

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 20-092

GAS AND ELECTRIC UTILITIES

2021-2023 New Hampshire Statewide Energy Efficiency Plan

Order on Motion for Rehearing of Order No. 26,415

ORDER NO. 26,458

February 19, 2021

In this order, the Commission grants the motion of the Office of the Consumer Advocate for rehearing of Order No. 26,415 (October 8, 2020), and designates Paul B. Dexter and Elizabeth R. Nixon as staff advocates pursuant to RSA 363:32, II.

I. PROCEDURAL HISTORY

On September 1, 2020, the Joint Utilities¹ filed the Second Triennial Statewide Energy Efficiency Plan (Plan) for review and approval by the Commission. On September 2, 2020, the Office of the Consumer Advocate (OCA), Acadia Center, and Conservation Law Foundation (collectively, the Movants) filed a motion to designate two members of the Commission's staff (Staff) as staff advocates (Designation Motion) pursuant to RSA 363:32. In the Designation Motion, the Movants claimed that the specified Staff members, Paul B. Dexter and Elizabeth R. Nixon, should not take an active role in the Commission's deliberative process due to their advocacy for particular policy outcomes during the process leading up to the filing of the Plan. On September 9, Clean Energy New Hampshire (CENH) filed a letter supporting the

¹ The "Joint Utilities" are Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty; New Hampshire Electric Cooperative, Inc.; Public Service Company of New Hampshire d/b/a Eversource Energy; Unitil Energy Systems, Inc. (UES); Liberty Utilities (EnergyNorth Natural Gas) Corp d/b/a Liberty; and Northern Utilities, Inc.

Designation Motion. The Commission heard oral argument on September 14. On that same day, Staff filed an objection (Staff Objection) to the Designation Motion.

The Commission declined to designate Mr. Dexter and Ms. Nixon, reasoning that the Movants complained only that Staff has a position regarding matters in the proceeding implicating our quasi-legislative function, to which the concerns of 363:32 do not apply. Order No. 26,415 (October 8, 2020) at 7. On October 16, the OCA filed a Motion for Rehearing of Order No. 26,415 (Rehearing Motion). No objections to the Rehearing Motion were received.

The Designation Motion, Staff Objection, Rehearing Motion, and other docket filings, except for any information for which confidential treatment is requested of or granted by the Commission, are posted at: <https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-092.html>.

II. REHEARING MOTION

The OCA moved for rehearing of Order No. 26,415 and reiterated its request for designation of Mr. Dexter and Ms. Nixon. Rehearing Motion at 19. The OCA asserted that, under the New Hampshire Administrative Procedure Act (APA), RSA Ch. 541-A, the Commission is limited to two procedural mechanisms, those used in adjudicative proceedings and those used in agency rulemaking. Rehearing Motion at 17. The OCA further argued that RSA 374-F:4, XI explicitly subjects administrative or adjudicative proceedings under the Electric Industry Restructuring Act, RSA Ch. 374-F, including setting the level of the system benefits charge (SBC), to RSA 541-A. *Id.* at 18. According to the OCA, all ratemaking proceedings before the Commission are adjudicative in nature.² *Id.* at 16.

² The OCA's arguments in favor of staff advocate designation, and those of Staff in opposition to designation, are summarized at length in Order No. 26,415 and will not be repeated here.

III. COMMISSION ANALYSIS

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief. Good reason may be shown by identifying new evidence that could not have been presented in the underlying proceeding, *O'Loughlin v. N.H. Personnel Comm'n*, 117 N.H. 999, 1004 (1977), or by identifying specific matters that were “overlooked or mistakenly conceived” by the Commission, *Dumais v. State*, 118 N.H. 309, 311 (1978). A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *Abenaki Water Company, Inc. – Rosebrook Water System*, Order No. 26,312 at 8 (November 27, 2019).

