

DT 01-028

VERIZON-NEW HAMPSHIRE

Intrastate Switched Access Rates

**Order on Office of Consumer Advocate's Motions
to Designate and For Hearing**

O R D E R N O. 23,893

January 11, 2002

APPEARANCES: Gregory M. Kennan, Esq., on behalf of Verizon New Hampshire; Devine Millimet & Branch, Frederick J. Coolbroth, Esq., representing Merrimack County Telephone Co., Granite State Telephone Company, Inc., Dunbarton Telephone Co. Inc., Northland Telephone Company of Maine, Inc.; Bretton Woods Telephone Co., Inc., and Dixville Telephone Co.; Robert J. Aurigema, Esq, on behalf of AT&T Communications of New Hampshire; Marcia A.B. Thunberg, Esq., on behalf of the Office of Consumer Advocate; and, representing the Staff of the Public Utilities Commission, Lynmarie Cusack, Esq..

I. INTRODUCTION AND BACKGROUND

On January 31, 2001, Verizon-New Hampshire (Verizon NH) filed a proposal to address RSA 378:17-a, III, Intrastate Switched Access Rates. The Commission issued an Order of Notice on March 1, 2001 establishing a deadline for intervention requests and a scheduling a prehearing conference date of March 28, 2001. The Office of Consumer Advocate (OCA) notified the Commission on March 5, 2001 that it would be participating in the case on behalf of residential ratepayers. Sprint Communications, WorldCom and AT&T filed intervention requests.

On March 16, 2001, OCA filed a Motion to Dismiss. Objections to said motion were filed by Verizon, Commission Staff (Staff) and AT&T. A prehearing conference was held as scheduled on March 28, 2001, at which time the Commission heard oral arguments concerning OCA's Motion to Dismiss. On June 14, 2001, the Commission issued Order No. 23,727 denying the Motion to Dismiss and directing the parties and Staff to meet to establish a procedural schedule to govern the duration of the case.

On July 31, 2001, Staff submitted a letter to the Commission indicating that agreement had been reached on a procedural schedule which was to conclude with a hearing on September 16, 2001. Thereafter, the Commission received additional written communications from Staff requesting modifications to the procedural schedule primarily to afford the parties and Staff the opportunity to continue settlement discussions. In response, the Commission issued a secretarial letter establishing a settlement conference on October 23, 2001.

On October 22, 2001, Verizon filed a letter with the Commission requesting that the instant proceedings be deferred until the Commission completed its audit of Verizon. That same date, the Commission notified the parties and Staff via

secretarial letter that the October 23, 2001 settlement conference should proceed as scheduled, and that the Commission will consider a motion to defer upon receiving a pleading in conformance with Commission rules. On October 24, 2001, Staff submitted a letter to the Commission indicating, *inter alia*, that settlement of the docket in the near future was unlikely.

On October 25, 2001, the Office of Consumer Advocate (OCA) filed a Motion for Designation of Employee (Motion to Designate) in this docket. Specifically, OCA requests the Commission to designate its Chief Engineer (and now also Director of the Telecommunications Division)(hereinafter Telecommunications Director) as a Staff Advocate in this proceeding. On October 31, 2001, Staff filed its Objection to the OCA Motion to Designate Commission Employee (Objection) and Motion to Strike certain portions of OCA's Motion (Motion to Strike). On October 31, 2001, Verizon filed a response to the OCA motion (Verizon Response). On November 1, 2001, OCA responded to Staff's Objection and its Motion to Strike. No other party filed a position with respect to the OCA Motion to Designate.

On October 31, 2001, OCA filed a Motion for Evidentiary Hearing, seeking an evidentiary hearing on its

Motion. OCA recited in its cover letter, pursuant to Puc Rule 203.04 (e), that Verizon-NH (Verizon) opposes the Motion for Evidentiary Hearing, that Staff and the Independent Telephone Companies do not concur in the request for an evidentiary hearing, and that no other party responded to OCA's request for concurrence in this request.

