

**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**

**COMMENTS OF INTERVENERS CITY OF BERLIN AND TOWN OF GORHAM**

NOW COME Interveners City of Berlin and Town of Gorham (referenced as “**the City**” or “**the Town**”, respectively) in the captioned Docket and file this their Comments on the Proposed Schedule and Auction Process as tendered by JP Morgan as the Auction Advisor (“JPM”) and certain PUC Staff (primarily Attorney Anne Ross and Thomas Frantz and referenced herein as “Staff”).

**I. Background**

1. The City and the Town were granted full Intervener status in this Docket at the Commission’s Pre-Hearing Conference held on September 19, 2016.

2. This Docket springs from the Commission’s prior Docket DE 14-238, which concerned whether Public Service Company of New Hampshire d/b/a Eversource (“PSNH”) should divest its Generation Assets (“**the Divestiture Docket**”). The City 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. The Town became a full Intervener in that 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.

3. The City is the host community for the PSNH Smith Hydro facility, which has a nameplate capacity of 15.2 MW and is currently assessed by the City at approximately \$56.5 Million. The Town 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. As such, these facilities are major portions of the tax bases in the respective municipalities.

4. The City 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. The City also actively participated in the negotiations resulting in the Amendment to the 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement dated January 26, 2016 (“**the 2016 Amendment**”) and the Partial Litigation Settlement (“**the Litigation Agreement**”) also dated January 26, 2016, which were both filed with the Commission in the Divestiture Docket on that same date. The Town was not a signatory to the 2015 Agreement and was thus not considered a “Settling Party” under the 2016 Amendment or Partial Litigation Settlement.

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

6. Pursuant to Article X of the 2015 Agreement, the Settling Parties requested that “following closure of Docket 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 [Rate Recovery Bonds], and calculation and reconciliation of the

stranded cost recovery charge.” Additionally, Section IV (b) of the 2016 Amendment resulted in the following language:

**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. 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.**

See 2016 Amendment at page 3. Furthermore, pursuant to Paragraph 25 of the 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].”

7. 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.

8. This current Docket is the “separate adjudicatory docket” referenced in Paragraph 25 of the Litigation Agreement, Article X of the 2015 Agreement, and Section IV(b) of the 2016 Amendment. However, for the reasons stated below, the Schedule currently being proposed by JPM and Staff do not meet the letter or the spirit of the provisions set forth above.

## **II. Schedule as Proposed by JPM and Staff**

9. Moments before the start of the Pre-Hearing Conference in this Docket on September 19, 2016, Staff Attorney Ross provided the parties present with a one-page memo, which started with a portion of Section IV(b) of the 2016 Amendment (the full text is set forth in bold in Paragraph 6, above) and then continued with the following:

**With this background we recommend the following process for the auction based upon the recommendation made by J.P. Morgan, the auction advisor.**

### **1. Expedited Adjudicative Process (Sept – early Oct.)**

**Commission to Determine, auction design and process, asset groupings and removal of mercury boilers at Schiller site**

**Process to include, JPMorgan filing of recommendation (Sept.) 12, PHC and tech session on issues raised by JPM recommendation and party written comments on JPM recommendation (Sept. 30).**

### **2. Administrative Process (Sept. – March 2017)**

**Auction Process**

**Preparation Phase (Sept. – early Nov.)(see JPM rec. Scope of work)**

**First Round/Phase 1 (Nov. – late Dec.) (see JPM rec. Scope of work)**

**Second Round/Phase 2 (Jan. – early March) (see JPM rec. Scope of work)<sup>1</sup>**

### **3. Expedited Adjudicative Process (Jan. – March)**

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<sup>1</sup> What was not included in this one page memo but was referenced in the following Tech Session is that there is contemplated to be a “Third Round” where the top two bidders are subject to final negotiations of the price and the sales documents. Presumably, this “Third Round” occurs between the end of the Second Round and the start of the Adjudicative Process to review and approve the final bids.

