

**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 17-124**

**OBJECTION OF**  
**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**  
**d/b/a EVERSOURCE ENERGY**  
**TO THE MUNICIPAL INTERVENORS’**  
**JOINT MOTION FOR REHEARING AND STAY**  
**OF ORDER NO. 26,057**

October 3, 2017

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 September 28, 2017 in the instant docket by the City of Berlin, the Town of Bristol, 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 previously considered by the Commission. In addition, the Motion is not ripe, as any potential harm alleged by the Municipal Intervenors is speculative. Finally, many of the bases set forth in support of the Motion are incorrect.

In support of its objection Eversource states as follows:

1. On September 19, 2017, the Commission issued Order No. 26,057, “Order on Confidential Treatment of Auction Data” (the “Order”) in this proceeding. That Order was issued in accordance with New Hampshire law to expedite the divestiture

of PSNH's generation assets pursuant to 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 "Litigation Settlement" also dated January 26, 2016 (collectively, the "2015 Settlements").

2. The Municipal Intervenors' 22-page Motion may be reduced to one primary complaint: i.e., the Commission's treatment of certain information from PSNH's process of divesting its generation assets violates their due process rights. This complaint has no merit.
3. In its August 3, 2017, "Order of Notice" establishing this docket, the Commission announced its preliminary intention to handle certain information relating to the auction process as confidential in a manner identical to the treatment of similar information in Docket No. DE 02-075 involving the divestiture of the Seabrook Nuclear Station. Interested parties were given an opportunity to state their "position with regard to the treatment of confidential auction data." Order of Notice at 3.
4. The Municipal Intervenors all submitted petitions for intervenor status in this proceeding, and those petitions were granted. The City of Berlin and the Town of New Hampton subsequently submitted written comments regarding the treatment of confidential auction data. On August 18, 2017, the Commission held an on the record proceeding in this docket, at which time all of the Municipal Intervenors had the further opportunity to raise their concerns regarding the Commission's proposed treatment of confidential auction information.

5. The Motion merely repeats the written and oral statements previously provided by the Municipal Intervenors. In fact, in footnote 4 of the Motion, the Municipal Intervenors explicitly incorporate their prior arguments into this filing.
6. Pursuant to RSA 541:3, the Commission may grant 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. *Dumais v. State*, 118 N.H. 309, 311 (1978). A successful motion does not merely reassert prior arguments and request a different outcome. *See Campaign for Ratepayers Rights*, 145 N.H. 671, 674 (2001); *Connecticut Valley Electric Co.*, 88 NH PUC 355, 356 (2003); *Public Service Company of New Hampshire*, Docket No. 07-108, Order No. 24,966, slip op. at 5 (May 1, 2009). *See also Eversource Energy*, Docket No. DE 16-817, Order No. 25,973 (December 23, 2016) (Municipal Intervenors’ request for reconsideration and stay of auction design order denied). In their Motion, the Municipal Intervenors add nothing beyond what was included in their prior statements. On this basis alone, the Commission should reject the Motion.
7. Throughout the Motion, the Municipal Intervenors make reference to a “preference” granted to communities that host PSNH’s hydro generating assets. *See, e.g.*, Motion at ¶¶ 3, 46, 49. The 2015 PSNH Settlement indeed gives such host communities a favored status for participating in the divestiture auction as a potential buyer for one or more assets. *See* 2015 PSNH Settlement at line 461 (the divestiture process will be designed to accommodate the participation of municipalities that host generation assets); and line 472 (Any municipalities providing notice to the Commission of

their desire to bid on generating assets shall automatically be qualified to participate beyond the Initial Phase.) The auction process approved by the Commission provided these “preferences” to the host communities. The Municipal Intervenors now conflate these auction process preferences into a preferred intervenor status in the instant proceeding. No such special status exists.

