....Furthermore, we find that the manner of retaining an Auction Advisor contemplated by the 2016 Litigation Settlement will ensure a fair, transparent, and effective process.

Order No. 25,920 at 69.

Thus, we defer to our Auction Advisor, JPM, regarding the optimal design and process for the conduct of the sale of the Eversource Generation Facilities. The settlements clearly anticipated that the Auction Advisor would control the process and that the Commission would oversee it to the extent it deems necessary. We will not substitute our judgment as to whether various alternative auction processes would produce better results, because we have selected an Auction Advisor with the experience and judgment to advise us on those issues.

**B. Selection of Auction Advisor**

The Litigation Settlement approved in Order 25,920 described the process for selecting an Auction Advisor:

19. The Settling Parties and Staff agree that it is premature to establish a specific auction design prior to the Commission's retention of an auction advisor.

20. The Settling Parties and Staff agree that selection of an expert auction advisor by the Commission should be accomplished through a competitive request for proposals ("RFP") process conducted by the Commission with appropriate input from other parties to this proceeding.

Litigation Settlement at 5. Consistent with the settlements and Order No. 25,920, the Commission conducted a public, transparent and competitive selection process and chose JPM as

its Auction Advisor. The selection of JPM and the contract with JPM were approved by the Governor and Executive Council on September 7, 2016.

The Commission selected JPM because the firm has extensive experience marketing and selling a variety of electric generation assets owned by both regulated and private businesses. That experience, spanning a period of more than 20 years, qualifies JPM to design and conduct a successful sale of the Eversource Generation Assets and gives the Commission a basis for deferring to JPM's expertise, over the expertise of other parties and experts in this docket, with regard to the design and conduct of the auction.

### **C. Role of Auction Advisor and Auction Design**

Pursuant to the 2015 Settlement and Litigation Settlement, the role of the Auction Advisor is to design and conduct the auction of the Generation Facilities with Commission oversight. Although the settlements provide for the settling parties to have input on issues such as design of the auction process, asset groupings and approval of final bids, those issues are to be resolved in expedited adjudicatory proceedings, with the Commission retaining such control as it deems necessary. 2015 Settlement, IV, B. As provided in the settlements, having selected JPM to serve as Auction Advisor, the Commission has asked JPM to recommend an auction design and process for the sale of the Generation Facilities which meets the goals of the settlement agreements.

JPM has described a number of principles that will guide a successful auction of electric generation facilities and will maximize the value received from bidders. The auction process should be transparent with clear rules and procedures. JPM Comments November 4, 2016, at 3. The transaction should foster a sense of competition among the bidders, while maintaining confidentiality with respect to whether and how much other bidders may have bid, to incentivize

each bidder to offer their highest value for the asset or group of assets. *Id.* The auction should be governed by rules that are consistent with industry standards for similar sales so that the rules are familiar to competitive bidders. *Id.* There should be fairness among the bidders so that they are treated equally and judged on consistent standards. *Id.* at 3-4. There should be continuity to the process without changes in the middle of the auction. *Id.* at 4. The pace of the process should be appropriate to allow enough time for due diligence but expeditious enough to maintain market interest. *Id.* Finally, the right amount of data should be available to bidders to allow them to conduct their analysis and submit meaningful bids. *Id.*

Consistent with those guidelines, JPM has provided its advice on the auction design through written comments filed with the Commission on September 12, October 17, and November 4, 2016. JPM has structured the auction process in two rounds, with Round 1 reaching a broad group of potential bidders and Round 2 involving a smaller number of selected bidders who appear to be the best prospects after Round 1. JPM plans to reach out to a broad universe of potential buyers in advance of Round 1 to alert them to the process and allow them to submit their qualifications to participate in the process. JPM September 12, 2016 Comments at 7.

The schedule of the auction as a result of the amended design is as follows. The request for qualification process for Round 1 bidders will begin in mid- to late November 2016. Criteria for selection into Round 1 include ownership and operation of similar facilities, expected sources of financing to purchase the facilities, ownership, governance structure, and operations of the bidder. JPM Comments September 12, 2016, at 7.

Confidentiality agreements will be circulated to qualified Round, 1 bidders and finalized in mid-December 2016 to early January 2017. JPM Comments October 17, 2016 at 1. A CIM

will be circulated to, Round 1 bidders in early January 2017. Preliminary non-binding offers for the facilities will be due in mid- to late February, 2017.

Round 2 bidders will be selected in early to mid-March, allowed access to detailed due diligence material on the facilities through an electronic data room, and given facility tours and meetings with existing Eversource management. Selection criteria for Round 2 bidders include: the bid price, the assets bid on, demonstrated commitment to the transaction, ability to get financing, past market behavior or reputation, and their experience owning and operating similar facilities JPM Comments November 4, 2017 at 4-5.

Round 2 is expected to last approximately 8 weeks, which should allow the bidders time to complete due diligence and to mark up the draft purchase agreement prior to submitting their final binding bids. JPM Comments September 12, 2016, at 8-9. JPM will then prepare a presentation summarizing such proposals and review the results of the auction with the Commission, prior to beginning final negotiations. Depending on the nature of the final proposals received, JPM is likely to recommend that the Commission select more than one party for final negotiations of the transaction contract. This is typical in competitive auction processes as it fosters competition among the final parties and can potentially lead one of them to improve their bid (in terms of price or terms) above what they included in their final proposal. This process also helps to ensure that agreement is reached with one party in the event the other party withdraws or ceases to participate in final negotiations.

#### **D. Ascending Clock Auction Design**

Pursuant to N. H. Code of Admin. R. Puc 203.27 (a)(2), we will grant the request by Berlin and Gorham to take administrative notice of the following pre-filed written testimony in Docket No. DE 14-238: (1) George E. Sansoucy dated July 16, 2015, on behalf of Berlin and

Gorham, (2) Leszek Stachow dated September 18, 2015, and supplemented on January 26, 2016, on behalf of Non-Advocate Staff, and (3) Dr. Peter Cramton dated September 18, 2015, and revised September 28, 2015, on behalf of Non-Advocate Staff.

Our expert, JPM, with experience selling similar generation portfolios, has recommended a broad two round auction process to generate robust interest in the power industry market for the Generation Assets. JPM has indicated that it knows of no sales of similar electric generation portfolios that have been conducted using the ascending clock auction recommended by the Municipalities, and by Mr. Sansoucy, Mr. Stachow, and Dr. Cramton. JPM Comments October 17, 2016, at 3. Although in theory an ascending clock auction can create transparency and fairness, none of the three witnesses filing testimony in DE 14-238 can point to its use in selling assets such as electric generation facilities. Electric generation facilities are highly complex industrial facilities whose value is derived primarily from their ability to generate cash flow in the future. Purchasing such complex assets requires buyers to conduct extensive due diligence on the assets, including operational, financial, economic, environmental, and regulatory due diligence. This due diligence takes significant effort and cost on the part of potential buyers before reaching a point where they can submit a binding proposal. JPM Comments November 4, 2016, at 3.

All of Dr. Cramton's examples of ascending clock auctions are for commodities, electric power or capacity, not for the ownership and operation of generating plants. Commodities are typically uniform, standard, broadly available assets whose price is relatively knowable and thus require minimal buyer due diligence. On the other hand, JPM has given us numerous examples of sales of electric generation plants using the bid process it proposes for the sale of Eversource's

generation facilities. In fact, the Seabrook Nuclear Power Station was successfully sold in 2002 in a similar two round auction process conducted by JPM.

We have reviewed the written testimony and recommendations of the various experts. In examining this evidence, we rely on the experience of each expert and the specific results that each expert can identify with regard to use of the recommended auction design for the sale of electric generating facilities. On that basis, we find that the use of an ascending clock auction in a sale of this type would be without significant, relevant precedent. We take seriously the importance of maximizing the potential value of the Generation Facilities and do not wish to try an experimental approach to this auction design. It is apparent that the broad two round process recommended by JPM is the appropriate auction design for Generation Facilities and we reject the suggestion that we have JPM conduct an ascending clock auction.

#### **E. Third Round of Bidding**

The Municipalities also recommend a third round of bidding after the conclusion of JPM's Round 2 binding bids in which the Municipalities would have an opportunity to bid up specific assets against the highest Round 2 bidders. Alternatively, the Municipalities suggest that if they do not bid, they be allowed to see winning and losing bids at the end of Round 2 so that they can be involved in negotiating the allocation of bid prices among assets. JPM states that creating a third bidding round would add uncertainty and confusion for bidders which would very likely negatively impact the ability of the process to maximize transaction value. JPM Comments October 17, 2016, at 3. Further, according to JPM, allowing the Municipalities access to confidential bidding information would not be consistent with standard practice and would discourage bidding. *Id.* at 3-4. Based on the advice of our Auction Advisor that such activity would likely reduce total transaction value, we reject the suggestion that there be a third

bidding round, or that the Municipalities participate in negotiations with final Round 2 bidders over allocation of value to various assets.

#### **F. Reserve Price**

The Municipalities suggest that the Eversource hydro assets be auctioned with a reserve price set at the level of the 2016 municipal tax assessments of the facilities. Setting a reserve price for this auction is contrary to the terms of the 2015 Settlement, which directs that all assets be sold. If a reserve price for an asset is set above market value, it will increase the likelihood that the asset will not sell. We have no indication of how the municipal tax assessed values of the hydro assets compare to the market values. In fact, the auction will establish the market value of the assets. Further, JPM recommends against setting a reserve price for this auction, because in JPM's experience setting reserve prices is unlikely to help maximize the value of the assets sold. JPM Comments October 17, 2016, at 3. Therefore, we reject the suggestion that the hydro facilities be auctioned with a reserve price.

#### **G. Asset Groupings for Bidding**

The Municipalities request that they be allowed to bid on individual hydro facilities. JPM has designed an auction process which allows the Municipalities and any other bidders to bid on individual assets, therefore the auction design fulfills this request. The Municipalities also suggest that the hydro assets be sold as a separate portfolio. JPM does not recommend selling the hydro facilities separate from the fossil units because JPM does not believe that this approach will maximize value for the portfolio. *Id.* JPM's experience is that certain bidders may find purchasing the portfolio has more value than buying part of the portfolio. JPM's auction design does not force any groupings of assets and instead allows bidders flexibility to bid on all or some of the assets. The winning bidder (or bidders) can then be selected based on whatever

combination of proposed transactions maximizes value. We believe that JPM's recommendation regarding asset groupings is market based and reasonable.

#### **H. Allocation of Purchase Price to Specific Facilities**

The 2015 Settlement Agreement requires that we "fairly allocate among individual assets the sale price of any assets that are sold as a group." 2015 Settlement IV. B. The Municipalities have requested that value be allocated to specific hydro facilities. JPM has provided in its amended auction process that all Round 1 and Round 2 bidders must allocate bid prices to hydro facilities in order to participate in the auction. JPM Comments October 17, 2016, at 2. This auction process accommodates the Municipalities' request and is consistent with the settlement requirements.

#### **I. Lack of Criteria for Bidder Entry into Second Round**

Sierra Club argues that there is a lack of specificity concerning the criteria used by JPM in selecting Round 1 bidders to enter into Round 2. Sierra Club claims that this lack of clarity will depress bidder participation and result in lower sale results. JPM indicated in its final comments that criteria for entry into Round 2 include: the bid price, the assets bid on, demonstrated commitment to the transaction, ability to get financing, past market behavior or reputation, and their experience owning and operating similar facilities. JPM Comments November 4, 2017 at 4-5. We find such criteria sufficiently detailed to give bidders notice of the factors considered by JPM in allowing entry into Round 2.

#### **J. Failed Auction**

CLF asks that the Commission eliminate the option of re-auctioning an asset that doesn't sell at auction and instead require retirement of that asset. CLF claims that if bidders know that

an asset will be re-offered if it doesn't sell they are not likely to bid on it in the first auction, or they are likely to bid lower. The 2015 Settlement provides,

Should generation assets be left unsold as a result of the auction process or as a result of the Commission not approving a sale, the Commission in consultation with the auction advisor shall initiate a new divestiture process for such unsold assets no later than ninety days from the date of the Commission's order approving the sale of the other generating assets or direct PSNH to pursue retirement of such unsold asset in an economic manner ....

2015 Settlement IV G. We will follow the settling parties' directive and will determine, in consultation with JPM, what course to pursue and what information we will require from Eversource, if and when we encounter a failed auction. At this time, we are focused on approving an auction design and process that will maximize the value of the portfolio and result in a sale of all the Eversource generation facilities.

#### **K. Delay of Sale**

The Municipalities suggest a number of later dates for beginning various stages of the auction. They argue that the auction should not start until after the sale of generation assets owned by TransCanada is completed. We note that TransCanada has announced the sale in the trade press and so that request is already met. Further, the Municipalities request that Round 1 of the sale not start until after May 1, 2017, or alternatively that Round 2 not start until May 1, 2017. Finally, the Municipalities suggest that the sale be further delayed so that the final binding bids are due in July 2017. All of those requests for delay are based on the Municipalities' claim that the issues of approving a bid for one of the hydro facilities are too complex to be part of the annual town meeting, to be held on March 14, 2017, for the three towns involved. As a result, all three towns assert that they must hold special meetings and that the votes on bidding on the acquisition of a generation asset cannot occur before July 2017.

Under the amended auction process, in order to accommodate the Municipalities' participation, JPM has extended the process so that final binding bids are due in early to mid-May 2017. JPM has advised us that the current financing environment is favorable for asset sales like the sale of the Generation Assets. JPM Comments November 4, 2016, at 4. JPM has further advised us that once we move the sale date out beyond May 2017, the risk of the financial environment changing increases, and for that reason JPM does not recommend further delay if we are to maximize total portfolio value for these assets. *Id.* To the extent we must balance the risk of delay and diminution in overall transaction value against the particular needs of the Municipalities, the 2015 Settlement is clear that maximizing value must be our primary objective. Therefore, we will not require additional delay of the auction process, beyond the two months proposed by JPM under the amended auction process, to further accommodate the Municipalities' requests for more time.

#### **L. Firm Bids and Municipal Bids**

The Municipalities request that we rule that their bids, if they are the highest but come without any financing commitment, be selected as winning bids even though the Municipalities will then have to take the bid amount to the voters, a process which will take two to three months. The Municipalities take the position that RSA 38:13 prevents them from offering a binding bid with financing because they cannot know the price to be paid for the plant until their bid is accepted as the final winning bid.

RSA 38:13 provides in part:

Within 90 days of *the final determination of the price to be paid* for the plant and property to be acquired ..., 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. (emphasis added)

While we understand that RSA 38 is designed for a slightly different process where the municipality and the utility may reach an agreement on price, or alternatively the Commission may determine a price for the taking, the auction process requires a different interpretation of the final price language in RSA 38:13. An alternative reasonable interpretation of that language in an auction process requiring a fully financed bid, is that the bid amount is the final determination of the price to be paid. That final price is subject to the condition that it be the highest bid, but that does not negate the fact that when the bid is submitted the price is final. In this auction, if the municipal bid in Round 2 is accepted, the municipality will be obligated to purchase at the price it bid. Given this interpretation, the governing body of a municipality 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.

