

DE 00-210
DE 00-211

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petitions for Valuation of Certain Hydro-Electric Facilities

**Order Staying Docket No. DE 00-210
and Setting Status Conference in Docket No. DE 00-211**

O R D E R N O. 23,733

June 28, 2001

I. BACKGROUND AND PROCEDURAL HISTORY

These dockets concern requests for valuation of two hydro-electric facilities owned by Public Service Company of New Hampshire (PSNH), precedent to their possible forced acquisition by the municipalities in which the facilities are located. Docket No. DE 00-210 involves Amoskeag Station in Manchester; Docket No. DE 00-211 concerns the J. Brodie Smith Station in Berlin.

Appearing jointly, the City of Manchester and the City of Berlin filed petitions for valuation pursuant to Section 5 of Chapter 249 of the Session Laws of 2000. Chapter 249 reflects the Legislature's approval, with certain modifications, of the 1999 PSNH Restructuring Settlement Agreement, which resolved ongoing litigation between PSNH and the Commission over the Company's stranded costs and other issues and opened the PSNH service territory to competitive

energy suppliers as of May 1, 2001.¹ In Section 5 of Chapter 249, the Legislature authorized municipalities to seek valuation of PSNH generation assets within their borders, a condition precedent to their condemnation pursuant to RSA Chapter 38, but without completing the voter approval process that would normally be required as part of the Chapter 38 municipal acquisition process. The Legislature set October 1, 2000 as the deadline for petitions under Chapter 249:5; the Commission received the instant petitions on September 29, 2000.

Pursuant to a duly published Order of Notice, the Commission conducted a Pre-Hearing Conference on November 30, 2000. In our Order following the Pre-Hearing Conference (No. 23,536, December 12, 2000), we noted that the Office of Consumer Advocate (OCA) had entered an appearance on behalf of residential ratepayers, and we granted an intervention petition submitted jointly by the towns of Bow, Hillsborough and Gorham as well as the City of Franklin and the New Hampton

¹ Specifically, and although the Commission was vested with the authority to approve the Restructuring Settlement Agreement generally, the Legislature's approval was required for the so-called "securitization" provisions of the Restructuring Settlement Agreement, which bind the State of New Hampshire to permit PSNH to collect certain stranded cost charges from its customers until a set of bonds issued to cover these obligations is paid off.

Village Precinct (collectively, the Municipal Intervenors).

On January 18, 2001, upon review of written briefs submitted by the parties, the Commission entered Order No. 23,620 in these dockets. Order No. 23,620 concerned certain threshold issues. The Commission ruled that the "independent asset valuation specialist" to be hired by the Commission pursuant to 2000 Laws 249:5 would function much as any independent expert hired by the Commission would, i.e., by submitting pre-filed testimony and submitting to discovery and cross-examination. Further, the Commission concluded that proceedings in this docket would be subject to the terms of the PSNH Restructuring Settlement Agreement, particularly the Agreement's "employee protection" provisions as they relate to the two hydro-electric facilities at issue here. Finally, the Commission sought suggestions from the parties as to potential asset valuation specialists it might hire. Thereafter, the Commission issued a formal Request for Proposals with regard to the hiring of such an expert.

The petitioners moved to amend their initial filing on April 30, 2001. The motion noted that, in addition to authorizing a petition to the Commission under Chapter 249:5 with regard to Smith Station, the City of Berlin had also initiated acquisition proceedings under RSA 38:3 by virtue of

a two-thirds vote of the City Council, followed by a confirming approval from a majority of the City's qualified voters at an election held on November 7, 2000. According to the motion, on December 4, 2000 Berlin formally placed PSNH on notice of the confirming vote pursuant to RSA 38:7, whereupon PSNH made no reply within 60 days. The petitioners pointed out that, pursuant to RSA 38:7, in these circumstances PSNH "forfeits any right it may have had to require the purchase of its plant and property by the municipality, and the municipality may proceed to acquire the plant as provided in RSA 38:10." Motion to Amend the Joint Petition for the Determination of the Fair Market Value of the Amoskeag and J. Brodie Smith Hydro Stations at 2. Therefore, the petitioners asked in their motion that the Commission permit them to amend the valuation petition to include a request for an RSA 38:9 valuation, which establishes the "just compensation" for purposes of an RSA 38:10 condemnation.