II. POSITIONS OF THE PARTIES

A. OCA

OCA requests that the Telecommunications Director be designated as a Staff advocate pursuant to RSA 363:32, I(a)(1), (2) and (3), or in the alternative pursuant to RSA 363:32, II. OCA further raises unspecified claims that residential customers' due process rights and statutory rights under 42 U.S.C.A. § 1983 will be violated if the relief sought is not granted.

OCA argues that the Telecommunications Director should be considered a "co-party" with Verizon. OCA argues that Telecommunications Director Bailey requested Verizon to file a plan to reduce intrastate access rates to the interstate level pursuant to HB 387, codified as RSA 378:17-a (effective June 2, 2000). This assertion is based on a statement to that effect by Verizon in a letter to the Commission dated October 22, 2001, a copy of which is attached

to OCA's motion. OCA further recites its belief that Verizon would not have filed the instant case if the Telecommunications Director had not agreed to support Verizon's request for increased rates to residential customers in the event access charges to wholesale suppliers were lowered. OCA goes on to argue that Verizon and the Telecommunications Director should be considered "co-parties" to this case, noting that the Commission Staff has no independent authority to open dockets or request that utilities file a docket. OCA argues that Staff's responsibility pursuant to RSA 363:17-a and RSA 363:31, VII, is to assist the Commission to balance the interests of the customer and the utility, and that in order to fulfill that responsibility, Staff may not determine its position on a filing before the case is completely filed and examined. OCA continues with the assertion that, given these responsibilities, the Telecommunications Director may not participate as a witness, citing concepts of constitutional due process and statutory claims under 42 U.S.C.A. §1983 (forbidding deprivation of civil rights under color of state law).

OCA further alleges that the Telecommunications Director throughout the last six months "in a number of

dockets and situations...has committed personal attacks on members of the OCA Staff and humiliated them in front of others." OCA states that "these statements over time have humiliated and intimidated and are considered hostile and inappropriate..." Motion to Designate at 4-5. OCA further asserts that as a result of the alleged statements, it "cannot participate in a meaningful way, receive a meaningful hearing as referred by Law." Motion to Designate at 5, citing Portsmouth Savings Bank & Trust, 123 N.H. 1 (1983). OCA argues that if the Commission were to rely on testimony or input from the Telecommunications Director, it would raise issues as to whether residential consumers' civil rights were denied under color of state law, as prohibited by 42 U.S.C.A. §1983, and "Constitutional due process."

In the OCA's response to the Staff Objection, at 2-3, OCA summarizes its position that because of the Telecommunications Director's alleged actions, comments and statements about the OCA, and attitude towards OCA, the Commission should determine that (a) the Telecommunications Director has committed or is likely to commit to a highly adversarial position on raising residential rates to lower access charges, and she may not be able to fairly and neutrally advise the Commission on these issues, (b) the

docket concerns matters that are particularly contentious or controversial with significant consequences, and (c) the issues in the docket are so contentious as to create a reasonable concern on the part of the OCA about the Telecommunications Director's role in advising the Commission on these issues. OCA asks that pursuant to RSA 363:32, I (a)(1), (2) and (3), the Commission designate the Telecommunications Director as a staff advocate in this proceeding, or in the alternative, pursuant to RSA 363:32, II, the Commission designate the Telecommunications Director as Staff advocate. Motion to Designate at 5.

B. Staff

Staff argues that OCA's motion is without merit. Staff Objection at 1. Staff observes that the statute under which this case is being conducted, RSA 378:17-a, at paragraph III indicates that this Commission "should as soon as possible" consider reducing intrastate access charges after the federal government significantly reduces interstate access charges. As a result of the passage of the statute, the Staff contemplated how to effectuate the General Court's instruction to consider reducing intrastate access charges, given the FCC's substantial reduction to interstate access charges on

July 1, 2000.¹ Staff, along with a member of the OCA, met with Verizon in August 2000, to discuss proposals for implementation of the statute. It was Staff's understanding that subsequent to the meeting the Company would file a proposal. The letter from Telecommunications Director Bailey to Verizon, noted in OCA's motion, was sent to Verizon after a period of time had elapsed since the date Staff expected Verizon to file its proposal, pursuant to the August discussion of how to proceed. Staff Objection at 2.

