

**STATE OF NEW HAMPSHIRE
BEFORE THE PUBLIC UTILITIES COMMISSION**

**Development of New Alternative Net Metering Tariffs and/or Other Regulatory
Mechanisms and Tariffs for Customer-Generators**

Docket No. DE 16-576

**Opposition of Energy Freedom Coalition of America, LLC to Motion for Designation of
Staff Advocates Pursuant to RSA 363:32**

NOW COMES Energy Freedom Coalition of America, LLC (“EFCA”), a party in this docket, and states its opposition to the January 12, 2017 Motion for Designation of Staff Advocates Pursuant to RSA 363:32 (the “Motion”) filed by the Office of the Consumer Advocate (“OCA”), the City of Lebanon, and the New England Ratepayers Association (“NERA”) (collectively, the “Moving Parties”). The Commission should deny the Motion because the Moving Parties have not alleged that that Commission Staff “may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding,” nor have the Moving Parties shown any other “good cause” for such a designation pursuant to RSA 363:32. Moreover both practical considerations and the interests of justice require its denial, as described further below.

In some ways this is not an ordinary proceeding, neither in the scope of its subject matter nor in the breadth of activity and material generated in the proceeding. Substantively, as directed by new paragraph XVI of RSA 362:A-9 as amended by New Hampshire House Bill 1116, the Commission opened this non-adjudicative proceeding by Order of Notice dated May 19, 2016, “to develop new alternative net metering tariffs, which may include other regulatory mechanisms and tariffs for customer-generators, and determine whether and to what extent such tariffs should be limited in their availability within each electric distribution utility’s service territory.”¹

The proceeding is made more complex by the level of its parties’ involvement. Nearly 30 entities are parties in the proceeding. Staff have convened at least 7 technical sessions in the

¹ Order of Notice at 1.

proceeding, spanning several dozen hours. Over 30 pieces of testimony have been filed in the docket, including both direct testimony and rebuttal. In multiple rounds of discovery, parties have asked hundreds of data requests, generating extensive responses. Much of this information in testimony and in discovery is technical in nature, yet the data necessary for informed cost-based decision-making is not readily available due to a lack of advanced metering infrastructure and collaborative opportunities. Nearly every party agrees that there is a current lack of relevant utility distribution system data and customer data, such as interval data for distributed generation (“DG”) customers, load patterns on the utility distribution system, the effects of DG resources on distribution system loads, data on capacity projects planned by utilities, voltage and power quality issues, and reliability data – and that today much of the absent data is in our public utilities’ hands.

Given this context, the parties are all finding their way through the proceeding. Commission staff serve as an essential guide to this immense proceeding. Moreover, the Commission benefits greatly from the role staff plays in assessing and advising the Commission on parties’ positions. On a practical basis, it would be exceedingly difficult for the Commission to achieve the mandate set forth by the General Court in HB 1116 without staff continuing to serve in its present role.

Perhaps most fundamentally, the OCA has neither made the case for designation of staff under RSA 363:32, nor even complained of any specific harm. There is simply no evidence that Commission Staff “may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding,” nor have the Moving Parties shown any other “good cause” for such a designation pursuant to RSA 363:32. Moreover the interests of justice require its denial, as described further below.

APPLICABLE LAW

New Hampshire law governs the Commission’s general operations and relationship with its staff, as well as specific provisions governing the designation of staff advocates. The general and specific laws each support the Commission’s use of staff in this proceeding, and do not support the Motion.

As the Commission has recognized, it is a statutorily created agency charged with being “the arbiter between the interests of the customer and the interests of the regulated utilities.”² To carry out that duty the Commission may employ “such regular staff, including experts, as it shall deem necessary.”³ Staff’s expert role takes two forms, often in the same proceeding. On one hand, Staff is “expected to...develop [] proposals for resolution of issues before the Commission, and to promote those proposals ... where possible.”⁴ On the other hand, staff is “to advise the Commission fairly and neutrally as to the positions of the parties, the status of the docket, the law applicable to the situation, the policy considerations that should be taken into account, and other aspects of the case.”⁵

Staff continues to “have this duty of neutral advice even when they hold a particular conflicting view, and even when it is clear the Commission is seriously entertaining a contrary position.”⁶ To avoid designation in every proceeding in which it takes a position, staff is “entitled to the presumption that they are ‘of conscience and capable of reaching a just and fair result.’”⁷ Commission precedent holds that this presumption of fairness “should not be lightly overcome.”⁸

This proceeding is not an adjudicative matter.⁹ Even if this were an adjudicative matter, the Moving Parties have failed to meet the necessary burdens for designation of staff under RSA 363:32. Specifically limited to the context of adjudicative proceedings, RSA 363:32 addresses the designation of Commission staff as staff advocates, under mandatory and discretionary prongs. RSA 363:32, I governs mandatory designation:

² *Public Service Company of New Hampshire*, Order No. 25,954, Order Denying Joint Motion to Designate Staff (October 18, 2016) (citing RSA 363:17-a).

³ RSA 363:27, I.