JPM has explained the reasons for requiring financed and binding bids in Round 2 of the auction. JPM Comments November 4, 2016, at 5. It is important that the process end promptly and that winners be selected so that parties expending substantial resources on due diligence have some reasonable chance of being selected as the final winning bid. *Id.* Requiring all bidders to submit final binding bids with as little contingency as possible is more likely to maximize the price paid for the assets and treats all final bidders equally. *Id.* at 6.

Moreover, given the importance of final binding bids not being subject to financing contingencies in any auction, it is difficult to understand how any of the various alternative auction processes proposed by the Municipalities would work if they are not able to submit bids with financing approval. Even if the Commission were to direct an ascending clock auction, as

suggested by the Municipalities, the bidders would need to be similarly situated so that the winning bid could be accepted and the transaction closed. We cannot design an auction process that accomplishes fairness and transparency but allows one group of bidders to bid with a significant contingency to displace other qualified non-contingent bids. JPM has advised us that such an arrangement would be very unusual, would create uncertainty around the process, and would therefore discourage bidders from participation, which in turn would not be conducive to maximizing value. *Id.* at 3 and 6.

#### **M. Timing Issues for the Municipalities**

The Municipalities argue that they cannot make a decision to bid in the auction in the time frame provided, even under the amended schedule contained in the JPM October 17, 2016, comments. The Municipalities argue that they do not have sufficient resources to analyze data, educate selectmen, and educate citizens in time to present the acquisition of the Eversource facilities for a vote at this year's annual meeting to be held on March 14, 2017.<sup>5</sup> Even if we assume that these arguments are correct, the Towns are not prevented from hiring outside experts and consultants to assist in the process leading up to annual meeting. Further, they have not asserted that it is legally impossible for the issue of purchasing the generation facilities to be presented at their respective annual meetings.

JPM has made several changes to the auction process to assist the Municipalities. First JPM agreed to give the Municipalities early access to the electronic data room relating to the hydro assets they host, in November 2016, as soon as confidentiality agreements are signed. JPM also agreed to provide the Municipalities the independent engineering report and the

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<sup>5</sup> The City of Berlin does not claim that it has timing problems regarding an annual meeting because it is a City with more flexibility in making decisions. These arguments are made by the Towns of Bristol, Gorham and New Hampton.

independent market report as soon as those reports are available, estimated to be in November 2016. Other bidders will not have access to the electronic data room until mid-March and will not have access to the independent engineering and market reports until early January 2017 when the CIM is distributed. According to JPM, this early access to data and reports, although treating the Municipalities differently from other bidders, will not materially interfere with the auction process. JPM Comments November 4, 2016, at 6.

We will require a revision to the proposed auction process to further accommodate the Municipalities. We direct JPM and Eversource to make the portions of the CIM relating to the hydro assets that the Municipalities host, available in November 2016 when the independent engineering and market reports are available. This early access to data on the generating facilities will allow the Municipalities the months of December and January to analyze the data and to determine whether they wish to proceed with a bid in the upcoming auction. New Hampton must post a warrant for this year's annual meeting by January 30, 2017, Gorham and Bristol must post their warrant by February 27, 2017. Berlin Comments September 30, 2016, at 6.

One additional accommodation that JPM has made for the Municipalities is to exempt them from any requirement to make an indicative bid in Round 1 in the mid- to late February time frame. JPM has offered to let the Municipalities give an indication of value in Round 1 and has agreed to give the Municipalities feedback, on a confidential basis, concerning how their value relates to the other indicative bids. JPM has stated that this accommodation may be made to the Municipalities without negatively impacting the auction process. JPM Comments November 4, 2016, at 6.

Given these accommodations, we believe that the Municipalities have sufficient time to give the legal notice they are required in order to vote to bid on their respective assets, and to vote to finance the bid with a municipal bond under RSA 33-C. While the Towns of Gorham, Bristol, and New Hampton have claimed that they are not able to approve bids in the time offered, based on our understanding of the comments filed and the statutes cited, we believe it is legally possible for all three towns, to go through the process to approve a fully financed bid by mid-May 2017. In order to meet this schedule, the Towns may need to do more in preparation for their annual meetings than they had anticipated, so that they can present the decision to acquire the hydro assets to their voters at their annual meetings in March 2017.

#### **N. Process Required by Settlement for Auction Design**

The Municipalities ask that we provide for additional data requests, technical sessions, testimony, and hearings, to determine what auction design will work best to maximize the value of the Eversource portfolio. We decline to have the parties in this proceeding engage in further process for several reasons. We have a record in this docket sufficient to decide the important issues of auction design. Based on the advice of our Auction Advisor, JPM, we need to have this auction process continue at a commercially reasonable pace in order to generate and maintain market interest and to maximize the total transaction value. Finally, we are required by the terms of the settlements to expedite the adjudicated issues concerning the auction design.

Our process thus far conforms to the requirements of RSA 541-A:31 and all parties have had an opportunity to present two rounds of comments on auction design, to adopt prior written testimony on auction design, and to ask questions of JPM, both at the prehearing conference and in writing following the pre-hearing conference. Parties have presented their positions and concerns to the Commission, both orally at the prehearing conference and in writing. We believe

this process is fair and adequate in order for the Commission to rule on an appropriate auction design. We have afforded notice and an opportunity to be heard on issues of auction design and we note that administrative agencies are granted some flexibility in fashioning appropriate procedures for adjudications. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

**O. Subsequent Issues Arising During Auction Process**

The auction design suggested by JPM moves the process from today's date through the conclusion of the second round bids without any specific Commission approval required. Given JPM's expertise in conducting similar auctions, and the clear criteria that JPM will apply to its decision as to which bidders enter Round 1 and which bidders will move from Round 1 to Round 2, we believe that it is appropriate to allow the process to proceed without further Commission approval. We direct Staff to stay involved with the process and to let us know of any problems that may emerge and need our attention.

During the auction process, we ask the parties and Staff to begin discussions with JPM about the process needed for our review and approval of final bids at the end of the process in May 2017. The final review should be designed to allow expedited consideration and approval of bids with participation of intervenors, and with minimal disturbance to the final acceptance of bids and closing on the purchases. If the parties are unable to agree on and recommend a process, we will open a proceeding as Round 2 gets underway to establish an appropriate process for our approval in the May 2017 timeframe.

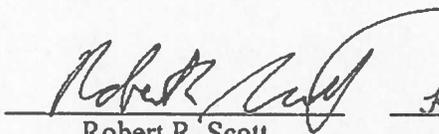
**Based upon the foregoing, it is hereby**

**ORDERED**, that the auction design recommended by JPM as described and modified herein is **APPROVED**.

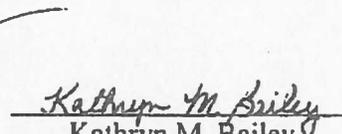
By order of the Public Utilities Commission of New Hampshire this tenth day of  
November, 2016.



Martin P. Honigberg  
Chairman



Robert R. Scott  
Commissioner



Kathryn M. Bailey  
Commissioner

Attested by:



Lori A. Davis  
Assistant Secretary

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December 9, 2016

**VIA EMAIL AND HAND DELIVERY**

Debra A. Howland  
Executive Director & Secretary  
New Hampshire Public Utilities Commission  
21 South Fruit Street, Suite 10  
Concord, NH 03301-2429

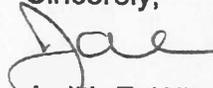
Re: PSNH d/b/a Eversource - Auction of Electric General Facilities  
Docket No. DE 16-817

Dear Director Howland:

Enclosed for filing in the above-captioned matter please find the original and seven (7) copies of the Intervenor Municipalities' *Joint Motion for Reconsideration and Stay*.

Please do not hesitate to contact me if you have any questions. Thank you.

Sincerely,



Judith E. Whitelaw  
[jae@mitchellmunigroup.com](mailto:jae@mitchellmunigroup.com)

Encs.

cc: Barbara Lucas, Town Administrator w/enc.  
Commission's Service List w/enc.  
(All via email only)

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

<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 Intervenors 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.

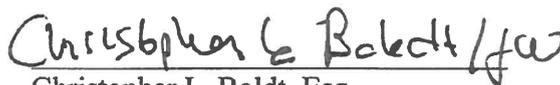
76. Due to the significance of the issues involved in this proceeding and this Motion, the Municipal Intervenors respectfully request that the Commission stay all proceedings in this Docket, including any action by JPM to advertise the Auction Design and Process to interested parties or otherwise publically 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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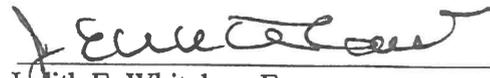
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**Certificate of Service**

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.

  
\_\_\_\_\_  
Judith E. Whitelaw, Esq.

**THE STATE OF NEW HAMPSHIRE  
before the  
PUBLIC UTILITIES COMMISSION**

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

**Auction of Electric Generation Facilities  
Docket No. DE 16-817**

**OBJECTION OF  
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE  
d/b/a EVERSOURCE ENERGY  
TO THE MUNICIPAL INTERVENORS'  
JOINT MOTION FOR RECONSIDERATION AND STAY  
OF ORDER NO. 25,967**

December 15, 2016

Pursuant to Rule Puc 203.07(f), Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH,” “Eversource,” or the “Company”) hereby objects to the “Joint Motion for Reconsideration and Stay” (the “Motion”) filed on December 9, 2016 in the instant docket by the City of Berlin, the Town of Gorham, and the Town of New Hampton (collectively, the “Municipal Intervenors”). The Motion is primarily a reassertion of prior arguments of the Municipal Intervenors that were considered by the Commission, and the arguments made therein that the Commission failed to properly address those matters both factually and procedurally is simply incorrect.

In support of its objection Eversource states as follows:

1. On November 10, 2016, the Commission issued Order No. 25,967, “Order Approving Auction Design” (the “Order”) in this proceeding. That 34-page Order was issued pursuant to the Commission’s approval in Docket No. DE 14-238 of the “2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement”

(the “2015 PSNH Settlement”) as amended by the January 26, 2016 Amendment thereto and the accompanying “Litigation Settlement” also dated January 26, 2016 (collectively, the “2015 Settlements”).

2. The Municipal Intervenors’ 26-page Motion may be reduced to three primary complaints:
  - i. the auction schedule established by the Order restricts the Municipal Intervenors’ ability to reasonably participate in the auction; ii. the auction process established by the Order fails to ensure that prices bid for the generation assets will be maximized; and, iii. the Commission failed to conduct an adjudicatory proceeding prior to issuing the Order.None of these complaints has merit.

**i. The allegation that the auction schedule established by the Order restricts the Municipal Intervenors’ ability to reasonably participate in the auction**

3. The Municipal Intervenors’ main complaint regarding the auction schedule centers on the need for the two towns, Gorham and New Hampton, to have Town Meeting approvals prior to participating as bidders in the divestiture process. As an initial matter, the Municipal Intervenors’ complaint is that it is now too late for the two towns to include the possibility of participating in the divestiture process on the agenda for their upcoming Town Meetings. If indeed it is now too late for the upcoming Town Meetings, as alleged in the Motion, that situation is due primarily to the two towns’ failure to act in a timely manner.
4. The Commission approved the Settlements by its Order No. 25,920 on July 1, 2016 in Docket No. DE 14-238. Both Berlin and Gorham were party-intervenors in that proceeding. Thus, as of July 1, it has been clear that there would be a “near-term ... process for the divestiture of PSNH’s fossil and hydro generating assets...” 2015 PSNH

Settlement at lines 24-25. That 2015 PSNH Settlement also describes the divestiture process as “expeditious” (line 33) and that it shall be “expeditiously pursued” (line 430). Moreover, the Commission issued its order of notice in this proceeding on September 7, 2016 and noted therein certain dates and deadlines for the process relating to the auction design, a process in which the Municipal Intervenors have participated.

5. Not only have the Towns known since July 1 that the divestiture process is imminent, they have also known that their Town Meetings would be held in early 2017 or that special Town Meetings may be necessary. Despite that knowledge, it appears that the Towns have taken no action to seek the approvals they deem necessary under RSA Chapter 38. Despite the urgency of the situation alleged by the Towns in their pleadings before this Commission related to what they regard as the acquisition of “major portions of the tax bases of the Municipal Intervenors” (Motion at ¶3), they do not appear to have prioritized the scheduling of town meeting items over arguably more routine items such as “the acquisition of fire trucks, police cars, and other pieces of municipal equipment” (Motion at ¶61).
6. The Towns’ failure to act now forms the basis for their Motion. They seek to delay the expedited divestiture process in order to allow them to take actions they could have, and should have, taken months ago.
7. The 2015 PSNH Settlement makes it clear that the “primary objective will be to maximize the realized value of the fossil and hydro generation assets.” (Lines 459-460). That 2015 PSNH Settlement also makes it clear that, “A *secondary objective* of the auction processes, *to the extent not inconsistent with the primary objective*, will be to accommodate the participation of municipalities that host generation assets... .” (Lines

460-462, emphases added). The Municipal Intervenors' desire to stay the Order and delay the divestiture process is patently inconsistent with the approved Settlements and elevates the secondary objective above the primary objective.

8. In their Motion, the Municipal Intervenors speculate that delay of the auction "could" increase the assets' value due to "the new federal administration coming into power." (Motion at ¶75). That may, or may not, be true – and there is no way to know now what may happen. Indeed, delay "might" decrease the value of the assets. For example, intervenor Sierra Club has recently filed suit against the U.S. Environmental Protection Agency ("EPA") seeking a Writ of Mandamus from the U.S. Court of Appeals for the First Circuit ordering the EPA to issue new NPDES permits for Eversource's Merrimack and Schiller Stations by June, 2017. If Sierra Club is successful, the timing of the new NPDES permits could disrupt the auction process, as new permits would be issued within days of when final bids are expected (in May, 2017).
9. The Municipal Intervenors' allege that "concerns over rising interest rates have not materially occurred." *Id.* This statement is factually wrong. "Concerns" that interest rates may rise have existed since the initial settlement talks – and those concerns still exist. When Order No. 25,920 approving the Settlements was issued on July 1, the interest rates 10- and 20-year Treasury bonds were 1.46% and 1.81% respectively. (U.S. Department of the Treasury Resource Center). As of the date of the Motion, those rates were 2.47% and 2.87% -- increases of nearly 70% and 60%, respectively. The Settlements call for the issuance of Triple-A rated securitization bonds to recover all stranded costs that remain following the divestiture process. As Triple-A securities bear interest rates reflective of the underlying Treasury bond rates, increases in the T-bond

rates will increase the cost of securitization. Recall that in Mr. Chung's testimony in Docket DE 14-238, he estimated that over \$1/2 Billion of Rate Reduction Bonds will be necessary. If such bonds were issued today, the interest increases that have already occurred will have increased the cost of the RRBs by millions of dollars a year above that previously contemplated. And, "concerns" regarding further interest rate increases appear to be warranted; consider headlines such as "*Why the Fed Is About to Raise Interest Rates*" that appeared in the New York Times on December 2 predicting that the Federal Reserve would increase interest rates at its December meeting – yesterday, on December 14, *it did*, with further rate hikes projected during the upcoming year.

