

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

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

Docket No. 2017-0018

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S
MEMORANDUM OF LAW IN SUPPORT OF SUMMARY DISPOSITION
UNDER RULE 25**

This Memorandum of Law is submitted in support of Public Service Company of New Hampshire's ("PSNH") Motion for Summary Disposition pursuant to Supreme Court Rule 25.

I. Introduction

Consistent with the Legislature's mandate that the divestiture of PSNH's electric generating assets proceed as expeditiously as possible, the New Hampshire Public Utilities Commission ("PUC" or "Commission") conducted an expedited adjudicatory process, "retaining such direction and control as it deem[ed] necessary,"¹ and approved the auction design and procedures established by its auction advisor, J.P. Morgan ("JPM").

The PUC's Order approving this process addressed every issue raised by Appellants City of Berlin and the Towns of Gorham and New Hampton ("Municipalities") in this appeal. Following significant proceedings allowing for the parties' input into the process, the Commission allowed a discovery process that included written questions submitted to the Auction Advisor (J.P. Morgan) witness, a technical session with that witness, several conference

¹ 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement (defined in RSA 369-B:2, XVIII (2015) ("2015 PSNH Settlement")). The original 2015 PSNH Settlement was amended prior to PUC approval by the "Amendment to Settlement." Conformed extracts are attached as Exhibit A hereto. Appellant Berlin is a party to the 2015 PSNH Settlement; appellants Berlin and Gorham were both party-intervenors in PUC Docket No. DE 14-238 where the Commission reviewed and approved that Settlement by its Order No. 25,920, which was not challenged by any party. That PUC approval also encompassed a separate "Litigation Settlement." These settlements (collectively, the "Settlements") are available at the PUC's on-line docket book system at <https://www.puc.nh.gov/Regulatory/Docketbk/2014/14-238.html> as hearing Exhibits A, B and C respectively.

calls, two rounds of written comments and live on-the record cross-examination of that witness under oath before the PUC Commissioners. The resulting order approving the auction process provided accommodations to the Municipalities to facilitate their participation.

Notwithstanding their significant participation in these proceedings, the Municipalities now seek to turn the goal of divestiture on its head² by asking for more process than they are due³ to the detriment of the auction's primary objective—maximizing the realized value of the generation assets. The PUC acted entirely within its discretion in approving the auction design and process recommended by its expert advisor, JPM, after due consideration of the arguments and proposals of the Municipalities. The fact that the Municipalities have delayed invoking their own approval processes or are unwilling to exercise any flexibility to participate in the process is their own choice. And the resulting consequences, if any, should not be visited upon the PUC, PSNH's customers who will bear the substantial cost of delay, or the value of the PSNH assets themselves. The Court should exercise its discretion and decline to hear this appeal or summarily affirm PUC Order Nos. 25,967 ("Auction Order") and 25,973 approving the auction design and process for the divestiture of PSNH's electric generating assets.

II. Standard of Review

Appeals from an administrative agency are discretionary, and the Supreme Court may decide not to take such an appeal without further reason. Sup. Ct. R. 10(1). This Court may

² 2014 N.H. Laws 310:1 Purpose. The purpose of allowing the public utilities commission to determine if divestiture of Public Service Company of New Hampshire's (PSNH) remaining generation assets is in the economic interests of PSNH's retail customers *should be to maximize economic value for PSNH's retail customers, minimize risk to PSNH's retail customers, reduce stranded costs for PSNH's retail customers, promote the settlement of outstanding issues involving stranded costs*, and, if appropriate, provide for continued operation or possible repowering of PSNH's generation assets. (Emphasis added). Attached hereto as Exhibit B.

³ The 2015 PSNH Settlement makes clear the primary objective of the auction process "will be to maximize the realized value of the fossil and hydro generation assets referred to as the TTV." (Section IV.B, Lines 459-460, as amended). It also makes clear that, "A *secondary* objective of the auction processes, *to the extent not inconsistent with the primary objective*, will be to accommodate the participation of the municipalities that host generation assets. . . ." (Lines 460-62, as amended, emphasis added.)

summarily affirm a decision of an administrative agency if “no substantial question of law is presented and the Supreme Court does not find the decision unjust or unreasonable.” Sup. Ct. R. 25(1)(c); *see also Appeal of Granite State Electric Company*, 124 N.H. 144 (N.H. 1983).