First, the OCA claims that there are only two types of proceedings that come before the Commission; adjudications and administrative rulemaking. We do not agree that the types of proceedings that come before us are so limited. The APA specifically contemplates more “procedural mechanisms” than the OCA claims are available to the Commission. *See e.g.* RSA 541-A:16, I(d)); *see also* RSA 541-A:29, II (a). In fact, the APA defines “nonadjudicative processes” as all agency procedures and actions other than an adjudicative proceeding. RSA 541-A:1, X. The breadth and scope of this definition encompasses a multitude of Commission actions, including certain rulings, actions on applications, petitions, and other requests that are not required to occur through an adjudicative process under the Act. *See e.g.* RSA 369:4.

As set forth in our underlying Order, it is clear that this proceeding involves both adjudicative and nonadjudicative components. To proceed as determined in our underlying order, we would be required to segment the proceeding into adjudicative and nonadjudicative parts pursuant to RSA 363:33 for purposes of applying the subdivision on Participation of Staff

in Adjudicative Proceedings, RSA 363:30-36, before proceeding with deliberations. We decline to do that at this juncture, finding it more expedient to treat the entire proceeding as adjudicative, thereby rendering RSA 363:30-36 applicable to all parts of the proceeding. After reviewing the factual record and relevant legal arguments, we conclude that it is appropriate to apply adjudicative procedures to the entire proceeding. Such an approach will lead to a fair and orderly resolution. Accordingly, we find that the OCA has stated good reason for rehearing of Order No. 26,415.

RSA 363:32 provides for designation of one or more of the Commission's staff as advocates, if requested by a party with full rights of participation in the proceeding, or upon its own initiative, whenever the Commission conducts an adjudicative proceeding in accordance with the provisions of RSA 541-A:31 through RSA 541-A:35. Designation is mandatory in some situations and discretionary in others. Pursuant to RSA 363:32, I, the Commission *must* designate members of its staff as advocates if it determines that they "may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding." We find that Mr. Dexter and Ms. Nixon are, as described by the OCA, "of conscience," and "professionals of integrity" and remain fully capable of fairly and neutrally advising the Commission on all positions advanced in this docket. The mere assertion that two Staff members sought to influence the EERS consensus building process does not, on its own, lead us to conclude that they could not fairly and neutrally advise the Commission. As the Commission has found in the past, statements contrary to a moving party's position do not necessarily provide a basis for mandatory designation. *See, e.g., Public Service Company of New Hampshire*, Order No. 25,630 at 9 (February 14, 2014) (citing *Public Service Company of New Hampshire*, Order No. 25,305

at 3 (December 20, 2011)). Consequently, we will not designate Mr. Dexter or Ms. Nixon staff advocates under RSA 363:32, I.

Under RSA 363:32, II, the Commission *may* designate one or more members of its Staff as a staff advocate in an adjudicative proceeding if it finds good reason to do so. The statute enumerates three non-exclusive factors to consider in determining whether good reason exists for such discretionary designation: (1) whether the proceeding is particularly controversial and significant in consequence; (2) whether the proceeding is so contentious as to create a reasonable concern about staff's role; and (3) whether it appears reasonable that such designations may increase the likelihood of a stipulated agreement by the parties. RSA 363:32, II.

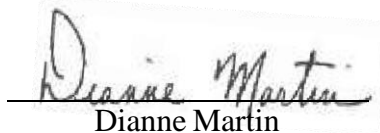
We find that that there is good reason for granting the request to designate in this proceeding. At this juncture, we find it more expedient to treat the entire proceeding as adjudicative. Accordingly, we designate as staff advocates Paul B. Dexter and Elizabeth R. Nixon, pursuant to RSA 363:32, II.

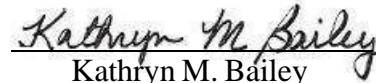
Based upon the foregoing, it is hereby

ORDERED, that the Motion of the Office of the Consumer Advocate for rehearing of Order No. 26,415 is GRANTED as set forth above; and it is

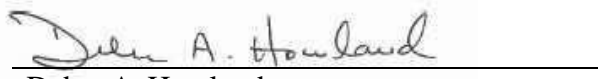
FURTHER ORDERED, that, upon reconsideration, Paul B. Dexter and Elizabeth R. Nixon are designated as staff advocates pursuant to RSA 363:32, II, and will not advise the Commission during its deliberations on the merits of this proceeding.