Staff counters OCA's allegation that Verizon would not have filed its access recommendations absent an agreement that residential rates could be raised to offset lower access rates, by noting that Verizon has throughout the proceeding voiced its opposition to reducing access charges at all. Staff Objection at 3. Staff points out that the transcript from the prehearing conference reveals that Verizon asserted that there were "very good reasons not to reduce access rates," and that the transcript has many statements of Verizon's position that the Commission take no action on its filing. Id. citing, Trans. at 17, 35, and 36. Staff denies

¹ The FCC reduced switched access rates to \$.015 end to end Minutes of Use (MOU) on July 1, 2000. On July 1, 2001 the FCC completed the CALLS plan to reduce interstate switched access levels to approximately \$.011 end to end MOU. The intrastate access rate on July 1, 2000 was \$.058 end to end MOU and remains unchanged to this day.

OCA's assertion that the Telecommunications Director agreed before Verizon's filing to a proposal to lower access rates on condition of raising residential basic rates, arguing that had such an agreement been made, it would have been filed already in the docket as a (partial) settlement. Id.

Staff argues that the statute at issue in this docket expressly contemplates a possible increase in residential basic rates, implying that should any member of Staff take a position in favor of such an increase in the context of a decrease in access rates, such a position would be consistent with a sound interpretation of statutory intent. Staff argues, however, that a factual review of the procedural and substantive background of this docket reveals no prior commitment on the part of any member of Staff to any specific outcome. Therefore, Staff argues, the OCA's claim is without merit. Staff Objection at 4.

Staff further notes that OCA was aware of the circumstances by which the docket was initiated, not only because of its participation in the August meeting, but because the question of whether the docket should proceed was raised and discussed in light of the OCA Motion to Dismiss, filed in March, 2001. Staff Objection at 2. Staff goes on to argue that if the OCA had a true basis for its claim that the

Telecommunications Director was a "co-party" with Verizon, it should not have waited until the 11th hour to come forward with the allegation. Staff argues that the OCA possessed the information it alleges since the docket was initiated, and that therefore the claim for equitable relief should be denied, " given the unreasonable delay and the prejudice it causes." Staff Objection at 4.

Staff objects to OCA's Motion to Designate on the further ground that it is inconsistent, on the one hand arguing that the Telecommunications Director cannot appear as a witness, and on the other hand arguing that the Telecommunications Director should be designated as a Staff Advocate, one of whose roles under the statute on bifurcation is to appear before the Commission as a witness. Staff Objection at 5. To the extent OCA is suggesting that the Telecommunications Director should not participate in the case in any role, Staff contends that this is not a form of relief to which the OCA is entitled under any reading of the bifurcation statute. Id.

Staff counters the OCA's asserted constitutional and civil rights claims, citing *Appeal of Office of Consumer Advocate*, 134 NH 651 (1991), and *Appeal of Maddox*, 133 NH 180, 182 (1990). Staff argues that OCA has provided no

factual allegations that would support a claim that the Telecommunications Director has prejudged the merits of the case, Staff Objection at 5-6, and notes in any event that the Commission is entitled to have the advice of Staff members who have developed a point of view on the industries subject to its jurisdiction based on their expertise and experience. Id. at 6. Staff argues that the case on which OCA grounds its due process claims concerning the Telecommunications Director's asserted hostile comments, *Portsmouth Savings Bank*, does not stand for the proposition advanced by OCA, and indeed stands for the proposition that the Telecommunications Director should participate in the case and be cross-examined on her views.

Staff counters the allegations of hostility on the part of the Telecommunications Director with the assertion that the Telecommunications Director has repeatedly tried to negotiate the OCA's concerns, and with the observation that as a member of the Staff team, she adopted and pursued the OCA's proposal that an audit should be conducted before the Commission considered the possibility of raising basic rates if access rates are lowered. Id. Staff concludes that the OCA has not overcome the presumption that the Telecommunications Director can perform her duties with

fairness, and urges that the Commission deny the motion to designate her as a staff advocate.

