

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2017 TERM  
WINTER SESSION

NO. \_\_\_\_\_

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

**PETITION TO APPEAL FROM THE ADMINISTRATIVE DECISION  
OF THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION  
PURSUANT TO NH RSA 541:6 AND SUPREME COURT RULE 10 AND REQUEST  
FOR SUSPENSION OF NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION  
ORDERS 25,967 AND 25,973 PURSUANT TO RSA 541:18**

THE CITY OF BERLIN and TOWN OF GORHAM  
By Its Attorneys:

DONAHUE, TUCKER & CIANDELLA, PLLC  
Christopher L. Boldt, Esq. #15301  
Eric A. Maher, Esq. #21185  
Towle House, Unit 2  
164 N.H. Route 25  
Meredith, NH 03253  
(603) 778-0686

THE TOWN OF NEW HAMPTON  
by and through their attorneys,  
MITCHELL MUNICIPAL GROUP, P.A.

Judith E. Whitelaw, Esq. #2730  
Walter L. Mitchell, Esq. #1778  
25 Beacon Street East  
Laconia, NH 02246  
(603)524-3885

A. NAMES AND ADDRESSES OF THE PARTIES AND THEIR COUNSEL

i. Appellants:

1. City of Berlin  
168 Main Street  
Berlin, NH 03570  
Tel: (603)752-7532
2. Town of Gorham  
20 Park Street  
Gorham, NH 03581  
Tel: (603)466-3322
3. Town of New Hampton  
6 Pinnacle Hill Road  
New Hampton, NH 03256  
(603)744-3559

Counsel for Berlin and Gorham  
Donahue, Tucker & Ciandella  
Christopher L. Boldt, Esq.  
Eric A. Maher, Esq.  
Towle House, Unit 2  
164 N.H. Route 25  
Meredith, NH 03253  
(603) 778-0686

Counsel for New Hampton  
Mitchell Municipal Group, P.A.  
Judith E. Whitelaw  
Walter L. Mitchell  
25 Beacon Street East  
Laconia, NH 02246  
(603)524-3885

ii. Appellee:

1. Eversource Energy d/b/a Public Service Company of New Hampshire ("PSNH")  
780 North Commercial Street  
P.O. Box 330  
Manchester, NH 03105  
(603)634-3355

Counsel for PSNH  
Robert A. Bersak  
780 North Commercial Street  
P.O. Box 330  
Manchester, NH 03105  
(603)634-3355

iii. Non-Appealing Parties:

1. New Hampshire Public Utilities Commission (“PUC”)  
21 South Fruit Street, Suite 10  
Concord, NH 03301  
(603)271-2431

Counsel for the PUC

F. Anne Ross  
21 South Fruit Street, Suite 10  
Concord, NH 03301  
(603)271-2431

2. Conservation Law Foundation  
53 Exchange Street, Suite 200  
Portland, ME 04101  
(207)210-6439

Counsel for the Conservation Law Foundation

Emily K. Green  
53 Exchange Street, Suite 200  
Portland, ME 04101  
(207)210-6439

3. Sierra Club  
50 F. Street NW 8<sup>th</sup> Floor  
Washington, D.C. 20001  
(202)675-7917

Counsel for the Sierra Club

Zachary M. Fabish  
50 F. Street NW, 8<sup>th</sup> Floor  
Washington, D.C. 20001  
(202)675-7917

4. Town of Bristol, New Hampshire  
230 Lake Street  
Bristol, NH 03222  
(603)744-3354

Counsel for the Town of Bristol

Shawn M. Tanguay  
78 Bank Street  
Lebanon, NH 03766

5. International Brotherhood of Electrical Workers  
680 Central Avenue, Suite 202  
Dover, NH 03820  
(603)743-1652

6. City of Concord, New Hampshire  
41 Green Street  
Concord, NH 03301

(603)225-8505

Counsel for the City of Concord

James W. Kennedy  
41 Green Street  
Concord, NH 03301  
(603)225-8505

7. Office of Energy and Planning  
Governor Hugh J. Gallen State Office Park  
Johnson Hall, 3<sup>rd</sup> Floor  
107 Pleasant Street  
Concord, NH 03301  
(603)271-2155

Counsel for the Office of Energy and Planning

Christopher G. Aslin  
Assistant Attorney General  
Environmental Protection Bureau  
33 Capitol Street  
Concord, NH 03301  
(603)271-3679

8. Office of Consumer Advocate  
21 South Fruit Street Suit 18  
Concord, New Hampshire 03301  
(603)271-1172

B. A COPY OF THE ADMINISTRATIVE AGENCY'S FINDINGS AND RULINGS; A COPY OF THE ORDER SOUGHT TO BE REVIEWED; A COPY OF THE MOTION FOR REHEARING, AND ALL OBJECTIONS THERETO; AND A COPY OF THE ORDER ON THE MOTION FOR REHEARING.

1. Order No. 25,967, dated November 10, 2016, issued by the PUC ("**PUC Order**").
2. Joint Motion for Reconsideration and Stay, dated December 9, 2016 by the Appellants ("**Appellants' Motion**").
3. Objection of Public Service Company of New Hampshire d/b/a Eversource Energy to the Municipal Intervenors' Joint Motion for Reconsideration and Stay of Order No. 25,967, dated December 15, 2016 ("**PSNH's Objection**").
4. Order No. 25,973, Order Denying Request for Reconsideration of Auction Design and Stay of Auction Process, dated December 23, 2016, issued by the PUC ("**the Denial Order**").

C. SPECIFIC QUESTIONS TO BE RAISED ON APPEAL EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE. RULE 10(1)(C).

1. Whether the PUC erred when it determined the auction design and process for the divestiture of PSNH's electric generation assets without holding an adjudicatory hearing, as was required by the 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement, dated June 10, 2015 ("**the 2015 Agreement**"), 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**"), dated January 26, 2016, which were all adopted and approved by the PUC by Order 25,920, dated July 1, 2016?