8. The Municipal Intervenors received their opportunity to participate in the auction process. Perhaps they did, by submitting bids; perhaps they did not. The Municipal Intervenors received exactly what was agreed to in the 2015 PSNH Settlement. If any of the Municipal Intervenors participated as bidders in the process, their expressed desires to learn all the details regarding the losing bidders’ confidential bids is outrageous. If the Municipal Intervenors did not choose to bid on any of the assets, that was their choice.
9. It is important to remember what the standard is regarding the divestiture of PSNH’s generating assets. That standard was set forth in the 2015 PSNH Settlement at line 429: “For the economic benefit of customers, the Commission and PSNH shall expeditiously pursue divestiture of PSNH’s owned generation fleet... .” *See also*, RSA 369-B:3-a, III (the Commission “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.*”) (emphasis added).
10. The 2015 PSNH Settlement (at line 434) continues:

The goals of the asset auctions are to maximize the net Total Transaction Value (“TTV”), which reflects all of the cash and non-cash elements of the transaction(s), realized from the sale(s) in order to minimize Stranded Costs, to provide a market-based determination of Stranded Costs, and to establish a competitive energy market, while at

the same time providing certain employee and host community protections as set forth herein.

The goals of the generation asset divestiture auction process are clearly set forth in the 2015 PSNH Settlement: 1) Maximization of the TTV; and, 2) Establishment of a competitive energy market. Host community protections were noted as ancillary benefits of the auction, created as a result of maximizing the TTV, offering those municipalities the opportunity to participate in the auction as bidders, and the creation of tax stabilization payments in the event the sales price of an asset is less than that asset's assessed tax value.

11. Nothing in the 2015 PSNH Settlement calls for continuation or maximization of municipal property tax bases. Via maximization of the TTV, overall, municipalities' interests in protecting the fair market value of the generation assets within their borders is protected, but no one municipality has a special preference for the maximization of its tax base.
12. The second main reason for divestiture – “Establishment of a competitive energy market” – is put into peril by the Municipal Intervenors' Motion. The parties that have participated in the generation auction process make their business by buying, operating, and selling similar assets throughout the world. There is an absolute need that losing bidders not have their unsuccessful bids placed into the public domain. *See* Direct Testimony of John J. Reed dated July 6, 2015, Docket No. DE 14-238, Determination Regarding PSNH's Generating Assets” at p. 16. (“Bidders must be afforded confidential treatment and know that the competitive advantage they bring to the table will not be shared with other bidders.”)

13. The Municipal Intervenors citation to Part 1, Article 8 of the New Hampshire

Constitution as supporting their Motion is misplaced. The documents in question are not “government records.” They are business records related to the sale of privately-owned property; i.e., PSNH’s generating assets. It must be remembered that PSNH is a private citizen, not a government entity. The fact that the divestiture of its generation assets implements a public policy does not transform the sale into a public sale. Nor does the administration of that process with oversight by the Commission Staff change the nature of this private sale.

14. The New Hampshire Supreme Court, discussing this Constitutional provision, has noted that some governmental proceedings and records have historically not been open to the public. *Associated Press v. State*, 153 N.H. 120, 125 (2005).

Recognizing this, RSA 91-A:5, IV, exempts from disclosure “confidential, commercial, or financial information” – precisely the type of information that the Order’s confidential information process seeks to protect.

15. The material subject to confidential treatment by the Commission’s Order is

information that has economic value by virtue of its secrecy from other persons who could benefit economically from its disclosure. As such, the information falls within the definition of “trade secret” in RSA 350-B:1, IV. *See Ovation Plumbing, Inc. v. Furton*, 33 P.3d 1221 (Colo. App. 2001), *as modified on denial of reh’g* (Sept. 6, 2001) (Contract bid pricing information, involving the bid itself rather than the methods of calculating the bid or the constituent elements of the bid, could meet the definition of a trade secret.)