10. Not only have the Municipal Intervenors failed to act diligently to be in a position to participate in the divestiture auction process, they also have rejected an alternative statutory method available to them that would eliminate the problems caused by the need for multiple Town Meeting approvals. RSA 38:32 provides an exemption from the provisions of RSA Chapter 32 for the development by a municipality of any small scale power facility, as defined in RSA 374-D:1, IV. RSA 374-D:1, IV defines a small scale power facility to be

a facility which produces electrical energy solely by the use, as a primary energy source, of biomass, waste, geothermal energy, renewable resources including but not limited to the flow of water, or any combination thereof and which has a rated capacity of not more than 80 megawatts. Such facility shall include all other equipment and structures designed to generate, distribute, and transmit electrical energy either to or from such facility.

Every one of Eversource's hydro generating assets fits the definition of "small scale power facility" as each is a renewable resource with rated capacities of less than 80 megawatts. RSA Chapter 374-D prescribes a process available to municipalities to

acquire small scale power facilities outside of the RSA Chapter 38 process, necessitating only one vote for bonding authorization.

11. The Municipal Intervenors claim that the exemption contained in RSA 38:32, and the process contained in RSA Chapter 374-D “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,’” quoting from RSA 374-D:2. Motion at fn 7. The Municipal Intervenors are wrong.
12. Under Chapter 374-D:2 (the provision quoted by the Municipal Intervenors), “Municipalities may ... acquire ... small scale power facilities at sites ... made available to them for a period at least equal to the term of any financing undertaken under this chapter.” No initial Town Meeting or city council vote is necessary to implement this procedure. RSA Chapter 38 is not applicable under the exemption set forth in RSA 38:32. The Municipal Intervenors state that Chapter 374-D is not applicable in the case of a utility generation divestiture because that Chapter does not apply to “the acquisition of a pre-existing, privately-owned, electric generation facility which is being offered for Sale.” The Municipal Intervenors provide no citation to support their position.
13. Contrary to the Municipal Intervenors’ interpretation of Chapter 374-D, this Commission has already stated that, “The Legislature has explicitly determined that ‘the development by a municipality of any small scale power facility, as defined in RSA 374-D:1, IV shall not be subject to the provisions of [Chapter 38].’” Order No. 23,350, November 22, 1999, Docket No. DE 99-135. That docket dealt with the City of Manchester’s interest in

acquiring Eversource's Amoskeag Hydro Station – one of the generating assets that will be divested via the upcoming auction process. RSA Chapter 374-D has not been changed since the issuance of Order No. 23,350. The process that the Commission found was available then to the City of Manchester remains available to the Municipal Intervenors today.

14. Not only has the Commission indicated that RSA Chapter 374-D is an option available to municipalities seeking to acquire Eversource's hydroelectric generating stations, contrary to its present position in the Motion the City of Berlin itself previously agreed that Chapter 374-D applies to the instant situation. Agreeing with the Commission's view on RSA Chapter 374-D set forth in Order No. 23,350, in its "Memorandum of the City of Berlin Regarding the Effect of House Bill 489 Upon RSA Ch. 38 Valuation Proceedings" filed in Docket Nos. DE 00-210 and DE 00-211 on June 1, 2001, the City of Berlin stated:

### **III. THE NEW HAMPSHIRE LEGISLATURE ENCOURAGED MUNICIPAL INVOLVEMENT WITH SMALL SCALE POWER GENERATION.**

The New Hampshire legislature has not only granted municipal right [sic] to acquire utility plants, it has initiated a policy of encouraging municipal involvement with small scale power generation by enacting RSA Ch. 374-D. A small scale power facility includes a facility which produces electrical energy solely by use of renewable resources, including the flow of water, and which has the capacity of not more than eighty (80) megawatts. There is no dispute that the Smith and Amoskeag facilities are small scale power facilities. The New Hampshire legislature has provided that a municipality may acquire small scale power facility and operate, or enter into contract for the operation of, such facilities. RSA 374-D:2. The power produced by these facilities may be transmitted and distributed by the municipality to any power user or public utility at such prices determined by the governing board. RSA 374-D:2.

In addition to authorizing the acquisition of small scale power facilities, the legislature also authorized municipalities to issue bonds and notes and prescribed terms and conditions under which those bonds and notes may be issued to facilitate the acquisition of these facilities. RSA 374-D:3 *et seq.* The legislature also determined that "the development by a municipality of any small scale power facility, as defined in RSA 374-D:1, IV shall not be subject to the provisions of [chapter 38]". RSA 38:32. As the Commission explicitly

found in its Order dated November 22, 1999, the "legislature intended to streamline and thus to encourage the process of municipalities becoming newly involved in small scale power production, ... " (Order No. 23, 350 at 3). In other words, the New Hampshire legislature has found that it is in the public interest for Cities, such as Berlin, to become involved with renewable energy facilities, such as the Smith Hydro Station.

15. Consistent with both the Commission's and the City of Berlin's interpretations of RSA Chapter 374-D, per RSA 38:32, "Nothing in this section shall be construed as exempting municipalities from the provisions of this chapter with respect to the acquisition of a utility plant and equipment if there exists a dispute between the municipality and the utility." This sentence of the exemption statute makes it clear that the RSA 38:32 exemption does indeed apply to the acquisition of utility plant and equipment from a utility, as long as there is no dispute between the municipality and the utility. In the instant case, there is and will be no dispute. Any acquisition made as a result of being the winning bidder under the auction will be done via bilateral contract, with the terms agreed upon between the winning bidder and Eversource, subject to the oversight and administration of the auction by the Commission.
16. Furthermore, when the exemption at RSA 38:32 was first being considered by the Legislature (then RSA 38:3-a, prior to the 1997 overall revision of Chapter 38 in 1997 N.H. Laws, Chapter 206) the issue of the applicability of the exemption to "existing operating utility sites" was discussed. A version of the exemption was considered which eliminated "existing operating utility hydroelectric facilities" from the assets a municipality may acquire pursuant to RSA Chapter 374-D. *See* Letter dated April 3, 1981 from the Governor's Council on Energy attached hereto as Attachment A. The statute as enacted by the Legislature did not contain the language removing "existing operating utility hydroelectric facilities" from the RSA Chapter 38 exemption provision.

The Municipal Intervenors read the statute to include words that the Legislature decided not to incorporate.

17. The 1981 letter from the Governor's Council on Energy also refutes the Municipal Intervenors' contention that RSA Chapter 374-D only applies to new development. The inclusion of a provision restricting the exemption only to "new" developments was discussed in that 1981 letter and rejected. Nowhere in the statute as enacted has the Legislature limited a municipality's ability to use RSA Chapter 374-D to "new" developments.
18. For the reasons stated above, the Municipal Intervenors' complaint in the Motion that their ability to participate in the generation asset auction has been effectively prevented by the Order is incorrect.

**ii. The allegation that the auction process established by the Order fails to ensure that prices bid for the generation assets will be maximized**

19. The Municipal Intervenors' second basis for rehearing is that the auction process established by the Order fails to ensure that prices bid for the generation assets will be maximized. This allegation is contrary to the expert opinion of the Commission's auction advisor, J.P. Morgan as provided to the Commission via sworn testimony on September 19, 2016, as well as J.P. Morgan's other submissions to the Commission dated September 12, 2016; September 29, 2016; October 17, 2016; and, November 3, 2016.
20. The auction process adopted by the Commission in the Order was not only recommended by J.P. Morgan, but it is also the same process recommended by Eversource expert John J. Reed in his testimony in Docket No. DE 14-238 and is the same process used for every utility divestiture to date (other than adjustments made to accommodate the Municipal

Intervenors). (Mr. Reed was engaged by Eversource pursuant to the provision of the 2015 PSNH Settlement requiring that, “PSNH shall engage an expert consultant regarding typical divestiture processes and submit testimony from that expert as part of the Commission’s proceeding to review this Agreement.” 2015 PSNH Settlement, lines 452-454).

21. The Municipal Intervenors’ claim that a new, untested auction process would better maximize the bids submitted for Eversource’s generation assets cannot be proven.<sup>1</sup> Opinions that a different, untested process might increase the value only amounts to speculation in the absence of any demonstrated uses of such a new process. Bidders understand the process that J.P. Morgan and Mr. Reed recommended – a process that the majority of potential bidders have participated in previously. The Commission’s decision to adopt the recommendation of J.P. Morgan was informed and well-founded. The Municipal Intervenors are by no means experts in generating asset auctions, and the suggestion that the Commission defer to their recommendations over that of J.P. Morgan and Mr. Reed is absurd. Hence, the Municipal Intervenors’ request for rehearing should be denied.

**iii. The allegation that the Commission failed to conduct an adjudicatory proceeding prior to issuing the Order.**

<sup>1</sup> The Municipal Intervenors rest their claim that other auction designs may be appropriate, in part, on the existence of testimony from George Sanscoucy, Leszek Stachow, and Dr. Peter Cramton. See Motion at 12. In Order No. 25,967, at the urging of the Municipal Intervenors the Commission took administrative notice of that testimony and then analyzed and rejected the proposals contained therein. Order No. 25,967 at 22-24. Nonetheless, the Municipal Intervenors now argue that the mere existence of that testimony requires the Commission to grant rehearing here. Such unfounded assertions are simply restatements of prior contentions, and they neither undermine the conclusions reached by the Commission, nor demonstrate that reconsideration is warranted.

22. The third complaint of the Municipal Intervenors in their Motion is that the Commission failed to conduct an adjudicatory proceeding. The 2015 PSNH Settlement approved by the Commission in Docket No. DE 14-238, as amended, stated, “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.” Section X of the 2015 PSNH Settlement states:

The Settling parties request that following closure of Docket No. DE 14-238, the Commission open a docket with appropriate ongoing proceedings to address the administration of the divestiture auction, issuance of a finance order implementing RRBs, and calculation and reconciliation of the stranded costs recovery charge.

23. The expedited adjudicatory process described in the Settlements was one subject to the Commission’s “direction and control as it deems necessary.” In the Order, the Commission discussed how the process it used conformed to the Administrative Procedure Act, Chapter 541-A. The Order was issued using an expedited process, under the Commission’s direction and control as it deemed necessary to fulfill the primary objective of the auction process – maximization of the total transaction value.<sup>2</sup> This proceeding has some unique attributes because the longer the auction takes to be

<sup>2</sup> Were the Commission to issue an order on Monday, December 19 granting the Municipal Intervenors’ Motion and adopting a schedule in line with the minimum days requested in their proposed schedule on page 24 of the Motion, a hearing in this matter would not occur until May, 2017 at the earliest. Even if that clearly unreasonable schedule was implemented, and even if the Commission could issue an order promptly following that hearing, it would mean that an auction design would not be approved, and that the actual auction could not begin, until sometime after June or July 2017. Such an outcome is clearly contrary to the expedited process contemplated by the 2015 Settlements. Furthermore, under the Municipal Intervenors’ analysis, municipal participation in any process that may be approved may be significantly delayed for months into the early part of 2018. A delay of that magnitude, a delay caused by the failure of the municipalities to act in 2016, would undoubtedly hamper the auction process for other assets, and undermine the primary purpose of this divestiture.

completed, the greater the erosion of benefits to customers and risks that may impact auction results. Until the auction is completed and any remaining stranded costs are taken off Eversource's books when the proceeds from the securitization financing are received, customers will continue to be responsible for paying Eversource rates that include a return of and a return on its book investment. The return of and on rate Eversource's generation rate base amounts to tens of millions of dollars per year. Until the auction is completed and the sale transaction finalized, Eversource will continue to operate the generating assets in the marketplace subjecting customers to the risk of repair or diminished value. As noted earlier, until the securitization financing is completed, there remains the concern and reality of increasing interest rates, which have a "double-whammy" – not only will increasing interest rates create higher securitization financing costs that customers will bear, but higher interest rates also impact bidders' financing costs resulting in lower values for generating assets when those higher financing costs are included in discounted cash flow and other valuation methodologies.

24. The Commission complied with the terms of the Settlements by expediting its Order and by exercising the agreed-upon provision of the Settlements that it retains "such direction and control as it deems necessary" to achieve the express primary goal of the Settlements – maximization of TTV. The Order need not be stayed not should the Commission grant rehearing.

**WHEREFORE**, Eversource urges the Commission to deny the Municipal Intervenors' Joint Motion for Reconsideration and Stay of Order No. 25,967, and order such further relief as may be just and equitable.

Respectfully submitted,

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

December 15, 2016

Date

By: \_\_\_\_\_

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Robert.Bersak@Eversource.com

**CERTIFICATE OF SERVICE**

I hereby certify that, on the date written below, I caused the attached pleading to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

December 15, 2016  
Date

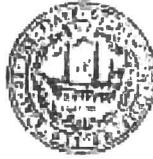
By: \_\_\_\_\_  
Robert A. Bersak

**Attachment A**

**April 3, 1981 letter**

**From the**

**Governor's Council on Energy**



STATE OF NEW HAMPSHIRE

Office of the Governor

84 Beacon Street

Concord, NH 03301

1035/1271-2711

Telex Freq 1-800-852-3422

Governor's Council on Energy

April 3, 1981

Mr. Don D'Embruoso  
c/o Ransmeier and Spellman  
110 North Main Street  
Concord, New Hampshire

Dear Don:

I am writing in response to your recent letter containing proposed amendments to House Bill 402 and House Bill 95.

We are in the process of amending H.B. 402 per request of the House Science and Technology Committee to expand its scope to accommodate other forms of renewable energy as defined under PURPA. The legislation will, therefore, refer to "small scale power facilities" rather than being limited to hydroelectric facilities.

In regard to your suggested amendments, I will be unable to include them as presented. The use of the word "new" is unacceptable in that it could easily be construed to mean only new dams, powerhouses, turbines, etc.

The majority of the sites targeted for restoration are retired existing sites which will be redeveloped for power. I am willing to suggest amending the bill to protect existing operating utility sites. I would favor:

38:3-a Exemption for the Municipal Small Scale Power Facility. The development by a municipality of any small scale power facility, as defined in RSA 374-D:1, III shall not be subject to the provisions of this chapter, except in the case of existing operating utility hydroelectric facilities and in municipalities which have acquired or established a plant under this Chapter.

It is my position to encourage hydroelectric development and I do not wish to deny municipalities the opportunity to develop retired utility sites. An individual site may be more attractive to a municipality than a utility for reasons of financing and available PURPA rate and, therefore, I would like to leave these sites available for municipal development.

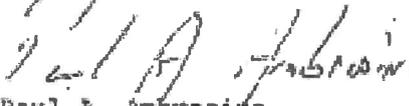
Mr. Don D'Ambruso  
April 3, 1961  
Page Two

My objections to the word "new" are also obviously applicable to Chapter 374-D as mentioned on your letter.