2. Whether the PUC erred when it determined that the auction design and process complied with the 2015 Agreement, 2016 Amendment, and the Litigation Agreement's requirement that the auction design and process be determined pursuant to an "expedited adjudicatory hearing" when the PUC only: (a) allowed questioning of one representative of the PUC's auction advisor, JP Morgan ("**JPM**"); (b) held one technical session of one representative of JPM immediately after the pre-hearing conference; (c) allowed municipal intervenors to submit informal questions to JPM; (d) allowed the parties to submit comments to the PUC with regard to the auction design and process; and (e) at the Appellants' request, took notice of pre-filed testimony of three witnesses from a prior, related docket?

3. Whether the PUC erred when it determined that the PUC had held an adjudicatory hearing with regard to the auction design and process when the PUC: (a) did not schedule or authorize the use of data requests; (b) did not schedule or authorize the submission of pre-filed testimony as to issues pertinent to the auction design and process; (c) only scheduled one technical session of one representative of JPM immediately following the initial and only pre-hearing conference; (d) did not schedule or allow a hearing during which the parties could present evidence or cross-examine the individuals whose opinions were submitted with regard to the auction design and process; and (e) issued a decision on the auction design and process that was not based on sworn testimony or documentary evidence, but rather upon the unsworn, uncorroborated, and conclusory statements of JPM?

4. Whether the PUC erred when it adopted a modified version of the auction design and process proposed by JPM when: (a) the PUC did not receive any pre-filed testimony as to that auction design and process; (b) JPM did not provide any testimony under oath as to the basis for JPM's proffered auction design and process or the basis for JPM's rejection of alternative auction designs suggested by the City of Berlin ("**Berlin**"), the Town of Bristol ("**Bristol**"), the Town of Gorham ("**Gorham**"), and the Town of New Hampton ("**New Hampton**") (collectively "**Municipal Intervenors**"); and (c) the PUC relied upon the unsworn comments and suggestions of JPM in adopting a modified version of JPM's proposed auction design and process and in rejecting the modifications to the auction design and process proposed by the Municipal Intervenors?

5. Whether the PUC violated Part I, Article 14 of the New Hampshire Constitution by

adjudicating the rights of the Appellants without conducting an adjudicatory hearing, as was required by the 2015 Agreement, 2016 Amendment, and Litigation Agreement?

6. Whether the PUC erred when it interpreted RSA 38:13 by determining that the legislative bodies of the Municipal Intervenors could ratify a bid for the acquisition of one of PSNH's generation assets and the requisite bonding for that acquisition pursuant to RSA 38:13 prior to the submission or acceptance of that bid or the finalization of the sale price for that generation asset?

7. Whether the PUC erred when it interpreted RSA 38:13 to allow a municipality to submit for approval to the voters of that municipality a bid and a request for bonding prior to the selection of the municipality's bid during an auction for electric generation assets?

8. Whether the PUC erred when it determined, for the first time in the Denial Order, that a municipality could utilize the procedure set forth in RSA chapter 374-D to acquire the electric generation assets owned by PSNH in an auction procedure as an alternative to complying with the provisions of RSA chapter 38?

9. Whether the PUC erred when it interpreted RSA chapter 374-D, for the first time in the Denial Order, to allow municipalities to submit a fully-bonded, pre-approved bid in an auction for an electric generation asset owned by a private entity rather than complying with the provisions of RSA chapter 38?

10. Whether the PUC erred in accepting new evidence that was submitted by PSNH in its Objection as grounds for denying the Appellants' Motion in the Denial Order?

11. Whether the PUC acted unlawfully and unreasonably when it took the administrative action, for the first time in the Denial Order, to close the docket on the auction design and process to "conduct a commercially reasonable auction without interruption for ongoing litigation" when such closure of the docket undermines the Appellants' rights to seek a suspension from this Court of the PUC's Orders under RSA 541:18 and, thereby, mitigate the harm to the Appellants as a result of the PUC's Auction design and process?

D. PROVISIONS OF THE CONSTITUTIONS, STATUTES, ORDINANCE, RULES, OR REGULATIONS INVOLVED IN THE CASE, SETTING THEM OUT VERBATIM AND GIVING THEIR CITATION.

The provisions of Part I, Article 14 of the New Hampshire Constitution, RSA 38:3, RSA 38:4, RSA 38:13, RSA 38:32; RSA 369-B:3-a; RSA 374-D:2; RSA 541:3, RSA 541:4, RSA 541:5, RSA 541:6, RSA 541:7, RSA 541:18, RSA 541-A:30-a, RSA 541-A:31, RSA 541-A:33, RSA 541-A:35, N.H. CODE OF ADMIN. RULES Puc 203.01 to 203.34 are set forth in the Appendix at page 100.

E. PROVISIONS OF INSURANCE POLICIES, CONTRACTS OR OTHER DOCUMENTS INVOLVED IN THE CASE, SETTING THEM OUT VERBATIM.

Not Applicable.

F. CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED, WITH APPROPRIATE REFERENCES TO THE TRANSCRIPT, IF ANY.

Berlin is the host community for the PSNH Smith hydro-electric facility, which has a nameplate capacity of 15.2 MW and is assessed by Berlin at approximately \$56.5 Million. Gorham is the host community for the PSNH Gorham hydro-electric facility, which has a nameplate capacity of 2.1 MW and is currently assessed by Gorham at approximately \$3.9 Million. Bristol and New Hampton are both hosts to the Ayers Island hydro-electric facility, which has a nameplate capacity of 8.4 MW.

This case is an appeal from Berlin, Gorham, and New Hampton (“**the Appellants**”) of a decision of the PUC in docket DE16-817 (“**the Auction Docket**”), establishing an auction design and process for the divestiture of PSNH’s electric generation assets throughout the State of New Hampshire. The determination of whether PSNH should divest its electric generation assets was the subject of a separate adjudicatory docket DE 14-238 (hereinafter “**the Divestiture Docket**”). Berlin and Gorham were intervenors in the Divestiture Docket and frequently expressed throughout the Divestiture Docket their interest to protect the tax bases of Berlin and Gorham, a concern that would be later echoed by Bristol and New Hampton in the Auction Docket.