III. Bases for Summary Disposition

Appellants’ 29-page Petition may be reduced to two complaints:⁴ (1) the Commission failed to conduct an adequate adjudicatory proceeding prior to issuing the Order on review; and (2) the auction schedule established by the Commission unreasonably restricts the Appellants’ ability to reasonably participate in the auction.⁵

- a. **Consistent with the Legislature’s mandate that “time is of the essence,” the controlling statutes and the Settlements provide for an auction process to be established by the PUC’s auction advisor and approved by the PUC in an expedited proceeding subject to its direction and control.**

2014, 310:1, RSA 369-B:3-a, II (2015), and the Settlements concerning divestiture all provide an overriding directive to the Commission in its administration of the auction: to maximize the overall sale value of the generation assets while proceeding as expeditiously as possible.⁶ Although municipalities like Appellants were given the right to participate in the

⁴ This is the third time these arguments have been presented. Appellants raised them in the Auction Docket (DE 16-817) proceedings before the PUC; they were rejected by the Commission in Order Number 25,967, “Order Approving Auction Design” (November 10, 2016). On December 9, 2016 Appellants raised them again in their Motion for Reconsideration of Auction Design and Stay of Auction Process. The Commission gave careful consideration to these same arguments a second time even though it determined that the Appellant’s Motion “does not present any new information that would change our original decision on the design of the auction process.”

⁵ The Municipalities also claim the Commission acted unlawfully and unreasonably by closing the docket on the auction design and process. *See* Petition, p. 6, ¶11. This claim raises no substantial question of law, and even if it did, any error in closing the docket is harmless. The PUC has advised it will not start the auction process until the litigation on auction design is resolved, in order to give certainty and predictability to the auction process and to maximize the sale results, as required by the 2015 PSNH Settlement at lines 434-38 and by law in 2014, 310:1 (*see* Exhibit B).

⁶ The Legislature also “requests that the supreme court and any other courts asked to rule on any matters pertaining to the subject of this chapter [Electric Rate Reduction Financing and Commission Action] act as expeditiously as possible. Time is of the essence.” RSA 369-B:1, XIV. *See also* 1996, 129:3 wherein the Legislature asked that in any challenges concerning the Electric Restructuring law “the general court urges the court of jurisdiction to give priority to and expeditiously adjudicate any such challenge.”

auction process, the Settlements made clear that their intervention was permitted only *so long as their participation did not interfere with the primary goal of maximizing asset value*. 2015 PSNH Settlement, lines 459-462.

The 2015 PSNH Settlement approved by the Commission provided extensive discretion to the PUC to approve an auction design and process and conduct an expedited adjudicatory proceeding. It states, “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*.” (Emphasis added).

Similarly, the statute mandating the PUC’s review of the 2015 Settlement required the Commission to expedite its review process. RSA 369-B:3-a, II (2015). Importantly, the 2015 Settlement does not elaborate on the “expedited adjudicatory” process for approving the recommended auction design. Rather, the expedited adjudicatory process discussed in the Settlements is described as an “appropriate...proceeding[];”⁷ one subject to the Commission’s “direction and control as it deems necessary” to fulfill the primary objective of the auction process—maximization of the total transaction value (“TTV”), as required by 2014, 310:1.

In light of these mandates, the Commission properly relied upon JPM to design an auction process intended to maximize the TTV. Further, although the Commission, as described below, accounted for and accommodated the Municipalities’ concerns through an expedited adjudicatory proceeding, it exercised its discretion to reject those comments that interfered with the primary objective of the auction process.⁸ Overall, the Commission complied with the terms

⁷ 2015 PSNH Settlement, Section X, line 909.

⁸ J.P Morgan rejected the municipalities’ request to delay the auction, explaining “postponing the auction start until May 2017 is unlikely to enhance the transaction value for the assets and introduces material risk to the

of the statutes and the Settlements by expediting its Order approving the auction process and by exercising the agreed-upon “direction and control as it deem[ed] necessary” over the proceedings to achieve the express primary goal of the Settlements—maximization of the value of PSNH’s generation assets. Because a review of Commission Order Nos. 25,967 and 25,973 demonstrates the Commission did not act unjustly or unreasonably, the Court should summarily dispose of this Appeal.

b. The Municipalities participated in the proceedings, and their interests were considered and accommodated.

Even a cursory review of the proceedings demonstrates the Commission’s process conformed to the Administrative Procedure Act, RSA Chapter 541-A, the Municipalities fully participated in the proceedings, and their interests were accommodated.

JPM provided a written auction design with its proposal that was reviewed and approved by the Governor and Executive Council and then filed that design with the Commission on September 12, 2016. The Commission made a JPM witness available for questioning under oath on September 19, 2016. Attorneys for the Municipalities appeared at the prehearing conference and counsel for Appellants Berlin and Gorham (Attorney Boldt) questioned the JPM witness at that session. At the conclusion of his questioning, Attorney Boldt indicated “the remainder of my questions can go into tech session.” Transcript, Prehearing Conference, September 19, 2016, at 35.