PSNH submitted an opposition to the motion on May 10, 2001. In it, PSNH cited the legislative findings contained in House Bill 489, which had then passed both houses of the Legislature and was awaiting gubernatorial signature, to the effect that a delay in the divestiture of PSNH's non-nuclear generation assets was necessary in the short-term to

allow PSNH to provide Transition Service² so as to shield customers from price volatility in competitive electricity markets. As PSNH noted, and as is described more fully below, House Bill 489 therefore provides for a 33-month delay in the sale of these generation assets and includes an explicit reference to the Company's hydro-electric facilities.

In the view of PSNH, because the Legislature explicitly determined in House Bill 489 that a delay in the divestiture of the Company's non-nuclear generation assets would be in the public interest, the Commission is precluded from making the public interest determination under RSA 38:10 that is a pre-requisite to municipal condemnation of a generation facility under RSA 38. Therefore, according to PSNH, to grant the petitioners' motion would be a "mere exercise in futility" and would be inconsistent with notions of administrative efficiency.

On May 22, 2001, Governor Shaheen signed House Bill 489 into law, as Chapter 29 of the Laws of 2001. *Inter alia*, Chapter 29 provides for a delay in the sale of PSNH's non-

² Transition Service is "electricity supply that is available to existing retail customers prior to each customer's first choice of a competitive electricity supplier and to others, as deemed appropriate by the commission." RSA 374-F:2, V.

nuclear generation assets pursuant to the PSNH Restructuring Settlement Agreement. Instead of the near-term sale of these facilities, their divestiture was postponed to no sooner than 33 months after the so-called Competition Day in PSNH's service territory, May 1, 2001. Among the provisions implementing this change is the following legislative determination: "The public utilities commission may stay or suspend any proceedings on petitions filed under [Laws of] 2000, 249:5 consistent with the provisions of this act [i.e., Chapter 249] relative to the divestiture of Public Service Company of New Hampshire assets."

In light of this enactment, which was immediately effective, the Commission advised the parties by letter on May 22, 2001 that there would be a delay in the selection of the Commission's independent asset valuation specialist. The Commission asked the parties to submit, on or before June 4, 2001, written statements of their positions as to whether the Commission should exercise its authority under Chapter 29 to stay or to suspend one or both of these dockets. The Commission specifically asked the parties to address whether municipal acquisition of hydro-electric facilities pursuant to RSA Chapter 38 or Laws 2000, Chapter 249:5 is limited by the provision in the newly enacted Chapter 29 postponing the sale

of PSNH's non-nuclear generation assets. In response to this request, the Commission received pleadings from PSNH, the petitioners, the Municipal Intervenors and OCA.

II. POSITIONS OF THE PARTIES

A. Cities of Berlin and Manchester

The petitioners, although appearing jointly, noted that the two municipalities do not take the same position on the issue of whether these dockets should be stayed or suspended. According to the petitioners, the City of Manchester wishes to take no position on the subject, whereas the City of Berlin continues to believe that it should be permitted to move forward with the acquisition of Smith Station pursuant to RSA 38.

Berlin notes that it has taken all of the steps that are conditions precedent to the valuation and acquisition of Smith Station under RSA 38. In that regard, Berlin points out that the Legislature has not merely authorized such acquisitions but has encouraged municipal involvement in small-scale power generation (i.e., facilities with a capacity of not more than 80 megawatts, such as the Smith and Brodie stations) by enacting RSA 374-D (concerning the issuance of Municipal Small Scale Power Facility Bonds).

Berlin points out that the RSA 38 municipal

acquisition process existed long before New Hampshire undertook to restructure its electric industry. The City notes that, when the Legislature enacted the Electric Utility Restructuring Act, RSA 374-F, in 1996, it made no attempt to alter or to amend RSA 38 and expressed no such intent in either its formal legislative findings or in the Restructuring Act's enumerated policy principles.

According to Berlin, a fair reading of the PSNH Restructuring Settlement Agreement reveals no intention to affect the RSA 38 acquisition process. In the City's view, while the Settlement Agreement did provide a process for municipal acquisitions, this was entirely separate and apart from the rights municipalities already enjoyed under RSA 38. Similarly, in the view of Berlin, the enactment of 2000 Laws 249:5 did not alter RSA 38 in any way but simply provided for a modified version of the separate acquisition process contemplated by the Settlement Agreement.