Berlin and Gorham’s primary concerns in the Divestiture Docket were the process by which those assets would be auctioned and the manner by which a winning bidder would be selected. Berlin and Gorham were also concerned that, since PSNH would be able to recover its

stranded costs from ratepayers, PSNH did not have a large incentive to ensure that the generation assets would sell for their maximum value. Berlin and Gorham were further concerned that, since all generation assets owned by PSNH were going to be sold-off, the assets could be grouped in a sale such that the less attractive fossil plants would drag-down the total sale price for PSNH's entire generation asset portfolio, resulting in a depressed allocated sale price for the hydro facilities.

To allow for the issue of whether to divest PSNH's generation assets and the various rate-recovery mechanisms associated with divestiture to be adjudicated as expeditiously as possible, the parties in the Divestiture Docket agreed that the auction design and process would be determined pursuant to a separate adjudicatory docket. The parties to the Divestiture Docket executed the 2015 Agreement, later amended by the 2016 Amendment, which provides:

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 [of the 2015 Agreement], 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.

See 2016 Amendment at Section IV(b) (emphases added). Section X of the 2015 Agreement provides that the "Parties request 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" amongst other matters. The parties further executed the Litigation Agreement, which provides at Paragraph 25, "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]." The PUC



approved the 2015 Agreement, as amended by the 2016 Amendment, and the Litigation Agreement on July 1, 2016 in Order No. 25,920.

Following the execution of the 2015 Agreement, the PUC conducted an expedited adjudicative proceeding in the Divestiture Docket with regard to the determination of whether PSNH should divest its generation assets and various ancillary cost-recovery mechanisms associated with that divestiture, which took over eighteen months. The adjudicative proceeding in the Divestiture Docket involved numerous days of technical session, extensive pre-filed testimony, data requests, and several days of hearings during which witnesses were subject to cross-examination.

On September 7, 2016, the PUC opened the Auction Docket to “oversee the process of auctioning the generation facilities owned by [PSNH].” See September 7, 2016 Order of Notice. Berlin and the Towns of Bristol, Gorham, and New Hampton timely moved to intervene in the Auction Docket. On September 12, 2016, the PUC staff filed JPM’s proposed auction design and process. See September 12, 2016 Letter from Anne Ross to the PUC. JPM’s proposed auction design and process sought to establish a two phase process utilizing the following timetable:

Preliminary Stage

- a. Develop a list of potential bidders and detailed approach for bidder outreach — September of 2016;
- b. Prepare and finalize a request for quotation — September to early October of 2016;
- c. Prepare a confidential information memorandum, which would provide an overview of assets, investment highlights, operational and financial details, amongst other information — September to October of 2016;
- d. Prepare a request for proposals and bid instruction letter — September to October of 2016;

- e. Negotiate confidentiality agreements and meet with parties that meet JPM's selection criteria and seek their participation in the auction — October to early November of 2016.

#### First Round/Phase I

- a. Distribute confidential information memorandum — November to December of 2016;
- b. Receive indicative, non-binding offers and prepare summary presentation — late December of 2016;
- c. Analyze and discuss offers with PUC in consultation with PSNH and select bidders to be invited to bid in Phase II — late December of 2016 to early January of 2017.

#### Second Round/Phase II

- a. Open virtual data room populated with materials necessary for due diligence to selected Phase II bidders — January of 2017;
- b. Receive final, binding offers and prepare summary presentation — late February to early March of 2017.

See JPM's Auction design and process dated September 12, 2016, appended to the September 12, 2016 Letter.

On September 15, 2016, the PUC notified the parties to the Auction Docket that the PUC would hold a pre-hearing conference on September 19, 2016, during which the PUC would make JPM available for questioning. See September 15, 2016 Secretarial Letter. At the September 19, 2016 Pre-Hearing Conference, the PUC granted Berlin, Bristol, Gorham, and New Hampton's motions to intervene. See September 22, 2016 Secretarial Letter. Additionally, the PUC allowed questioning of Neil Davids of JPM and allowed for additional questions during a technical session that immediately followed the Pre-Hearing Conference. See September 22, 2016 Secretarial Letter. The Municipal Intervenors participated in both the Pre-Hearing Conference and the Technical Session. At no time was there any indication that there would never be an

actual hearing in the Auction Docket.

In a Secretarial Letter dated September 21, 2016, the PUC stated that JPM “will respond to follow-up questions from parties forwarded to Staff” by September 30, 2016 and further informed the parties that they could file written comments to the PUC on JPM’s proposed auction design and process by September 30, 2016. See September 21, 2016 Secretarial Letter. On September 30, 2016, Berlin and Gorham, together, and New Hampton and Bristol, individually, submitted comments to JPM’s proposed auction design and process, specifically stating that JPM’s proposed auction schedule effectively excluded municipalities from participating in the auction of PSNH’s generation assets. See Comments of Intervenors City of Berlin and Town of Gorham at 5-9 (“**Comments of Berlin and Gorham**”); Comments of Intervenor Town of New Hampton at 3-4 (“**Comments of New Hampton**”); Comments of the Town of Bristol as an Intervenor Regarding the Proposed Auction Procedure as set for[sic] by J.P. Morgan at 3-5 (“**Comments of Bristol**”).

In support of these assertions, the Municipal Intervenors noted that RSA chapter 38 requires a municipality to obtain the approval of 2/3 of the voters in the municipality to participate in the acquisition of an electric generation facility. See Comments of Berlin and Gorham at 5-9; Comments of New Hampton at 3-4; Comments of Bristol at 3-5. The Municipal Intervenors further noted that Phase I and Phase II of the auction would be conducted during town meeting season, making the review of the then yet-to-be-disclosed materials, the preparation of voter education materials, and the conduct of public education meetings practically impossible while addressing other town meeting matters. See Comments of Berlin and Gorham at 5-9; Comments of Bristol at 3-5. Additionally, New Hampton specifically argued that it would be legally incapable of obtaining approval from the legislative body by the early March 2017 timetable (let alone the January 2017 deadline for Phase I) proposed by JPM. Comments of New Hampton at

3-4. The Municipal Intervenors also noted that they could not tender a final, binding bid because RSA 38:13 requires municipalities to submit the “final determination of the price to be paid” to the voters for ratification and approval of bonding. See Comments of Berlin and Gorham at 7-8; Comments of New Hampton at 6; Comments of Bristol at 4-5.