Following that hearing, all parties were given the opportunity to ask the JPM witness questions during a technical session. In addition, following the technical session, parties were given the opportunity to submit further written discovery questions to the JPM witness, before

auction process related to the potential market appetite for the assets.” JPM Oct. 17, 2016 Modification at Section 1(C), attached as Exhibit B to PUC’s Motion for Summary Affirmance (the “PUC Motion”).

written comments were filed. Most of the parties and two of the Municipalities failed to take advantage of this opportunity. Only one party, the Town of New Hampton, submitted a written question to JPM, to which JPM responded with a written answer. Indeed, the JPM response to that question provided an accommodation to the Municipalities in the proposed auction design.

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

On October 21, 2016, the Municipalities filed a second round of written comments on the auction process modifications offered by JPM that were designed to accommodate municipal participation even further than the auction design filed with the Commission on September 12, 2016.

In all, the Commission's auction advisor offered a number of accommodations to the Municipalities in the auction design. First, the Municipalities may offer indications of value in round one without submitting a proposal formally, to explore whether their values are competitive with non-binding proposals received from commercial bidders as part of round one indicative bids. Also, the Municipalities were given access to the confidential "data room" for their respective hydro assets in November 2016, while commercial bidders were not expected to get access to such information until approximately March 2017. Moreover, the Commission delayed the auction process by several months, with final binding proposals expected to be due

in early to mid-May 2017, which gives the Municipalities more time to prepare their bids, if they decide to participate in the process. JPM Comments, November 4, 2016, at 6.⁹

At the Municipalities' request, the Commission also took administrative notice of pre-filed testimony on auction design by several witnesses in Docket No. DE 14-238. That testimony was submitted by the City of Berlin in support of an ascending clock auction design.¹⁰ The Commission reviewed and considered that written testimony and weighed it against the advice it received from JPM when it ultimately issued its Auction Order.

In sum, the adjudicative process utilized by the Commission allowed cross-examination of a JPM witness, discovery including written questions submitted to a JPM witness, several conference calls with JPM, a technical session with the JPM witness, and two rounds of written comments.

The Municipalities criticize the PUC for failing to afford opportunities for further discovery mechanisms, as well as submission of pre-filed testimony, and further cross-examination of witnesses. However, in addition to the discretion and control over the proceedings given the PUC in the 2015 PSNH Settlement, New Hampshire law and the Commission's own regulations provide it the authority to waive otherwise generally applicable procedural rules. *See e.g.*, Puc 201.05 (Waiver of Rules) and Model Rules of Practice and Procedure, Jus 803.03 (Waiver or Suspension of Rules by Presiding Officer). Consistent with these rules, the Commission's Order of Notice in the docket put all parties on notice of the procedure that would be used for this expedited proceeding. *See* Order of Notice, Docket No. DE

⁹ Note that as a result of this pending appeal, the auction process has been further delayed, until potential bidders have confidence that the divestiture process may continue unabated.

¹⁰ In an ascending clock auction, a continuous or discrete clock indicates the standing high bid and the bidders press a button to exit from the competition. Typically, the number of remaining bidders is posted with the standing high bid. There is no evidence that such an ascending clock auction has ever been used in the sale of utility generating assets. *See* PUC Motion, Exhibit A at 3: "J.P. Morgan is not aware of any auction process involving assets like the Portfolio where the process was conducted in this manner."

16-817 (September 7, 2016).¹¹ Moreover, the Commission “enjoys ‘broad discretion in the management of discovery.’” *In Re Pub. Serv. Co. of New Hampshire*, 89 N.H.P.U.C. 367 (June 29, 2004) (quoting *YYY Corp. v. Gazda*, 145 N.H. 53, 59 (2000)). Thus, the Commission conducted an “appropriate ongoing proceeding to address the administration of the divestiture auction” (2015 PSNH Settlement, Section X) expeditiously while appropriately balancing the parties’ input and participation.

c. **The consequences of the Municipalities’ failure to take proper action should not be visited on Asset value, PSNH, or PSNH’s customers.**

Despite their knowledge as early as enactment of Senate Bill 221 (2015 N.H. Laws 221) in July, 2015 that there would be an “expeditious” process regarding the divestiture of PSNH’s fossil and hydro generating assets, the Municipalities have failed to take reasonable or meaningful steps to participate. The Commission approved the Settlements by its Order No. 25,920 on July 1, 2016 in Docket No. DE 14-238. Both Berlin and Gorham were party-intervenors in that proceeding. Thus, certainly as of July 1, 2016 it has been obvious that there would be a “near-term . . . process for the divestiture of PSNH’s fossil and hydro generating assets. . . .” 2015 PSNH Settlement at lines 24-25. The 2015 PSNH Settlement describes the divestiture process as “expeditious” (line 33) and stated it shall be “expeditiously pursued” (line 430). Moreover, the PUC issued its Order of Notice on September 7, 2016, and noted therein certain dates and deadlines for the process relating to the auction design, a process in which the Municipalities have participated. Not only have they known since July 1, 2016 that the divestiture process is imminent, they also have known that their Town Meetings would be held in