Berlin takes exception to the view, expressed by PSNH in its opposition to the motion to amend the petition, that in light of the legislatively-imposed delay in the sale of PSNH's non-nuclear generation assets the Commission is precluded from finding that the condemnation of Smith Station is in the public interest, as required by RSA 38:10 in order

for such a transaction to go forward. To that end, Berlin draws a distinction between a sale of the plant - precluded for 33 months by virtue of Chapter 29 of the Laws of 2001 - and the condemnation of the same plant under RSA 38.

The City further draws the Commission's attention to language in RSA 38:3, providing that when the voters of a city have endorsed a proposed acquisition, as the voters in Berlin have here, such action "shall create a rebuttable presumption that such action is in the public interest." According to the City, this provision "is not to be taken lightly." Memorandum of Law of the City of Berlin at 10. Berlin further invokes the Commission's own 1999 recitation of the 1997 bill that created this rebuttable presumption, which noted that the measure's sponsor described it as a "highlight" of his proposal. *See City of Manchester*, 84 NH PUC 624, 627 (1999) (quoting, e.g., Minutes of Hearing before the House Science, Technology and Energy Committee on House Bill 528 at 1 (Feb. 11, 1997) and concluding that purpose of 1997 amendment to RSA 38 was to streamline process of gaining Commission approval of municipal condemnations under RSA 38). According to Berlin, in these circumstances, and because these proceedings are contested cases within the meaning of the Administrative

Procedures Act, RSA 541-A, PSNH is now obligated to come forward with evidence that the proposed condemnation is not in the public interest, whereupon the Commission must issue a written order with regard to the public interest determination that includes findings of fact and conclusions of law based on the record adduced at hearing.

Finally, Berlin invokes RSA 38:11, which provides in relevant part that, "[w]hen making a determination as to whether the purchase or taking of utility plant or property is in the public interest under this chapter, the commission may set conditions and issue orders to satisfy the public interest." According to Berlin, it is within the Commission's power under RSA 38:11 to impose conditions on the condemnation of Smith Station that would satisfy the legislative concerns articulated in House Bill 489 as enacted by 2001 Laws 29, with regard to the effect of fluctuations in the wholesale electricity markets if PSNH divests its non-nuclear generation assets in the near term.³

³ As Berlin notes in its memorandum, the effect of such fluctuations would be delayed during the first 33 months following Competition Day because the price of such service is either fixed or capped during that period. See RSA 369-B:3, IV(b)(1) (requiring PSNH to so agree in exchange for securitization authority). We note that to the extent that PSNH's costs exceed its Transition Service revenue during the period, the PSNH Restructuring Settlement Agreement contains a

According to Berlin, in light of the RSA 38:3 presumption of public interest, the Commission cannot simply "guess" that municipal acquisition of Smith Station and its 14 megawatts of hydro-electric capacity would not be in the public interest because it would tend to expose PSNH Transition Service customers to fluctuations in the wholesale electricity markets. Memorandum of Law of the City of Berlin Regarding the Effect of House Bill 489 Upon RSA Ch. 38 Valuation Proceedings at 12. Rather, according to Berlin, in order to reach that result the Commission would have to make a factual determination that the acquisition would have such an effect - something which, according to Berlin, cannot be known absent details of the terms and conditions of the acquisition and the remaining capacity available to PSNH. Berlin notes that, in the unlikely event the Commission made such a determination, it could impose appropriate conditions on the acquisition, such as requiring Berlin to sell Smith Station's output to PSNH at an appropriate price.

B. Public Service Company of New Hampshire

PSNH asks the Commission to suspend both pending dockets. According to the Company, the Commission clearly has

mechanism that would allow PSNH to recover such deferrals at a later date in certain circumstances.

the authority to do so pursuant to Laws 2001, Chapter 29:17, and should take that action in order to implement the Legislature's determination that it is appropriate to delay the divestiture of PSNH's non-nuclear generation assets to permit their use for Transition Service. In addition to reiterating the arguments it made in opposition to the petitioners' motion to amend their petition, PSNH contends that any divestiture of hydro-electric assets would either increase the cost of Transition Service to customers or greatly complicate the valuation of such assets. According to PSNH, these complications involve determining the cost to PSNH retail customers of losing the assets, estimating the loss of synergies PSNH achieves by operating multiple generation facilities with the same personnel, and the added costs with respect to the ongoing federal relicensing of the Merrimack River Project, which includes the Amoskeag Station.