In addition, I have no interest in incorporating H.B. 95 with H.B. 402 and therefore cannot add your amendments. My principal goal is to provide assistance to individual private and municipal developers of small power production.

I hope this letter will clarify GCOE's interest and intent relative to H.B. 402. A copy of the proposed amendments will be available to you upon completion and both Donnie Pope and myself are willing to further discuss any changes to accommodate your interests.

Sincerely,

  
Paul A. Ambrosino  
Special Assistant

PAA/pm

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DE 16-817**

**EVERSOURCE ENERGY AUCTION OF GENERATION FACILITIES**

**Order Denying Request for Reconsideration of Auction Design  
And Stay of Auction Process**

**ORDER NO. 25,973**

**December 23, 2016**

In this order, the Commission denies the request by several municipalities for reconsideration and a stay of Order No. 25,967 approving the auction design recommended by the Commission's auction advisor, J.P. Morgan.

**I. PROCEDURAL HISTORY**

This docket was established to conduct the sale of the fossil and hydro electric generation facilities (Generation Facilities) owned by Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) as directed in Order No. 25,920 (July 1, 2016). Order No. 25,920 approved the 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement filed with the Commission on June 10, 2015 (2015 Settlement), as amended by the Partial Litigation Settlement filed on January 26, 2016 (Litigation Settlement) (collectively the Settlements). Order No. 25,920 and the Settlements approved in that order require the sale of the Generation Facilities to be conducted by an auction advisor selected by the Commission.

Following a competitive request for proposals (RFP), the Commission selected J.P. Morgan as its auction advisor (JPM or Auction Advisor). The contract with JPM to conduct the sale of the Generation Assets was approved by the Governor and Executive Council on

September 7, 2016. On September 12, 2016, JPM filed a description of the proposed auction process and on October 17, 2016, JPM filed a modification to the auction process to further accommodate municipal participation in the auction. On November 4, 2016, JPM filed additional comments on the auction design.

The Office of Consumer Advocate (OCA) filed its notice of participation on September 13, 2016, and the following parties sought intervention: the Towns of Gorham, Bristol and New Hampton, the Cities of Berlin and Concord, the Sierra Club, the Conservation Law Foundation (CLF), the Office of Energy and Planning (OEP), and the International Brotherhood of Electrical Workers Local 1837 (IBEW).

On September 15, 2016, by secretarial letter, the Commission gave all parties notice that the Auction Advisor, would be available for questioning concerning its recommended auction design at the prehearing conference on September 19, 2016. All parties present at the prehearing conference had an opportunity to question the witness for JPM, Neil Davids, who testified under oath about the proposed auction process described in JPM's September 12 filing. *See* Hearing Transcript Sept. 19, 2016, at 27.

Following the hearing, during a technical session, parties had further opportunity for questions and discussions with Mr. Davids. Commission Staff (Staff) filed a letter on September 21, summarizing the parties' discussions at the technical session. The Commission granted all intervention requests by Secretarial Letter on September 22, 2016, and required JPM to respond to follow-up questions from parties. The Town of New Hampton submitted a question to JPM on September 21, and JPM responded on September 29.

The parties filed written comments on September 30, 2016, and additional comments on October 21, 2016. On November 10, 2016, the Commission issued Order No. 25,967 (Auction

Order) approving the auction process and design recommended by JPM, with certain modifications to further accommodate participation by intervening cities and towns.

On December 9, 2016, the City of Berlin and the Towns of Gorham and New Hampton (together the Municipalities) filed a joint motion for Reconsideration and Stay (Joint Motion). On December 15, 2016, Eversource filed an objection to the Joint Motion (Objection). The filings in this docket, except for any information for which confidential treatment has been requested of or granted by the Commission, are posted to the Commission's website at <http://www.puc.nh.gov/Regulatory/Docketbk/2016/16-817.html>.

## II. POSITIONS OF THE PARTIES

### A. Joint Motion

#### 1. Requirements of an Adjudication on Auction Design

The Municipalities claim that this docket did not afford them sufficient process and did not comply with N.H. Code of Admin. Rules Puc Part 203. Specifically, they claim they were entitled to all of the discovery allowed under Puc 203.09, including data requests, technical sessions, depositions, and any other discovery method permissible in civil proceedings, when necessary to enable parties to acquire admissible evidence. Joint Motion at 8. The Municipalities argue that JPM has presented conclusory and unsupported assertions in support of its auction design. Specifically, the Municipalities question JPM's statements concerning use of ascending clock auctions for electric generating facilities, grouping of hydro facilities separately from the fossil facilities, delaying bids by Municipalities until May 1, 2017, setting a reserve price, and allowing the Municipalities into a final negotiation process. *Id.* at 9.

The Municipalities argue that they must be allowed to cross-examine JPM concerning sworn testimony and to submit evidence, either at hearing or in the form of pre-filed testimony.

*Id.* at 10. According to the Municipalities, if they had been allowed to submit pre-filed testimony, they could have expanded on their concerns that the proposed auction design makes participation by the Municipalities practically impossible. *Id.* at 11. They also stated that had they been allowed to submit prefiled testimony they might have submitted testimony on auction design from individuals familiar with auction processes used in market conditions similar to the Eversource divestiture. *Id.* They claim that cross-examination of a JPM witness would have allowed them to challenge JPM's bare assertions concerning the advisability of certain auction processes. *Id.* Finally, the Municipalities argue that the process provided by the Commission falls short of the adjudication required under the Litigation Settlement, and violates their rights to due process. *Id.* at 12-13.

## 2. Auction Process and Municipal Participation

The Municipalities repeat arguments made in both rounds of their written comments, that the approved auction process does not allow them enough time to comply with processes required by RSA Chapter 38 and effectively shuts them out of the auction. According to the Municipalities, RSA 38 requires two votes, one to authorize a bid, and a second to approve financing. *Id.* at 16. They assert that they cannot determine the price to be paid under RSA 38:13 until their bid is selected as a winning bid, and only after that can they submit a financing to voters for approval. *Id.* at 14 and 17. The Municipalities claim that the Commission's interpretation of RSA 38:13 is incorrect. They assert that RSA 38:13 prevents them from determining a final price to submit as a bid and submitting that amount to voters before entering the bid in the auction. They also assert that the Commission incorrectly found that, under RSA 38, they would only have to hold one vote in order to participate in the auction. *Id.* at 14 and 16.

The Municipalities argue that they may not acquire their hosted hydro facilities under RSA 374-D because they do not currently own the sites where the facilities are located. *Id.* at 17, fn 7. They also argue that RSA 374-D applies only if a municipality is seeking to construct or develop a new small energy facility, and does not allow purchase of existing facilities. *Id.* The Municipalities claim that requiring them to obtain financing approval before submitting their binding bid would put them at a disadvantage because their bid amount would then be public while other second round bids would not be public. *Id.* at 19.

The Municipalities repeat arguments that Gorham and New Hampton cannot present the question of whether or not to participate in an auction at their respective annual town meetings in March 2017. They argue that they must review complicated and extensive materials concerning the hydro facilities during an exceptionally busy time of year, and that determining the advisability of participating in the auction process and holding the necessary public education meetings in time for the March 14, 2017, annual meeting is “practically impossible.” *Id.* at 20. They assert that they are not able to hold a special meeting to authorize a bid in the auction until May 1, 2017. *Id.* at 22. Under their interpretation of RSA 38, they would then need to have a second vote on issuing bonds following a determination that theirs was the winning bid. They also contend that they should be allowed to submit a bid in round two without bond approval and that their bid should not be disadvantaged as compared with commercial parties’ bids with pre-financing approval. *Id.* at 21-22.

Finally, the Municipalities repeat arguments that a third round of bidding should occur, where the Municipalities would review the second round bids, and if the bids were not competitive with the Municipalities’ assessment of the facilities’ value, the Municipalities would be allowed to submit bids which would then be subject to voter ratification of bonding. *Id.* at 23.

They claim that the “third round has little downside, primarily where [their] involvement will act as a firewall against a depressed sale and will not materially delay the divestiture of PSNH’s assets.” *Id.*

3. Proposed Procedural Schedule

The Municipalities recommend a procedural process for additional discovery, pre-filed testimony, and a hearing on auction design. The proposed schedule would take approximately four and a half months (19 weeks) and, if begun immediately, would end sometime in mid-May 2017. The auction process itself could then not begin until the summer of 2017 at the earliest.

**B. Eversource Objection**

1. Requirements of an Adjudication on Auction Design

Eversource argues that the Commission properly expedited the process on auction design and that the 2015 Settlement contemplates that the auction advisor establish the structure and details of the auction process under the Commission’s oversight. *Id.* at 11. Eversource points out that the Commission provided an expedited adjudicatory process consistent with the Administrative Procedure Act, RSA 541-A. Under the Municipalities’ suggested procedural schedule, Eversource states that a final hearing would not take place until May 2017 and an auction would not commence until June or July 2017. In addition, if the Municipalities’ process arguments under RSA 38 were accepted, Eversource posited that the auction would not conclude until early 2018. *Id.* at 11 fn 2.

Eversource points out that delay of the auction harms ratepayers who must continue to pay a return on the equity in the generation assets as part of their default service rates. *Id.* at 12. In addition, according to Eversource, as interest rates rise the potential value of the assets is

reduced, while the cost of securitizing the stranded costs at the end of the auction process increases. Eversource disagrees with the Municipalities' speculation that delay of the auction could increase generation asset values because of a new federal administration. Eversource further argues that outstanding National Pollutant Discharge Elimination System permits for Eversource's Merrimack Station could be issued in the future and might negatively impact the auction. *Id.* at 4.

Eversource also refutes the Municipalities' claim that "concerns over rising interest rates have not materially occurred." Joint Motion at 25. According to Eversource in July 2016 when Order No. 25,920 was issued interest rates on the 10 and 20 year Treasury Bonds were 1.46% and 1.81% respectively. Objection at 4. On the date of the Joint Motion those rates were 2.47% and 2.87%. Eversource states that Triple-A rated securitization bonds, required by the 2015 Settlement to pay for stranded costs, bear rates reflective of the underlying Treasury bond rates. *Id.* Eversource points out that on December 14, 2016, the Federal Reserve did increase interest rates further. *Id.* Such increases raise the costs of securitizing the stranded costs following the auction.

## 2. Auction Process and Municipal Participation

Eversource first argues that the Municipalities complaint that it is too late for Gorham and New Hampton to get town meeting approvals to participate in the auction, is the result of the Towns' "failure to act in a timely manner." *Id.* at 2. The Commission approved the Settlements by Order No. 25,920 on July 1, 2016, and both Berlin and Gorham were party intervenors in that docket. Since then, it has been clear that there would be a "near-term process for the divestiture of PSNH's fossil and hydro generating assets ...." 2015 Settlement at lines 24-25. The Settlement also describes the divestiture process as "expeditious," *id.* at line 33, and

“expeditiously pursued,” *id.* at line 430. According to Eversource, despite the Municipalities’ knowledge that the divestiture auction would occur soon, they did not take steps to set up special meetings to authorize their participation in the auction process, nor did they take steps to include the question of auction participation in the upcoming annual Town meetings in March 2017.

In addition to failing to take prompt action to be in a position to participate in an auction, according to Eversource, the Municipalities failed to avail themselves of an alternative statute that would allow them to eliminate the problems caused by the need for multiple Town Meeting approvals under RSA 38. Objection at 5. RSA 38:32 provides an exemption from the provisions of RSA 38 for the development by a municipality of any small scale power facility as defined in RSA 374-D:1, IV. Eversource claims that all of its hydro facilities are less than 80 megawatts in capacity and qualify under the small scale power facility definition of RSA 374-D:1, IV.

Eversource asserts that RSA 374-D allows municipalities to acquire small scale power facilities with only one vote to authorize bonding of the purchase. Eversource disagrees with the Municipalities’ interpretation of RSA 374-D:2 as limited to situations where the municipality owns the site or is acquiring the site to develop a new facility. Eversource cites a prior Commission order which states “[t]he Legislature has explicitly determined that ‘the development by a municipality of any small scale power facility, as defined in RSA 374-D:1, IV shall not be subject to the provisions of [Chapter 38].’” Order No. 23,350, November 22, 1999, Docket No. DE 99-135. Docket 99-135 involved the City of Manchester’s proposed acquisition of the existing Amoskeag Hydro Station in Manchester. Objection at 6. Eversource also quotes from a Memorandum of Law filed by the City of Berlin, on June 1, 2001, in Commission dockets DE 00-210 and DE 00-211. In that Memorandum, the City of Berlin argued that RSA 374-D

was available for Berlin to acquire the Smith Hydro station without following the provisions of RSA 38. Objection at 7-8.

Although Eversource acknowledges that the exemption under RSA 38:32 is not available if there is a dispute between the utility and the municipality, Eversource claims that in this case there is no dispute because the purchase will be made by a winning bidder by contract with terms agreed to between Eversource and the bidder and approved by the Commission. *Id.* at 8.

Eversource describes legislative history regarding language rejected by the Legislature that would have required facilities acquired by municipalities under RSA 374-D to be new.

Eversource argues that the fact that this language was not enacted supports the interpretation that RSA 374-D applies to existing as well as new facilities. *Id.* 8-9.

Eversource notes that the 2015 Settlement makes clear that the “primary objective will be to maximize the realized value of the fossil and hydro generation assets,” Settlement at lines 459-460, and that the “secondary objective of the auction processes, to the extent not inconsistent with the primary objective, will be to accommodate the participation of municipalities that host generation assets . . . .,” *id.* at lines 460-462. Eversource challenges the Municipalities’ assertions that the auction design recommended by JPM will not maximize the value of the prices bid for the generation assets.

Eversource states that its own auction witness, John J. Reed, recommended the same two-round auction process for the sale of the Eversource generation assets in Docket No. DE 14-238. Further, Eversource asserts that the auction process recommended by JPM (except for certain accommodations offered the Municipalities) is the same process used for every utility divestiture to date. Objection at 9. Finally, Eversource points out that the Municipalities are not

experts in generation asset auctions and argues that the Commission properly relied upon the advice of its own auction advisor, JPM, for the auction design.

### III. COMMISSION ANALYSIS

The Commission may grant rehearing or reconsideration for “good reason” if the moving party shows that an order is unlawful or unreasonable. *See* RSA 541:3, RSA 541:4; *Rural Telephone Companies*, Order No. 25,291 (November 21, 2011). A successful motion must establish “good reason” by showing that there are matters the Commission “overlooked or mistakenly conceived in the original decision,” *Dumais v. State*, 118. N.H. 309, 311 (1978) (quotations and citations omitted), or by presenting new evidence that was “unavailable prior to the issuance of the underlying decision,” *Hollis Telephone Inc.* Order No. 25,088 at 14 (April 2, 2010); *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, Order No. 23,976 (May 24, 2002); *Consumers New Hampshire Water Co., Inc.*, 80 NH PUC 666 (1995). A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome. *Public Service Co. of N.H.*, Order No. 25,676 at 3 (June 12, 2014); *see also Freedom Energy Logistics*, Order No. 25,810 at 4 (September 8, 2015).