Staff further moves that all references to statements made by the Telecommunications Director during settlement discussions be stricken from OCA's Motion to Designate, in order to preserve the confidentiality of settlement discussions. Motion to Strike. OCA replies that confidentiality may be breached under the PUC rules where the information is being used to demonstrate bias on the part of a witness or party. OCA Response to Motion to Strike, at 4.

C. Verizon

Verizon contends that the Commission should disregard OCA's Motion to Designate. Verizon argues that OCA's personal attacks on the Staff and parties "fail to hide the lack of substance in its positions." Verizon Response at 5. Characterizing OCA's argument as a criticism of the Telecommunications Director and Verizon for "attempting...to reach a negotiated settlement of this matter," id., at 6, Verizon points to the administrative procedures act's encouragement of negotiated settlements, RSA 541-A:39. Verizon implicitly criticizes what it characterizes as OCA's "ad hominem" litigation of this docket. Id. Verizon states that OCA has falsely alleged that Verizon and Staff were

furthering a conspiracy, whereas in fact they were attempting, with the other parties to the case, to negotiate a settlement that would implement the statutory policies on access, which recognize the potential necessity to increase basic exchange rates if wholesale access rates are reduced. Id. Verizon notes that AT&T recognized the contribution of "the good offices of the Commission Staff" to the settlement process. Id., n. 3. According to Verizon, these efforts "should be commended, not condemned." Id. at 6.

III. COMMISSION ANALYSIS

A. Request for Evidentiary Hearing on Motion

We first take up the question of OCA's motion for an evidentiary hearing on its Motion to Designate. OCA does not cite, and our rules do not contain, a provision requiring the Commission to conduct an evidentiary hearing on a motion. Cf. Rules, Puc 203.04. The New Hampshire Supreme Court has made it clear that a Superior Court judge does not abuse his discretion in denying a request for an evidentiary hearing on a motion where the moving party failed to submit any memorandum, brief statement, or offer of proof "to demonstrate what facts or additional information he would have presented at the hearing if he was given the opportunity." *Provencher v. Buzzell-Plourde Associates et al.*, 142 N.H. 848, 852

(1998). Here, with two exceptions, the OCA provided only conclusory assertions in its Motion to Designate as to so-called hostile statements, comments and actions by the Staff member in question. The OCA did not provide further specifications in the Motion for Evidentiary Hearing, but merely referred back to the allegations in the Motion to Designate, and cited unspecified additional comments that could be shown in an evidentiary hearing. OCA Response at 4.

Thus, other than the two specific examples of alleged hostile comment or behavior cited in the Motion to Designate, the OCA has not provided a sufficient offer of proof of what specific disputed facts it would adduce at an evidentiary hearing. Staff does not deny the specific comments or behaviors alleged by OCA in its Motion to Designate, but vigorously objects to the characterization of those comments and behaviors, and the inferences as to the Telecommunications Director's attitude towards OCA that should be drawn from them. The only factual assertion by Staff in direct opposition to a factual assertion of the OCA is the statement that on no occasion did the Telecommunications Director "deliberately set out to humiliate or intimidate any member of the OCA." Nothing that the OCA has alleged in its Motion to Designate would support a contention that any member

of Staff did any of the acts alleged with the ill intent ascribed to Staff by the OCA. Further, there is no need for an evidentiary hearing to determine fairly the implications of the alleged statements and conduct of the Staff member in question, and the OCA motion for an evidentiary hearing on its Motion to Designate is denied.

B. Grounds for Motion to Designate

We turn next to a consideration of whether the undisputed facts alleged in the OCA's Motion to Designate demonstrate a level of hostility or bias against the OCA and its position sufficient to overcome the presumption that the Telecommunications Director is "of conscience and capable of reaching a just and fair result." *Appeal of Office of Consumer Advocate*, 134 NH 651, 660 (1991), *citing Appeal of Maddox*, 133 NH 180, 182 (1990).²

² We do not address the OCA's assertion that its due process and constitutional civil rights have been violated, because the OCA did not specify the manner in which the alleged conduct by the Staff member would violate such rights, and did not offer case law to demonstrate that such conduct rose to the level of a violation of due process or civil rights. As noted by Staff in its Objection, the case cited by OCA in support of its due process claim, *Portsmouth Savings Bank & Trust*, 123 NH 1 (1983), stands rather for the proposition that due process is a flexible concept, adapted to the circumstances of a given proceeding. *See also, Appeal of Public Service of New Hampshire*, 122 N.H. 1062, 1073 (1982); *State v. Chick*, 141 N.H. 503, 504 (1996) (insufficient elaboration of constitutional claim waives argument).