C. Towns of Bow, Hillsborough and Gorham and New Hampton Village Precinct

The Municipal Intervenors⁴ take the position that

⁴ As they originally appeared in these proceedings, the Municipal Intervenors included the City of Franklin. However, the Municipal Intervenors' May 29, 2001 pleading, submitted in response to the Commission's request for positions, does not refer to Franklin. We therefore assume that this municipality does not join in the positions articulated therein.

House Bill 489, as enacted by 2001 Laws 29, precludes the municipal acquisition of any PSNH generation facility, under either 2000 Laws 249:5 or RSA Chapter 38. According to the Municipal Intervenors, the Legislature was well aware of both Chapter 249 and RSA 38 and "did nothing in House Bill 489 to permit a continuation of proceedings under either of those statutes." Statement of Position of the Towns of Bow, Hillsborough and Gorham and New Hampton Village Precinct at 1. In fact, according to the Municipal Intervenors, section 17 of Chapter 29 specifically grants the Commission the authority to stay or suspend any Chapter 249:5 proceedings "consistent with the provisions of this Act relative to the divestiture of Public Service Company of New Hampshire assets." The Municipal Intervenors concede that this language refers only to Chapter 249:5 proceedings, but take the position that it would make little sense in these circumstances to permit a Chapter 38 proceeding to go forward, particularly given that Chapter 249:5 requires compliance with Chapter 38 once the valuation process has been completed. Further, according to the Municipal Intervenors, it would be illogical to conduct a valuation now with regard to an acquisition that must be delayed given the current volatility in natural gas prices and the attendant effects on electricity markets.

D. Office of Consumer Advocate

OCA also asks the Commission to suspend both proceedings. According to OCA, Chapter 29 prohibits the sale of PSNH's hydro-electric generation assets before February 1, 2004 and it therefore would be inappropriate to expend resources and time now to develop values that will likely require updating at such time as the Commission could determine in 2004 that an actual sale is in the public interest.

III. COMMISSION ANALYSIS

A. Docket No. DE 00-210

Neither the City of Manchester nor any other party argues that the Chapter 249:5 valuation of Amoskeag Station should go forward in light of the Legislature's recent determination in 2001 Laws 29:17 that the Commission may stay or suspend any such proceedings "consistent with the provisions of this act relative to the divestiture of Public Service Company of New Hampshire assets." The Legislature made certain findings in that enactment that are directly relevant, viz:

I. Commodity prices for oil and natural gas have substantially increased in the past year, resulting in higher wholesale electricity prices in New

Hampshire and throughout the New England region. The higher wholesale electricity prices have prevented competitive electricity suppliers from being able to compete with standard transition service, causing them to exit the market or not even enter it in the first place.

II. Given the increase in wholesale electricity prices and the potential lack of a significant number of viable competitive suppliers, it is important that measures be taken to protect customers from the potential of a non-competitive and volatile electricity market. . . .

III. A critically important measure that should be undertaken to protect customers from price volatility and a noncompetitive market is for the public utilities commission to delay the divestiture of Public Service Company of New Hampshire's ("PSNH") fossil and hydro generation assets until the commission determines such sale is in the public interest. Delay in the divestiture of PSNH's fossil and hydro generation assets would allow for the use of those assets to serve transition service. While this delay in divestiture is in the public interest today, the general court finds that competitive electricity markets should provide benefits for customers over the long term. When the sale of PSNH's fossil and hydro generation assets is in the public interest, the public utilities commission should proceed with the sale of those assets in order to establish competitive electricity markets.

Laws 2001, Ch. 29:4. Given that the City of Manchester does not seek an opportunity to demonstrate or to argue that a delay in the divestiture of Amoskeag station is not "in the

public interest today," as otherwise explicitly determined by the Legislature, we see no reason for further proceedings in Docket No. DE 00-210 at the present time. We conclude that it is appropriate to stay that docket indefinitely given the Legislature's findings, and we deem the City of Manchester to have waived any opportunity to advance a different view.