We agree with Eversource that the Joint Motion does not present any new information that would change our original decision on the design of the auction process recommended by our Auction Advisor, JPM. Further, the Joint Motion does not demonstrate that the Commission overlooked or mistakenly conceived of the meaning and interpretation of the relevant agreements and statutes addressed therein. Nonetheless, for the sake of clarity, we will address the arguments made in the Joint Motion.

**A. Requirements of an Adjudication on Auction Design**

The Municipalities' rights regarding the auction design come from the 2015 Settlement Agreement, the 2016 Amendments to that Agreement, and the Litigation Settlement. Those documents in turn are controlled by the provisions of RSA 369-B:3-a and all provide the process offered in this docket. In the order approving the divestiture of the Eversource generation assets, the Commission held that, "[w]e believe that it is wise to defer the questions related to the auction design to a separate proceeding, as informed by the advice to be provided by the Auction Advisor .... Furthermore, we find that the manner of retaining an Auction Advisor contemplated by the 2016 Litigation Settlement will ensure a fair, transparent, and effective process." Order No. 25,920, at 69 (July 1, 2016).

The 2015 Settlement provides, "[t]he structure and details of the auction process(es) shall be established by the auction advisor, under the oversight of 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." Section X of the 2015 Settlement states:

The Settling parties request that following closure of Docket No. DE 14-238, the Commission open a docket with appropriate ongoing proceedings to address the administration of the divestiture auction, issuance of a finance order implementing RRBs, and calculation and reconciliation of the stranded costs recovery charge.

2015 Settlement at ln. 908-911. The statute requiring our review of the 2015 Settlement requires us to expedite our review process. RSA 369-B:3-a, II. The 2015 Settlement does not elaborate on the "expedited adjudicatory" process for approving an auction design recommended by the Commission's auction advisor.

JPM provided a written auction design with its proposal for approval by the Governor and Executive Council on September 7, 2016, and filed that written auction design in this docket on September 12, 2016. The Commission made a JPM witness available for questioning at the prehearing conference on September 19, 2016. Attorneys Boldt, Tanguay and, Whitelaw each appeared at the prehearing conference and Mr. Boldt questioned the JPM witness under oath at that hearing. At the conclusion of his questioning Attorney Boldt indicated that “the remainder of my questions can go into tech session.” Transcript Prehearing Conference, September 19, 2016, at 35.

Following the prehearing conference all parties were given the opportunity to ask the JPM witness questions during a technical session. In addition, following the technical session, parties were given the opportunity to submit further written questions to the JPM witness, before written comments were filed. Only one party, the Town of New Hampton, submitted a written question to JPM and JPM responded with a written answer filed with the Commission on September 29, 2016. The JPM response to that question provided an accommodation to the Municipalities in the proposed auction design.

All parties, including the Municipalities, filed the first round of written comments on the auction design on September 30, 2016. Following written comments, Commission Staff (Staff) and JPM witnesses had two conference calls with counsel for the Municipalities concerning the various process and auction design concerns described in the Municipalities’ first round comments. Following those discussions, on October 17, 2016, JPM filed a modified auction design and provided responses to the Municipalities’ first round comments, as well as the Municipalities’ concerns raised with Staff and JPM in the two conference calls. On October 21, 2016, the Municipalities filed a second round of written comments on the auction process

modifications JPM had offered that were designed to accommodate municipal participation further than the auction design filed with the Commission on September 12, 2016.

At the Municipalities' request, we also took administrative notice of pre-filed testimony on auction design by several witnesses in DE 14-238. That testimony was submitted by the City of Berlin and by Staff in support of an ascending clock auction design. We reviewed and considered that written testimony and weighed it against the advice we received from JPM in our Auction Order.

Under the Settlements, the competitive bid process and the review and approval by the Governor and Executive Council were designed to assure all parties, including the Municipalities, that the auction advisor was both qualified and impartial and would conduct an auction in a manner designed to maximize overall asset value. The adjudicative process we offered the parties in this docket allowed cross-examination of a JPM witness at the prehearing conference, written questions submitted to a JPM witness, a technical session with the JPM witness, and two rounds of written comments.

N.H. Admin. Code Rule Puc 203.09 provides a range of discovery tools, including written data requests, technical sessions, depositions and other forms of discovery available in civil courts in New Hampshire. Nonetheless, we are not bound by our own administrative rules to offer the same process in all adjudicated proceedings. We have the flexibility to allow questions in technical sessions, as was done here, rather than providing for extensive written data requests. We are also able to offer parties an opportunity for written comments instead of sworn pre-filed testimony in order to gather parties' positions on issues raised. The process offered in this proceeding conforms to requirements of RSA 541-A.

The Settlements were clear that the expedited adjudicated process for considering auction design was to be determined by the Commission. The Settlements were equally clear that we were to open an “appropriate ongoing proceeding to address the administration of the divestiture auction.” 2015 Settlement, Section X. The expedited process offered in this proceeding appropriately balanced the need for parties to question the auction design offered by JPM against the need to move quickly and allow the sale of the generation assets to proceed expeditiously. We have already disposed of the Municipalities’ constitutional due process claims in our Auction Order. *See* Auction Order at 33.

**B. Auction Process and Municipal Participation**

1. Timing of Approvals under RSA Chapter 38

The Municipalities continue to argue that the timing of the proposed auction will prevent them from participating due to the need to conduct two town meeting votes under RSA 38. Contrary to the Municipalities’ assertion, in the Auction Order we agreed that two votes were required under RSA 38, but we held that the first vote authorizing participation in the auction could be taken at the annual town meeting. Despite arguments by the Municipalities that voting at annual town meeting could not happen, the Municipalities did not claim that it is legally impossible to hold the vote to authorize participation in an auction under RSA 38 at annual town meetings. Instead they claimed that they did not have the resources available to educate voters and to prepare for a vote at the annual town meeting.

Given the importance of this auction claimed by the Municipalities in their written comments, and the length of time that they have known that an auction will occur,<sup>1</sup> we agree with Eversource that the Municipalities should have taken actions to enlist additional resources

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<sup>1</sup> The Municipalities have known since we issued Order No. 25,920 on July 1, 2016, approving the sale of Eversources’ generation facilities, that an auction would occur in the near future.

to prepare for a vote on auction participation, and to begin to educate municipal officials and voters about the auction process.

The Municipalities repeat an additional argument under RSA 38:13 that we rejected in the Auction Order. They claim that the language in RSA 38:13 dealing with ratification and bonding approval prevents them from voting on bonding until after an auction has occurred and their bid has been selected as a winning bid. They base this argument on RSA 38:13's requirement that a final price be determined before a vote is taken on bonding for the purchase.

Within 90 days of the *final determination of the price to be paid* for the plant and property to be acquired under the provision 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 ....

RSA 38:13 (emphasis added)

In our Auction Order, we held that "final determination of the price to be paid" could include a municipality's decision to offer a binding bid in an auction of utility assets. If the Municipalities' interpretation of this final determination of price is correct, then they can never offer a binding bid in an auction with pre-approved financing. The Municipalities insist that this is the case and therefore demand that their bid, contingent on a future successful financing vote, should not be disadvantaged over competing commercial bids. Berlin Comments, at 6, October 21, 2016. This disparate treatment for municipal bids as well as the subsequent delay needed to determine whether the financing will be approved, is unusual for auction processes of this type, puts commercial bidders at a disadvantage relative to municipal bidders, and in JPM's opinion would discourage a robust auction. JPM Comments, November 4, 2016 at 6.

2. RSA Chapter 374-D for Municipal Participation in Auction

The Municipalities claim that they cannot use an alternative statutory basis for acquiring their hosted hydro facilities under RSA 374-D. The process under RSA 374-D appears less complicated and is exempt from RSA 38. *See* RSA 38:32. RSA 374-D does not require the two votes that the Municipalities find impractical under RSA 38. Further, RSA 374-D does not contain the final price determination language found in RSA 38:13. As a result, under RSA 374-D, the Municipalities would not have a similar basis for insisting that they cannot offer a bid with financing pre-approved. RSA 374-D:2 provides in part:

Municipalities may design, develop, acquire, and construct small scale power facilities at sites owned or leased by them or otherwise made available to them for a period at least equal to the term of any financing undertaken under this chapter ....

The Municipalities argue that acquisition of an existing small power facility is not included under RSA 374-D:2. We disagree. The use of a list of actions joined by “and” under a plain reading would allow a municipality to engage in any one of those activities, including “acquir[ing] ... small scale power facilities.” Further the Municipalities claim that RSA 374-D:2 only allows Municipalities to develop small scale power that they own or lease. Again, a plain reading of the additional phrase “or otherwise made available to them” would seem to allow purchase of the site at the time that the facility is acquired. Eversource in its objection brought to our attention the fact that a prior Commission found RSA 374-D applicable to municipal purchases of existing hydro facilities. *See* Order No. 23,350, November 22, 1999, Docket DE 99-135. Eversource also cited to a memorandum of law in which the City of Berlin asserted its right to use RSA 374-D in the past to acquire Smith Hydro. *See* Memorandum of Law filed by the City of Berlin, June 1, 2001, in Commission Docket Nos. DE 00-210 and DE 00-211. We

believe Berlin had it right in 2001 and that Eversource is correct today in arguing that RSA 374-D is available to the municipalities who want to acquire their hosted hydro facilities.

3. Other Auction Design Issues Raised by the Municipalities

JPM has offered a number of accommodations to the Municipalities in the auction design. The Municipalities may offer indications of value in round one without submitting a proposal formally, to explore whether their values are competitive with non-binding proposals received from commercial bidders as part of round one indicative bids. The Municipalities were given access to the “data room” for their respective hydro assets in November 2016, while commercial bidders will not get access to such information until approximately March 2017. The auction process has been delayed by several months, with final binding proposals now expected to be due in early to mid-May, which gives the Municipalities more time to prepare their bids, if they decide to participate in the process. JPM Comments, November 4, 2016, at 6.

The Municipalities have suggested many other modifications to the process as designed by JPM. As discussed in the Auction Order, JPM has recommended against making those modifications as they would be expected to impact the auction process negatively by creating uncertainty for commercial bidders and likely reducing the competitiveness of the Auction. The Municipalities continue to suggest auction process modifications that would provide them an advantage over commercial bidders with respect to their respective hydros. This includes a request for a “third round” that would permit the Municipalities to submit proposals and potentially be selected over any commercial bidders for the assets even after commercial bidders have completed their extensive due diligence and submitted final, fully-financed, binding proposals, without the Municipalities having submitted any proposal earlier in the process. Moreover, the Municipalities suggest they should have this right even though such “third round”

proposals from them would not be fully-financed and would also be subject to further voter approval.

We have selected an auction advisor with extensive experience selling electric generation assets and we are justified in following their suggestions concerning an auction design and its likely impacts on the value received for the assets sold. As Eversource points out, the broad, two round auction design recommended by JPM was also recommended by Eversource's own expert in testimony filed in docket DE 14-238, and further, it is the process used for all similar divestitures of utility generation assets. Objection at 9-10. JPM testified that they have handled more than forty sales of similar generation assets, and they have advised the New England public utilities commissions on all regional generation divestiture processes, including the divestiture of the Seabrook Nuclear Generating station in 2002. Transcript, September 19, 2016, at 29. JPM testified that the process is designed to be transparent and flexible and to maximize bidder participation. *Id.* at 29-30. Rather than improving the auction design and encouraging robust participation by commercial parties, the suggestions by the Municipalities will likely discourage such participation and reduce overall transaction value. JPM has indicated that it is important that an auction proceed at an appropriate pace and that bidders have a reasonable chance of winning a bid at the end of the process. JPM Comments, at 4, November 4, 2016. Bidders must expend substantial amounts of time and money for experts and due diligence before bidding on electric generation assets. JPM has advised us that bidders will not likely expend such funds and potentially not participate in the auction at all, if the Municipalities' third round suggestions are incorporated. *Id.* at 6.

The Settlements provide a clear priority in our administration of an auction, and that is to maximize the overall sale value of the assets. Further the Settlements require that we expedite

the auction process. The Municipalities have repeatedly expressed concerns about preserving the assessed tax value for the hydro assets they host as a result of the auction. The Settlements address this concern by providing for payments for three years to any municipalities whose hosted generation assets sell for prices below the tax assessed value. 2015 Settlement at ln. 617-646. Nonetheless the Municipalities assert that they must continue to litigate in order to protect their right to provide “a firewall against a depressed sale.” Joint Motion at 23.

Under the Settlements the Municipalities are given the right to participate in an auction process so long as their participation does not interfere with maximizing asset value. Were we to adopt the Municipalities’ third round of bidding, we would be elevating their priority of participating to preserve their tax base over the competing and higher priority of maximizing the overall transaction value. We must design an auction that will maximize the total transaction value, and the Municipalities’ ability to participate must give way to that primary goal if there is a conflict. We have crafted accommodations to the Municipalities while preserving a commercially reasonable sale process based upon JPM’s advice.

#### **IV. CONCLUSION**

The process we have offered has allowed the Municipalities ample opportunity to present their concerns. We do not believe further litigation will solve their problems. We are bound by RSA 369-B:3-a, II to expedite our review and implementation of the 2015 Settlement. The 2015 Settlement requires that we conduct an auction of the Eversource assets expeditiously. JPM advises us that the market for these assets is favorable at this time. Further delay will only add risk that conditions in the market will shift. Given these considerations, we deny the stay requested by the Municipalities.

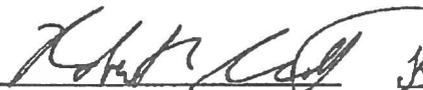
Although the Settlements anticipated a single proceeding to consider the design and to approve the results of the auction, we issue this order as our final order on auction design and we will close this docket. This will allow all parties with appeal rights regarding auction design to pursue those remedies immediately, so that we can conduct a commercially reasonable auction without interruption for ongoing litigation.

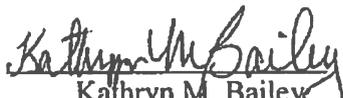
**Based upon the foregoing, it is hereby**

**ORDERED**, that the Motion for Rehearing filed by the City of Berlin and the Towns of Gorham and New Hampton is **DENIED**.

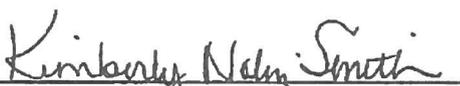
By order of the Public Utilities Commission of New Hampshire this twenty-third day of December, 2016.

  
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Martin P. Honigberg  
Chairman

  
\_\_\_\_\_  
Robert R. Scott  
Commissioner

  
\_\_\_\_\_  
Kathryn M. Bailey  
Commissioner

Attested by:

  
\_\_\_\_\_  
Kimberly Nolin Smith  
Assistant Secretary

## N.H. Const. Pt. FIRST, Art. 14

Statutes current through Chapter 4 of the 2016 Regular Session

*LEXIS™ New Hampshire Revised Statutes Annotated > Constitution of the State of New Hampshire > Part First Bill of Rights*

### **Art. 14. [Legal Remedies to be Free, Complete, and Prompt.]**

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Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

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End of Document

**TITLE III**  
**TOWNS, CITIES, VILLAGE DISTRICTS, AND**  
**UNINCORPORATED PLACES**

**CHAPTER 38**  
**MUNICIPAL ELECTRIC, GAS, OR WATER SYSTEMS**

**Section 38:3**

**38:3 By Cities.** – Any city may initially establish such a plant after 2/3 of the members of the governing body shall have voted, subject to the veto power of the mayor as provided by law, that it is expedient to do so, and after such action by the city council shall have been confirmed by a majority of the qualified voters at a regular election or at a special meeting duly warned in either case. Such confirming vote shall be had within one year from the date of the vote to establish such a plant, and if favorable, shall create a rebuttable presumption that such action is in the public interest. If the vote is unfavorable, the question shall not be again submitted to the voters within 2 years thereafter.

**Source.** 1997, 206:1, eff. July 1, 1997.

**TITLE III**  
**TOWNS, CITIES, VILLAGE DISTRICTS, AND**  
**UNINCORPORATED PLACES**

**CHAPTER 38**  
**MUNICIPAL ELECTRIC, GAS, OR WATER SYSTEMS**

**Section 38:4**

**38:4 By Towns or Village Districts.** – Any town or village district may initially establish such a plant after 2/3 of all 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. A favorable vote to establish such a plant shall create a rebuttable presumption that such action is in the public interest. If such vote is unfavorable, the question shall not be again submitted to the voters within 2 years thereafter.

**Source.** 1997, 206:1, eff. July 1, 1997.

# TITLE III

## TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

### CHAPTER 38

#### MUNICIPAL ELECTRIC, GAS, OR WATER SYSTEMS

##### Section 38:13

**38:13 Ratification.** – 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.

**Source.** 1997, 206:1, eff. July 1, 1997.

**TITLE III**  
**TOWNS, CITIES, VILLAGE DISTRICTS, AND**  
**UNINCORPORATED PLACES**

**CHAPTER 38**  
**MUNICIPAL ELECTRIC, GAS, OR WATER SYSTEMS**

**Additional Provisions for Electric Systems**

**Section 38:32**

**38:32 Exemption for Municipal Small Scale Power Facility.** – Except in municipalities which have acquired, expanded, or established a plant under this chapter, the development by a municipality of any small scale power facility, as defined in RSA 374-D:1, IV shall not be subject to the provisions of this chapter. Nothing in this section shall be construed as exempting municipalities from the provisions of this chapter with respect to the acquisition of a utility plant and equipment if there exists a dispute between the municipality and the utility.

**Source.** 1997, 206:1, eff. July 1, 1997.

# TITLE XXXIV

## PUBLIC UTILITIES

### CHAPTER 369-B

#### ELECTRIC RATE REDUCTION FINANCING AND COMMISSION ACTION

##### Section 369-B:3-a

###### **369-B:3-a Divestiture of PSNH Generation Assets; Review of 2015 Settlement Proposal. –**

I. The general court finds that divestiture of PSNH's generation plants and securitization of any resulting stranded costs pursuant to RSA 369-B:3, IV(c) is in the public interest, subject to the provisions of paragraph III.

II. As part of an expedited proceeding, the commission shall review the 2015 settlement proposal and determine whether its terms and conditions are in the public interest. Notwithstanding RSA 374-F:3, VI, the commission may incorporate rate designs that fairly allocate the costs of divestiture of PSNH's generation plants among customer classes. As part of its review of the 2015 settlement proposal, the commission shall take into account the impact on all PSNH customer classes, and shall consider the impacts on the economy in PSNH's service territory, the ability to attract and retain employment across industries, and whether the proposed rate design fairly allocates the costs of divestiture of PSNH's generation plants among customer classes. The commission may approve or reject the 2015 settlement proposal, or condition its approval on any modification of the terms and conditions that it determines to be necessary to meet the public interest standard, so long as any order to divest provides for recovery of stranded costs and such other costs of divestiture as may be approved by the commission. If the commission conditions its approval, the settling parties may amend or terminate the 2015 settlement proposal.

III. Notwithstanding paragraphs I and II, if the commission rejects the 2015 settlement proposal or approves it with conditions that are not acceptable to the settling parties as provided in paragraph II, the commission, as part of the pending expedited proceeding in Docket DE 14-238, Determination Regarding PSNH's Generation Assets, shall order divestiture of all or some of PSNH's generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so. If it orders divestiture, the commission shall determine the manner in which any assets should be divested; provide for the cost recovery of such divestiture, which cost recovery may include rate reduction bonds as provided in RSA 369-B:3, IV(c); and, notwithstanding RSA 374-F:3, VI, may incorporate rate designs that fairly allocate the costs of divestiture of some or all of PSNH's generation assets among customer classes. In considering rate designs, the commission shall consider the impacts on the economy in PSNH's service territory and the ability to attract and retain employment across industries.

IV. Prior to any divestiture of its generation assets, PSNH may modify or retire such generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so and provides for the cost recovery of such modification or retirement.

V. On or before October 15, 2015, the commission shall submit to the legislative oversight committee on electric utility restructuring established under RSA 374-F:5 a progress report concerning the status of the proceedings referred to in this section.

**Source.** 2003, 21:4, eff. April 23, 2003. 2014, 310:2, eff. Sept. 30, 2014. 2015, 221:10, eff. July 9, 2015.

# TITLE XXXIV PUBLIC UTILITIES

## CHAPTER 374-D MUNICIPAL SMALL SCALE POWER FACILITY BONDS

### Section 374-D:2

**374-D:2 Powers.** – Municipalities may design, develop, acquire, and construct small scale power facilities at sites owned or leased by them or otherwise made available to them for a period at least equal to the term of any financing undertaken under this chapter. Municipalities may operate, or may enter into contracts for the operation of, such facilities on such terms and conditions as the governing board may determine. Power produced by such facilities may be transmitted and distributed by a municipality to any user of power or to any public utility, at such price and on such terms and conditions as may be agreed to by the governing board.

**Source.** 1981, 545:6, eff. Aug. 29, 1981.

# TITLE LV

## PROCEEDINGS IN SPECIAL CASES

### CHAPTER 541

#### REHEARINGS AND APPEALS IN CERTAIN CASES

##### Section 541:3

**541:3 Motion for Rehearing.** – Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

**Source.** 1913, 145:18. PL 239:1. 1937, 107:14; 133:75. RL 414:3. RSA 541:3. 1994, 54:1, eff. Jan. 1, 1995.

# TITLE LV

## PROCEEDINGS IN SPECIAL CASES

### CHAPTER 541

#### REHEARINGS AND APPEALS IN CERTAIN CASES

##### Section 541:4

**541:4 Specifications.** – Such motion shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided, and when such application shall have been made, no ground not set forth therein shall be urged, relied on, or given any consideration by the court, unless the court for good cause shown shall allow the appellant to specify additional grounds.

**Source.** 1913, 145:18. PL 239:2. 1937, 107:15; 133:76. RL 414:4.

# TITLE LV

## PROCEEDINGS IN SPECIAL CASES

### CHAPTER 541

#### REHEARINGS AND APPEALS IN CERTAIN CASES

##### Section 541:5

**541:5 Action on Motion.** – 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.

**Source.** 1913, 145:18. PL 239:3. 1937, 107:16; 133:77. RL 414:5.

# TITLE LV

## PROCEEDINGS IN SPECIAL CASES

### CHAPTER 541

#### REHEARINGS AND APPEALS IN CERTAIN CASES

##### Section 541:6

**541:6 Appeal.** – Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.

**Source.** 1913, 145:18. PL 239:4. 1937, 107:17; 133:78. RL 414:6.

# TITLE LV

## PROCEEDINGS IN SPECIAL CASES

### CHAPTER 541

#### REHEARINGS AND APPEALS IN CERTAIN CASES

##### Section 541:7

**541:7 Petition.** – Such petition shall state briefly the nature of the proceeding before the commission, and shall set forth the order or decision complained of, and the grounds upon which the same is claimed to be unlawful or unreasonable upon which the petitioner will rely in the supreme court.

**Source.** 1913, 145:18. PL 239:5. 1937, 107:18; 133:79. RL 414:7.

# TITLE LV

## PROCEEDINGS IN SPECIAL CASES

### CHAPTER 541

#### REHEARINGS AND APPEALS IN CERTAIN CASES

##### Section 541:18

**541:18 Suspension of Order.** – No appeal or other proceedings taken from an order of the commission shall suspend the operation of such order; provided, that the supreme court may order a suspension of such order pending the determination of such appeal or other proceeding whenever, in the opinion of the court, justice may require such suspension; but no order of the public utilities commission providing for a reduction of rates, fares, or charges or denying a petition for an increase therein shall be suspended except upon conditions to be imposed by the court providing a means for securing the prompt repayment of all excess rates, fares, and charges over and above the rates, fares, and charges which shall be finally determined to be reasonable and just.

**Source.** 1913, 145:18. PL 239:18. 1937, 107:31; 133:92. RL 414:20. 1951, 203:16, eff. Sept. 1, 1951.

# TITLE LV

## PROCEEDINGS IN SPECIAL CASES

### CHAPTER 541-A

#### ADMINISTRATIVE PROCEDURE ACT

##### Section 541-A:30-a

###### **541-A:30-a Rules for Adjudicative Proceedings. –**

I. Subject to paragraph V, each agency shall adopt rules pursuant to RSA 541-A governing the nature and requirement of all formal and informal procedures available in an adjudicative proceeding.

II. The attorney general, in consultation with agencies that conduct adjudicative proceedings, and with the approval of the director of the office of legislative services, shall draft proposed rules on model procedures relative to adjudicative proceedings and request a fiscal impact statement pursuant to RSA 541-A:5 within 90 days of the effective date of this section. The attorney general shall adopt the model rules pursuant to RSA 541-A on behalf of agencies, for purposes described in paragraph V, that do not have adopted effective rules on adjudicative proceedings. The attorney general shall amend the model rules pursuant to RSA 541-A as necessary after consultation and approval as required for the original proposed model rules. Neither the original proposed model rules nor any amendments shall be adopted by the attorney general unless the committee has voted to approve them. Notwithstanding RSA 541-A:17, I, the original model rules and any amendments shall not expire.

III. The model rules adopted pursuant to paragraph II, and all rules on adjudicative proceedings, unless authorized otherwise by statutes governing an agency, shall address at least the following areas:

- (a) Filing and service of documents;
- (b) Appearances before agencies;
- (c) Procedures for pre-hearing exchange of information;
- (d) Burden of proof;
- (e) Standard of proof;
- (f) Computation of time periods;
- (g) Roles of complainants, intervenors, and agency staff in disciplinary and enforcement proceedings;
- (h) Continuances;
- (i) Reopening of the record;
- (j) Waiver of rules governing adjudicative proceedings;
- (k) Procedure and criteria for the withdrawal of a presiding officer; and
- (l) Retention schedule for written decisions or orders pursuant to RSA 541-A:35, subject to any longer periods for retention set by the director of the division of archives and records management of the department of state pursuant to rules adopted under RSA 5:40.

IV. Each agency may adopt, pursuant to RSA 541-A, the text of the model rules. In order to adopt any supplements or modifications to the model rules, each agency shall adopt, pursuant to RSA 541-A, the text of the model rules as amended by the supplements or modifications.

V. Notwithstanding the provisions of RSA 541-A:22, I, an agency shall apply the model rules as necessary in a particular adjudicative proceeding to the extent that the agency's rules or governing statutes do not address the procedures in the model rules, and provided that:

- (a) Such use shall not conflict with a statute, judicial decision, or other rules of the agency;
- (b) Notice shall be given to all parties with the notice pursuant to RSA 541-A:31, III of the extent to which the model rules will apply to the proceeding; and
- (c) The agency shall provide copies of the notice to the attorney general, the director of the office of legislative services, and the joint legislative committee on administrative rules.

VI. A copy of the written decision or order pursuant to RSA 541-A:35 shall be readily available to the public pursuant to the provisions of RSA 91-A unless:

(a) Otherwise provided by statute; or

(b) The written decision or order has been disposed after a retention period adopted pursuant to paragraph III.

VII. Each agency shall retain a copy of the verbatim recording of all oral proceedings pursuant to RSA 541-A:31, VII at least 30 days after the opportunity for all administrative and judicial appeals has been exhausted.

VIII. The attorney general shall prepare and distribute to all agencies authorized to conduct contested cases copies of the model rules and any amendments thereto, along with recommended guidelines for presiding officers in an adjudicative proceeding. These guidelines shall be available to the public pursuant to RSA 91-A. The guidelines shall be updated annually to address relevant changes in statutes, rules, or judicial decisions. Each agency that receives the guidelines shall provide a copy to all presiding officers in a contested case and to all members of the agency who may render the final decision in a contested case.

**Source.** 1998, 298:2, eff. July 1, 1998. 2003, 97:4, eff. Aug. 5, 2003.

# TITLE LV

## PROCEEDINGS IN SPECIAL CASES

### CHAPTER 541-A

#### ADMINISTRATIVE PROCEDURE ACT

##### Section 541-A:31

###### **541-A:31 Availability of Adjudicative Proceeding; Contested Cases; Notice, Hearing and Record. –**

I. An agency shall commence an adjudicative proceeding if a matter has reached a stage at which it is considered a contested case or, if the matter is one for which a provision of law requires a hearing only upon the request of a party, upon the request of a party.

II. (a) An agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction, except that no disciplinary proceeding against an occupational licensee shall be initiated unless such action is commenced within 5 years of the date upon which the alleged violation of an applicable rule or statute occurred, or within 5 years of the date upon which the violation could reasonably have been discovered.

(b) The time limitation provided in subparagraph (a) shall be tolled (1) during the period of time during which a criminal action on the matter is pending in a trial court of this state, or of another state, or of the United States, (2) during the time in which a complainant is a minor or incapacitated, and (3) during any time which the accused prevents discovery of the subject matter of the alleged violation.

(c) The time limitations established in this paragraph shall not apply to the commencement of actions initiated by the real estate appraiser board under RSA 310-B.

III. In a contested case, all parties shall be afforded an opportunity for an adjudicative proceeding after reasonable notice. The notice shall include:

(a) A statement of the time, place, and nature of the hearing.

(b) A statement of the legal authority under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the issues involved. Upon request an agency shall, when possible, furnish a more detailed statement of the issues within a reasonable time.

(e) A statement that each party has the right to have an attorney present to represent the party at the party's expense.

(f) For proceedings before an agency responsible for occupational licensing as provided in paragraph VII-a, a statement that each party has the right to have the agency provide a certified shorthand court reporter at the party's expense and that any such request be submitted in writing at least 10 days prior to the proceeding.

IV. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

V. (a) Unless precluded by law, informal disposition may be made of any contested case, at any time prior to the entry of a final decision or order, by stipulation, agreed settlement, consent order or default.