**Review and approval of form of securitization financing to be used once auction proceeds are determined contingent upon approval of final bids**

**4. Expedited Adjudicative Process (March – April)**

**Review and approval of final bids on assets. Process to involve hearing and limited discovery on winning bids.**

10. In the sections below, the City and the Town will highlight a non-exhaustive list of reasons why this proposed schedule is not only unworkable and contrary to the express provision of the 2015 Agreement that the Auction Process(es) “will accommodate the participation of municipalities that host generation assets,” see 2015 Agreement at page 17, lines 461-462, but also may result in increased stranded costs that are to be recovered by PSNH from its rate payers. Moreover, this proposed schedule is silent on what is to happen in each particular line item, including but not limited to the very important issues of how prices for particular hydro facilities will be allocated within any “group” bids and how individual asset bids will be evaluated in light of any “group” bids. Those particulars must be fleshed out in detail through appropriate discovery and then an official hearing. Accordingly, the City and the Town are not in a position to provide comments on those logistical steps at this time; and the City and the Town respectfully reserve the right to make further suggestions once such discovery has been completed.

**III. The Proposed Schedule Conflicts with Statutes Governing the Schedules for Necessary Municipal Meetings.**

11. RSA Chapter 38 expressly authorizes the City and the Town to “[e]stablish, expand, take, purchase, lease or otherwise acquire and maintain and operate” the hydro facilities involved in this Docket. See RSA 38:2 (I) (Supp. 2015). With respect to the City, its City Council must first vote (by a 2/3rds majority) that it is “expedient to” acquire the facility(ies),

that vote to be then “confirmed by a majority of the qualified voters at a regular election or at a special meeting” held within one year of the date of the Council’s vote. See RSA 38:3 (2000).

12. With respect to the Town, the Town voters must vote by ballot at an annual or special town meeting that it is “expedient to” acquire the facility(ies). See RSA 38:4 (2000).

13. With respect to both the City and the Town, a second vote must occur at either a regular or special election/town meeting “within 90 days of the final determination of the price to be paid for” the facility(ies) to “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 . . . .” See RSA 38:13 (2000). This statute expressly states that the City and the Town do NOT have to file a petition with the Superior Court to hold a special meeting on this financial matter.

14. The 2017 Annual Meeting for the Town is March 14, 2017, since the Town is a “traditional town meeting” town; and the last date to post the warrant and budget for the Town is February 27, 2017. See RSA 39:5 (Supp. 2015). Other towns, such as New Hampton, are “SB2 Towns,” meaning those Towns conduct their town meetings over two-sessions. The First “Deliberative Session” must be held on or between February 4 and February 11, 2017; and such towns must post their warrant and budget by January 30, 2017. See RSA 40:13 (II) (Supp. 2015). The Second Session of the SB2 town meeting, where all warrant articles are voted upon by the townspeople, must be held on March 14, 2017. See RSA 40:13, VII (Supp. 2015).

15. Special town meetings cannot be held on a biennial election day (November 8, 2017) per RSA 39:1 or within 60 days of an annual meeting, which would be Friday, January 13<sup>th</sup> for the Town or between December 5 and 12<sup>th</sup> for SB2 towns per RSA 39:3.

16. Obviously, before either the City Council or the Town’s voters vote on whether it is “expedient to” acquire the facility(ies), numerous steps must occur. First and foremost, the

City's and the Town's advisors must have access to a fully populated Virtual Data Room. To do that, the parties must agree on the terms of an appropriate Confidentiality Agreement. Counsel for PSNH has provided to the undersigned a draft Confidentiality Agreement for this information; however, that document is far broader and more cumbersome than the ones previously required in either the Divestiture Docket or the other numerous tax abatement appeals brought by PSNH that the undersigned has been involved in for various municipalities, including the City and the Town. While the undersigned has provided suggested revisions to counsel for PSNH concerning that draft Confidentiality Agreement in the hopes of meeting the needs of both sides, the parties have not yet reached agreement on those terms.