B. Docket No. DE 00-211

In light of the City of Berlin's desire to pursue the matter further, the applicable law does not permit us to make the same determination as to Docket No. DE 00-211.

1. Implied Repeal or Amendment of RSA 38

As an initial matter, we note our disagreement with those parties who take the position that 2001 Laws 29 precludes the City of Berlin from pursuing an acquisition of Smith Station under RSA 38. To adopt such a view would be to conclude, in effect, that the Legislature had repealed or modified RSA 38 as it applies to Smith Station. This would be inappropriate given the absence of an explicit legislative command to that effect.

As the New Hampshire Supreme Court has repeatedly emphasized, a tribunal should not deem a statute to have been repealed by implication "[i]f any reasonable construction of the two statutes taken together can be found." *Appeal of*

Campaign for Ratepayers Rights, 142 N.H. 629, 631 (1998)
(citation omitted). "When interpreting two statutes which deal with similar subject matter, [the tribunal must] construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." *Id.*

Given these principles, we deem it noteworthy that Chapter 29 imposes a delay in the "sale" of PSNH's non-nuclear generation assets, see 2001 Laws 29:13, II, whereas the process described in RSA 38:10 and RSA 38:11 allows for the "condemnation" or "taking" of a facility.⁵ One can therefore harmonize Chapter 29 with RSA 38, short of an implied repeal, by concluding that the delay absolutely imposed by the former does not apply to condemnations pursued under the latter.

The Municipal Intervenors point out that, in

⁵ RSA 38:11, which concerns the Commission's obligation to make a public interest determination, refers to the "purchase" as well as the "taking" of utility property by a municipality, even though such a determination is not required "when the municipality and utility agree upon the sale of utility plant and property." Elsewhere, RSA 38 makes clear that the type of "purchase" that requires the commission's public interest determination is one in which the municipality proposes to buy a facility outside the municipality's boundaries. See RSA 38:6.

adopting a delay in the divestiture of PSNH's non-nuclear generation assets, the Legislature "did nothing to permit a continuation" of proceedings under Chapter 38. The principles of statutory construction referenced above require us to draw the opposite inference from such inaction than that advocated by the Municipal Intervenors. In other words, the Legislature could have but did not amend or repeal RSA 38 in a manner that affected the City of Berlin's right to proceed thereunder, nor did it explicitly tell the Commission to stay any such proceeding.

2. The RSA 38:10 Public Interest Determination

We further agree with PSNH and the City of Berlin that the appropriate focus at this juncture, given the recent legislative determinations, is on the public interest determination we are to make under RSA 38:11 prior to any condemnation by the City of Berlin of Smith Station. However, we do not believe we can summarily suspend proceedings with regard to Smith Station as suggested by PSNH nor do we deem it appropriate to move forward with the valuation of Smith Station as advocated by Berlin.

As the City of Berlin points out, it is entitled to notice and hearing prior to the Commission's decision on whether it is consistent with the public interest for the City

to take Smith Station. See RSA 38:10. Berlin also correctly notes that it enjoys a rebuttable presumption of such public interest pursuant to RSA 38:3 because the City's voters have approved the acquisition, thereby imposing on opponents of the condemnation the burden of producing evidence to the contrary. See, e.g., *Estate of Laura*, 141 N.H. 628, 631 (1997).

However, nothing in RSA 38 requires the Commission to conduct the valuation described in RSA 38:9 prior to deciding whether the transaction is in the public interest pursuant to RSA 38:10 and RSA 38:11.

In the particular circumstances of this case, we believe it is appropriate to defer the valuation determination process, until after we have resolved certain issues relevant to the requisite public interest determination, particularly those related to the relationship between a possible near-term transfer of Smith Station to Berlin in the midst of a legislatively mandated delay in the divestiture of PSNH's other non-nuclear generation assets.