(b) In order to facilitate proceedings and encourage informal disposition, the presiding officer may, upon motion of any party, or upon the presiding officer's own motion, schedule one or more informal prehearing conferences prior to beginning formal proceedings. The presiding officer shall provide notice to all parties prior to holding any prehearing conference.

(c) Prehearing conferences may include, but are not limited to, consideration of any one or more of the following:

(1) Offers of settlement.

(2) Simplification of the issues.

(3) Stipulations or admissions as to issues of fact or proof, by consent of the parties.

(4) Limitations on the number of witnesses.

(5) Changes to standard procedures desired during the hearing, by consent of the parties.

(6) Consolidation of examination of witnesses by the parties.

(7) Any other matters which aid in the disposition of the proceeding.

(d) The presiding officer shall issue and serve upon all parties a prehearing order incorporating the matters determined at the prehearing conference.

VI. The record in a contested case shall include all of the following that are applicable in that case:

- (a) Any prehearing order.
- (b) All pleadings, motions, objections, and rulings.
- (c) Evidence received or considered.
- (d) A statement of matters officially noticed.
- (e) Proposed findings and exceptions.
- (f) Any decision, opinion, or report by the officer presiding at the hearing.
- (g) The tape recording or stenographic notes or symbols prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding.
- (h) Staff memoranda or data submitted to the presiding officer, except memoranda or data prepared and submitted by agency legal counsel or personal assistants and not inconsistent with RSA 541-A:36.
- (i) Matters placed on the record after an ex parte communication.

VII. The entirety of all oral proceedings shall be recorded verbatim by the agency. Upon the request of any party or upon the agency's own initiative, such record shall be transcribed by the agency if the requesting party or agency shall pay all reasonable costs for such transcription. If a transcript is not provided within 60 days of a request by a person who is a respondent party in a disciplinary hearing before an agency responsible for occupational licensing, the proceeding shall be dismissed with prejudice. Any party may record an oral proceeding, have a transcription made at the party's expense, or both, but only the transcription made by the agency from its verbatim record shall be the official transcript of the proceeding.

VII-a. At the request of a party in any oral proceeding involving disciplinary action before an agency responsible for occupational licensing except for an emergency action under RSA 541-A:30, III, the record of the proceeding shall be made by a certified shorthand court reporter provided by the agency at the requesting party's expense. A request shall be submitted to the agency in writing at least 10 days prior to the day of the proceeding.

VIII. Findings of fact shall be based exclusively on the evidence and on matters officially noticed in accordance with RSA 541-A:33, V.

**Source.** 1994, 412:1. 1999, 331:2-4. 2000, 288:20, eff. July 1, 2000. 2014, 34:2, eff. Jan. 1, 2015.

# TITLE LV

## PROCEEDINGS IN SPECIAL CASES

### CHAPTER 541-A

#### ADMINISTRATIVE PROCEDURE ACT

##### Section 541-A:33

###### **541-A:33 Evidence; Official Notice in Contested Cases. –**

I. All testimony of parties and witnesses shall be made under oath or affirmation administered by the presiding officer.

II. The rules of evidence shall not apply in adjudicative proceedings. Any oral or documentary evidence may be received; but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidence offered may be made and shall be noted in the record. Subject to the foregoing requirements, any part of the evidence may be received in written form if the interests of the parties will not thereby be prejudiced substantially.

III. Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

IV. A party may conduct cross-examinations required for a full and true disclosure of the facts.

V. Official notice may be taken of any one or more of the following:

(a) Any fact which could be judicially noticed in the courts of this state.

(b) The record of other proceedings before the agency.

(c) Generally recognized technical or scientific facts within the agency's specialized knowledge.

(d) Codes or standards that have been adopted by an agency of the United States, of this state or of another state, or by a nationally recognized organization or association.

VI. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

**Source.** 1994, 412:1, eff. Aug. 9, 1994.

# TITLE LV

## PROCEEDINGS IN SPECIAL CASES

### CHAPTER 541-A

#### ADMINISTRATIVE PROCEDURE ACT

##### Section 541-A:35

**541-A:35 Decisions and Orders.** – A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed promptly to each party and to a party's recognized representative.

**Source.** 1994, 412:1. 2000, 288:21, eff. July 1, 2000.

CHAPTER Puc 200 PROCEDURAL RULES

PART Puc 201 GENERAL REQUIREMENTS

Puc 201.01 Applicability. This chapter shall apply to all matters that come before the commission.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

Puc 201.02 Place of Hearings.

(a) Except as provided in (b) below, the commission shall conduct all hearings at its offices in Concord.

(b) The commission shall conduct one or more public statement hearings within the meaning of Puc 102.17 in the service territory of an affected utility or municipal district if:

(1) Required by law to do so; or

(2) It would assist the commission to ascertain the views of the utility's customers by conducting such a hearing in a particular location other than Concord.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #8657-A, eff 6-10-06

Puc 201.03 Construction. The rules in this chapter, and any rules incorporated herein by reference, shall be construed to secure a just and timely determination of the issues.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

Puc 201.04 Public Records.

(a) All documents submitted to the commission or staff in an adjudicative or non-adjudicative proceeding shall become matters of public record, subject to RSA 91-A, as of the day and time of the submission with the following exceptions:

(1) Accident reports under RSA 374:40;

(2) Information about individual residential customers, the disclosure of which would constitute an invasion of privacy within the meaning of RSA 91-A:5, IV;

Puc 202.16 - EXPIRED

Source. #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

Puc 202.17 - EXPIRED

Source. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

Puc 202.18 - EXPIRED

Source. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

PART Puc 203 ADJUDICATIVE PROCEEDINGS

Puc 203.01 Staff Participation. When participating in an adjudicative proceeding, commission staff shall be subject to the rules in this part in the same manner and to the same extent as a party.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

Puc 203.02 Filing Requirements.

(a) Except as provided in (b) below, for a filing to be effective in an adjudicative proceeding, a party shall:

- (1) File one original and 6 paper copies of all documents with the commission, and, for material submitted with a motion under Puc 203.08, file one public copy and 7 confidential copies;
- (2) File an electronic copy, as required by Puc 203.03, with the commission;
- (3) Serve pursuant to Puc 203.11 an electronic copy on each person identified on the commission's service list for that docket;
- (4) Serve an electronic copy with the office of the consumer advocate; and
- (5) Serve a written copy pursuant to Puc 203.11 on each person identified on the commission's service list as not able to receive electronic mail.
- (6) In adjudicative proceedings to which the office of the consumer advocate (OCA) is a party, filing parties shall also provide confidential materials to the OCA.

(b) Upon request of a person submitting a document and upon receipt of an extra copy of the document with the filing, the commission shall date stamp and return the copy as confirmation of the filing.

(c) Documents filed pursuant to this rule shall be printed double-sided on both sides of the documents' paper sheets.

Source. #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06; ss by #10101, eff 3-24-12

Puc 203.03 Electronic Copies.

(a) Each person filing a document shall, in addition to the paper filing required by Puc 203.02 or otherwise, electronically file each document, to the extent practicable, in an electronic file format compatible with the computer system of the commission.

(b) The commission shall maintain a list on its web site of the types of electronic file formats compatible with its computer system.

Source. #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

Puc 203.04 Form.

(a) Petitions, pleadings, motions and briefs shall:

- (1) Be typed or printed on paper 8-1/2 by 11 inches in size, double-sided;
- (2) Have no less than one inch margins on all sides;
- (3) Be page numbered sequentially, including attachments;
- (4) Be submitted in unbound form;
- (5) Be double-spaced;
- (6) Contain on the initial sheet a heading across the top thereof reading "Before the New Hampshire Public Utilities Commission";
- (7) Identify the name of the petitioner, applicant or other party who is the subject of such proceeding; and
- (8) Identify the nature of the document.

(b) Each document shall bear the title of the proceeding and the docket number assigned the matter by the commission, to the extent known.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06; ss by #10101, eff 3-24-12

Puc 203.05 Pleadings.

(a) All petitions and motions shall include the following:

- (1) A cover page identifying the name of the utility and the subject matter of the motion or petition;
- (2) A clear and concise statement of the authorization or other relief sought;
- (3) The statutory provision or legal precedent under which the authority or other relief is sought;
- (4) The legal name of each person seeking the authorization or relief and the address or principal place of business of such person;
- (5) The electronic mail address of the person making the filing or a statement that the person making the filing is unable to receive electronic mail;
- (6) A concise and explicit statement of the facts upon which the commission should rely in granting authorization or relief; and
- (7) Such other data as the petitioner considers relevant to the request for authority or relief.

(b) The commission shall notify in writing a petitioner filing a petition when such petition is deficient in any respect and any such deficient petition shall not be deemed to have been filed until the deficiency is corrected.

Source. #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

Puc 203.06 Petitions.

(a) Except as noted in (c) below, a petitioner shall not be required to submit pre-filed written testimony with a petition.

(b) If a petitioner wishes to submit testimony with a petition in the interest of expediting the proceedings, the commission shall accept such testimony.

(c) All petitions seeking a rate adjustment shall be filed in compliance with Puc 1600 if applicable and shall be accompanied by pre-filed testimony and exhibits.

(d) When submitted, written testimony shall set forth:

- (1) The facts relied upon;
- (2) Other relevant facts; and
- (3) Policy arguments in support of the result sought.

(e) If the scope of a proceeding is expanded or issues arise which were not reasonably anticipated by the petitioner, the commission shall allow the petitioner to file supplemental direct testimony or comments on the new or unanticipated issues.

(f) If a witness' written testimony exceeds 20 pages, the testimony shall include a detailed table of contents.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

#### Puc 203.07 Motions.

(a) A motion may be filed by any party or, in the case of a motion for rehearing, a person directly affected by a commission action pursuant to RSA 541:3.

(b) Except as provided in (c) below, any motion shall be filed in writing in the form of a pleading that contains the word "motion" in its title.

(c) The presiding officer shall permit an oral motion to be made on the record during a hearing or prehearing conference.

(d) A motion shall clearly and concisely state:

- (1) The facts and law which support the motion; and
- (2) The specific relief or ruling requested.

(e) Objections to a motion, except for motions for rehearing, shall be in writing and filed within 10 days of the date on which the motion is filed.

(f) Objections to a motion for rehearing pursuant to RSA 541:3 shall be filed within 5 days of the date on which the motion for rehearing is filed.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

#### Puc 203.08 Motions for Confidential Treatment.

(a) The commission shall upon motion issue a protective order providing for the confidential treatment of one or more documents upon a finding that the document or documents are entitled to such treatment pursuant to RSA 91-A:5, or other applicable law based upon the information submitted pursuant to (b) below.

(b) A motion for confidential treatment submitted pursuant to this rule shall contain:

- (1) The documents, specific portions of documents, or a detailed description of the types of information for which confidentiality is sought;
- (2) Specific reference to the statutory or common law support for confidentiality; and
- (3) A detailed statement of the harm that would result from disclosure and any other facts relevant to the request for confidential treatment.

(c) Documents submitted to the commission or staff accompanied by a motion for confidential treatment shall not be disclosed to the public until the commission rules on the motion.

(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.

(e) Documents submitted to the commission or staff accompanied by a written statement pursuant to (d) 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.

(f) When a party provides the commission or staff with a document accompanied by a motion for confidential treatment or a statement of intent to file such a motion, the party shall furnish 7 copies of the document.

(g) The commission shall mark each copy as confidential and maintain it within the commission offices in a secure location.

(h) If the commission grants a motion for confidential treatment, the confidential information shall not be subject to public disclosure and the document shall be treated according to such conditions as the commission determines are necessary to preserve such confidentiality.

(i) If the commission denies a motion for confidential treatment or modifies a previously issued protective order so that information previously held confidential is no longer entitled to such treatment, the information shall not be disclosed until all rights to request rehearing and to appeal have been exhausted or waived.

(j) When necessary to protect the confidentiality of material entitled to such treatment under this section, the commission shall include in its protective order a directive that all parties receiving the material shall also treat it as confidential.

(k) The granting of a motion for confidential treatment shall be subject to the ongoing authority of the commission on its own motion, or on the motion of staff, any party, or member of the public to reconsider the determination.

(l) If any information entitled to confidential treatment under this rule is thereafter released or made public by the party who sought its protection, any confidential treatment shall cease with respect to the released information but shall remain in full force and effect as to the information not so released or made public.

(m) The commission shall retain one copy of any documents entitled to confidential treatment under this rule and destroy all others within one year after all rights to appeal final orders of the commission have been exhausted.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06; ss by #9897, INTERIM, eff 3-26-11, EXPIRED: 9-22-11

New. #10101, eff 3-24-12

Puc 203.09 Discovery.

(a) The petitioner, the staff of the commission, the office of consumer advocate and any person granted intervenor status shall have the right to conduct discovery in an adjudicative proceeding pursuant to this rule.

(b) Unless inconsistent with an applicable procedural order, any person covered by this rule shall have the right to serve upon any party, data requests, which may consist of a written interrogatory or request for production of documents.

(c) Data requests shall identify with specificity the information or materials sought.

(d) A copy of each data request, each objection to data requests and each response to data requests shall be served upon every person designated for discovery filings on the commission's official service list pursuant to Puc 203.11.

(e) Objections to data requests and responses to data requests shall not be filed or served pursuant to Puc 203.02.

(f) A response to a data request shall be made within 10 days of the date of receipt or in accordance with a procedural schedule established by the commission.

(g) Objections to data requests shall:

(1) Be served in writing on the propounder of the requests within 10 days following receipt of the request unless the commission specifies a different time period in a procedural schedule order; and

(2) Clearly state the grounds on which they are based.

(h) Failure to object to a data request or requests for documents within 10 days of its receipt without good cause shall be deemed a waiver of the right to object.

(i) Motions to compel responses to data requests shall:

(1) Be made pursuant to Puc 203.07;

(2) Be made within 15 business days of receiving the applicable response or objection, or the deadline for providing the response, whichever is sooner;

(3) Specify the basis of the motion; and

(4) Certify that the movant has made a good-faith effort to resolve the dispute informally.

(j) The commission shall authorize other forms of discovery, including technical sessions, depositions and any other discovery method permissible in civil judicial proceedings before a state court when such discovery is necessary to enable the parties to acquire evidence admissible in a proceeding.

(k) When a party has provided a response to a data request, and prior to the issuance of a final order in the proceeding, the party shall have a duty to reasonably and promptly amend or supplement the response if the party obtains information which the party would have been required to provide in such response had the information been available to the party at the time the party served the response.

Source. #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

#### Puc 203.10 Amendments.

(a) The commission shall permit the amendment of any document filed with the commission provided:

(1) The party requesting the amendment shall give notice of the request to all persons on the service list for the proceeding; and

(2) The commission determines that the amendment shall encourage the just resolution of the proceeding and will not cause undue delay.

(b) The commission shall not allow any amendment that has the effect of broadening the scope of the proceeding unless it provides notice to those affected and an opportunity to comment prior to final commission action.