The statute, RSA 363:32, I(a), provides that the Commission shall designate Staff on the request of a full party when:

(1) It appears that Staff members have committed or are likely to commit to a *highly* adversarial position in the proceeding, and may not be able to *fairly and neutrally* advise the commission on all positions advanced in the proceeding;

(2) The docket concerns an issue or matter which is *particularly* contentious or controversial and which is significant in consequences;

(3) The issues in the docket are so contested as to create *reasonable* concern on the part of any party about the Staff's role in commission decision making; or

(4) It appears reasonable that such designations may increase the likelihood of a stipulated agreement of the parties.

Id. (emphasis supplied).

The OCA did not request designation under paragraph 4, so we do not discuss it, other than to note that this provision of the designation statute recognizes and reinforces the favorable view of settlement in Commission dockets that Verizon references in its response to the OCA's motion.

We then turn to a discussion of the application of the remaining three paragraphs. Paragraphs 1 and 3 emphasize the role the Staff plays in the Commission's deliberative process. The concern expressed in paragraph 1 as to whether the Staff has committed to "a highly adversarial position in the proceeding" is linked to the underlying concern that the

Staff be able to "fairly and neutrally advise the commission on all positions advanced in the proceeding." Similarly, the concern expressed in paragraph 3 is not whether the proceedings are contested, but rather whether they are "so contested" as to create "reasonable concern on the part of any party about the Staff's role in commission decision making." In both paragraphs, the concern is that the Staff be able to fairly and accurately characterize and analyze the competing positions in the case, and overall to maintain its professional objectivity when responding to questions by the Commissioners during their deliberation and determination of the docket. Thus, how adversarial and how contested the proceedings must be in order to merit designation under RSA 363:32, I(a) (1) and (3) is a function of the impact of such litigiousness on the ability of Staff to assist the Commission fairly in the decisionmaking process.

Paragraph 2 of the statute does not contain an express link between, on the one hand the level of contention or controversy and significance of consequences, and on the other hand the Staff role in Commission decision making. However, the Staff is employed to assist the Commissioners, and has no independent authority to make binding decisions with regard to cases before the Commission. The Commission is

authorized to organize the Staff as the Commission determines "best achieves its statutory responsibilities." RSA 363:27. The decision making role is explicitly given to the Commissioners, not the Staff, even in cases where the Commission designates Staff to hear a case and make a hearing officer's report. RSA 363:17-a, 363:17. Thus, paragraph 2 of RSA 363:32, I(a) must be read in light of Staff's role in providing professional and expert advice to the Commissioners. As with paragraphs (1) and (3), then, the level of contention and controversy, and the significance of the consequences, are factors in assessing whether a Staff member can fairly and neutrally advise the Commissioners.

Certainly, a claim of controversy or significant consequences may be made regarding most of the matters brought before the Commission. One could, for example, view any contested case as contentious. However, paragraph (2) of the designation provision requires that a case be "particularly contentious." Similarly, we understand the statutory reference to significance to require that more be at stake than in the ordinary case. Each case is undoubtedly significant to the individual petitioners and consumers who appear before us, and some more general standard is required if the statutory scheme is to have meaning.

An example of a particularly contentious and significant case would be Docket No. DE 99-099, the Commission's review of the Settlement Agreement between Northeast Utilities, Public Service Company of New Hampshire and the Governor, the Attorney General and the Commission Staff. In that docket, several members of the Commission's Staff and consultants to the Commission were designated as staff advocates. The controversy and consequences of that docket were unquestionably significant: the Settlement Agreement proposed the resolution of over a dozen pending dockets, including a base rate investigation and several long-standing controversies, and the dismissal of federal district court litigation where the Commission and individual Commissioners were themselves named defendants. While every request for bifurcation on the basis of RSA 363:32, I(a)(2) need not match the same level of controversy and consequence as existed in DE 99-099, the movant does have a burden of demonstrating the particular contentiousness and the significance of each.