17. Next, the data from the Virtual Data Room must be analyzed and compiled into a body of usable information and recommendations to be given to the respective governing bodies of the City and Town. The members of those governing bodies must have time to process and digest the information provided and have an opportunity to ask follow-up questions, which may require further analysis. Once the governing bodies feel that they have the necessary information, educational public hearings will need to be held to provide usable information to the citizens of these communities before either the City Council makes its informed "expedient to do so" vote contemplated by RSA 38:3 or the Special Town Meeting is held for the Town voters to make such an informed vote as contemplated by RSA 38:4. It is the considered opinion of the undersigned, the Town's Manager, and others that these issues are far too complex to be part of the "normal" Annual Town Meeting on March 14<sup>th</sup>. Furthermore, there are certain synergies and economies of scale that can be brought to the table by the City and the Town (and possibly other municipalities) cooperating in the acquisition and operation of these facilities that warrant these communities considering these important issues in tandem rather than separately. Such



cooperation could well increase the ultimate prices paid for the facilities in question and thereby reduce the stranded costs to be borne by the rate payers.

18. It would only be after the results of those first votes were known, that the City and the Town would be able to express the requisite interest contemplated by the Staff Proposed Schedule "First Round/Phase 1" or, thereafter, provide a binding bid in the Staff Proposed Schedule "Second Round/Phase 2".

19. Additionally, if the City and/or the Town (and/or a group of related municipalities) were the "winning bidders" as a result the proposed "Third Round", the ratification votes of the voters in both the City and the Town are required to be held within 90 days of the date the final price is determined. See RSA 38:13. Since these votes would be associated with bonding the necessary funds for the acquisition, the measures must pass by a 2/3rds majority vote in accordance with RSA 33-B:2 and RSA 33:8 or 33:9, respectively, underscoring the need for information sessions and public outreach throughout the process.

20. Accordingly, the City and the Town respectfully assert that the Schedule and Process as currently recommended by JPM and Staff is completely unworkable and contrary to the express provision of the 2015 Agreement that the Auction Process(es) "will accommodate the participation of municipalities that host generation assets." Simply put, the Schedule and Process, as proposed, does not allow for the meaningful involvement of the municipalities in the Auction Process(es).

21. Furthermore, the City and the Town respectfully assert that without the full and fair participation of the municipalities in accordance with the provisions of RSA 38 or some other accommodation to address the concerns of the municipalities, the generation assets in question may well be sold for far lower prices, thus increasing the stranded costs recovered by



PSNH from its rate payers. In an effort to find a mutually beneficial way to meet the real needs of the various parties involved, the City and the Town have included various suggestions in the sections below to improve upon the proposed Schedule and Auction Process.

**IV. The Divestiture Docket Contains Pre-Filed Testimony Concerning Alternative Auction Process(es) that Should be Evaluated by the Commission in this Docket.**

22. Before the Litigation Agreement was entered into, various parties, including “Non-Advocate” Commission Staff, tendered Pre-Filed Testimony in the Divestiture Docket raising concerns about the Auction Process now being submitted by JPM and Staff in this Docket. That Pre-Filed Testimony provided an alternate Auction Process, and included, but is not necessarily limited to, the following (which are incorporated herein by reference):

- a. George E. Sansoucy’s testimony dated July 16, 2015 on behalf of the City and the Town;
- b. Leszek Stachow’s testimony dated September 18, 2015 as supplemented on January 26, 2016 on behalf of “Non-Advocate Staff,” which supported an “Ascending Clock” auction process; and
- c. Dr. Peter Cramton’s testimony dated September 18, 2015 as revised September 28, 2015 on behalf of “Non-Advocate Staff”, which explained the “Ascending Clock” auction process.

23. The City and the Town respectfully urge that the Commission take administrative notice of the above-listed Pre-Filed Testimonies from the Divestiture Docket pursuant to Puc 203.27 (a)(2). See N.H. CODE OF ADMINISTRATIVE RULES Puc 203.27 (a) (stating that the Commission “shall take administrative notice when a party presents one or more of the

following: . . . (2) The relevant portion of the record of other proceedings before the commission”) (emphasis added).