⁴ *Verizon New Hampshire*, 87 NH PUC 11, 19 (2002).

⁵ *Id.*; see also *Public Service Company of New Hampshire*, Order No. 25,630 (February 14, 2014) at 5-7.

⁶ *Id.*

⁷ *Verizon New Hampshire* at 17-18 (2002) (quoting *Appeal of Office of Consumer Advocate*, 134 N.H. 651, 660 (1991); *Public Service Company of New Hampshire* at 6 (2014)).

⁸ *Id.*

⁹ The Commission order opening this docket did not commence an adjudicative proceeding, nor has any subsequent Commission order in this docket. By contrast, the Commission routinely issues Orders Commencing Adjudicative Proceedings when it wishes to commence such an adjudicative proceeding. See, e.g., Order Commencing Adjudicative Proceeding, Clean Power Development, LLC, Order No. 25,075 (February 24, 2010); Order Commencing Adjudicative Proceeding and Scheduling a Prehearing Conference, Holyoke Gas & Electric Dep’t., Order No. 25, 160 (October 28, 2010). Moreover, no matter how the proceeding is described, it is fundamentally not an adjudicative proceeding as defined under state law. As a legislative – and non-adjudicative – proceeding, this proceeding is not a “contested case” nor is it “an adjudicative proceeding in accordance with the provisions of RSA 541-A:31 through RSA 541-A:35” subject to the provisions of RSA 363:32 regarding designation of staff.

[T]he commission *shall* designate one or more members of its staff as a staff advocate ... when the commission determines that such members of its staff may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding.¹⁰

Paragraph II of the same section allows discretionary designation “for good cause shown” and suggests three factors to consider:

[T]he commission *may* designate one or more members of its staff as a staff advocate ... at any time for good reason, including that: the proceeding is particularly controversial and significant in consequence; the proceeding is so contentious as to create a reasonable concern about staff’s role; or it appears reasonable that such designations may increase the likelihood of a stipulated agreement by the parties.¹¹

Thus under RSA 363:32, I the Commission must designate only if staff “may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding,” otherwise it may designate staff “for good cause shown” while considering the factors in RSA 363:32, II.

ARGUMENT

The Commission should deny the Motion because practical considerations, the interests of justice and the mandates of the General Court require that the Commission have available to it staff and expert resources capable of advising it, as the Commission discharges the duties imposed on it by HB 1116. Moreover, the Moving Parties have failed to allege the facts that would be necessary for the Commission to designate staff under either the mandatory or discretionary paragraphs of RSA 363:32.

As a review of the docket record shows, this proceeding is extraordinary in both the scope of its subject matter and in level activity and volume of material generated or filed in the proceeding. The General Court’s charge and the Commission’s Order of Notice framed this proceeding “to develop new alternative net metering tariffs, which may include other regulatory mechanisms and tariffs for customer-generators, and determine whether and to what extent such tariffs should be limited in their availability within each electric distribution utility’s service territory.”¹² As the Commission executes this mandate, it is authorized to rely on expert staff who both “develop [] proposals for resolution of issues before the Commission, and to promote

¹⁰ RSA 363:32, I (emphasis added).

¹¹ RSA 363:32, II (emphasis added).

¹² Order of Notice at 1.

those proposals ... where possible”¹³ and “advise the Commission fairly and neutrally as to the positions of the parties, the status of the docket, the law applicable to the situation, the policy considerations that should be taken into account, and other aspects of the case.”¹⁴ This duty that staff must be allowed to provide the Commission “neutral advice” while also engaging directly in the proceeding is so important that staff’s dual role is protected by a presumption that staff are “of conscience and capable of reaching a just and fair result.”¹⁵ Commission precedent holds that this presumption of fairness “should not be lightly overcome.”¹⁶

If there was ever a proceeding where the Commission needed its staff to play this role of expert guide, this is it. Beyond the important and broad-reaching substantive scope of this proceeding, it is made more complex by the level of activity: nearly 30 parties, dozens of hours of conferences and technical sessions, over 30 pieces of direct and rebuttal testimony, at least 4 rounds of discovery featuring hundreds of data requests and extensive responses. Compounding the practical challenges facing the Commission, much of this information in testimony and in discovery is technical in nature, yet the data necessary for informed cost-based decision-making is unavailable.

Commission staff serve as an essential guide to this proceeding, both to the parties and to the Commission, consistent with Commission precedent.¹⁷ As an administrative matter, without staff playing this role, the Commission will be hard-pressed to achieve the mandate set forth by the General Court in HB 1116.

Moreover, the Moving Parties have not established any case for either mandatory or discretionary designation under applicable law. Even if this were an adjudicative proceeding,¹⁸ the Moving Parties have not met the substantial burdens required for mandatory or discretionary designation. Mandatory designation is governed by RSA 363:32, I. Under this subsection, the Commission must designate only if staff “may not be able to fairly and neutrally advise the

¹³ *Verizon New Hampshire*, 87 NH PUC 11, 19 (2002).