We thus turn to whether the Staff member in question can perform her duties with the requisite level of professionalism and objectivity, given the assertions as to the adversary nature of the positions she has taken in

negotiations, the contentiousness and significance of the issues, and the level of contest in the docket.

As noted above, the Staff, as much as Commissioners, are entitled to the presumption that they are "of conscience and capable of reaching a just and fair result." *Appeal of Office of Consumer Advocate*, 134 NH 651, 660 (1991), *citing Appeal of Maddox*, 133 NH 180, 182 (1990). If the Commission were required to bifurcate Staff under the designation statute every time a party raised an objection in a major contested case, not only would this give rise to impermissible bootstrapping on the part of the parties, but the Commission would be required to increase its Staff substantially, with a commensurate increase in its budget. Further, the Commission hires professionals, such as the Telecommunications Director, with due regard to their professional credentials, their demeanor, and their ability to provide fair and unbiased information and advice concerning cases. If a party were able to make unfounded allegations of bias or hostility, and, by invoking the bifurcation statute, succeed in depriving the Commission of its flexibility to deploy Staff as needed, the Commission decision making process would be severely hampered. For these reasons, the presumption of Staff's ability to

fairly and neutrally advise the Commission should not be lightly overcome.

With respect to the particular allegations in this case, we note first that the assertion that Staff and Verizon somehow conspired together to have Verizon file the instant docket, and then to achieve a specific outcome, is unsupported by any credible factual assertions. On that ground alone, we could ignore it. In the instant case, we add the observation that the Commission has a statutory responsibility to undertake a proceeding to implement RSA 378:17-a, III. This provision calls for the Commission to "consider" lowering access charges whenever there is a significant reduction in federal access charges. Staff assisted the Commission in commencing a proceeding for that purpose, when it met with OCA and Verizon to discuss the shape such a proceeding should take. OCA presents no credible factual assertions that Staff, in its discussions with Verizon and OCA regarding how the Commission should consider lowering access charges pursuant to RSA 378:17-a, III, dictated what form that filing should take. OCA misapprehends the role of Staff in assisting the Commission to carry out its statutory responsibilities, if it conflates a Staff effort to prompt a necessary filing by a utility with a conspiracy between Staff and that utility.

With respect to the allegations of hostile comment or behavior cited by the OCA in its Motion to Designate, none demonstrate a level of hostility or bias sufficient to overcome the presumption accorded to Staff that they are capable of acting fairly in any given case. In the case of the comment made during recent settlement negotiations, the comment itself, if true, indicates that it may have been provoked by undisclosed comments by the OCA Staff member assertedly the target of the remark. Further, parties should expect in the process of negotiating a case that exchanges will be candid. If the Telecommunications Director made the comment alleged, that one comment does not demonstrate bias as to the OCA overall or as to the outcome of the case, but rather it is equally plausible to conclude that the statement was a colorful way of characterizing the respective and opposing negotiating positions of Staff and the OCA in the settlement discussions.

Had the OCA demonstrated a consistent pattern of comments in a derogatory or insulting tone, perhaps its claim of bias would have had merit. *Cf. State v. Linsky*, 117 N.H. 866, 883 (1977) (denying motion to recuse, although observing that in retrospect "the trial court might wish that some of its remarks had not been made."); *but see Bricker v. Sceva*

Speare Memorial Hospital, 114 N.H. 229 (1974). But aside from unspecified allegations of a pattern of conduct, the OCA does not attempt to demonstrate that the particular comment proves anything but the fact that parties may have experienced a heated moment in a long and difficult negotiation.

As to the assertion that the Telecommunications Director slandered the OCA regarding its representation of its constituents in the last Verizon rate case, OCA provides no specific words that the Telecommunications Director allegedly uttered, much less specific words that would lead a reasonable person to conclude that anything the Telecommunications Director said in fact brought the OCA into disrepute. The assertion that an individual has committed a slander upon a party is not one the Commission will entertain based on such a vague and conclusory assertion.