24. The concerns and alternatives expressed by Mr. Sansoucy, Mr. Stachow, and Dr. Cramton raise both significant doubts about the efficacy of the Auction Process being proposed by JPM and Staff in the current Docket. Moreover, these Testimonies suggest various improvements for the Auction Process, not the least of which is the “Ascending Clock” Auction Process, which would be far more transparent, fair, simple and efficient than that being currently proposed. These attributes can be achieved via a process that may involve more rounds than are currently being proposed by JPM and Staff in which bids are ascertained and published and then additional inquiry is made to see if any bidders wish to go higher.

25. One way of thinking of this is to imagine an auction at Christie’s for a painting by Van Gogh:

a. Under the JPM/Staff process as explained on September 19<sup>th</sup>, only the Auction House knows of the various “non-binding” bids out of a pool of approximately 150 to 200 House Clients. Then the House selects the top 10 or 12 of those House Clients to make “binding” bids, which may or may not be as high as their respective “non-binding” bids. The other bidders do not necessarily know who else is bidding or the amount of the others’ bids. The House then selects one or two bidders to see if there is any tweaking of the dollar amounts or sales documents.

b. Under the Ascending Clock process, the bids start out as binding and could be identified by number, much like a paddle at Christie’s. The bidders on a particular asset or group of assets would know that there is a particular high amount that they would have to match to continue in the bidding. The amount is incrementally increased by the

Auction Manager while there are two or more bidders interested until at last a top bidder is obtained.

In short, under the JPM/Staff proposal, there is no opportunity for “bidding up” or “bidding against” another by the bidders; and that means that money could well be left on the table, thus increasing the stranded costs to be paid by the rate payers. Alternatively, under the Ascending Clock method, there is a maximum opportunity to realize the most money for a particular asset.

**V. Various Alterations of the JPM/Staff Auction Process that Should be Evaluated by the Commission in this Docket.**

26. Without waiving the suggestion that the Ascending Clock method be approved by the Commission in this Docket or the need for additional discovery concerning the particular logistics of each “step” in the JPM/Staff Auction Process being proposed as noted above, the City and the Town respectfully urge the Commission to consider the following alternations to the JPM/Staff Auction Process being proposed:

a. Provide definitive access to a fully populated Virtual Data Room on the Hydro Assets to Hydro Facility Host Municipalities, including, but not necessarily limited to, the City, the Town, the Intervener towns of Bristol and New Hampton, and the Intervener City of Concord by a date certain as soon as possible but no later than November 1, 2017.

b. Wait to start Phase 1 of JPM/Staff’s Auction Process until the sale of TransCanada’s hydro facilities on the Connecticut River in New Hampshire and Vermont have actually closed. JPM has indicated that it is involved in that sale on behalf of TransCanada and that that sale is in the midst of its “Second Round”. By waiting for that sale to actually close, the bidders involved in the TransCanada sale will know who is and is not the ultimately successful bidder, and those who were not successful will have freer use of available funds, which may have been held in reserve pending conclusion of the TransCanada sale. Additionally, by waiting

for the TransCanada sale to actually close, the market for these types of assets is not flooded at the same time and will avoid the creation of a “buyers’ market,” which will generate increased stranded costs that must be borne by the rate payers.

c. Wait to start Phase 1 of JPM/Staff’s Auction Process until May 1, 2017 to allow the Host Municipalities appropriate time to educate their governing bodies and their voters to these important issues and the options available to those Municipalities under the process required by RSA Chapter 38, as set forth in Section III, above. By doing so, the Host Municipalities are given a real and meaningful opportunity to access and process the data from the Virtual Data Room, conduct the necessary public meetings outside of the statutory confines for either Traditional or SB2 Town Meetings, and participate in the Auction Process.