The Municipal Intervenors suggested various alternatives to the Auction design and process, including, but not limited to, (a) holding an “ascending clock” auction; (b) delaying the start of the Phase I until after May 1, 2017 to allow the Municipalities to hold special town meetings to obtain voter approval; (c) bifurcating the auction of PSNH’s hydro-electric assets from its fossil facilities; (d) considering Municipalities automatically qualified to bid in Phase II and conduct Phase II in May of 2017; and (e) allowing the Municipalities to submit bids after the second round, if deemed necessary, based on the final binding bids obtained during Phase II. See Comments of Berlin and Gorham at 10-13; Comments of New Hampton at 8-9; Comments of Bristol at 5-7. In support of the “ascending clock proposal,” Berlin and Gorham asked the PUC to take official notice of prior pre-filed testimony from George E. Sansoucy, Leszek Stachow, and Dr. Peter Crampton in the Divestiture Docket. See Comments of Berlin and Gorham at 9-11. Berlin and Gorham further expressed concern that the auction design and process was being decided outside of an adjudicatory proceeding and that further discovery and questioning was required of JPM to ensure that the proceedings were conducted in an adjudicatory fashion. See Comments of Berlin and Gorham at 13-14.

On October 17 2016, JPM responded to the Municipal Intervenor’s Comments. See October 17, 2016 Letter from Anne Ross to PUC. Specifically, JPM agreed to make minor modifications to its proposed auction design and process by: (a) allowing the Municipal

Intervenors access to the virtual data room in November of 2016,<sup>1</sup> (b) allowing the Municipal Intervenors to bid in Phase II without submitting a bid in Phase I, (c) requiring bidders in Phase I to allocate portions of their bid prices amongst the various facilities sought to be purchased, and (d) requiring final, binding bids to be submitted by early-to-mid May. See October 17, 2016 Amendment to the auction design and process filed September 12, 2016, appended to the October 17, 2016 Letter. JPM also, for the first time, stressed that municipal bids should have “as little conditionality as possible.” See October 17, 2016 Amendment to the auction design and process filed September 12, 2016. JPM went on to dismiss many of the proposed alternatives to the auction design and process from the Municipal Intervenors. See October 17, 2016 Amendment to the auction design and process filed September 12, 2016.

On October 21, 2016, Berlin and Gorham, together, and Bristol and New Hampton, individually, filed comments to JPM’s revised auction design and process. See Comments of Intervenors City of Berlin and Town of Gorham to JP Morgan’s Amendment to Auction Design & Process Memo Dated October 18, 2016 (hereinafter “Berlin and Gorham Second Comments”); Comments of Intervenor Town of New Hampton to the Amendment to the Auction Design and Process (hereinafter “New Hampton’s Second Comments”); Comments of the Town of Bristol as Intervenor Regarding the Proposed Amendments to Auction Procedure as set for[sic] by J.P. Morgan (hereinafter “Bristol’s Second Comments”). The Municipal Intervenors raised their concerns that the auction design and process, as amended by JPM, did not provide for adequate time to allow the Municipal Intervenors to coordinate necessary educational sessions with their voters and hold required votes to allow for the submission of a bid. See Berlin and Gorham’s

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<sup>1</sup> That access was eventually granted to the Municipal Intervenor on November 28, 2016.

Second Comments at 5-7; New Hampton's Second Comments at 2-5; Bristol's Second Comments at 2-3.

The Municipal Intervenors also expressed concern that JPM's comments regarding "conditionality" created a presumption against accepting municipal bids, which by law would have to be conditioned upon the ratification by the voters after the bid was selected. See Berlin and Gorham's Second Comments at 5-6; New Hampton's Second Comments at 7. The Municipal Intervenors again proposed a "third round" bidding procedure, whereby the Municipal Intervenors would only participate if final bids were submitted that were below the Municipal Intervenors' assessments for the subject facilities. See Berlin and Gorham's Second Comments at 6-7; New Hampton's Second Comments at 6. Lastly, Berlin and Gorham informed the PUC that discovery was needed to ascertain the validity of JPM's proposals and various rebuffs of the Municipal Intervenors' proposals and that JPM needed to provide evidence for its various assertions. See Berlin and Gorham's Second Comments at 7-9.

On November 4, 2016, JPM filed additional comments regarding the auction design and process. See November 4, 2016 Letter from Anne Ross to the PUC. JPM stressed that bids submitted during Phase II would need to have binding financing commitments — a condition that essentially disqualifies the Municipal Intervenors from the auction process. See November 3, 2016 J.P. Morgan comments on Auction principles and specific process criteria, appended to the November 4, 2016 Letter. JPM further rebuffed the Municipal Intervenors' third round proposal. At no time did JPM submit any evidence, either through documentary materials or testimony, for the basis of its proposed auction design and process or its dismissal of the Municipal Intervenors' proposals. See November 3, 2016 J.P. Morgan comments on Auction principles and specific process criteria.

On November 10, 2016, the PUC issued Order No. 25,967, through which it adopted the auction design and process proposed by JPM with certain modifications. PUC Order at 1. At the outset, the PUC granted Berlin and Gorham's request that certain pre-filed testimony from the Divestiture Docket be officially noticed. PUC Order at 22-23. The PUC went on to dismiss the various alternatives and suggested modifications from the Municipal Intervenors, relying solely on the conclusory and unsupported assertions of JPM. See PUC Order 22-28.