The last particular factual allegation offered in support of the OCA's conclusions as to bias, that the Telecommunications Director in the last Verizon rate case, in 1989, "attempted a number of times to have the Consumer Advocate move from the table he was seated at," is attenuated in time and insignificant in implication, even if it were true. Thus this allegation, without more, does not support an assertion of bias or hostility on the part of the

Telecommunications Director, even if the facts are as stated in the Motion to Designate.

Finally, with regard to the assertion that Staff has developed a fixed point of view as to the outcome of the case, we note first that, as Staff points out in its Objection, Staff are not only entitled to develop views and opinions based on their experience, expertise, and knowledge gained from working on a case, but to the development of a view on policy. Such views are not inconsistent with fairly and neutrally advising the Commission on specific cases. See, e.g., *New Hampshire Milk Dealers' Association v. Milk Control Board*, 107 N.H. 335 (1996) (distinguishing adjudicative facts, about which decision makers may not have made up their minds before hearing all the evidence, from legislative facts and policy, about which the decision maker may fairly have firm opinions before the commencement of a case). Accord, *Appeal of Lathrop*, 122 N.H. 262 (1982); *Petition of Betty Sprague*, 132 N.H. 250, 267 (1989).

Staff have a dual role in proceedings before the Commission. They are expected to bring their expertise and experience to bear in developing proposals for resolution of issues before the Commission, and to promote those proposals in negotiations towards settlement where possible. They are

also expected 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. They continue 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.

The OCA misapprehends the role of Staff, implying throughout its pleading that the requirement of impartiality applicable to the Commission in RSA 363:12, II applies equally to Staff. This is simply not so. As we stated above, Staff are not decision makers. They are required, pursuant to RSA 363:12, V, to observe the same standards of fidelity and diligence that apply to the Commissioners, but it is not necessary that they observe the same duty of impartiality. Professional staff do not have to be impartial in order to be able to fairly and neutrally advise, and we will not impose such a requirement. Thus, even if there were facts alleged that were sufficient to demonstrate lack of impartiality in this case on the part of the Telecommunications Director, that alone would not have been sufficient to rebut the presumption

that the Director is able to fairly and neutrally advise the Commission.

Based on the above analysis, we determine that the OCA has not offered to prove facts that would lead a reasonable person to conclude that the Telecommunications Director has "committed to or [is] likely to commit to a highly adversarial position in the proceeding and may not be able to fairly and neutrally advise the commission on all positions advanced in the docket." RSA 363:32, I(a)(1). Nor does the docket concern "an issue or matter which is particularly contentious or controversial," within the meaning of RSA 363:32, I(a)(2). Nor would a reasonable person conclude that the issues in the case are so contested as to create "a reasonable concern on the part of any party about the staff's role in commission decision making." RSA 363:32, I(a)(3). Thus, we determine that the OCA has not established grounds sufficient to require designation of the Telecommunications Director pursuant to RSA 363:32, I (a)(1), (2) and (3).

With regard to the OCA's request that we designate the Telecommunications Director pursuant to our discretionary authority under RSA 363:32, II, we decline to exercise that authority. We believe that the Telecommunications Director

should continue to be involved to attempt to resolve outstanding issues between the parties should settlement discussions continue, and to provide analysis of the issues shared with the public and the parties through the medium of open testimony, should she so determine. We also believe that our ability to analyze the complexities of this docket will be impaired if we are deprived of the advice of our Telecommunications Director during the decision making aspects of the docket.

Based upon the foregoing, it is hereby

ORDERED, that the Motion of the Office of Consumer Advocate for Evidentiary Hearing, dated October 31, 2001, is DENIED; and it is

FURTHER ORDERED, that the Motion of the Office of Consumer Advocate for Designation of Employee, dated October 25, 2001, is DENIED.

By order of the Public Utilities Commission of New Hampshire this eleventh day of January, 2002.

_____	_____	_____
_____	Thomas B. Getz	Susan S. Geiger
Nancy Brockway	Commissioner	Commissioner
Chairman		

Attested by:

Debra A. Howland
Executive Director and Secretary