¹⁴ *Id.*; see also *Public Service Company of New Hampshire*, Order No. 25,630 (February 14, 2014) at 5-7.

¹⁵ *Verizon New Hampshire* at 17-18 (2002) (quoting *Appeal of Office of Consumer Advocate*, 134 N.H. 651, 660 (1991); *Public Service Company of New Hampshire* at 6 (2014)).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See RSA 541-A:1 et seq.; see also *Appeal of Pennichuck Water Works*, [120 N.H. 562, 565-66, 419 A.2d 1080, 1083](#) (1980) (stating that in setting rates, the PUC is performing essentially a “legislative” function). This is not a “contested case” or “proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing,” but rather a legislative matter in which the Commission will rule on matters of general applicability. As such, RSA 363:32 neither applies nor can serve as the basis for a designation.

commission on all positions advanced in the proceeding.” While the Moving Parties invoke do subsection I, they do not even allege that Mr. Faryniarz, Mr. Wiesner, or Ms. Crampton (or any other staff member or consultant) will not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding.

Rather, the Moving Parties alleged that the Faryniarz rebuttal testimony “was indeed rebuttal in the sense that it critiqued and largely rejected the direct testimony filed by the parties in October”.¹⁹ Indeed, the Faryniarz rebuttal testimony evaluates and rebuts portions of all testimony previously filed in the docket, demonstrating staff’s ability to fairly and neutrally advise the commission on all positions advanced in the proceeding.²⁰ The Commission should therefore deny mandatory designation.

Under Subsection II, the Commission may designate staff “for good cause shown” while considering the factors in RSA 363:32, II. While the Moving Parties allege that “the proceeding is particularly controversial and significant in consequence” and that “the proceeding is so contentious as to create a reasonable concern about staff’s role”, the Moving Parties alone cannot manufacture the contention they would need to prevail here. Moreover, the Moving Parties’ mere allegation that designating Mr. Wiesner and Ms. Cramton as Staff Advocates would facilitate settlement discussions is unsubstantiated.

Furthermore, the Commission is specifically authorized to employ “such regular staff, including experts, as it shall deem necessary,” to both develop and promote proposals for resolution of issues before the Commission and “to advise the Commission fairly and neutrally as to the positions of the parties, the status of the docket, the law applicable to the situation, the policy considerations that should be taken into account, and other aspects of the case.”²¹ Staff is “entitled to the presumption that they are ‘of conscience and capable of reaching a just and fair result.’”²² This presumption of fairness “should not be lightly overcome,”²³ and is especially important in a proceeding such as this, which the Moving Parties acknowledge to be a broad proceeding directed by the legislature. The tariffs or policies to be developed will apply broadly

¹⁹ Motion at paragraph 5.

²⁰ See, e.g., the “further critiques” of TASC witness Beach, Faryniarz at 35:14-36:12, 52, 55, 63; see the discussion of “potential issues with the parties’ arguments regarding alternatives to demand/fixed charges” addressing testimony sponsored by EFCA, NHSEA, Eversource, CLF, and Unitil.

²¹ *Verizon New Hampshire*, 87 NH PUC 11, 19 (2002); see also *Public Service Company of New Hampshire*, Order No. 25,630 (February 14, 2014) at 5-7.

²² *Id.*

²³ *Id.*

and prospectively to the whole state; and will affect multiple classes of parties, multiple parties within each class, and all stakeholders in the electric industry, not just a specific utility, solar developer, or ratepayer. In such a proceeding, staff's role is to gather, assess, analyze, and summarize as many facts and positions as possible. Therefore the Commission should deny the motion.

Finally, the Moving Parties fail to complain of any harm. Indeed, some of the recommendations in the Faryniarz testimony are consistent with testimony or other statements by OCA – for example, support for time-of-use (TOU) rates instead of demand charges.²⁴ For the Moving Parties to file the motion is thus ironic – and the Commission should deny the Motion.

CONCLUSION

The Moving Parties have not presented any evidence that Mr. Faryniarz, Mr. Wiesner, and Ms. Cramton are unable to advise the Commission fairly and neutrally in this proceeding. The Moving Parties have failed to allege facts necessary for either mandatory or discretionary designation. Indeed, as a very practical matter of administration, given the scope of the proceeding, the Commission and the parties need the Commission staff to continue to serve in its expert role to achieve the mandate of HB 1116.

WHEREFORE, EFCA respectfully requests that the Commission deny the Motion.

Respectfully submitted

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²⁴ See New Hampshire Office of the Consumer Advocate, December 23, 2016, available at <https://www.facebook.com/newhampshireoca/posts/698895703605427> (Demand charges for residential electric customers are bad public policy... This is EXACTLY why the OCA supports experiments with TOU rates..."); D. Maurice Kreis, September 26, 2016, available at <https://twitter.com/DMoKreis/status/780566038064861184> (“I vote for the TOU rates.”)

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2017, seven copies of the foregoing were hand delivered to the Commission, as well as copies to the Service List as listed on the NHPuc website.

By: /s/ Anthony W. Buxton
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