Addressing the Municipal Intervenors' concerns regarding timing and the submission of a firm bid, the PUC interpreted RSA 38:3, RSA 38:4, and RSA 38:13, to allow the Municipal Intervenors to bid on the subject facilities upon the completion of one legislative meeting during which the voters would both (a) authorize the Municipal Intervenors to participate in the auction process and (b) pre-approve the bid amount and the requisite bonding that would be needed to finance the Municipal Intervenors' bids should the bids be selected. See PUC Order at 28-30. In doing so, the PUC interpreted RSA 38:13's requirement that municipalities obtain voter approval as to "whether or not to acquire" a facility "[w]ithin 90 days of final determination of the price" to mean that the Municipal Intervenors could obtain pre-approval from the voters prior to their bids being selected. See PUC Order at 29. The PUC reasoned that if a municipal bid was accepted at Phase II, then the municipality will be obligated to purchase at the price it bid, meaning that the submission of a bid was the "final determination of the price" as far as the Municipal Intervenors were concerned. See PUC Order at 29. In interpreting the relevant statutes so as to dismiss the Municipal Intervenors' timing concerns, the PUC relied on JPM's uncorroborated assertions that delay would be detrimental to the goal of maximizing the assets' sale price. See PUC Order at 27-28. The PUC also noted that nothing under New Hampshire law legally prohibited the Municipal Intervenors from seeking voter approval during their respective March 2017 annual

town meetings, and dismissed the Municipal Intervenors' concerns that the proposed schedule did not afford adequate opportunity to review relevant information, prepare a bid, educate the public and meet statutory public hearing and notice requirements prior to March. See PUC Order at 27-28.

Lastly, the PUC rejected the Municipal Intervenors' concerns that the selection of the auction design and process did not follow the 2015 Agreement, the 2016 Amendment, and the Litigation Agreement. See PUC Order at 32-33. The PUC reasoned that, based on JPM's assertions that the auction needed to be conducted quickly, the process provided (i.e. questions during pre-hearing conference, one technical session, adoption of pre-filed testimony from the Divestiture Docket, the ability to submit questions to JPM, and submission of comments) was sufficient to constitute an adjudicatory proceeding under RSA 541-A:31. See PUC Order at 32-33.

On December 9, 2016, the Appellants filed the Appellants' Motion,<sup>2</sup> in which they argued that the PUC had not held adjudicatory proceedings, as required by the 2015 Agreement, 2016 Amendment, and the Litigation Agreement, because the PUC: (a) had only one technical session immediately after a pre-hearing conference; (b) did not authorize data requests or technical sessions; (c) did not require or allow parties to submit pre-filed testimony; (d) did not allow cross-examination of any witnesses submitted by the parties; and (e) did not rely on any evidence or testimony provided under oath in adopting JPM's proposed auction design and process. See Appellants' Motion at 7-13. The Appellants also noted that such procedural mechanisms were required as part of an adjudicatory proceeding under RSA chapter 541-A and the rules of the PUC.

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<sup>2</sup> Berlin, Gorham, and New Hampton noted that the Appellants' Motion was to be construed as a motion for rehearing under RSA chapter 541, but declined to fashion the Motion as such, since the PUC did not actually hold a hearing.



See Appellants' Motion at 10-12. The Appellants noted that the 2015 Agreement, the 2016 Amendment, and the Litigation Agreement were all executed, in part, to facilitate the prompt resolution of Divestiture Docket (where there was a full, expedited adjudicatory proceeding that did involve full discovery, pre-filed testimony, and cross-examination over an eighteen month period), and that the adjudicatory proceeding in the Auction Docket undermined the Municipal Intervenors' contractual rights under those Agreements. See Appellants' Motion at 7-13. The Appellants submitted a detailed proposed adjudicatory schedule to rectify the procedural deficiencies in the Auction Docket. See Appellants' Motion at 23-24.

The Appellants also argued that the auction design and process approved by the PUC did not comport with RSA chapter 38, specifically with regard to the PUC's interpretation that RSA 38:13 allowed municipalities to obtain pre-approval for a bid and bonding. See Appellants' Motion at 15-19. The Appellants also noted that requiring the Municipal Intervenors to present a proposal for a pre-approved bid to the voters at the March annual meeting, with associated hearings and meetings prior to the vote, would publically disclose the Municipal Intervenors' bids well before non-municipal bidders would have to submit their bid, thus materially disadvantaging the Municipal Intervenors. See Appellants' Motion at 19. The Appellants, anticipating that PSNH would argue that RSA chapter 374-D was available to the Appellants, even though the PUC had not referred to that statute in the PUC Order, argued that RSA chapter 374-D was not applicable to the auction of privately-owned electric generation assets and that the Municipal Intervenors had to comply with RSA chapter 38. See Appellants' Motion at 17, fn. 7.

Lastly, the Appellants noted that it would be practically impossible to comply with the PUC's auction design and process, noting that to suitably inform the public, it would need to review materials provided in the recently-opened virtual data room, prepare public education

materials, hold public education meetings, and prepare all materials associated with the approval and bonding articles, all during town meeting season. See Appellants' Motion at 19-22. The Appellants informed the PUC that they would have to wait until after town meeting to obtain approval to participate in the auction design and process, and, even then, would still need to submit a bid to their voters for approval and bonding after being selected. See Appellants' Motion at 21-22. The Appellants continued to assert the necessity of a third round of bidding. See Appellants' Motion at 22-23.

PSNH objected, disagreeing with the various arguments set forth in the Appellants' Motion for Reconsideration and alleging various new facts and arguments which were not previously in the record, including recent reports of rising interest rates and out-of-context references to prior PUC proceedings involving Berlin. See PSNH's Objection at 4-5. Additionally, PSNH raised the applicability of RSA chapter 374-D. See PSNH's Objection at 5-9.

The PUC, without a hearing, denied the Appellants' Motion for Reconsideration. See Denial Order. The PUC ruled that the process afforded to the parties in the Auction Docket was sufficiently adjudicative to comply with the 2015 Agreement, the 2016 Amendment, and the Litigation Agreement, citing RSA 369-B:3-a's requirement that the PUC "expedite [its] review process" and the 2015 Agreement's requirement for the PUC to conduct an "additional expedited adjudicatory proceeding." See Denial Order at 11-14. The PUC also stated that it had allowed cross-examination of a JPM representative at the Pre-Hearing Conference, ignoring the fact that the Pre-Hearing Conference was held before the Auction Docket's lone technical session, before JPM submitted its amended auction design and process, and before JPM dismissed the Municipal Intervenors' proposals. See Denial Order at 13.

The PUC further affirmed its determination with regard to the auction design and process.

