

THE STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

DE 17-124

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

Auction of Electric Generation Facilities

COMMENTS OF INTERVENOR THE CITY OF BERLIN CONCERNING THE  
TREATMENT OF POTENTIALLY CONFIDENTIAL AUCTION DATA  
(Redacted/Public version)

NOW COMES Intervenor the City of Berlin (“**the City**”) and hereby makes its comments concerning the Commission’s treatment of potentially confidential Auction Data in this Docket:

1. On August 3, 2017, the Public Utilities Commission (“**PUC**”) issued an Order of Notice (“**the Order**”) opening this docket to oversee the process of approving the auction results the generation facilities owned by Public Service Company of New Hampshire d/b/a Eversource Energy (“**Eversource**”), including Eversource’s hydro plant located in the City. This current docket is based upon the July 1, 2016 Commission Order No. 25,920 approving the Restructuring and Rate Stabilization Agreement, as amended and the Partial Litigation Settlement Agreement (collectively “**the Agreements**”) in the original Docket No. 14-238.
2. The Order contained a deadline of August 15<sup>th</sup>, 2017 for written comments on treatment of confidential data, which was subsequently extended to August 25, 2017 by the Executive Director’s Secretarial Letter of August 18, 2017.

3. These written comments are in keeping with and in addition to the verbal comments made by the undersigned during the Pre-Hearing Conference before the Commission on the afternoon of August, 18, 2017 (“the PHC”).

**I. The Requirement for These Comments is Premature**

4. The Commission’s requirement for these comments is premature for the following reasons:
  - a. As was noted during the PHC by Staff Attorney Speidel, Staff intended to file a Motion for Confidential Treatment once the Auction Bids were actually received and evaluated. Thus, these comments would be more appropriate as a response to any such Motion. Accordingly, the City respectfully reserves the right to file additional comments in response to any such Motion for Confidential Treatment;
  - b. At this time, we do not even know what documents are sought to be claimed as confidential; and
  - c. Additional potentially interested parties, including any presumed successful and/or unsuccessful bidders in this Auction, may need to be added so that the current deadline is unfair and a potential violation of due process to the rights of such parties.
5. Accordingly, the City respectfully objects to the current deadline for these Comments but nevertheless complies with this deadline in good faith and in the interests of facilitating these proceedings.

## II. Auction Data Should be Presumed to Be Public

6. Without waiving the above-referenced objections, the City respectfully asserts that the Auction Data being evaluated by the PUC in this adjudicative proceeding must be presumed to be public in accordance with RSA 91-A. See, e.g., State of N.H. v. Kibby, \_\_ N.H. \_\_ (Docket #2016-318; issued August 15, 2017)(“The courts of New Hampshire have always considered their records to be public, absent some overriding consideration or special circumstance.’ Petition of Keene Sentinel, 136 N.H. 121, 126 (1992)(quotation and bracket omitted). ‘Such access is critical to ensure that court proceedings are conducted fairly and impartially, and that the judicial process is open and accountable.’ Petition of Union Leader Corp., 147 N.H. 603,604 (2002)(citations omitted).”)
7. As the Agreements referenced above indicate, the PUC’s consideration of the Auction results and the associated determination of what amount, if any, resulting stranded costs are to be borne by the ratepayers are to be conducted in an adjudicatory proceeding. Specifically, pursuant to Section IV(B) of the 2015 Agreement, as amended by the 2016 Amendment:

“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.”

(Emphases added.) See also Section X of the 2015 Settlement Agreement (requesting that “the Commission open a docket with appropriate ongoing proceedings to address the administration of the divestiture auction”).

8. As with any governmental records, “[t]here is a presumption that court records are public and the burden of proof rests with the party seeking closure or non-disclosure of court records to demonstrate with specificity that this is some overriding consideration or special circumstance, that is, a sufficiently compelling interest which outweighs the public’s right of access to those records.” State of N.H. v. Kibby, \_\_\_ N.H. \_\_\_, quoting, Petition of Keene Sentinel, 136 N.H. at 128.
9. Furthermore, before making any determination to shield records from the public, this Commission must, like any court, employ a process to balance the public’s interest in access to court documents against any alleged competing interest. Specifically, “the party opposing disclosure of the document [must] demonstrate that there is sufficient compelling reason that would justify preventing public access to that document’.... Second, ‘the court [must]determine that no reasonable alternative to nondisclosure exists and use the least restrictive means available to accomplish the purposes sought to be achieved.’” State of N.H. v. Kibby, \_\_\_ N.H. \_\_\_, quoting, Associated Press v. State of N.H., 153 N.H. 120, 136 (2005) and Petition of Keene Sentinel, 136 N.H. at 128.
10. Additionally, even if this Commission chose to consider that it is not acting as a “court” in this adjudicative proceeding, a similar balancing test is still required if this Commission were to determine that the information in question was exempt from

disclosure as confidential under RSA 91-A:5(IV). The N.H. Supreme Court has repeatedly held:

We employ a three-step approach to analyzing this issue. Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476-77, 686 A.2d 310 (1996); see United States Dep't of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 762, 771-73, 776, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989) (analyzing federal Freedom of Information Act). First, we evaluate whether there is a privacy interest at stake that would be invaded by disclosure. Nashua, 141 N.H. at 477. If there is not, the Right-to-Know Law mandates disclosure. *Id.* Next, we assess the public's interest in disclosure. 141 N.H. at 476-77. While an individual's motives in seeking disclosure are irrelevant, in the privacy context, disclosure of the requested information should serve the purpose of informing the public about the conduct and activities of their government. 141 N.H. at 477. Finally, we balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure. 141 N.H. at 476. "When the exemption is claimed on the ground that disclosure would constitute an invasion of privacy, we examine the nature of the requested document . . . and its relationship to the basic purpose of the Right-to-Know Law." *Id.* The party resisting disclosure bears a heavy burden to shift the balance toward nondisclosure. N.H. Housing Fin. Auth., 142 N.H. at 554.

