

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

DE 20-092

**Electric and Gas Utilities
2021-2023 Triennial Energy Efficiency Plan**

**COMMISSION STAFF'S OBJECTION TO MOTION FOR DESIGNATION
OF STAFF ADVOCATES PURSUANT TO RSA 363:32**

Staff of the Public Utilities Commission (Staff) hereby objects to the Motion for Designation of Staff Advocates Pursuant to RSA 363:32 (Motion), filed on September 2, 2020 by the Office of Consumer Advocate (OCA), the Conservation Law Foundation (CLF), and Acadia Center (collectively, Movants). The Movants seek to have the Commission designate as staff advocates the Electric Division's Elizabeth Nixon and Staff Attorney Paul Dexter, under the provisions of RSA 363:32 (Staff Designation Statute).¹ Motion at 3.

The Motion should be denied because, as described in more detail below, it fails to state any valid basis for mandatory designation of staff advocates under RSA 363:32, I, and it further fails to provide sufficient grounds for the Commission to designate staff advocates pursuant to its discretionary authority under RSA 363:32, II. For the purposes of this Objection, Staff assumes, but does not concede, that this is an adjudicative proceeding under RSA 541-A to which the Staff Designation Statute is applicable.²

1. The Motion States No Basis for Mandatory Designation of Staff Advocates Under the Staff Designation Statute

¹ On September 9, 2020 Clean Energy New Hampshire filed a letter of support for the joint motion that will not be addressed in this objection because it contains no arguments beyond those already asserted by the Movants and was styled as a letter of support rather than a motion. *See*, Puc 203.07(b)(requiring motions to be filed in the form of a pleading and contain the word "motion" in their title).

² *Cf. Development of New Alternative Net Metering Tariffs and/or Other Regulatory Mechanisms And Tariffs For Customer-Generators, Order Denying Motion to Designate Staff Advocates*, Order No. 25,980 at 8-11 (January 24, 2017) (Net Metering Order) (Staff Designation Statute does not apply in a proceeding where the Commission is performing its "legislative function" and is not adjudicating a "contested case" under RSA 541-A).

According to the Movants, the Commission must designate Ms. Nixon and Mr. Dexter staff advocates because they may be unable to fairly and neutrally advise the Commission regarding the 2021-23 Statewide Energy Efficiency Plan (Plan). The Movants cite previous statements of concern regarding the “savings goals contemplated and ultimately endorsed by the EERS Committee.”³ Motion at 10.

Under RSA 363:32, I, the Commission is required to designate one or more members of its Staff as a staff advocate in an adjudicative proceeding when it determines a Staff member or members “may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding.”

The Commission has consistently spoken of Staff’s dual roles in litigated proceedings, stating that “Staff’s expert role takes two forms, often in the same case.” *See Public Service Company of New Hampshire*, Order No. 25,954 (October 18, 2016) at 2. One such role is to “develop [] proposals for resolution of issues before the Commission, and to promote those proposals ... where possible.” *Id.* at 2-3 (citing *Verizon New Hampshire*, 87 NH PUC 11, 19 (2002)). Staff’s other role 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.” *Id.* at 3 (citing *Verizon New Hampshire* at 19; *Public Service Company of New Hampshire*, Order No. 25,630 (February 14, 2014) at 5-7).

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

³ Savings goals drive program budgets, which in turn drive System Benefits Charge (SBC) levels. SBC impacts of the Plan are shown at Bates 940 and, in the case of Eversource, commercial customers would see an increase in the program-related SBC from \$0.00528/kWh in 2020 to \$0.02432/kWh in 2023.

position.” *Id.* To avoid designation in every case 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.’” *Id.* (citing *Verizon New Hampshire* at 17-18). The Commission has emphasized that the presumption of fairness “should not be lightly overcome.” *Id.* Nor is the presumption of fairness the same as a presumption that Staff will remain impartial; although Staff must “observe the same standards of fidelity and diligence that apply to the Commissioners,” Staff need not “observe the same duty of impartiality.” *Id.* The Commission has also stated that

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, that alone would not have been sufficient to rebut the presumption that [Staff] is able to fairly and neutrally advise the Commission.

Id. (citing *Verizon New Hampshire* at 19; *Public Service Company of New Hampshire*, Order No. 25,630 at 6). The Commission has reaffirmed this established precedent as recently as 2017 in the Net Metering Order, in which it denied a similar motion filed by the OCA to designate staff advocates.