The PUC maintained that the Municipal Intervenors were authorized under RSA 38:13 to obtain pre-approval from their respective voters to acquire and bond the subject facilities prior to the acceptance of the Municipal Intervenors' bids. See Denial Order at 14-15. The PUC went on to state, without any evidence other than the unsworn statements of JPM, that authorizing the Municipal Intervenors to submit a bid contingent upon ratification by the voters, as required by RSA chapter 38, would frustrate the auction process, place non-municipal bidders at a disadvantage, and discourage a robust auction. See Denial Order at 15. The PUC also ruled, for the first time and without granting a rehearing, that the Municipal Intervenors alternatively could bid on the subject facilities without voter approval pursuant to RSA 374-D:2, which allows for municipalities to “design, develop, acquire, and construct small scale power facilities at sites owned or leased by them or otherwise made available to them.” See Denial Order at 16 (emphasis added). The PUC then rejected the Appellants' “third round” proposal, again relying on JPM's unsworn statements that such a proposal would be detrimental to the purpose of maximizing the sale price for the assets. See Denial Order at 17-19.

Lastly, the PUC, despite acknowledging the various Agreements' intent that the design of the auction and approval of the sale would occur in the same docket, closed the Auction Docket to “allow all parties with appeal rights regarding auction design to pursue those remedies immediately, so that we can conduct a commercially reasonable auction without interruption for ongoing litigation.” See Denial Order at 20. In doing so, the PUC frustrated the Municipal Intervenors' ability to seek a stay from this Court of the implementation of the auction design and process under RSA 541:18.

The Appellants now appeal the PUC's Denial Order.

G. JURISDICTIONAL BASIS FOR THE APPEAL, CITING RELEVANT STATUTES OR CASES.

NH RSA 541:6 Appeal. Within thirty days after the application for rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the Supreme Court.

H. DIRECT AND CONCISE STATEMENT OF THE REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTION AND WHY THE ACCEPTANCE OF THE APPEAL WOULD PROTECT A PARTY FROM SUBSTANTIAL AND IRREPARABLE INJURY, OR PRESENT THE OPPORTUNITY TO DECIDE, MODIFY OR CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE.

i. Question 1 through 5

With regard to the PUC's procedural errors, there is a substantial basis for a difference of opinion between the Appellants, PSNH, and the PUC as to the requirements of an adjudicatory hearing before the PUC, specifically whether the extremely limited procedure provided by the PUC in the Auction Docket amounted to an adjudicatory proceeding as required in the 2015 Agreement, the 2016 Amendment, and the Litigation Agreement.

There is a substantial difference in opinion with regard to this issue because the Appellants' opinion is that an adjudicatory proceeding must entail, at the least: a full and fair use of the discovery mechanisms available to parties under the PUC's administrative rules; the submission of pre-filed testimony; the opportunity to cross-examine witnesses; and the issuance of a decision the factual findings to which rely on evidence in the record. The Appellants' interpretation of the phrase "adjudicatory" is supported by RSA chapter 541-A and the PUC's administrative rules. The PUC's administrative rules give the Appellants "the right to conduct discovery," including serving data requests, participating in technical sessions, and conducting depositions. See N.H. CODE OF ADMIN. R. Puc 203.09 (authorizing PUC to allow other forms of

discovery when “necessary to enable the parties to acquire evidence admissible in a proceeding”). RSA 541-A:31 gives the Appellants the ability to “respond and present evidence and argument on all issues involved” in a proceeding, and RSA 541-A:33 requires that testimony be provided under “oath and affirmation.” The Appellants were further entitled to present evidence and argument and to cross-examine witnesses to ensure a “full and true disclosure of the facts.” See RSA 541-A:33 (2007); N.H. CODE OF ADMIN. R. Puc. 203.24 (a). Lastly, the Appellants were entitled to a decision that was based on findings of fact based “exclusively on the evidence and matters officially noticed” by the PUC. See RSA 541-A:31, VII (2000); RSA 541-A:35; see also RSA 541-A: 33 (2000); N.H. CODE OF ADMIN. R. 203.23 (b) (stating that “all testimony of parties and witnesses, including any pre-filed written testimony adopted by a witness at hearing, shall be made under oath or affirmation”).

PSNH and PUC, however, believe that the process afforded to the parties in the Auction Docket was adjudicatory. The PUC ruled that the ability to ask questions of a single JPM representative during a pre-hearing conference and subsequent technical session, the ability to submit questions to JPM, the taking of judicial notice of limited pre-filed testimony from the Divestiture Docket, and the ability to submit comments to the PUC on the auction design and process were sufficient for the Auction Docket to constitute an adjudicatory proceeding. According to the PUC and PSNH, the requirement for an “expedited adjudicatory hearing” allowed the PUC to eliminate procedure rights statutorily and administratively provided to parties and issue a decision devoid of admissible evidence.

The acceptance of this appeal will protect the Appellants and their taxpayers from substantial and irreparable harm because, absent acceptance, the PUC’s decision will force the Appellants to accept an auction and design process that will impact the assessments of significant

portions of their respective tax bases without the benefit of the adjudicatory hearing for which the parties specifically negotiated in the Divestiture Docket. The auction design and process adopted by the PUC was predicated upon the bare assertions of JPM, which were not provided under oath and did not contain any supporting evidence. The PUC accepted JPM's bare assertions, essentially delegating en toto the PUC's responsibility to determine an auction design and process to JPM's "expertise" in the area of utility auctions. The Appellants were afforded only one opportunity for a brief technical session of one JPM representative in the earliest stages of the Auction Docket; the Appellants did not receive the benefit of any of the other procedural rights which were to be provided in an adjudicatory proceeding. The Appellants had no meaningful opportunity to investigate or rebut JPM's conclusory assertions, many of which dismissed recommendations vital to allow for the Appellants' participation in compliance with RSA chapter 38 and all of which directly impacted the timing of the auction. Consequently, significant portions of the Appellants' tax bases will be auctioned-off pursuant to a procedure that freezes the Appellants out of the auction process, the participation of whom was intended to protect the tax base, the taxpayers, and the ratepayers against a "fire sale" of the subject facilities.

