

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2017-0018

APPEAL OF THE CITY OF BERLIN AND THE TOWNS OF GORHAM AND NEW  
HAMPTON

APPELLANTS' OBJECTION TO PUBLIC UTILITIES COMMISSION'S MOTION FOR  
SUMMARY AFFIRMANCE AND EVERSOURCE ENERGY'S MOTION FOR  
SUMMARY DISPOSITION

NOW COME the City of Berlin ("**Berlin**"), the Town of Gorham ("**Gorham**"), and the Town of New Hampton ("**New Hampton**"; collectively "**the Appellants**"), by and through their attorneys Donahue Tucker, & Ciandella, PLLC and the Mitchell Municipal Group, respectively, and object to the Public Utilities Commission's ("**PUC**") Motion for Summary Affirmance and Eversource Energy d/b/a Public Service Company of New Hampshire's ("**PSNH**") Motion for Summary Disposition (collectively "**the Motions**"). In support thereof the Appellants state as follows:

1. This Honorable Court should deny the Motions and accept the Appellants' Rule 10 Appeal because, contrary to PSNH and the PUC's assertions, the Appellants presented a substantial question of law and the PUC's decisions were both unjust and unreasonable. The Appellants have presented a substantial question of law because the Appellants have demonstrated that (a) the PUC deprived the Appellants of procedural rights to an adjudicatory hearing (as opposed to a non-adjudicatory proceeding) guaranteed to them by the 2015 Agreement, the 2016 Amendment, and the Litigation Agreement (collectively, "**the Agreements**"), as well as rights guaranteed by RSA chapter 541-A and the PUC's administrative

rules and (b) the PUC's auction design and process was not based on any admissible evidence and was predicated upon an erroneous interpretations of RSA chapters 38 and 374-D, neither of which are addressed in either Motion.

2. At the outset the Appellants note the inappropriateness of an adjudicative body filing a motion for summary affirmance in an appeal of its own decision. Rule 21 does not permit an adjudicative body or trial court to move for summary affirmance, only this Honorable Court or a party to the underlying case. See N.H. R. of Sup. Ct. 21.<sup>1</sup> The Appellants are aware of no other instance when an adjudicative body or trial court has sought to advocate for its own decision before this Court. For the PUC to do so and to actively seek to defeat the Appellants' appeal rights is highly unusual and inappropriate. For this reason, this Court should strike the PUC's Motion.

3. The Appellants demonstrated that there is a substantial question of law as to whether the procedure employed by the PUC to determine the auction design and process was adjudicative. The Appellants disagree with the PUC and PSNH that the procedure employed constituted an "adjudicative proceeding" as required by the Agreements. While adjudicative bodies retain a degree of discretion with regard to the management of proceedings and discovery, such bodies cannot exercise that discretion to violate New Hampshire law regarding adjudicative

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<sup>1</sup> The Appellants also object to the letter from Senators Jeb Bradley and Dan Feltes dated January 27, 2017, the submission of which is highly unusual. With all due respect to Sen. Bradley and Sen. Feltes, this Court should not be swayed by statements of select members of the legislative branch that were not parties to the Auction Docket. The separation of powers underlying our system of government requires that this Court determine the Appellants' substantive and procedural rights free of political pressure from elected officials.

proceedings.<sup>2</sup> The Appellants had a right to an adjudicative hearing, albeit expedited, which required the ability to present evidence, the ability to cross-examine witnesses, and the right to a decision based on actual, admissible evidence in the record that was vetted by cross-examination.<sup>3</sup> See RSA 541-A:33, I, III, IV (2007); RSA 541-A:35 (2007). What the PUC did in this case was to render its decision in the format of a non-adjudicatory proceeding, contrary to the requirement of the Agreements for an adjudicatory hearing.

4. Even if the PUC had the discretion to do away with the statutorily requirements set forth in RSA chapter 541-A, the PUC's management of these proceedings is a complete abdication of its responsibilities and undermines the contractual rights of the City of Berlin that were specifically negotiated. Cf. Centronics Corp. v. Genicom Corp., 132 N.H. 133, 143-44 (1989) ("under an agreement that appears . . . to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties'

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<sup>2</sup> The PUC asserts that its decision to do away with all but a cursory opportunity for discovery, avoid issuing an order based on admissible evidence in the record, and remove the Appellants' rights of cross-examination was a permissible waiver of its rules. While the PUC can unilaterally waive its rules, it cannot waive procedural requirements created by statute; to rule otherwise is to insert language into RSA 541-A:30-a, III(j) that the legislature did not see fit to include. See K.L.N. Constr. Co. v. Town of Pelham, 167 N.H. 180, 186 (2014) (noting canons of statutory construction). The PUC's claim to have done so now only solidifies the PUC's error.

Moreover, per the PUC's rules regarding waiver, the PUC must make specific findings prior to waiving its rules. N.H. CODE OF ADMIN. R. ANN. Puc. 201.05. The PUC did not make such findings, nor was waiver even mentioned in the PUC's Orders.