Staff submits that the statements of concern referenced in the Motion have no bearing on whether Ms. Nixon and Mr. Dexter may be able to fairly and neutrally advise the Commission. The fact that the Movants may disagree with any particular statement of Ms. Nixon or Mr. Dexter on behalf of Staff does not compel the Movants’ conclusion that those Staff members may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding. Motion at 10.

The Commission has long recognized that Staff often takes positions adverse to other parties, a longstanding practice that does not justify mandatory designation:

It has been, and continues to be, our practice to have Staff present its advice in the form of expert testimony in an "adversarial" setting, thereby allowing any party

which may disagree with such advice to test its accuracy and its theoretical basis via cross-examination and rebuttal testimony. It is useful, in fact, for Staff to occasionally provide testimony which is contrary to a petitioner's position, even when it is not its own recommended position, because it provides a better balanced record from which the Commission can make a decision.

Generic Investigation into IntraLATA Toll Competition Access Rates, 77 NH PUC at 555. More recently, the Commission has confirmed that a moving party “must show more than mere disagreement in testimony before we will draw an inference that Staff cannot perform its duties in a neutral and fair manner.” *Public Service Company of New Hampshire*, Order No. 25,630 at 8. “The fact that a staff member’s ultimate recommendation favors one party or another does not mean that the employee has committed to a particular result and should be designated a staff advocate.” *Id.* at 8-9 (citing *Carleton Water Company Trust*, 75 NH PUC 393, 394 (1990)). Rather, in order to establish mandatory designation, a moving party must demonstrate that “the staff member in question has done something beyond simply stating a contrary position.” *Id.* at 9. The Commission has consistently applied that clearly established precedent. *See Net Metering Order* at 11-13.

Apparently recognizing that longstanding precedent, the Movants claim that the statements of Ms. Nixon and Mr. Dexter “went well beyond” a statement of contrary position and they frame statements by Ms. Nixon and Mr. Dexter as “(obviously) seeking to influence” the EERS Committee stakeholder discussions. Motion at 13. This argument fails because it pretermits the context of Ms. Nixon and Mr. Dexter’s statements.

While Staff is not a member of the EERS Committee, it has provided input on many aspects of the Plan throughout the stages of its development, including through written comments and verbal representations by Ms. Nixon and Mr. Dexter to the EERS Committee. Those comments have been offered as part of a stakeholder process agreed upon by the parties to

a December 2018 Settlement (Settlement) that was approved by the Commission. Order No. 26,207 at 17 (December 31, 2018). That Settlement provided, in pertinent part, that the “Commission will solicit and hire a consultant to act as a technical consultant to *Staff and all other non-utility stakeholders.*” Settlement at 13 (emphasis added). The reference to Staff as a relevant stakeholder is followed by a commitment in the Settlement for stakeholders to discuss aspects of the 2021-23 Plan at the EERS Committee, including “the appropriate level of funding [and goals] relating to the 2021-2023 Plan,” and a commitment by the Settling Parties to “work in good faith through these discussions to reach consensus on the design of the plan.” *Id.* at 14. Staff is one of those Settling Parties. *Id.* at 1. If Staff were to withhold its opinion on aspects of the Plan until the litigated process, it arguably would have been a violation of that settlement commitment - a settlement to which Staff and all of the Movants were parties.⁴ Ms. Nixon and Mr. Dexter’s statements were offered in good faith as input provided in response to various plan drafts in an attempt to reach consensus.

Furthermore, if those same statements were offered in the form of Staff testimony, or during a technical session or settlement discussions, there would still be no cause for designation, because the Commission has consistently ruled that Staff statements contrary to the petitioner or Movants alone are not sufficient basis for designation. *See* Net Metering Order at 14; *Public Service Company of New Hampshire*, Order No. 25,630 at 9. Staff’s concern with the impact on ratepayers of significant increases in the SBC, moreover, is fully consistent with the

⁴ The Commission often embraces up-front collaborative processes as an investment in avoiding back-end litigation costs. Order No. 26,322 at 8 (December 30, 2019) (Stating “constructive stakeholder processes can aid the Commission in its decision-making duties and allow parties to reach a result in line with their expectations.”). The Commission Staff, like the Movants, are a key stakeholder in these processes due to their high degree of technical expertise on the subject-matter at issue. Limiting a Staff expert’s ability to advise Commissioners based on input provided by Staff during collaborative stakeholder processes would discourage Staff’s active and forthright participation in such processes, and in turn limit, their effectiveness. This would undermine the value proposition and credibility of non-adjudicative, collaborative processes at the Commission moving forward.

Commission’s obligations to ensure that utility rates are just and reasonable and to serve as the “arbiter” between utility customers and shareholders. RSA 378:7; RSA 363:17-a.

The Motion therefore fails to state a valid basis for mandatory designation of staff advocates under the Staff Designation Statute, RSA 363:32, I.

2. The Motion Provides Insufficient Grounds for the Commission to Designate Staff Advocates Pursuant to its Discretionary Authority under the Staff Designation Statute

The Motion further asserts that the Commission should exercise its discretionary authority to designate Ms. Nixon and Mr. Dexter as staff advocates because the instant proceeding “may be the most controversial, significant, and contentious proceeding the Commission will hear during the remainder of 2020,” and because participation of Mr. Dexter and Ms. Nixon in settlement negotiations would “enhance the ability of the Commission to resolve the case in a prompt and orderly fashion.” Motion at 11-12.

Under RSA 363:32, II the Commission *may* designate one or more members of its Staff as a staff advocate in an adjudicative proceeding

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.

RSA 363:32, II. The three factors specified might suggest that discretionary designation focuses more on the nature of the proceeding itself, independent of Staff’s testimony and positions.

However, the Commission has clarified that, even though the first factor does not expressly make a link to Staff’s role, the “controversial and significant” nature of the case “must be read in light of Staff’s role in providing professional and expert advice to the Commissioners.”

Public Service Company of New Hampshire, Order No. 25,630 at 10 (citing *Verizon New Hampshire* at 17). Merely stating that a case is controversial, significant, or contentious is not

enough; the moving party “must show how the nature of the case is likely to impact Staff’s ability to provide [the Commission] with fair and neutral advice, remembering that Staff still enjoys the presumption of fairness.” *Id.* The second factor by its own terms is not simply concerned with whether the proceeding is contested, but whether the case is “‘so contested’ as to create ‘reasonable concern on the part of any party about the Staff’s role in commission decision making.’” *Id.* at 9 (citing *Verizon New Hampshire* at 17). The primary concern is Staff’s ability to “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.” *Id.* The third factor focuses on Staff’s potential role in facilitating a negotiated settlement of litigated proceedings, and must be based on grounds providing reason to doubt that the identified Staff members can perform the role of facilitating settlement discussions. *See* Net Metering Order at 15.

Staff submits that the Movants have failed to provide a basis for any of the three factors specified as “good cause” for discretionary designation under RSA 363:32, II.

First, although Staff acknowledges arguments regarding the significance of this case, the Movants fail to describe how the nature of the case is likely to impact Staff’s ability to provide the Commission with fair and neutral advice. Even if the Movants had attempted to make such a connection, neither the subject matter nor the associated program budgets reach a level of significance warranting staff designation. While Staff recognizes that the level of the SBC has been a subject matter of import to the legislature, no party moved to designate staff advocates in either the initial EERS proceeding or during any of the three years in which the Commission considered budgets associated with the 2018-20 Plan. Likewise, while it may be true that the

budgets proposed in 2021-23 Plan are significant,⁵ the Commission has in other cases with an even more significant rate impacts than the instant petition declined requests to designate staff advocates. *See, Public Service Company of New Hampshire*, Order No. 25,630 at 10 (declining staff advocate designation where the subject matter at issue was review of a \$420 million investment to be recovered from a single utility's ratepayers with a rate impact of 2.03 cents per kWh).

Second, the Motion similarly fails to describe how any potential contentiousness of relevant issues will impact any Staff member's ability to fairly and accurately characterize and analyze the competing positions in the proceeding during deliberations. Even if the Movants had attempted to make such a connection, the contentiousness of any such issues does not rise to a level warranting staff designation. Staff has worked collaboratively with the energy efficiency stakeholders within the EESE Board EERS Committee's process – as outlined in Order No. 26,207 – for several months, contributing materially to the development of the Plan and endeavoring to eliminate some of the initial non-consensus issues in advance of litigation. Many, if not all, of the intervenors in this docket participated in that process and not one of the six utilities who developed and filed the Plan joined in the Motion or in any way expressed concerns about Staff's ability to remain objective during Commission deliberations.⁶ Moreover, the Commission has declined to designate Staff Advocates in cases far more contentious cases than this one. For example, in 2016 the OCA moved to designate staff advocates as the Commission developed an alternative net energy metering tariff. In that proceeding, there were

⁵ The combined electric and gas program spending proposed in the three year plan identified at petition Bates Page 15 is approximately \$391 million.

⁶ Other intervenors who participated in the collaborative discussions but did not join in the Motion include The Way Home, Southern New Hampshire Services, and the Department of Environmental Services.

17 parties in addition to the electric utilities, most of whom filed testimony, and more than 16 non-consensus issues at the time of hearing despite the filing of two competing settlement proposals. In spite of the OCA's claims that the Commission should designate as staff advocates Staff's expert witness, lead Staff director, and Staff attorney due to the contentious nature of the proceeding and the participation of a number of national and regional advocacy organizations, the Commission denied the OCA's request, finding that "merely stating that a case is controversial, significant, or contentious is not enough. The moving parties must show how the nature of the case is likely to impact Staff's ability to provide us with fair and neutral advice, remembering that Staff still enjoys the presumption of fairness." Net Metering Order at 13. The Movants have made no such showing in their Motion.

Third, although Staff acknowledges the possibility that Ms. Nixon's and Mr. Dexter's participation in settlement negotiations might increase the likelihood of a stipulated agreement of the parties, the Movants' expression of disinterest in negotiating with Commission Staff who may participate in Commission deliberations should not be taken into account when contemplating that possibility. Ms. Nixon is the primary subject-matter expert on the Staff's energy efficiency team and Mr. Dexter has been the lead Staff attorney overseeing the energy efficiency programs for several years; they would take part in settlement negotiations regardless of whether the Commission were to designate them as staff advocates. The Movants express "little interest in negotiating with Commission employees who will be at liberty to participate thereafter in the Commission's internal deliberations." Motion at 12. However, the OCA and the other Movants consistently take part in negotiations with non-designated Staff in cases with various levels of significance or contentiousness, including the prior four energy efficiency settlements involving essentially the same subject matter as this docket, with essentially the same

parties). The Movants' refusal to negotiate with Staff who deliberate with the Commissioners appears to be based on the flawed premise that Staff cannot play the dual role of advancing proposals for resolution of issues during adjudications and then fairly and neutrally advising the Commissioners during deliberations. That premise is directly at odds with the Commission's longstanding precedent and the presumption of fairness and good conscience afforded to Staff, a presumption which must not be lightly overcome. In addition, the Movants' stated position appears to ignore the obligation for all participants in settlement negotiations to maintain the confidential nature of such negotiations under N.H. Admin. R., Puc 203.20(a). The Commission has previously observed that "[B]ifurcation of 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." *In Re Verizon-New Hampshire*, 87 N.H.P.U.C. 11 (Jan. 11, 2002) The Movants' refusal to engage in settlement discussions with certain Commission Staff members who may take part in deliberations presents the same potential for "impermissible bootstrapping" and could result in the same foreseeable consequences contemplated by the Commission in that earlier case.

Finally, Staff observes that the heart of the Movants' arguments seem to lie not in the statutory bases they cite, nor the baseless claims they attempt to align with the statutory language and precedent of the Staff Designation Statute, but rather in assertions they make at the conclusion of the pleading section discussing "the situation." The Movants assert that "[t]he 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," and that "[i]t 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.” Motion at 9 (emphasis in initial). Staff agrees that the question of how to balance near-term SBC and LDAC increases against long-term bill savings is one of the many questions at issue in this proceeding, and among the most important of those issues. Staff takes issue, however, with the Movants’ inference that the identified Staff members cannot maintain their professional objectivity and integrity when addressing issues related to the Plan and its potential rate impacts during deliberation as the Commission considers that policy-related determination. The Movants’ inference is particularly worrisome when those Staff experts can offer the Commissioners advice on many of the likely issues in this case, inclusive of, but in addition to, the single issue the Movants characterize as a policy question to be decided.

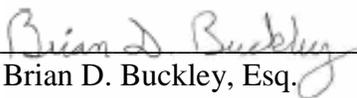
For the foregoing reasons, the Motion fails to state sufficient grounds for designation of staff advocates pursuant to the Commission’s discretionary authority under RSA 363:32, II.

Staff therefore respectfully requests that the Commission deny the Motion for Designation of Staff Advocates Pursuant to RSA 363:32 filed on September 2, 2020 by the Office of Consumer Advocate, Conservation Law Foundation, and Acadia Center.

Respectfully,

STAFF OF THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

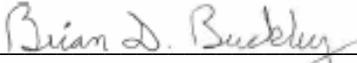
Date: September 14, 2020

By: 
Brian D. Buckley, Esq.
Staff Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objection to Motion for Designation of Staff Advocates Pursuant to RSA 363:32 has this day been served by electronic mail to all persons named on the official service list for this docket.

Dated: September 14, 2020



Brian D. Buckley, Esq. (N.H. Bar No. 269563)