N.H. Civ. Liberties Union v. City of Manchester, 149 N.H. 437, 440 (2003); see also, N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 111 (2016);

CaremarkPCS Health, LLC v. N.H. Dep't of Admin. Servs., 167 N.H. 583, 587 (2015).

11. In this case, there has been no such specific demonstration of overriding consideration, special circumstance or privacy interest at stake that would be invaded by disclosure; and the City respectfully asserts that at this time there cannot be any such showing. The information potentially the subject of the yet to be filed Motion for Confidential Treatment includes the various complete bid packages tendered by various bidders for the various Eversource's Generation Assets being Auctioned, including but not limited to any bids addressing the Smith Hydro Facility located in the City. Additionally, that information potentially includes information concerning potential bidders who may have been interested in the Smith Hydro Facility that the Auction Advisor chose not to allow to participate in either the Preliminary or Final Bidding Process. Full public access to such information is necessary to assure that this Auction Process was properly conducted so as to assure the ratepayers and the host communities that the best possible price has been obtained and thereby the lowest possible amount of stranded costs passed on to the ratepayers.
12. Without such information being fully accessible and usable in this Docket by Intervenors, the OCA, the Company and/or PUC Staff, this Commission cannot be in a position of fairly and impartially evaluate the propriety of the Auction Results and/or the amount of stranded costs to be securitized and allowed to be recovered by the Company ratepayers. In short, without this information, there can be no full and fair adjudication of these issues in any open and accountable manner.



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

f. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [End Redaction]

14. Additionally, the City respectfully disagrees with Attorney Bersak’s assertion that confidential treatment of certain information in the Seabrook Station sale in Docket No. DE-02-075 almost twenty years ago somehow controls this Docket. First, as noted above, the NH Supreme Court’s interpretations of RSA 91-A have increased and repeatedly stressed that the statute favors disclosure and that the entity seeking to avoid disclosure “bears a heavy burden”. See, e.g. N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 111 (2016); CaremarkPCS Health, LLC v. N.H. Dep’t of Admin. Servs., 167 N.H. 583, 587 (2015); Hampton Police Ass’n v. Town of Hampton, 162 N.H. 7, 12 (2011); and N.H. Civ. Liberties Union v. City of Manchester, 149 N.H. 437, 440 (2003). Second, this current Docket is not “identical” to the prior Seabrook Docket: this Docket concerns generation assets scattered across our State in many municipalities and of various types of fuel sources (hydro, oil, gas and wood) appealing to a broad range of potential bidders rather than just one nuclear plant. Third, while there is no evidence of the nature of the arguments listed in these

comments having been raised in the prior Seabrook matter, we can state for certain that the City was not involved in that prior Docket and cannot be considered to have waived its rights to public access to all necessary information in this current Docket. Accordingly, the City respectfully asserts that there can be no reasonable expectation of privacy of the submitted bid packets or of the information concerning potential bidders rejected by the Auction Advisor in this proceeding before the Commission and that all such information should be deemed public.

15. As noted above, even if this Commission deems that a privacy interest may exist concerning the information in question, the Commission must further balance that privacy interest against the public interest in confirming that the best possible price for the assets was obtained to both reduce the amount of stranded costs payable by the ratepayers and to support and maintain the tax base of the host municipalities to the benefit of their tax payers. See, e.g., N.H. Civ. Liberties Union, 149 N.H. at 440. In this case, such public interests should clearly outweigh any purported privacy interests of entities participating in this auction before the Commission.

**III. If Determined Not to Be Public, Auction Data Should be Full Produced under a Confidentiality Agreement or, alternatively, Minimally Redacted**

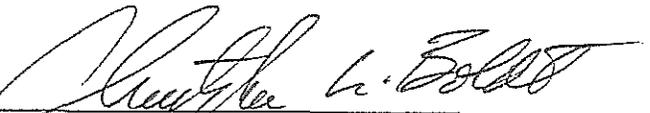
16. Without waiving the arguments and objections noted above, if this Commission deems, after examination of the actual documents in question, that the information should be kept confidential, the City respectfully requests that such information be produced in full under an appropriate Confidentiality Agreement and that, as in other Dockets, the information be fully available to be used as exhibits and in cross examination of witnesses in the confidential sessions of any hearing(s) before this

Commission. Alternatively and without waiving any arguments or objections, if for some legitimate reason this normal process is determined to be inappropriate in this Docket, then the City requests that the information in question be minimally redacted so that the Final Bid Packets have only the names and addresses of the Bidders and their representatives redacted but the remainder of the information in question be produced without redaction.

Respectfully submitted,

**The City of Berlin**  
By and through its City Attorney

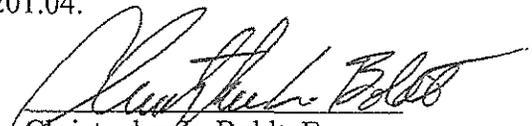
August 25, 2017  
Date

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### CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached Comments to be served pursuant to N.H. Code Admin. Rule Puc 203.11 and Puc 201.04.

August 25, 2017  
Date

  
Christopher L. Boldt, Esq.