16. The New Hampshire Supreme Court has held that governmental disclosure of trade secrets, including contract bids, is prohibited by RSA 91-A:4, I, and, therefore, because disclosure of such information “would constitute a misappropriation, such information is exempt from disclosure under public record laws.” *CaremarkPCS Health, LLC v. New Hampshire Dep’t of Admin. Servs.*, 167 N.H. 583, 590 (2015).
17. In *CaremarkPCS*, Caremark had submitted a bid to the N.H. Department of Administrative Services (“DAS”) in response to an RFP. *Id.* at 585. Subsequently, DAS received multiple requests to inspect and copy Caremark’s bid and the final contract. *Id.* In *CaremarkPCS*, despite Caremark being the winning bidder of a contract with the State itself, the Court held that under Chapter 350-B, Caremark’s bid information was not releasable. *Id.* at 587-90. In the instant case, the information in question does not relate to a contract with the State of New Hampshire or any other governmental instrumentality - - the contracting party will be PSNH; in the instant case the dispute does not involve the winning bidder’s information, but pertains only to information related to the losing bidders. Clearly, if the Caremark bid information was protected in *CaremarkPCS*, then the losing bidders’ information in this proceeding should also be entitled to at least the same level of protection for their sealed bid information.
18. The Municipal Intervenors allege (at ¶21 of the Motion), “That bidders did not require a non-disclosure agreement and that JPM did not seek confidential treatment until after bids were tendered is telling that there is no potential harm associated with this information.” In *CaremarkPCS*, the Supreme Court refuted this issue by stating that “a direct commitment to maintain the secrecy of a trade secret *is not required*

for the disclosure of a trade secret to constitute a misappropriation.” *Id.* at 588 (emphasis added). Rather, the trade secret need only have been obtained under circumstances giving rise to a duty to maintain its secrecy or limit its use. *Id.* In the case of Caremark, the underlying RFP, just as with the Commission’s order of notice in this docket, stated the intent of the government agency to maintain confidential information as confidential, showing circumstances that gave rise to a duty to protect the information. *Id.*

19. The participants in the auction process had a reasonable expectation that if they were not the winning bidder, their information would not be disclosed. The present auction is not the first divestiture of a generation asset by a utility in this state. The Seabrook Nuclear plant, sold in 2002, was divested by an affiliate of PSNH as part of the state’s electric industry restructuring effort. Then, as now, the Commission engaged an auction agent – also J.P. Morgan – to administer a commercially acceptable divestiture process. As part of the Commission’s sale of Seabrook, the Municipal Intervenors acknowledge that the Commission used the same process for treatment of similar confidential information as is contained in the Order here. There was no reason for bidders to expect that the Commission would come to a different result here; a result that today would make certain bid documents public that in Seabrook were kept confidential.
20. This Commission is well aware of the need for the confidentiality of sensitive commercial and financial information. As an economic regulator, this Commission has developed a keen sense of what needs to be protected, and how best to protect it



while balancing the needs for open government with the goal of lowering utility rates for consumers.

21. The Municipal Intervenors tout that they “are not competitors; the Municipal Intervenors have no means by which to exploit any business advantage that could possibly be gleaned from bidder identities, bids, or allocations.” Motion, ¶26. This is not accurate.
22. The Municipal Intervenors made an effort to ensure that they had an opportunity to participate in the divestiture auction process. Indeed, they took their case to the New Hampshire Supreme Court when they felt their ability to participate as bidders was encumbered by the Commission’s auction process decision. These municipalities clearly have an interest in potentially owning some of PSNH’s assets - - and New Hampshire law, in Chapter 38, gives them a potential mechanism for doing so. Recall that when PSNH started the divestiture process for its assets in 2001, the City of Berlin (as well as the City of Manchester) petitioned the Commission for valuations of PSNH’s Smith (and Amoskeag) Hydro Stations as a prelude to the potential municipalization of those assets. *See* Docket Nos. DE 00-210 and DE 00-211. As such, they have acted as though they are, in fact, competitors.
23. In addition, these Municipal Intervenors make it clear that their motives are aimed at maximizing the property tax revenues from the assets located within their borders. Such tax maximization can occur in two ways: by having access to confidential bid information or by delaying the sale of the assets if the Municipal Intervenors learn of sales prices they believe are inconsistent with the assessed values of the assets.

24. The Municipal Intervenors complain that the Commission's ordered treatment of confidential information "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." Motion ¶49. It must be noted that neither the Town of Bristol or the Town of New Hampton are parties to these settlement agreements. *See* Motion at ¶4 and at fn. 3. Thus, the "Municipal Intervenors" as a group do not have contractual rights arising from documents to which they are not parties.
25. In ¶33 of the Motion, the Municipal Intervenors argue that, "The Commission should reconsider its position and allow the Municipal Intervenors to have full access to all bidder names, bid numbers, and bid allocations... ." Nothing in the Commission's Order, eliminates the Municipal Intervenors' full access to the bid allocations (assuming they execute the requisite non-disclosure agreement), as they are included in the final bid packages. The Order does state that names and identifying information will be redacted from all bidder materials; but such names and bid numbers are not relevant to whether the decisions made regarding disposition of the generation assets maximized the TTV.
26. Ultimately, the Municipal Intervenors rely upon a public policy of openness in government to support their claim that the Commission's Order is unlawful. The Supreme Court in *CaremarkPCS* has rejected reliance on public policy as a means of forcing disclosure of similar bid information:

Finally, the Department argues that there are overriding public policy reasons that favor disclosure of the designated information. However, the Department makes "[its] argument in the wrong forum." *Petition of Kilton*, 156 N.H. 632, 645, 939 A.2d 198 (2007). With the enactment

of the UTSA, the legislature made the policy determination to prohibit the misappropriation of trade secrets. Accordingly, misappropriated trade secrets fall squarely within the exemption in the Right-to-Know Law for information the disclosure of which is “otherwise prohibited by statute.” RSA 91-A:4, I. To the extent that the Department argues that the legislature improperly balanced policy considerations, we observe that “[m]atters of public policy are reserved for the legislature, and we therefore leave to it the task of addressing the [Department's] concerns.” *Petition of Kilton*, 156 N.H. at 645, 939 A.2d 198.

*CaremarkPCS*, 167 N.H. at 590–91.

27. Contrary to the Municipal Intervenor's claims, the Commission's procedure set forth in the Order is legal and does not violate their due process entitlements.
28. It cannot be disputed that under New Hampshire law, “The rules of evidence shall not apply in adjudicative proceedings.” RSA 541-A:33, II; Puc 203.23(c). The Commission has both authority and discretion to determine the procedures that will govern a hearing and the nature and type of evidence that it will entertain.
29. That discretion for a quasi-judicial administrative agency such as the Commission to control its procedures concerning the handling and use of confidential information is certainly no less than that of the court system itself. In the federal courts, that discretion is “broad”:

District judges need wide latitude in designing protective orders, and the Federal Rules of Civil Procedure reflect that approach. ... The district court has “broad discretion” to decide “when a protective order is appropriate and what degree of protection is required,” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S.Ct. 2199, 2209, 81 L.Ed.2d 17 (1984), and great deference is shown to the district judge in framing and administering such orders. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir.1988), cert. denied, 488 U.S. 1030, 109 S.Ct. 838, 102 L.Ed.2d 970 (1989); 8 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2036 (1970).

*Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993).

30. The First Circuit has also held:

In *Modern Continental/Obayashi v. Occupational Safety & Health Review Commission*, 196 F.3d 274, 281 (1st Cir.1999), this court spoke of the need for “a clear showing of manifest injustice,” saying that, to warrant reversal, the lower court's discovery order must be “plainly wrong” and must be shown to have resulted in “substantial prejudice” to the complaining party.

*Brandt v. Wand Partners*, 242 F.3d 6, 18 (1st Cir. 2001).

31. In the instant proceeding, it is too soon to determine whether or not the

Commission’s procedural Order has “resulted in ‘substantial prejudice’” to the Municipal Intervenors. Their claims at this time are speculative and hypothetical. *See Society for the Prot. of New Hampshire Forests v. N. Pass Transmission, LLC*, No. 2016-0322, 2017 WL 695385, \*2 (N.H. Jan. 30, 2017) (deciding that a claim that is “purely speculative” is not ripe for adjudication; such a claim would be “fit for determination when it raises primarily legal issues, it does not require further factual development, and the challenged action is final.”) This proceeding has barely started; it is a long way from being final and there has been no factual development. There may be only one responsive and qualified bidder for some or all of the generating assets being sold; or there may be none. Similarly, there may be no question regarding the result of the generation auction that maximizes the TTV – the most important goal of the 2015 PSNH Settlement to which the City of Berlin is a signatory.

32. Despite the speculative and hypothetical nature of their claims, the Municipal

Intervenors have requested that the Commission “stay all proceedings in this Docket, during the pendency of the Commission's consideration of this Motion for Rehearing, and through any appeal of a denial of this Motion for Rehearing to the

New Hampshire Supreme Court.” Motion ¶52. As the Motion should be rejected, the Municipal Intervenors’ request for such an extraordinary stay should ultimately be moot.

33. Moreover, the request for a stay of “all proceedings” means that any sale of any asset, regardless of its relationship to the Municipal Intervenors, would not just be placed in limbo pending their pursuit of their issues - - it would possibly result in a need to redo the auction process. Bidders cannot be expected to hold their pricing for the approximate year-long period that a full Supreme Court appeal would likely take; hence, either the price paid for the assets will diminish over time or the bids will expire, requiring the auction process to start anew. The carrying costs paid by consumers, including the Municipal Intervenors themselves and all other retail customers of PSNH, of such a lengthy delay in PSNH’s sale of its generating assets are material and significant. A delay in the auction divestiture process by necessity also delays the refinancing of any remaining stranded costs (RSA 369-B:3, IV,(c)), a result that will cost the consumers of this state tens of millions of dollars. As such, the Motion’s request for stay impacts not just the completion of the sales that may, arguably, have an effect on the tax bases of the Municipal Intervenors, but the entire auction process for all facilities in all locations and for the 70% of New Hampshire that relies upon PSNH for its retail electric service.
34. Regardless of the mootness of the stay request, and the speculative and hypothetical nature of the alleged underlying harm, such a stay would be inconsistent with the law. The legislature has decreed that “time is of the essence” with respect to the divestiture of PSNH’s generation assets. RSA 369-B:1, XIV. To that end, the

legislature has directed the Commission, and any reviewing courts, to expedite their processes. *Id.*; RSA 369-B:3-a.

35. This proceeding has unique attributes because, as noted earlier, the longer the auction takes to be completed, the greater the erosion of benefits to customers as well as the risks that may impact auction results. As the Commission is aware, a significant portion of their value comes during the winter months, when the lack of availability of natural gas results in higher prices for electricity in the wholesale market. Such higher pricing provides value to the owners of generating plants that are not reliant on natural gas and are available to “keep the lights on” during the cold winter months. If the generation assets are not sold prior the upcoming winter, the value of those plants will be less, reducing the TTV of the auction and negatively impacting customers.
36. The Commission complied with the law and 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.
37. Based upon the matters set forth herein, the Order need not be stayed nor should the Commission grant rehearing.

**WHEREFORE**, PSNH urges the Commission to deny the Municipal Intervenors’ Joint Motion for Reconsideration and Stay of Order No. 26,057. Instead, the Commission should continue to expedite this proceeding as required by law and order such further relief as may be just and equitable.

Respectfully submitted,

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

October 3, 2017

Date

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



Robert A. Bersak  
Chief Regulatory Counsel  
780 North Commercial Street  
Post Office Box 330  
Manchester, New Hampshire 03105-0330  
(603) 634-3355  
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.

October 3, 2017

Date

By:



Robert A. Bersak