¹¹ While it is true that Puc 203.09 provides a range of discovery tools, including written data requests, technical sessions, depositions and other forms of discovery available in civil courts in New Hampshire, the Commission is not bound by its own administrative rules to offer the same process in all adjudicated proceedings. Instead, it has the flexibility to allow questions in technical sessions, as was done here, rather than providing for extensive written data requests. The PUC also is able to offer parties an opportunity for written comments instead of sworn pre-filed testimony in order to gather parties’ positions on issues raised.

early 2017 or that special Town Meetings may be necessary. Despite the urgency of the situation alleged by the Municipalities in their pleadings before the Commission and in their Petition to this Court related to what they claim will cause a dilution of their tax bases, they do not appear to have prioritized the scheduling of town meeting items over arguably more routine items such as “the acquisition of fire trucks, police cars, and other pieces of municipal equipment.” (Motion at ¶61).

At bottom, it is the Municipalities’ own failure to act that formed the basis for their Motion for Reconsideration and now underpins their Petition to this Court. They seek to delay the expedited divestiture process required by statute and the Settlements in order to allow them to take actions they could have, and should have, taken months ago. Furthermore, under the Municipalities’ analysis, municipal participation in any process may require additional significant delay, perhaps into the early part of 2018. A delay of that magnitude—effectively caused by the failure of the municipalities to act promptly in 2016—would hamper the auction process contrary to law, undermine the primary purpose of this divestiture, and cause tens of millions of dollars of additional costs that must be borne by PSNH’s customers. *See* Appellants’ App. 73-74.

As JPM pointed out in its November 4, 2016 comments, “[c]urrently, the market is supportive. There is a strong pool of parties looking to acquire merchant power assets who have access to both equity and debt financing.” Exhibit C to the PUC Motion, Section 1(B). “Further delays in the process . . . increasingly risk these favorable conditions falling away, which could materially hurt the ability of the process to maximize value for the assets.” Exhibit C to the PUC Motion, Section (1)(B). Pending litigation on auction design causes bidders to view the process as risky and unpredictable, which discourages bidder participation in an auction. *Id.*, Section

1(A). Due diligence required for bidders to make binding bids on large power generation plants is expensive and time consuming, and bidders will not invest the time if they do not have confidence in the process. *Id.*

The Municipalities' Motion for Reconsideration and Petition to this Court already have delayed the auction process, jeopardizing the success of the auction. Even if this appeal is disposed of immediately, the auction process, now delayed, cannot begin until at least February 2017, with final bids similarly delayed. Any further delay will continue to push the final bid date out, irreparably harming PSNH's customers via higher costs for electricity.

Right now, the market for generation assets is robust, and interest rates are relatively low, although interest rates are rising. As interest rates rise the cost of borrowing increases and it becomes more expensive to purchase assets and to securitize any remaining stranded costs. Further delay of the auction process also negatively impacts ratepayers. Delay of the process costs ratepayers tens of millions of dollars a year in return on equity paid to PSNH on the generation assets. *See* Appellants' App. 73-74. These costs, among others, are included in PSNH's tariffed rates. These costs will end only when a sale of the generation fossil hydro fleet is closed and any remaining investments are securitized pursuant to RSA Chapter 369-B.

The risks inherent in any further delay of the auction process far outweigh the Municipalities' demands to extend the process to allow more time for them to prepare and acquire the necessary voter approval for any such hypothetical bids. In fact, the delay imposed by this appeal alone should facilitate any voting process deemed necessary by the Municipalities.

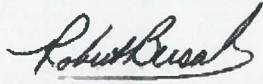
This Court should reject this appeal because it fails to raise any important issues of law, and time is of the essence.

Respectfully submitted,

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

January 23, 2017

Date

By: _____

Robert A. Bersak
N.H. Bar #10480
Chief Regulatory Counsel
Eversource Energy Service Company
780 North Commercial Street
Post Office Box 330
Manchester, New Hampshire 03105-0330
(603) 634-3355
Robert.Bersak@Eversource.com

Wilbur A. Glahn, III
N.H. Bar #937
McLane Middleton P.A.
900 Elm Street
Post Office Box 326
Manchester, NH 03105-0326
Direct: (603) 628-1469
Fax: (603) 625-5650
BILL.GLAHN@MCLANE.com