The Appellants respectfully request that this Court accept this appeal and reverse the erroneous and harmful decisions of the PUC.

ii. Questions 6 through 9

With regard to the PUC's auction design and process, there is a substantial basis for a difference of opinion between the Appellants, PSNH, and the PUC as to the procedural requirements that the Appellants must satisfy to lawfully acquire electric generation assets. The Appellants assert that they must follow RSA 38:3, :4, and :13 to lawfully acquire the subject facilities. The Appellants assert that a city must obtain approval from two-thirds of its city

council and, thereafter, a majority of voters at a special meeting to participate in the auction process. See RSA 38:3. Towns must obtain approval to participate in the auction process from two-thirds of the town's voters. See RSA 38:4. Upon said votes, the acquisition of the electric generation facility by the municipality carries a rebuttable presumption of being in the public interest. See RSA 38:3; RSA 38:4. The municipality may then submit a bid to acquire the facility. If a final sales price is determined, i.e., such as through acceptance of a final bid in the case of an auction, the municipality must then submit the "final determination of the price to be paid" to the voters for approval, as well as approval for any bonding associated with the winning bid. See RSA 38:13.

PSNH asserted, and the PUC ruled, that a municipality need not hold two public hearings under RSA 38 to acquire an electric generation facility. Rather, the municipality can seek voter approval to participate in the auction, determine a bid, and finance that bid all in the same meeting. The PUC ruled that the phrase "final determination of the price to be paid," when applied in the auction process, allowed municipalities to obtain a fully-bonded, pre-approved bid prior to the selection of any bids. The PUC and PSNH asserted that, for this reason, the Appellants could obtain sufficient approval to provide a fully-financed, binding bid in May of 2017. Alternatively, both PSNH asserted, and the PUC ruled in its Order on the Appellants' Motion (despite not holding a rehearing), that a municipality could avail itself of RSA chapter 374-D, thereby bypassing the requirements of RSA chapter 38.

The Appellants disagree with PSNH and the PUC as to the applicability of RSA chapter 374-D. RSA chapter 374-D is inapplicable and the Appellants cannot utilize the procedure set forth in RSA chapter 374-D because that procedure is to be utilized only for designing, developing, acquiring, or constructing a small scale power facility "at sites owned or leased by [a municipality]"

or otherwise made available to [the municipality] for a period at least equal to the term of financing to be acquired under RSA chapter 374-D.” RSA 374-D:2. Since the subject facilities are not on “sites owned or leased” by the Appellants or “otherwise made available to the” Appellants, this statute is not applicable under these circumstances.

The acceptance of this appeal will protect the Appellants from substantial and irreparable harm because the Appellants are legally foreclosed from participating in the auction of PSNH’s generation assets under the PUC’s approved auction design and process. The Appellants are foreclosed from the Auction design and process because they are legally incapable of submitting a final, binding bid that is not subject to subsequent voter ratification under RSA 38:13. If the Appellants are foreclosed from the auction, they will be incapable of safeguarding the auction process from a below-market bid to the detriment of the Appellants’ respective tax bases, the Appellants’ taxpayers (who will have to assume the tax burden associated with a significant reduction in the facilities’ assessed value), and the ratepayers (who will be saddled with the stranded costs associated with a below-market sale). In short, the Appellants’ and the public’s interest is greatly implicated in the Appellants’ ability to participate in the auction of PSNH’s assets, and the PUC’s erroneous interpretation of RSA chapter 38 and RSA 347-D:2 formed a basis for the PUC’s adoption of an auction design and process that prevents that participation.

For these reasons, this Court should accept the Appellants’ appeal.

iii. Question 10

The PUC unlawfully and unreasonably relied on new evidence that was submitted to the PUC for the first time in PSNH’s Objection, in denying the Applicant’s Motion without holding a rehearing. This evidence included, but was not limited to, pre-filed testimony of a PSNH witness in the Divestiture Docket and excerpts from a memorandum filed by the City of Berlin in a



sixteen-year old PUC docket, which said excerpts were taken completely out-of-context.

As is apparent by PSNH's submission and the PUC's consideration of this new evidence, there is a substantial difference of opinion as to the proper protocol for addressing a motion for rehearing. The Appellants assert that the proper procedure that the PUC should have followed was expressed by this Court in McDonald v. Town of Effingham Zoning Bd. of Adjustment, 152 N.H. 171, 176 (2006), in which this Court stated in the context of a ZBA appeal under a statutory scheme nearly identical to RSA chapter 541:

A better practice for the ZBA to taken when it identifies new grounds for its initial decision and intends to make new findings and rulings on them in response to a motion for rehearing would be for it to grant the rehearing motion without adding new grounds for denying the variance application. . . . [A]fter the rehearing and new order, the aggrieved party would then need to file a motion for rehearing on all issues ruled upon, at that time, to preserve them for appellate review.

This practice was not followed by the PUC, and it was error for the PUC to rely upon new findings and ruling in denying the Appellants' Motion.

The acceptance of this appeal will protect the Appellants from substantial and irreparable harm because the newly introduced evidence was relied upon by the PUC without any meaningful opportunity to rebut that newly introduced evidence. PSNH submitted its Objection on December 15, 2016, less than eight days later the PUC issued its 20-page Denial Order incorporating that newly submitted evidence. The Appellants had no opportunity, such as through a rehearing or even an opportunity to submit a reply, to demonstrate how PSNH's newly introduced evidence was either taken out of context or was otherwise inapposite to the issues in the Auction Docket. Consistent with the issues raised in Questions 1 through 5, the Applicants were deprived of their rights to be fully and fairly heard in the Auction Docket. Consequently, the PUC's decision which adopted the auction design and process was unlawful and unreasonable to

the prejudice of the Appellants.

For these reasons, this Court should accept the Appellants' appeal.

iv. Questions 11 and Request for Suspension of the PUC's Order

The PUC unlawfully and unreasonably closed the Auction Docket in the Denial Order to avoid any stays to the auction that would result from an appeal of the auction design and process. In doing so, the PUC circumvented the Appellants' rights to seek a stay from this Court pursuant to RSA 541:18. While that issue was not raised in the Appellants' Motion, it was raised by the PUC in the Denial Order, notwithstanding the fact that the PUC did not conduct a rehearing to introduce new elements into its underlying order. Because the PUC introduced new rulings into its Denial Order, without holding a rehearing, this issue is properly before this Court on appeal. See McDonald, 152 N.H. at 174-76 (holding that appellant was not required to file second motion for rehearing when ZBA based denial of motion for rehearing on additional dispositive ground to preserve issue for appeal).