(c) The executive director shall allow the correction of typographical errors in any document filed with the commission at any time.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97; EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

#### Puc 203.11 Service.

(a) Except for motions for rehearing filed pursuant to RSA 541:3, service of all documents relating to any proceeding shall be made:

- (1) Electronically, to the email address specified on the commission's service list for the docket; or
- (2) By personal delivery, first class mail or other expedited delivery service, to such persons identified on the commission's service list for the docket as unable to receive electronic mail.

(b) When a party submits a filing to the commission on the last day on which such filing may be made pursuant to a commission procedural schedule order or by law, the party shall also serve such filing on all parties to the proceeding electronically or by facsimile or, prior to the expiration of such deadline, shall notify all other parties that such filing is available at the commission.

(c) Motions for rehearing filed pursuant to RSA 541:3 shall be served by hand, by facsimile or other method such to ensure that they are received by the parties by 4:30 p.m. on the same day as they are filed with the commission.

(d) If a person becomes an intervenor after a docket has been opened, the commission shall furnish a copy of all documents previously filed in that docket, if so requested, at a charge, to the requesting party, pursuant to Puc 105.01.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

Puc 203.12 Notice of Adjudicative Proceeding.

(a) The commission shall give notice of a pre-hearing conference, or of a hearing in a case for which no pre-hearing conference has been scheduled, which shall contain the information required by RSA 541-A:31, III, namely:

- (1) A statement of the date, time, place and nature of the hearing;
- (2) A statement of the legal authority under which the hearing is to be held;
- (3) A reference to the particular statutes and rules involved, including this chapter;
- (4) A short and plain statement of the issues presented; and
- (5) A statement that each party has the right to have an attorney represent them at the party's own expense.

(b) The commission shall direct the petitioner or other party to the docket to disseminate a notice issued pursuant to this section to the general public by causing the notice to be published in a newspaper of general circulation serving the area affected by the petition or by such other method as the commission deems appropriate and advisable in order to ensure reasonable notification to interested parties.

(c) The cost of publication required by (b) above shall be borne by the petitioner, the party being investigated or, when consistent with the public interest, by the commission itself.

(d) A petitioner required by the commission to publish notice shall file an affidavit of compliance, with a copy of the notice as published appended thereto, by a date specified in the notice.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

Puc 203.13 Postponement of Hearing.

(a) A party requesting postponement of a hearing shall file a request with the executive director, in writing, at least 7 days prior to the date of hearing.

(b) The party requesting postponement shall make a good faith attempt to seek the concurrence of the other parties to the request.

(c) The commission shall grant a request for postponement of a hearing if it finds that to do so would promote the orderly and efficient conduct of the proceeding.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

Puc 203.14 Presiding Officer.

(a) Except as provided in (b) or (c) below, the chairman of the commission shall serve as presiding officer.

(b) When the chairman is absent but one or more commissioners are present at a hearing or prehearing conference, the most senior commissioner present shall designate the presiding officer.

(c) A hearings examiner of the commission shall serve as presiding officer when authorized pursuant to RSA 363:17.

(d) The duties of a presiding officer shall include, but are not limited to:

(1) Presiding over the prehearing conferences and hearings; and

(2) Ruling on discovery disputes, confidentiality requests, and procedural matters which may arise during the course of the proceeding.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

Puc 203.15 Prehearing Conference.

(a) In order to facilitate proceedings and encourage informal disposition, the presiding officer shall, upon motion of any party, or upon the presiding officer's own motion, schedule one or more prehearing conferences.

(b) The commission shall provide notice to all parties prior to holding any prehearing conference.

(c) Prehearing conferences shall include consideration of any one or more of the following:

- (1) Offers of settlement;
- (2) Simplification of the issues;
- (3) Stipulations or admissions as to issues of fact or proof, by consent of the parties;
- (4) Limitations on the number of witnesses;
- (5) Consolidation of examination of witnesses by the parties; and
- (6) Any other matters which aid in the disposition of the proceeding.

(d) Initial prehearing conferences convened at the commencement of proceedings shall also include consideration of any one or more of the following:

- (1) Statement of preliminary, non-binding positions and other issues of concern of the parties identified after initial review of the filing;
- (2) Consideration of any petitions for intervention and any objection filed thereto;
- (3) Changes to standard procedures desired for discovery or during the hearing, if requested by a party;
- (4) Establishment of a procedural schedule to govern the remainder of the proceeding; and
- (5) Motions for confidential treatment of matters raised in the proceeding and otherwise to facilitate discovery.

(e) The commission shall issue and serve upon all parties a prehearing order addressing the matters raised at any prehearing conference.

Source. #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

Puc 203.16 Appearance Before the Commission.

(a) Any person may appear before the commission:

- (1) In one's own behalf;
- (2) By an attorney authorized to practice in any state or the District of Columbia and in good standing;
- (3) By an employee or authorized agent; or
- (4) By any person the commission authorizes, pursuant to RSA 365:10-a, to act as a representative of the person before the commission.

(b) Any person appearing before the commission shall adhere to:

- (1) Puc 200; and
- (2) Any orders of the commission or agreements between the parties in the docket, including orders or agreements addressing confidentiality.

(c) The commission shall prohibit the appearance of any person described in (a) above if it finds that person to have demonstrated a disregard for commission practices and procedures or otherwise disrupted commission proceedings.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRES: 8-19-06

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

Puc 203.17 Intervention. The commission shall grant one or more petitions to intervene in accordance with the standards of RSA 541-A:32.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-A, eff 6-10-06

Puc 203.18 Public Comment. Persons who do not have intervenor status in a proceeding but having interest in the subject matter shall be provided with an opportunity at a hearing or prehearing conference to state their position.

Source. #8657-A, eff 6-10-06

Puc 203.19 Consolidation of Hearings.

(a) When more than one application or petition seeks the same or similar relief, the commission shall consolidate the cases to be heard on a common record if it determines that to do so will promote the orderly and efficient conduct of the proceeding.

(b) The executive director shall note any such consolidation in the docket record of each affected proceeding.

(c) The cost of consolidated hearings shall be borne equitably by the parties.

(d) In determining an equitable sharing of costs pursuant to (c) above, the commission shall consider:

(1) A utility's number of customers; and

(2) A utility's in-state revenue.

(e) If a party objects to consolidation, such consolidation shall not occur until after the party has had an opportunity to be heard on the issue.

Source. #8657-A, eff 6-10-06

Puc 203.20 Settlement and Stipulation of Facts.

(a) All participants in settlement conferences shall treat discussions at settlement conferences as confidential and shall not disclose the contents of such discussions to third parties or seek to introduce them into evidence.

(b) The commission shall approve a disposition of any contested case by stipulation, settlement, consent order or default, if it determines that the result is just and reasonable and serves the public interest.

(c) The parties to any proceeding before the commission shall, by stipulation in writing filed with the commission or entered in the record at the hearing, agree upon the facts or any portion thereof involved in the hearing when such facts are not in dispute among the parties.

(d) If a stipulation is filed and is not contested by any party, the stipulation shall bind the commission as to the facts in question, and the commission shall consider the stipulation as evidence in the decision of the matter.

(e) Settlements and stipulations shall be filed no less than 5 days prior to the hearing, except as provided in (f).

(f) The commission shall accept late-filed stipulations and settlements when such acceptance:

- (1) Promotes the orderly and efficient conduct of the proceeding; and
- (2) Will not impair the rights of any party to the proceeding

Source. #8657-A, eff 6-10-06

Puc 203.21 Limiting Number of Witnesses or Time. The commission shall limit the number of witnesses or the time for testimony or oral argument upon a particular issue, as needed, to avoid unnecessary or cumulative evidence.

Source. #8657-A, eff 6-10-06

Puc 203.22 Exhibits.

(a) A party presenting evidence at a hearing shall present such evidence in exhibit form if the evidence contains tabulations and figures so numerous as to make oral presentation difficult to follow.

(b) Exhibits may contain a summary in an accompanying text or caption section.

(c) Exhibits consisting of more than one page shall be paginated sequentially.

(d) Parties filing exhibits shall:

(1) Provide on the first page of each exhibit a space approximately 2-1/2 inches wide by 1-1/2 inches long in the upper right hand corner; and

(2) Provide that each subsequent page shall have no less than one inch margins on all sides.

(e) A party presenting an exhibit at hearing with any material that has not been previously submitted to the commission shall provide a copy to the hearing clerk, each commissioner, the court reporter, if any, any witness or witnesses then testifying and each party present at the hearing. Parties may request that the commission mark previously-submitted filings in the matter being heard as an exhibit at hearing, without having to submit an additional copy of such a document at hearing.

(f) Any party offering an exhibit other than a document or photograph shall:

(1) Produce the exhibit for evaluation during a hearing; and

(2) Submit a photographic representation of the exhibit for inclusion in the record.

Source. #8657-A, eff 6-10-06; ss by #10101, eff 3-24-12

Puc 203.23 Evidence.

(a) The parties entitled to offer evidence at hearing in an adjudicative proceeding shall be the petitioner, the staff of the commission, the office of consumer advocate and any person granted intervenor status.

(b) All testimony of parties and witnesses, including any prefiled written testimony adopted by a witness at hearing, shall be made under oath or affirmation.

(c) Pursuant to RSA 365:9 and RSA 541-A:33, II, the rules of evidence shall not apply in proceedings before the commission.

- (d) The commission shall exclude irrelevant, immaterial or unduly repetitious evidence.
- (e) The commission shall give effect to the rules of privilege recognized by law.
- (f) The commission shall entertain objections to evidence at hearing and note them in the record.
- (g) A party shall submit documentary evidence in the form of copies or excerpts unless the commission finds that the authenticity of the submission is questioned or the copy is not legible.
- (h) Excerpts of documents shall include the proper citation to the complete document.
- (i) A response to a data request posed pursuant to Puc 203.09(a), when offered into evidence by a party other than the party that provided the response, shall be treated as an admission of the party that provided the data response.

Source. #8657-A, eff 6-10-06

Puc 203.24 Cross Examination.

- (a) Consistent with any conditions imposed pursuant to RSA 541-A:32, III the petitioner, the staff of the commission, the office of consumer advocate and any persons granted intervenor status may conduct cross-examination of a witness in order to develop a full and true disclosure of the facts.
- (b) The commission shall limit the direct or cross-examination of a witness if it determines that such limitation is necessary to avoid repetitive lines of inquiry.

Source. #8657-A, eff 6-10-06

Puc 203.25 Burden and Standard of Proof. Unless otherwise specified by law, the party seeking relief through a petition, application, motion or complaint shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence.

Source. #8657-A, eff 6-10-06

Puc 203.26 Order of Procedure. In hearings on petitions, the petitioner shall have the opportunity to open and close any part of the presentation.

Source. #8657-A, eff 6-10-06

Puc 203.27 Administrative Notice.

- (a) The commission shall take administrative notice when a party presents one or more of the following:
  - (1) Any fact which could be judicially noticed in the courts of New Hampshire;
  - (2) The relevant portion of the record of other proceedings before the commission;
  - (3) Generally recognized technical or scientific facts within the commission's specialized knowledge; and
  - (4) Codes or standards that have been adopted by an agency of the United States, of New Hampshire or of another state, or by a nationally recognized organization or association.
- (b) The commission shall notify parties either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed.

(c) The commission shall afford parties an opportunity to contest the material so noticed.

Source. #8657-A, eff 6-10-06

Puc 203.28 Views and Inspections. The commission shall take a view or conduct an inspection of any property which is the subject of a hearing before the commission if requested by a party, or on its own motion, if the commission shall have determined that the view or inspection will assist the commission in reaching a determination in the hearing.

Source. #8657-A, eff 6-10-06

Puc 203.29 Recess and Adjournment. The commission shall recess, adjourn or continue any hearing if to do so will promote the orderly and efficient conduct of the proceeding.

Source. #8657-A, eff 6-10-06

Puc 203.30 Reopening the Record.

(a) The commission shall, on its own motion or at the request of a party, authorize filing of exhibits after the close of a hearing if the commission finds that late submission of additional evidence will enhance its ability to resolve the matter in dispute.

(b) Any party requesting authorization to file an exhibit after the close of a hearing shall make its request:

(1) Orally before the close of the hearing; or

(2) If the hearing has concluded, by motion, pursuant to Puc 203.06.

(c) In determining whether to admit the late filed exhibit into the record, the commission shall consider:

(1) The probative value of the exhibit; and

(2) Whether the opportunity to submit a document impeaching or rebutting the late filed exhibit without further hearing shall adequately protect the parties' right of cross examination pursuant to RSA 541-A:33, IV.

Source. #8657-A, eff 6-10-06

Puc 203.31 Transcripts.

(a) When the commission desires a transcript of the evidence of any hearing, to assist in its deliberation thereon, it shall order a transcript pursuant to a contract between the commission and stenographic reporter.

(b) The reporter's charge for attendance and expenses shall be paid by the petitioning utility or as otherwise directed pursuant to RSA 365:37 and RSA 365:38.

(c) The commission shall provide one copy of the transcript at no charge to the office of consumer advocate.

Source. #8657-A, eff 6-10-06

Puc 203.32 Briefs.

(a) Upon the request of a party or on its own motion, the commission shall allow parties to submit briefs at any point in an adjudicative proceeding if the commission determines that such briefing would assist the commission in its determination of the issues presented.

(b) The commission shall set any briefing deadline or deadlines so as to permit the parties adequate time to draft their briefs and without causing undue delay in the conclusion of the proceeding.

(c) The commission shall establish a briefing schedule that allows one or more parties to submit briefs in rebuttal or reply to the brief or briefs of one or more other parties when such a sequential schedule is necessary to assure due process, fairness or full discussion of the issues presented.

(d) The commission shall establish a page limit for briefs when it determines that such a limit would promote the efficient resolution of issues without adversely affecting the rights of any party.

(e) The commission shall encourage joint filing of briefs when there is more than one party advocating the same result and the same arguments and individual briefs would be duplicative.

Source. #8657-A, eff 6-10-06

Puc 203.33 Rehearing. Parties requesting rehearing shall do so according to the provisions of RSA 541.

Source. #8657-A, eff 6-10-06

Puc 203.34 Retention of Decisions. The commission shall keep a decision on file in its records for at least 5 years following the date of the final decision or the date of the decision on any appeal, unless the director of the division of records management and archives of the department of state sets a different retention period pursuant to rules adopted under RSA 5:40.

Source. #8657-A, eff 6-10-06

PART Puc 204 COMPLAINTS AGAINST PUBLIC UTILITIES

Puc 204.01 Submission of Formal Complaints.

(a) Any person wishing to make a formal complaint to the commission regarding an entity over which the commission has jurisdiction shall do so by filing the complaint in writing with the executive director pursuant to Puc 203.02.

(b) The provisions of Puc 203 shall not apply to complaints filed pursuant to this rule unless the commission institutes adjudicative proceedings pursuant to Puc 204.05.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #4998, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6559, eff 8-19-97, EXPIRED: 8-19-05

New. #8420, INTERIM, eff 8-23-05, EXPIRED: 2-19-06

New. #8657-B, eff 6-10-06; ss by #10797-A, eff 3-18-15