d. As an alternative to Subsection (c), above, bifurcate the sale of the generation assets so that the fossil plants are sold first under the current schedule proposed by JPM/Staff, with the sale of the Hydro Assets occurring later, after the sale of the fossil plants are known to occur. This would have two potential advantages. First, since the sale of the Merrimack Station is required for the proposed securitization of the stranded cost to successfully occur, the sale of that asset would be known earlier before both the Auction Advisor or PSNH expended efforts responding to the inquiries of or site visits with potential bidders for the Hydro Assets. Second, it would allow time for the Host Municipalities to access and process the data from the Virtual Data Room and conduct the necessary public meetings as referenced above.

e. As an alternative to Subsections (c) and (d), above, automatically allow Host Municipalities to participate in Phase II without having to make even a “non-binding” bid in Phase I and wait to start Phase 2 of JPM/Staff’s Auction Process until May 1, 2017 to allow the

Host Municipalities appropriate time to educate their governing bodies and their voters as noted above.

f. As an alternative to Subsections (c), (d) and (e), above, set a “reserve” price for the Hydro Assets at the 2016 Tax Year Assessment given by the Host Municipalities, automatically allow Host Municipalities to participate in the Third Round/Phase III without having to participate in Phases I or II if the results of the top two bidders in the Second Round/Phase II do not meet or exceed that “reserve” price, and wait to start that Third Round until May 1, 2017 to allow the time needed as referenced above.

## **VI. Conclusion.**

27. The City and the Town respectfully urge the Commission to consider the issues raised in these Comments so that full and fair discovery on the appropriate Auction Process is conducted and a true adjudicatory hearing is held at the appropriate time. The intention of the City and the Town is to reflect the true importance of their concerns over the excessively hasty Auction Process proposed by JPM and Staff. These concerns are not raised in the interests of delay, but in the interest that substantial justice be done.

28. The City and the Town respectfully remind the Commission that while the initial concerns in the Divestiture Docket was to reach a resolution quickly before interest rates rose, that Docket lasted approximately 22 months (September 2014 to July 2016) and interest rates have still not risen appreciably from the 2014 time frame. Given the importance of this Docket to the Host Municipalities and their taxpayers, and, above all, the PSNH rate payers throughout the State of New Hampshire, the City and the Town suggest that attempting to market these assets, process data, analyze bids, close financial transactions of such a complex nature and determine appropriate allocation of any “group” bids within a mere 7 ½ months (mid-September

to April) is not only financially unwise but violates the due process rights of the municipalities to an adjudicative proceeding approved by the Commission's Order of July 1, 2016 and the settlement documents underlying that Order referenced above. Indeed, so rapid a process is more akin to a "non-adjudicative proceeding" rather than an adjudicative one, for which the City and the Town successfully negotiated in the Divestiture Docket.

29. At the very least, the Commission must afford the Intervenor Municipalities a full and fair hearing on these issues, including adequate time to more fully conduct discovery concerning the JPM/Staff Auction Process and to determine what, if any, additional testimony may be needed to be presented by the Municipalities – all before any Auction Process is officially approved by the Commission. That full and fair hearing certainly cannot occur by the mid-October time frame suggested by Attorney Ross' one page memo tendered on September 19<sup>th</sup>.

30. Additionally, Attorney Ross' one-page memo's reference to "limited discovery on winning bids" is inappropriate to an adjudicative process, especially at this early stage. The municipalities may well need discovery on more than just the winning bids to confirm that the process has been handled appropriately and that price allocations concerning these major taxable assets are made correctly.

31. Finally, the City and the Town respectfully request that Attorney Ross and Mr. Frantz be designated as "Staff Advocates" pursuant to RSA 363:32 (II) as was the case in the Divestiture Docket.

32. The City and the Town thank the Commission for the opportunity to submit these Comments and we look forward to participating in the full and fair hearing of this matter at the appropriate time.

Respectfully submitted,  
DONAHUE, TUCKER & CIANDELLA, PLLC



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**Certificate of Service**

I hereby certify that I served a copy of these Comments pursuant to Puc 203.11 to  
the current service list in this Docket this 30<sup>th</sup> day of September, 2016.



Christopher L. Boldt, Esq.