There is a substantial difference of opinion between the Appellants and the PUC as to whether the PUC could close the Auction Docket and proceed with the implementation of the auction design and process in a new docket. The Appellants' opinion is that such closure frustrates the Appellants' ability to seek a suspension and stay on the implementation of the PUC's Order from this Court. RSA 541:18 authorizes this Court to suspend an order of an administrative agency when justice requires such a suspension. Therefore, it is this Court and not the PUC that is responsible for analyzing whether an order should be suspended pending an appeal.

By closing the Auction Docket and opening a new docket for the implementation of the auction design and process, the PUC appears to be of the contrary opinion that it can close the Auction Docket so that the PUC can operate unimpeded by this appeal. In doing so, the PUC

appears to have determined that suspension of the Auction Docket would not be in the interest of justice and has decided to implement the auction design and process and insulate the effects of a reversal. The PUC's decision to effectively preclude a suspension of its Order on the auction design and process is contrary to New Hampshire law and commandeers this Court's authority under RSA 541:18. The PUC's closure of the Auction Docket, therefore, was unlawful and unreasonable and must be addressed by this Court as a preliminary matter.

The Appellants face substantial and irreparable harm if this Court does not suspend the PUC's order on the auction design and process and allows the PUC to implement the auction design and process in its current form. The Appellants face substantial and irreparable harm because, absent a suspension, by the time this appeal is fully briefed and a decision is rendered, the PUC's aggressive auction design and process will have been fully executed. Therefore, a very real possibility exists that the PUC will fully execute the auction design and process and select a bidder, only to have that entire process reversed, which may have detrimental impacts to any subsequent bidding process. Therefore, failure to suspend the auction design and process' implementation now, while the Appellants' rights are being fully adjudicated by this Court, may result in a distressed sale of PSNH's generation assets, to the detriment of the Appellants, the taxpayers, and the ratepayers.

The interest of justice strongly weighs in favor of this Court suspending the PUC's Order because failure to do so will result in the expenditure of significant resources by all parties to the Auction Docket and the soon-to-be-opened docket implementing the auction design and process. Additionally, the interest of justice requires a suspension of the PUC's Order because, absent a stay, the auction of PSNH's generation assets will face one of two challenges: (1) either bidders will be apprehensive to expend time and energy conducting due diligence of these facilities due to

concerns regarding this appeal, potentially limiting the pool of bidders; or (2) the auction will be conducted without such concern, but be reversed, with the auction being conducted in a new fashion, but with less bidders due to the lack of desire to expend additional monies associated with preparing a subsequent bid. Both scenarios have the potential to dramatically impact the sales price of any of PSNH's generation assets, again to the disadvantage of the Appellants, their taxpayers, and the ratepayers.

The interests of justice will be served if this Court suspends the PUC's Order because the process that the PUC would have to undertake should it have to completely repeat the auction process, based on the above-referenced errors, would be far longer than if the PUC simply suspended its execution of the auction process now. Therefore, the suspension of the Order serves the Legislature's intent in RSA 369-B:3-a for the expedited adjudication of the divestiture of PSNH's assets. In short, the interest of justice strongly favors the issuance of stay in these proceedings.

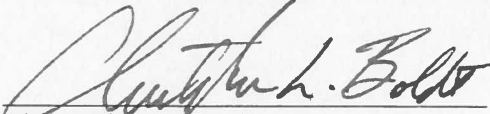
Therefore, this Court should accept this appeal and determine, pursuant to RSA 541:18, that the interest of justice are best served by suspending the PUC's order adopting the auction design and process, and staying any subsequent proceedings opened by the PUC to implement the PUC's auction design and process.

I. STATEMENT OF PRESERVATION OF ISSUES:

I hereby certify that, with the exception of Question 11 (the prevention of which was addressed above), every issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

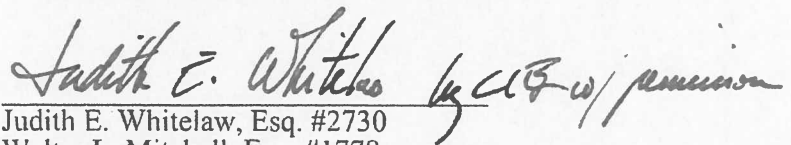
Respectfully submitted,  
City of Berlin and Town of Gorham  
by and through their attorneys,  
DONAHUE, TUCKER & CIANDELLA

Date: January 10, 2017

By:   
Christopher L. Boldt, Esq. #15301  
Eric A. Maher, Esq. #21185  
The Towle House  
164 NH Route 25, Unit 2  
Meredith, NH 03253  
(603) 766-4573

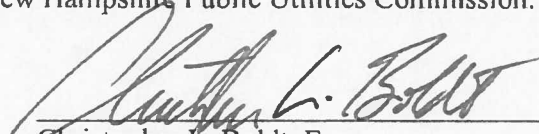
Respectfully submitted,  
Town of New Hampton  
by and through their attorneys,  
MITCHELL MUNICIPAL GROUP, P.A.

Date: January 10, 2017

By:   
Judith E. Whitelaw, Esq. #2730  
Walter L. Mitchell, Esq. #1778  
25 Beacon Street East  
Laconia, NH 02246  
(603)524-3885

### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, the City of Berlin and the Towns of Gorham and New Hampton's Rule 10 Appeal from Administrative Agency and Request for Suspension of New Hampshire Public Utilities Commission Orders 25,967 And 25,973 Pursuant to RSA 541:18 has been mailed this 10<sup>th</sup> day of January, 2017, via U.S. first-class mail, postage prepaid, to all counsel and/or parties of record and the New Hampshire Public Utilities Commission.

  
Christopher L. Boldt, Esq.  
Eric A. Maher, Esq.