No one should conclude from our decision today that we discount the possibility that permitting Berlin to acquire Smith Station under RSA 38 could be inconsistent with the public interest in light of the problems described by the

Legislature in Laws 2001, Chapter 29 and its efforts to address them therein. Neither do we rule out the possibility, as suggested by Berlin, that appropriate conditions might render an otherwise inappropriate transaction consistent with the public interest requirement. However, we caution Berlin not to assume that it may simply rely on the rebuttable presumption it enjoys under RSA 38:3 that the condemnation is in the public interest, awaiting what evidence other parties will adduce to rebut the presumption. When we take up the question of whether this presumption has been successfully rebutted, we expect to rely not only on the record adduced at hearing but also (1) the Legislature's findings, as set forth in Chapter 29 of the Laws of 2001, with regard to the need to shield New Hampshire electric customers from wholesale market volatility, and (2) facts about the state of that market of which we may take administrative notice.

A further caution to Berlin is in order. In its most recent filing, the City takes what we consider to be a too narrow view of the scope of the public interest the Legislature was seeking to protect by enacting Chapter 29. In our opinion, the Legislature did not merely seek to insulate PSNH customers from wholesale market risks for the first 33 months of permissible retail competition. Rather, the

Legislature chose to delay divestiture during this period, and determined that, at its conclusion, a further public interest determination would be made about the sale of PSNH's non-nuclear generation facilities. It is in this context that we will be determining whether the acquisition of Smith Station by the City of Berlin is in the public interest.

Berlin's stated willingness to undertake Commission-established conditions to its acquisition is laudable in this regard. It will not necessarily suffice, however, that Berlin is willing to abide by unspecified conditions. An appropriate avenue of inquiry at hearing is what specific conditions the City is willing to impose on the transaction that would specifically address the market-related issues presented by electric industry restructuring.

It is not our view that the lack of a binding valuation will preclude our deciding whether the acquisition is in the public interest, at least insofar as whether it is in the public interest to remove Smith Station from the list of PSNH generation assets that will be sold at auction at a later date. Because the price paid by Berlin under a condemnation would go to offset PSNH's otherwise recoverable stranded costs pursuant to the PSNH Restructuring Settlement Agreement, the price will presumably have a neutral effect on

the general public. The relevant issues, as suggested by PSNH, relate more to whether the loss of this asset from the company's generation portfolio has some detrimental effect on PSNH's near-term ability to keep Transition Service-related deferrals to a minimum and the long-term ability of New Hampshire customers to obtain safe and reliable electricity at a reasonable price.

In adopting the particular procedural course for Docket No. DE 00-211 we do not intend to suggest that in most RSA 38 condemnations, valuation will not precede the public interest determination. As a general proposition, RSA 38 when read sequentially sets out an orderly process that begins with local approvals, moves to negotiation with the relevant utility, allows for valuation when the utility refuses to sell, and culminates in condemnation if deemed to be in the public interest. We conclude only that the particular circumstances of this case justify a departure from this sequence and the statute does not prohibit such a departure.

IV. CONCLUSION

Because moving next to a process whereby the public interest of the proposed condemnation will be determined adequately addresses the issues raised in PSNH's opposition to the motion to amend the petition, and because no other bases

were suggested for denying the motion, the motion is hereby granted. The next appropriate step is to summon the parties to a Status Conference for the purpose of seeking agreement on a procedural schedule allowing for limited discovery followed by a hearing on whether the proposed acquisition of Smith Station by the City of Berlin is in the public interest pursuant to RSA 38:10 and RSA 38:11.

Based upon the foregoing, it is hereby

ORDERED, that the motion to amend the Joint Petition of the City of Berlin and the City of Manchester to provide that the City of Berlin is proceeding under RSA 38 is GRANTED; and it is

FURTHER ORDERED, that proceedings in Docket No. DE 00-210 are stayed indefinitely; and it is

FURTHER ORDERED, that a status conference in Docket No. DE 00-211 be scheduled for 10:00 a.m. on July 12, 2001 for the purpose of the parties discussing and recommending to the Commission a procedural schedule consistent with the determinations made herein; and it is

FURTHER ORDERED, that the Executive Director and Secretary shall notify the entities that responded to the

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Commission's Request for Proposals in connection with these dockets that the Commission will not be accepting any of the proposals at this time and will, if necessary, issue a new Request or Requests for Proposals at a future date.

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By order of the Public Utilities Commission of New
Hampshire this twenty-eighth day of June, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary