STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Electric and Gas Utilities

2021-2023 Triennial Energy Efficiency Plan

Docket No. DE 20-092

Motion for Designation of Staff Advocates Pursuant to RSA 363:32

NOW COME the Office of the Consumer Advocate ("OCA"), Acadia Center, and the Conservation Law Foundation ("CLF"), all either parties or putative parties to the docket, and move that certain members of the Staff of the Public Utilities Commission be designated as Staff Advocates in this proceeding pursuant to RSA 363:21. In support of this request, the Movants state as follows:

I. The Movants

OCA is a party to this proceeding pursuant to RSA 363:28, having filed a notice of participation on June 8, 2020 (Tab 3). CLF filed a request for intervenor status on September 1, 2020. Acadia Center intends to file such a motion. Both Acadia Center and CLF were granted intervenor status in the analogous administrative proceeding conducted three years ago. *See* Transcript of October 4, 2017 Prehearing Conference (Tab 15) in Docket No. DE 17-136 at 9. Accordingly, each of the movants is, or should be treated, as "a party with full rights of participation in the proceeding" within the meaning of RSA 363:32, I, which specifies who may seek the designations authorized by the statute.

II. The Legal Standard

RSA 363:32 provides that in an adjudicative proceeding, the Commission should designate certain members of its Staff as a "staff advocate" in certain circumstances. Pursuant to RSA 363:35, such a designation means that an affected Commission employee shall not "advise the commission, its presiding officer, individual commissioners, or any decisional employee designated as such in the same proceeding, with respect to matters at issue in the contested case."

Section 32 specifies three distinct grounds for such a designation.

Paragraph I refers to circumstances in which "such members of [the Commission's] staff may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding." Designation is mandatory in such circumstances.

Paragraph II refers to "good reason," including but not limited to situations in which "the proceeding is particularly controversial and significant in consequence," "the proceeding is so contentious as to create a reasonable concern about the staff's role," or "it appears reasonable that such designations may increase the likelihood of a stipulated agreement by the parties."

Paragraph III refers to a situation in which "such designation will contribute to the prompt and orderly conduct of the proceeding or is otherwise in the public interest." Designation under paragraphs II or III is discretionary, as demonstrated by the General Court's use of the phrase "may designate" in those paragraphs.

III. The Request

OCA, Acadia and CLF request that Commission employees Paul Dexter and Elizabeth Nixon be designated as Staff Advocates pursuant to RSA 363:32. In the opinion of OCA, Acadia, and CLF, the Commission must take this step because the grounds for designation in all three of the above-enumerated paragraphs of RSA 363:32 are satisfied. Our reasoning for this contention follows.

IV. The Situation

This docket concerns a request by all six of New Hampshire's electric and gas utilities, including the otherwise-unregulated New Hampshire Electric Cooperative, for approval of their jointly developed triennial plan for implementation of the state's Energy Efficiency Resource Standard ("EERS"). The proposed triennial plan would govern ratepayer-funded energy efficiency programs for the years 2021, 2022, and 2023.

It is part of New Hampshire's official energy policy as adopted by the General Court to "maximize the use of cost effective energy efficiency." RSA 378:37. But the EERS itself is a matter of Commission policy rather than legislative requirement. The electric industry Restructuring Policy Principles initially adopted by the General Court in 1996 authorize the Commission to approve a "nonbypassable and competitively neutral system benefits charge" (SBC) to fund "public benefits related to electricity" that include but are not limited to "energy efficiency programs." *See* RSA 374-F:3, VI (generally instructing the Commission to restructure the electric industry "in a manner that benefits all customers equitably and does not benefit one

customer class to the detriment of another"). All regulated electric and gas utilities must submit least-cost integrated resource plans to the Commission, which is obliged to consider "energy efficiency" as a policy priority when evaluating such plans for approval as in conformity with RSA 378:37. *See* RSA 378:39 (placing energy efficiency ahead of renewable energy sources and "all other energy sources" as policy priorities). Although RSA 374-F:8 directs the Commission to work at the regional and national level to advance New Hampshire's interests with respect to energy efficiency, although RSA 125-O:23 creates a Commission-administered energy efficiency fund to expend a limited amount of proceeds from the state's participation in the Regional Greenhouse Gas Initiative, although RSA 125-O:5-a tasks the Energy Efficiency and Sustainable Energy ("EESE") Board with promoting and coordinating energy efficiency programs in New Hampshire, and although sections 5 and 6 of RSA 374-F task the "legislative oversight committee to monitor the transformation of delivery of electric services" with monitoring and reviewing the state's energy efficiency programs, in particular "to determine what barriers exist to providing all-fuels, comprehensive energy efficiency savings to New Hampshire customers," the General Court has nowhere explicitly or implicitly *required* the Commission to adopt an EERS. In fact, the only legislative guidance in the EERS realm *limits* the Commission's authority to implement such a

standard.[1]

Therefore, to the extent New Hampshire has an Energy Efficiency Resource Standard, it is an exercise of the Commission's *discretionary* authority to oversee public utilities and determine just and reasonable rates. The Commission opened Docket No. DE 15-137 five years ago to consider whether to adopt an EERS and then took this historic step on August 2, 2016, via Order No. 25,932.[2]

In 2015, the Commission made clear that an EERS is intended to put the State on a path of "achieving all cost-effective energy efficiency." Order No. 25,932 at 1. But that objective is best understood as a Holy Grail of sorts; if nothing else, Order No. 25,932 made clear that the Commission intended to exercise strict oversight over the savings goals and resulting SBCs and LDACs (the LDAC being

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[1] Specifically, the concluding sentences of RSA 374-F:4, VI, which authorizes the imposition of an SBC, read as follows:

> Legislative approval of the New Hampshire general court shall be required to increase the system benefits charge. This requirement of prior approval of the New Hampshire general court shall not apply to the energy efficiency portion of the system benefits charge if the increase is authorized by an order of the commission to implement the 3-year planning periods of the Energy Efficiency Resource Standard framework established by commission Order No. 25,932 dated August 2, 2016, ending in 2020 and 2023, or, if for purposes other than implementing the Energy Efficiency Resource Standard, is authorized by the fiscal committee of the general court; provided, however, that no less than 20 percent of the portion of the funds collected for energy efficiency shall be expended on low income energy efficiency programs. Energy efficiency programs should include the development of relationships with third-party lending institutions to provide opportunities for low-cost financing of energy efficiency measures to leverage available funds to the maximum extent, and shall also include funding for workforce development to minimize waiting periods for low-income energy audits and weatherization.

By its terms, the RSA 374-F:4, VI limitation on the Commission's authority to use the SBC to fund the EERS is not applicable to the 2021-2023 triennium.

[2] Although Order No. 25,932 referenced RSA 4-E:1 and the resulting ten-year energy strategy (which endorsed the EERS concept) as the "catalysts" for Docket No. DE 15-137, the Commission made clear that ultimately it was acting pursuant to RSA 374:3 (general supervision of utilities) and RSA 378 (regulating utility rates and charges). *See* Order No. 25,932 at 45-48.

the gas equivalent of the SBC), in part by requiring the utilities to file successive triennial plans in their capacities as energy efficiency program administrators. *Id.* at 1-2, 52-54 ("[i]n addition to the cost effectiveness of the EERS measures, we must consider the impact on customers of funding the EERS through the SBC and the LDAC"), 56 (concluding that three-year planning periods are "long enough to afford more stability and continuity in program delivery" but "not so long as to limit the Commission's flexibility to adjust savings targets in response to changes in market conditions or other developments during that time"), and 59 ("when the three-year EERS plans are filed, we will review in advance and approve that spending only to the extent that it is just, reasonable, and least cost").

The advent of the EERS brought with it two significant changes to preexisting Commission policy. First, the EERS turned the key assumption of its predecessor "Core" energy efficiency programs on its head by doing away with the process of first establishing reasonable SBC and LDAC charges and then determining how much energy efficiency those charges were capable of funding. Under the EERS, the appropriate savings targets are established first and *then* the SBCs and LDACs fluctuate accordingly. Perhaps even more significantly, Order No. 25,932 cast the EESE Board in the role of stakeholder advisory body to collaborate with the program administrators on the development of triennial plans prior to their submission to the Commission for approval. *Id.* at 39-40 (Staff recommendation), 40 (joint program administrator recommendation), 41 (referencing settlement agreement adoption of the concept, including the hiring of

an independent consultant to assist the EESE Board), and 61 (concluding it is "appropriate" to involve the EESE Board, as a "collection of diverse energy stakeholders," in both EERS "planning and implementation").

This is precisely what occurred, both as to the initial triennial plan for 2018-2020 (approved by the Commission in Docket No. DE 17-136) and the 2021-2023 triennial plan that is now pending in the instant proceeding. In both instances, the EESE Board appointed and relied on an EERS Committee to undertake the detailed and exacting process of collaborating on draft triennial plans with the program administrators. In both instances, the Commission contracted with the Vermont Energy Investment Corporation to provide expert assistance to the EESE Board and the EERS Committee. In both instances, the EERS Committee deliberated and made recommendations to the EESE Board, which then conducted its own deliberations on the proposed triennial plan.[3]

In one key respect, the 2020 iteration of this stakeholder engagement process differed from its 2017 predecessor. That difference concerns the Commission Staff.

Both in 2017 and in 2020, no Commission Staff members were voting members of the EERS Committee. The reason for this is simple: Commission employees are advisors and resources for the agency that employs them and are not

[3] By design, the processes undertaken by the two successive iterations of the EESE Board and its EERS Committee were slightly different from each other. In 2017, the EERS Committee adopted and the EESE Board ultimately approved a detailed resolution outlining points of agreement and disagreement with the proposed triennial plan. In 2020, the EERS Committee simply conducted an up-or-down vote on the draft triennial plan (i.e., on a July 1, 2020 edition of the plan subject to certain modifications described by the program administrators), as did the EESE Board thereafter.

stakeholders in their own right.[4] *See, e.g.*, N.H. Code Admin. Rules Puc 203.01 (providing that when Commission Staff participates in adjudicative proceedings it is subject to the procedural rules "*to the same extent as* a party") (emphasis added). Commission Staff were invited to, and attended, meetings of the EERS Committee in both planning cycles. But in 2017, Staff avowedly took a hands-off approach to the Committee's deliberations, advising the chair of the Committee that the intention was to observe only. By contrast, in 2020 Commission Staff members were outspoken (albeit non-voting) participants in EERS Committee deliberations.

Specifically, as the key point of dispute emerged – the extent to which the new triennial plan should adopt aggressive savings targets, particularly in light of the ongoing COVID-19 pandemic – Staff Attorney Paul Dexter and Electric Division Analyst Elizabeth Nixon repeatedly and emphatically argued that the resulting increases to the SBCs and LDACs would be excessive. They expressed this concern at the outset of the Committee's informal discussions in early 2020 and reiterated it on virtually every available occasion as the plan coalesced – up to and including the meeting on August 3, 2020 at which the program administrators indicated they would adopt cumulative three-year savings goals of 5 percent for the electric utilities and 3 percent for the gas utilities as requested by other stakeholders.

[4] The director of the Commission's Sustainable Energy Division is a voting member of the EESE Board, but she has traditionally abstained from EESE Board votes on matters that will or may come before the Commission for decision. She thus abstained from the EESE Board vote on the 2021-2023 triennial plan.

OCA, Acadia, and CLF – all of which were among the stakeholders urging the program administrators to adopt ambitious savings targets for the upcoming triennium – do not contest the legitimacy of these concerns. Nor do OCA, Acadia, and CLF intend to criticize Staff for its forthrightness in articulating these concerns at meetings of the EERS Committee. However, we are mindful – and the Commission should be mindful – that ultimately the determination of savings targets, and the resulting near-term rate impacts, is fundamentally a policy determination. In late 2019, the Commission approved a new cost-benefit test (known as the "Granite State Test, which itself was the result of a Commission-administered consensus-seeking process among stakeholders (*including* Commission Staff)). *See* Order No. 26,366 (December 30, 2019) in Docket No. DE 17-136. Assuming that measures surviving cost-effectiveness screening under the Granite State Test are by definition cost-effective from the standpoint of ratepayers as a group, it follows that all SBC and LDAC dollars spent during the upcoming triennium on energy efficiency will save ratepayers money in the long term regardless of the savings targets that are approved. Therefore, the determination of what savings targets are appropriate is really a matter of figuring out how to balance near-term SBC and LDAC increases against long-term bill savings. It is not a matter of objective analysis, expert opinion, or even legal reasoning of the sort typically contributed by Staff to assist the Commissioners with the policy calls *they* must make.

V. The Situation as Applied to the Law

The facts and circumstances described above require the Commission to designate Mr. Dexter and Ms. Nixon as staff advocates pursuant to RSA 363:32. The request satisfies all three of the statutory grounds, each of which is an independent basis for adopting this designation.

The first ground involves a situation in which Staff members "may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding." Note that the language does not require a Commission determination that the Staff members *will* not be able to provide fair and neutral advice; the statute specifies that designation is appropriate when Commission employees *may* not be able to maintain the requisite neutrality. Both Mr. Dexter and Mr. Nixon abandoned any pretense of neutrality by repeatedly and emphatically stating their concern that the savings goals contemplated and ultimately endorsed by the EERS Committee were excessive.

Next, the statute requires designation when there is "good reason," a generic standard that explicitly includes situations in which "the proceeding is particularly controversial and significant in consequence" and/or "the proceeding is so contentious as to create a reasonable concern about the staff's role." That is precisely the situation of the instant proceeding. The deliberations of the EERS Committee during the first eight months of 2020 were highly contentious, with discussions focusing on how to improve New Hampshire's dismal standing (last in the northeast, according to the 2019 annual scorecard of the American Council for

an Energy Efficient Economy), how to achieve additional energy efficiency savings in light of escalating costs to achieve such savings, and (to be frank) the political implications of aggressive savings targets given the skepticism in some quarters about *any* ratepayer-funded energy efficiency and the argument that recurringly surfaces at the General Court that the SBC is really a tax (requiring legislative oversight) rather than a garden-variety utility rate (reasonably delegated the Commission's regulatory bailiwick).[5] In other words, this case may be the most controversial, significant, and contentious proceeding the Commission will hear during the remainder of 2020. In combination with the emphatic positions on the most controversial aspect of the triennial plan taken by Mr. Dexter and Ms. Nixon, this is a textbook case in which there is reasonable concern about the role of these Commission employees.[6]

Finally, the statute requires staff advocate designation when it "will contribute to the prompt and orderly conduct of the proceeding or is otherwise in the public interest." This resonates with language in the preceding "good reason" ground, which refers to situations in which "such designations may increase the likelihood of a stipulated agreement by the parties." Both Mr. Dexter and Ms.

[5] In this regard, the Commission should bear in mind that while the EERS Committee vote was unanimously in favor of the draft triennial plan, there were two dissenting votes at the EESE Board and each of those voters identified, as the basis of his vote, the lack of a legislative veto opportunity with respect to 2021-2023.

[6] OCA, Acadia, and CLF acknowledge that Mr. Dexter and Ms. Nixon are not the only members of the Commission Staff who have participated in meetings of the EERS Committee during 2020. However, their colleagues did not express any opinions about rate impacts arising out of the savings goals in the 2021-2023 triennial plan and, therefore, OCA and CLF lack a good-faith basis for seeking their designation as Staff Advocates. If appropriate, the Commission can conduct an internal inquiry and exercise its authority under RSA 363:32 to make such designations on its own motion.

Nixon are knowledgeable about energy efficiency and are deeply familiar with both the policy landscape and the relevant cast of characters. Their participation in settlement negotiations could contribute materially to the achievement of an agreement which, in a proceeding with a hard deadline of December 31 (because the new triennium begins the following day) would enhance the ability of the Commission to resolve the case in a prompt and orderly fashion. On the other hand, given the contentiousness and significance of this docket, OCA, Acadia, and CLF have little interest in negotiating with Commission employees who will be at liberty to participate thereafter in the Commission's internal deliberations.

The Commission last approved an RSA 363:32 designation in 2015, acting on its own motion as to the agency's Safety Division and its assigned counsel in a gas pipeline safety violation proceeding. *See* Order of Notice (June 5, 2015) in Docket No. DG 15-121 (Tab 5) at 2. The last time the Commission granted the request *of a party* for an RSA 363:32 staff advocate designation was in 2011. *See* Secretarial Letter (January 21, 2011) in Docket No. DE 10-195 (Tab 103) at 1.

More typical is the Commission's 2014 decision denying a designation motion interposed by OCA and several other parties concerning the prudence of the mercury scrubber installed by Public Service Company of New Hampshire ("PSNH") at Merrimack Station in Bow (several years before PSNH's divestiture of the coal plant and the utility's exit from the generation business). *See* Order No. 25,630 (February 14, 2014) in Docket No. DE 11-250 (Tab 164). Docket DE 11-250 was a highly controversial proceeding in which a Staff analyst and certain outside

consultants assisting him had developed testimony in support of PSNH's bid for recovery of all scrubber-related costs. The Commission ruled that to establish mandatory designation under paragraph I of RS 363:63, "the moving parties must demonstrate that the staff member in question has done something beyond simply stating a contrary position," i.e., a substantive position adverse to the one advanced by the movants. Order No. 25,630 at 9 (citations omitted).[7]

The comments made by Mr. Dexter and Ms. Nixon at numerous meetings of the EERS Committee went well beyond the mere statement of a position contrary to that of the EERS Committee. Indeed, at the time of the statements there was no position of the Committee; there were only ongoing discussions among stakeholders which Mr. Dexter and Ms. Nixon were (obviously) seeking to influence. In other words, they were not simply offering a position for the Commission to consider; they were seeking to have a *substantive impact*. Moreover, the objectionable testimony in the scrubber docket was factual in nature, focusing on PSNH's management of a major capital project. *See id.* at 2. Here, as noted *supra*, designation would not deprive the Commission of *in camera* consultation with experts on its payroll about factual matters; rather, designation would mean one set of policy preferences would

[7] The Commission also concluded in Order No. 25,630 that certain changes to RSA 363:32 adopted by the General Court in 2020 had the effect of granting the Commission new and "wide discretion in reviewing motions to designate." Order No. 25,630 at 7. As to Paragraph I, the Commission referenced the Legislature's removal of a requirement for the Commission to examine whether Staff members "have committed or are likely to commit to a highly adversarial position in the proceeding." *Id.* The movants here respectfully disagree with this interpretation of the revision to paragraph I of RSA 363:32. The deletion the requirement of a commitment (or likely commitment) to a highly adversarial position from the description of the circumstances requiring designation arguably reduces rather than expands the universe of circumstances in which the Commission may deny a designation request that invokes RSA 363:32, I.

not benefit from privileged treatment in the course of the Commission's deliberative process. Assuming *arguendo* that the Commission correctly concluded in 2011 that for RSA 363:32 purposes Staff is "entitled to the presumption that they are of conscience and capable of a just and fair result," *id.* at 6 (citations to prior Commission decisions and internal quotation marks omitted), such a presumption is neither challenged nor undermined by the mandatory designation called for in the instant motion.

As far as OCA, Acadia, and CLF are able to ascertain through diligent legal research, the New Hampshire Supreme Court has never opined about RSA 363:32. However, in *Appeal of Atlantic Connections, Ltd.*, 135 N.H. 510 (1992), the Court rejected Due Process and statutory arguments (the latter implicating the Administrative Procedure Act) related to the participation of Staff in the Commission's deliberative process. The bases of this rejection were (1) appellant's failure to preserve the issue by raising it before the Commission, and (2) the fact, undisputed in *Atlantic Connections*, that Staff assisted in the Commission's order-drafting process only after the Commissioners had decided the outcome of the case. *Id.* at 515-16. Here, the Commission can safely assume that by raising RSA 363:32 issues at the earliest possible juncture, the movants intend to preserve all available constitutional and statutory arguments about the propriety of allowing advocates for particular policy outcomes to take an active role in the Commission's deliberative processes.

VI. Conclusion

By invoking RSA 363:32, OCA and CLF do not question whether Mr. Dexter or Ms. Nixon are "of conscience;" indeed, our experience suggests they are professionals of integrity. Regardless of the sincerity of their desire to limit New Hampshire's progress toward all cost-effective energy efficiency, notions of basic fairness require them to be walled off from *ex parte* contact with the Commissioners as they decide how they will resolve the controversial policy questions this docket implicates. RSA 363:32 protects those notions of basic fairness, which is why the Commission should apply it here.

WHEREFORE, the Office of the Consumer Advocate, Acadia Center, and the Conservation Law Foundation respectfully request that this honorable Commission:

A. Grant the Motion to designate Staff Attorney Paul Dexter and Staff Analyst Elizabeth Nixon as Staff Advocates pursuant to RSA 363:32, and

B. Grant any other such relief as it deems appropriate.

Sincerely,

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September 2, 2020

Certificate of Service

I hereby certify that a copy of this Motion was provided via electronic mail to the individuals included on the Commission's service list for this docket.

D. Maurice Kreis