By order of the Public Utilities Commission of New Hampshire this nineteenth day of
February, 2021.


Dianne Martin
Chairwoman


Kathryn M. Bailey
Commissioner

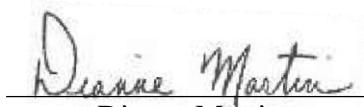
Attested by:


Debra A. Howland
Executive Director

CONCURRING OPINION OF DIANNE MARTIN, CHAIRWOMAN

While I concur in the Commission's reasoning and decision to designate the requested staff members as staff advocates, I believe additional good reason exists for designation. This proceeding is, without question, particularly controversial and significant in consequence, which constitutes good reason for designation under the plain language of RSA 363:32, II.

I write separately to emphasize my belief that the Commission should conscientiously exercise its discretion to designate staff members as either decisional employees or staff advocates in our adjudicative proceedings.³ Clearly delineating the roles of participating staff members so that the commissioners, staff members, parties, and the public have greater clarity regarding the function of staff members is in the public interest. Such efforts increase the transparency of our process and make it easier for the public, the parties, and the Commission to understand the roles of Commission members assigned to each proceeding. To that end, I agree with the 2012 Performance Audit Report of the Legislative Budget Assistant, which recommended the Commission reevaluate its designation practices in this regard.


Dianne Martin
Chairwoman

³ By law, commissioners are decisional employees. *See* RSA 363:30 ("Decisional employee" means any commissioner, presiding officer or staff member in an adjudicative proceeding who is specifically assigned to render a decision or make findings of fact and conclusions of law or to assist or advise the commission or presiding officer with respect to issues of law, fact or procedure, in accordance with this subdivision.) As a decisional employee in an adjudicative proceeding, I am expressly prohibited by law from communicating with any person or party, directly or indirectly, in connection with any issue in that proceeding, except upon notice and opportunity for all parties to participate. *See* RSA 363:34. I may, however, communicate with other commissioners and staff who are also decisional employees, and personal assistants. *Id.*

CONCURRING STATEMENT OF COMMISSIONER KATHRYN M. BAILEY

I concur in the Commission's decision to designate two Commission Staff members as staff advocates in this particular adjudicatory proceeding, under the discretionary provisions of RSA 363:32, II. I write to address the concurring statement of my colleague, which expresses her belief that the Commission needs to exercise its discretion to designate the roles of Commission Staff members so that Commissioners, Staff, parties, and the public have greater clarity regarding the roles of those involved in adjudicatory proceedings.

Taken to its logical conclusion, that belief might require designation of each participating Staff member as either decisional or advocate in every adjudicative proceeding. That practice is not required by the statute and, as the legislature recognized in 2010, would create the need for significantly more Staff members with a corresponding increase in the Commission's budget and utility assessments, ultimately resulting in higher rates charged to utility customers.

RSA 363:30, VII defines "Staff" as "the employees of the commission and any consultants and other contractors retained by the commission for the purpose of assisting the commission and its employees in providing advice or information, or for the purpose of supplementing the work of the commission and its employees." That definition contemplates that Staff will support and supplement the work of the Commission through independent investigation, provision of information, development of a record for decision, and the provision of advice to the Commissioners.

Unless specifically designated as a staff advocate or decisional employee under RSA 363:32, Staff has traditionally performed and continues to perform each of those various functions. In effect, Staff performs a dual role in litigated proceedings, which includes both a role in the development and promotion of proposals for resolution of issues before the

Commission and a role in providing fair and neutral advice to the Commission regarding parties' positions. *See Public Service Company of New Hampshire*, Order No. 25,954 at 2 (October 18, 2016); *see also Appeal of Office of Consumer Advocate*, 134 N.H. 651, 659-660 (1991). In the performance of those various duties, Staff is afforded the presumption of fairness which "should not be lightly overcome." Order No. 25,954 at 3.