<sup>3</sup> While the PUC and PSNH claim that there was cross-examination, this is a mischaracterization of the record. It defies all credulity to claim that a lone technical session conducted prior to JPM's responses to any of the Appellants' comments could constitute cross-examination. The same could be said of any questioning under-oath conducted during a pre-hearing conference before that technical session (this is not to ignore that the existence of a pre-hearing conference necessarily implies that an actual hearing will be held at some point). Attorney Boldt's statement at the Pre-Hearing Conference can in no way be viewed as a waiver of the right to discovery or a full hearing on the merits.

purpose”); cf. also Seaward Constr. Co. v. Rochester, 118 N.H. 128, 129-30 (1978); Griswold v. Heat, Inc., 108 N.H. 119, 122-23 (1967). The PUC deprived the Appellants of those rights in violation of the Agreements and RSA chapter 541-A. This Court should deny the Motions and accept the Appellants’ Rule 10 Appeal

5. Neither PSNH nor the PUC have submitted any argument as to why there is not a substantial question of law on the issue of the procedure that a municipality must follow to acquire privately-owned electric generation assets. In fact, the PUC conceded that there is a substantial question of law when it argued that its interpretations of RSA 38:13 and RSA 374-D are reasonable while the Appellants’ interpretations of those statutes are not. For this reason, this Court should deny the Motions and accept the Appellants’ Rule 10 Appeal.

6. With regard to the PUC and PSNH’s arguments that the Court should deny this appeal because “time is of the essence,” this Court should reject those arguments. The PUC and PSNH cite to RSA 369-B:3-a, II, claiming that this appeal should be denied because “time is of the essence” and that that any delay will be detrimental to ratepayers. However, there is simply no evidence of any such detriment other than the unsupported assertions from PSNH and JPM.<sup>4</sup>

7. RSA 369-B:3-a does not prescribe a definitive timeframe, and there is no evidence to suggest that the procedures sought by the Appellants would have so delayed the adjudication so as to be contrary to the legislature’s intent. Rather, based solely on JPM’s conclusory and un-vetted assertions, the PUC appears to have determined that the phrase “time is

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<sup>4</sup> To be clear, the Appellants have not sought a non-expedited adjudicative proceeding or an auction process that seeks significant delays. The procedures suggested by the Appellants throughout the Auction Docket would result in an adjudication and auction far shorter than the eighteen-month “expedited” adjudication in the Divesture Docket.

of the essence” means that the Appellants limitations cannot be accommodated.<sup>5</sup> It was the PUC’s reliance on such conclusory and baseless assertions that underlies this appeal.

8. PSNH and the PUC note that the claim of error regarding closing the docket was harmless because the PUC does not intend to initiate the auction process until this appeal is resolved. Such statements in the Motions are unsubstantiated by any written order from the PUC. However, the Appellants interpret these statements as PSNH and the PUC voicing no objection to the Appellants’ request for a suspension of the PUC’s orders pursuant to RSA 541:18; and Appellants ask this Court to so rule.<sup>6</sup>

9. In closing, this Honorable Court should deny the PUC and PSNH’s Motions and should accept the Appellants’ Rule 10 Appeal. The Appellants deserve their day in Court. The PUC denied them of that right. This Appeal presents the opportunity to correct that injury.

WHEREFORE, the Appellants respectfully request that this Honorable Court:

- A. Deny the PUC and PSNH’s Motions;
- B. Accept the Appellants’ Rule 10 Appeal from Administrative Agency;
- C. Suspend the PUC’s Orders No. 25,967 and 25,973; and
- D. Grant such further relief as is just and equitable.

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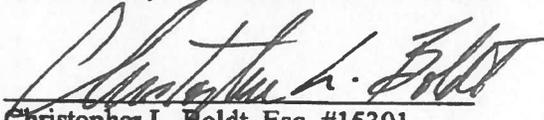
<sup>5</sup> While PSNH and the PUC admonish the Appellants for not taking action in July of 2016, these claims are baseless because: (a) the Appellants did not have access to the virtual data room necessary to prepare voter education materials until the data room was opened on November 28, 2016, and (b) there is no evidence that the Appellants did not take any action. The Appellants’ consultant, George E. Sansoucy, P.E., LLC, received the information from the virtual data room and is in the process of reviewing it. If the PUC had allowed discovery or conducted a hearing, the extent of the Appellants’ diligence could have been ascertained and been made known to the PUC.

<sup>6</sup> Of course, the delay in initiation of the auction process does not address or correct the issue of the PUC’s erroneous interpretations of RSA chapters 38 and 374-D that the Appellants can submit a fully-financed bid, without seeking ratification of the final determination of price. See RSA 38:13 (2000).

Respectfully submitted,  
City of Berlin and Town of Gorham  
by and through their attorneys,  
DONAHUE, TUCKER & CIANDELLA

Date: 1/27, 2017

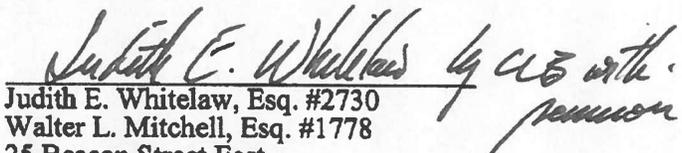
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Respectfully submitted,  
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by and through their attorneys,  
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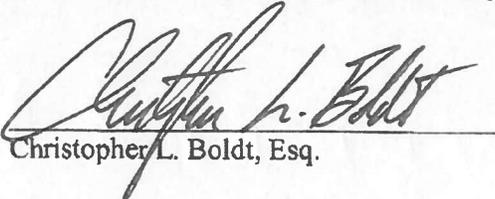
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### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been mailed this 27<sup>th</sup> day of January, 2017, via U.S. first-class mail, postage prepaid, to all counsel and/or parties of record, the New Hampshire Public Utilities Commission, and the New Hampshire Attorney General's Office.

  
Christopher L. Boldt, Esq.