During my 32-year tenure at the Commission, the practice has been that Staff publicly provides information to the Commission in adjudicatory proceedings. Staff investigates petitions, conducts discovery, identifies relevant issues, provides written and oral testimony, submits written filings, and otherwise ensures there is a complete and balanced record for decision. The parties benefit when Staff provides information publicly because it affords them an opportunity to respond. *See* Hearing Transcript December 22, 2020 at 30-34, *See also* Day 7 Hearing Transcript, March 27, 2018, in DG 17-048, at 77-79. The Commission benefits from a more complete record of issues that are raised by the parties and Staff, which are fully vetted in litigated dockets. *See Generic Investigation into IntraLATA Toll Competition Access Rates*, 77 NH PUC 553, 555 (1992) (describing Commission's practice to have Staff present its advice through expert testimony in an "adversarial" setting, thereby allowing any party which may disagree to test the accuracy and theoretical basis of that advice through cross-examination and rebuttal testimony, all in order to provide "a better balanced record from which the Commission can make a decision").

RSA 363:34 and :35 clarify that, when a Staff member is designated to serve as either a staff advocate or a decisional employee, specific restrictions apply to ex parte communications. The definitions of "decisional employee" and "staff advocate" are clear that a Staff member will fall into one or the other category only if he or she is "specifically assigned" to that limited role.

RSA 363:30, III, VIII. The Commission must make a list of all current designations available to the public. RSA 363:32, IV. The specific ex parte communication rules in RSA 363:34 cannot be read to prohibit communications between Commissioners and Staff members who, by definition and design, are expected to provide advice to the Commission, unless those Staff members have been specifically designated as staff advocates. Instead, the specific ex parte communication restrictions in RSA 363:34 and :35 must be interpreted within the context of the entire RSA 363:30-36 statutory subdivision, read as a whole, to apply only when Staff members have been specifically designated to serve as decisional employees and/or staff advocates. To read that provision any other way would render irrelevant the definition of Staff, and legislators must not be presumed to have included meaningless words.

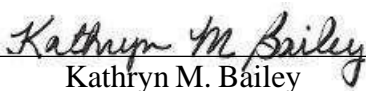
If any reasonable ambiguity could be found in the meaning of these statutory provisions, we would look to the legislative history of the RSA 363:30-36 statutory subdivision. In 2010, the legislature considered statutory changes that would have required routine designation of Staff in adjudicative proceedings and it received testimony describing Staff's traditional dual roles as both active participants in dockets and as direct advisors to the Commissioners. That testimony also emphasized that the proposed amendments would require significant increases in Commission staffing needs and related personnel costs. The legislature ultimately passed amended legislation that avoided such cost increases by requiring staff advocate designations only in the limited situations where specific Staff members "may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding." RSA 363:32, I.

The statute, as amended in 2010, also provides discretion to designate specific Staff members as staff advocates for good reason. If the commission were required to designate Staff as staff advocates in every adjudicative proceeding, there would be no reason for that discretion.

The statute also provides the Commission with the discretion to designate decisional employees. The fact that the statute uses permissive and discretionary language, rather than mandatory language, implies that any Staff members who are not specifically assigned to serve as staff advocates may advise the Commission consistent with their duties as contemplated in the definitions.

I believe that the routine designation of Staff members as staff advocates or decisional employees would severely impede the efficient functioning of the Commission and its ability to process dockets and issue decisions. The Commission's productivity would be substantially impaired and the quality of Commission decisions would be adversely affected. Simply put, the Commission was not and is not set up to operate that way, and the legislature was well aware of the agency's structure and organization when it most recently amended the statute.

In order to implement Staff designation in every litigated docket, the number of analysts and legal personnel would need to be increased dramatically. Such fundamental changes would tend to reduce the efficient and effective operation of the Commission, while greatly increasing the total costs of its operation. That is not required under current law and so I must take this opportunity to speak against it. I will therefore continue to work with any Staff member not specifically designated as a Staff advocate.


Kathryn M. Bailey
Commissioner

Service List - Docket Related

Docket#: 20-092

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