

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DE 20-092**

**GAS AND ELECTRIC UTILITIES**

**2021-2023 NEW HAMPSHIRE STATEWIDE ENERGY EFFICIENCY PLAN**

**Order Denying Motion to Designate Staff Advocates**

**ORDER NO. 26,415**

**October 8, 2020**

In this Order, the Commission denies the Motion of the Office of the Consumer Advocate, Acadia Center, and Conservation Law Foundation to designate staff members pursuant to RSA 363:32.

**I. PROCEDURAL HISTORY**

In 2016, the Commission approved an Energy Efficiency Resource Standard (EERS) and established a comprehensive framework for New Hampshire's ratepayer-funded energy efficiency programs. *Energy Efficiency Resource Standard*, Order No. 25,938 (August 2, 2016). In early 2018, the Commission approved the first statewide three-year energy efficiency plan (First Triennial Plan) under the EERS framework. *Public Service Company of New Hampshire*, Order No. 26,095 (January 2, 2018). In late 2018, the Commission approved a settlement agreement relating to the 2019 Update of the First Triennial Plan (2019 Update Settlement), and required the Second Triennial Plan be filed on or before July 1, 2020. *Public Service Company of New Hampshire*, Order No. 26,207 at 16 (December 31, 2018). Pursuant to that settlement, and to aid in the development of the Second Triennial Plan, the EERS Committee of the Energy Efficiency and Sustainable Energy (EESE) Board conducted a stakeholder process between Fall 2019 and August 2020. On June 5, 2020, the four electric and two natural gas distribution

utilities (Joint Utilities) filed a draft Second Triennial Plan. At the request of the Office of the Consumer Advocate (OCA) and the Joint Utilities, the Commission amended Order No. 26,207 to extend the filing deadline for the Second Triennial Plan from July 1, 2020, to September 1, 2020. Order No. 26,375 (June 30, 2020).

On September 1, 2020, the Joint Utilities filed the Second Triennial Plan for review and approval by the Commission. On September 2, the OCA, Acadia Center, and Conservation Law Foundation (CLF) (collectively, Movants) filed a motion (Motion) to designate two members of the Commission Staff (Staff) as staff advocates. On September 9, Clean Energy New Hampshire (CENH) filed a letter supporting the Motion.<sup>1</sup> The Commission heard oral arguments on the motion at a pre-hearing conference held on September 14. On that same day, Staff filed an objection (Objection) to the Motion.

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

## **II. POSITIONS**

### **A. Motion**

The Movants asserted that pursuant to RSA 363:32, I, the Commission must designate as staff advocates Elizabeth Nixon, a Utility Analyst in the Commission's Electric Division, and Staff Attorney Paul Dexter. According to the Movants, Ms. Nixon and Mr. Dexter made statements regarding the cost of the Second Triennial Plan savings goals during discussions of

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<sup>1</sup> N.H. Admin. R., Puc 203.07(b) requires that motions be filed in the form of a pleading and contain the word "motion" in their title. While the CENH letter requests that the Commission grant the Motion, its filing is styled as a letter in support, is not in the form of a pleading, and contains no new arguments or facts beyond those set forth in the Motion.

the EERS Committee that were “seeking to influence” those discussions. Motion at 13. The Movants asserted that those statements went beyond simple statements of a position contrary to the Movants’ position because they were intended to influence EERS Committee discussions. *Id.* According to the Movants, the statements were made with the intention of influencing an outcome, therefore demonstrating that the identified Staff members may not be able to fairly and neutrally advise the Commission on all positions advanced in the proceeding. *Id.* at 10.

The Movants next asserted that, alternatively, there is good reason for the Commission to use its discretion to designate pursuant to RSA 363:32, II. According to the Movants, the deliberations of the EERS Committee prior to the development of the Second Triennial Plan were highly contentious and the instant proceeding “may be the most controversial, significant, and contentious proceeding the Commission will hear during the remainder of 2020.” *Id.* at 10-11. As a basis for that argument, the Movants highlighted New Hampshire’s ranking on the American Council for an Energy Efficient Economy Scorecard;<sup>2</sup> escalating costs to achieve savings; the common characterization of the system benefits charge (SBC) as a tax rather than a utility rate; and the fact that two members of the EESE Board voted against a resolution supporting the draft plan over concerns regarding a lack of opportunity to legislatively veto the SBC increase. *Id.* The Movants also argued that designation may increase the likelihood of a stipulated agreement by the parties, citing Ms. Nixon’s and Mr. Dexter’s expertise on the subject matter as material contributions to any settlement process. *Id.* at 11-12. The Movants expressed “little interest in negotiating with Commission employees who will be at liberty to participate thereafter in the Commission’s internal deliberations.” *Id.* at 12.

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<sup>2</sup> The American Council for an Energy Efficient Economy Scorecard ranks states from most energy efficient to least energy efficient according to a points system on an annual basis. One of the aspects scored is the level of savings and spending associated with ratepayer-funded energy efficiency programs.

Although Movants argued that the standard set forth in RSA 363:32, III supports the designation of Ms. Nixon and Mr. Dexter as staff advocates, that section applies to the designation of a staff member as a decisional employee. *Cf. Id.* at 2, 11-12 and RSA 363:32, III. The OCA clarified at hearing that the Motion does not request that any staff member be designated as a decisional employee. Hearing Transcript of September 14, 2020, at 44-45.

### **B. Staff's Objection**

Staff asserted that the Motion provides insufficient grounds for mandatory designation pursuant to RSA 363:32, I.<sup>3</sup> Objection at 1-6. Staff cited extensive Commission precedent related to its traditional dual role in litigated proceedings, which includes a role in the development and promotion of proposals for resolution of issues before the Commission, but also a role in providing fair and neutral advice to the Commission regarding party positions. *Id.* at 2 (citing *Public Service Company of New Hampshire*, Order No. 25,954 at 2 (October 18, 2016)). Staff further cited the presumption of fairness afforded to Staff and the precedent emphasizing that presumption “should not be lightly overcome.” *Id.* at 3 (citing *Public Service Company of New Hampshire*, Order No. 25,954 at 3 (October 18, 2016)). Staff asserted that the statements at issue, and Movant’s disagreement with those statements, have no bearing on Ms. Nixon’s and Mr. Dexter’s ability to fairly and neutrally advise the Commission. *Id.* at 3-4. Staff cited a requirement of the 2019 Update Settlement that the Settling Parties, including Staff, participate in good faith in consensus-building processes at the EERS Committee as a justification for Ms. Nixon’s and Mr. Dexter’s participation in the EERS Committee process. *Id.* at 4-5 (citing 2019 Update Settlement at 13-14). In Staff’s view, for it to remain silent during pre-adjudication stakeholder processes would undermine the “value proposition” and credibility

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<sup>3</sup> For the purposes of its Objection, Staff assumed, but did not concede, that this is an adjudicative proceeding under RSA 541-A to which RSA 363:32 is applicable. Objection at 1.

of such processes at the Commission moving forward. *Id.* at 5. Staff further argued that Commission Staff has an obligation to make such statements during adjudicative proceedings, consistent with the Commission's obligation to ensure just and reasonable rates and to serve as the arbiter between utility customers and shareholders. *Id.* at 5-6 (citing RSA 378:7, RSA 363:17-a).

Staff further argued that there is no good cause for discretionary designation under RSA 363:32, II. *Id.* at 7-10. Staff asserted that the Movants' failure to describe how the significance or contentiousness of the case would impact Ms. Nixon's and Mr. Dexter's ability to provide the Commission with fair and neutral advice as dispositive. *Id.* at 7.

Staff asserted that the significance of this proceeding does not reach a level warranting designation. *Id.* As a basis for that assertion, Staff cited the lack of a Staff designation request in the initial EERS proceeding and the denial of a Staff designation motion in a recent case where even greater rate impacts were at issue. *Id.* at 7-8 (citing *Public Service Company of New Hampshire*, Order No. 25,630 at 10 (February 14, 2014)).

Staff argued that the Movants failed to demonstrate a connection between the contentiousness of the issues and Ms. Nixon's and Mr. Dexter's ability to provide the Commission with fair and neutral advice, but that, even if they had, the contentiousness does not reach a level warranting designation. *Id.* at 8. As a basis for that assertion, Staff cited the collaborative nature of the EERS Committee process, the lack of a designation motion from the Joint Utilities, whose filing is at issue in this docket, and the denial of a motion for designation filed by the OCA in another recent case that was more contentious than the instant case. *Id.* at 7-8. (Citing *Development of New Alternative Net Metering Tariffs and/or Other Regulatory*

*Mechanisms And Tariffs For Customer-Generators*, Order No. 25,980 at 13-14 (January 24, 2017).

Although it recognized that the participation of Ms. Nixon and Mr. Dexter in settlement negotiations might increase the likelihood of a negotiated agreement, Staff asked the Commission not to consider the Movants' expression of disinterest in negotiating with Commission Staff who may participate in Commission deliberations. *Id.* at 9. Staff argued that the Movants have negotiated with non-designated Staff in many cases, including prior energy efficiency dockets with a similar subject matter, contentiousness, and significance, and essentially the same parties as in this proceeding. *Id.*

### **III. COMMISSION ANALYSIS**

The Movants brought this motion pursuant to RSA 363:32, which governs the designation of members of the Commission's Staff in adjudicative proceedings conducted in accordance with RSA 541-A:31-:35.

The Movants complain that Mr. Dexter and Ms. Nixon have taken the position that the savings goals in the plan before us are excessive because they will lead to excessive increases in the System Benefits Charge (SBC) and the Local Delivery Adjustment Charges (LDAC). Motion at 8. According to the Movants, "the determination of savings targets, and the resulting near-term rate impacts, is fundamentally a policy determination." *Id.* at 9. They point out that the policy determination is a balancing of "near-term SBC and LDAC increases against long-term bill savings." *Id.*

The SBC is a charge controlled by the general court. In fact, RSA 374-F:3, VI provides that "legislative approval of the New Hampshire general court shall be required to increase the system benefits charge." Control of the energy efficiency portion of the SBC, however, subject

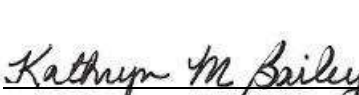
to specific conditions, has been delegated to the PUC for the purposes of this proceeding.<sup>4</sup> Accordingly, we find that when the Commission is determining the SBC as part of the triennial planning process, it is exercising its quasi-legislative authority pursuant to the general court's delegation, rather than its adjudicative authority. In addition, adjustment of the LDAC is rate setting, which is a legislative rather than adjudicative function. *Cf.* Order No. 25,980 at 8-11 and cases cited therein (rate setting is a legislative function not subject to RSA 363:32). We therefore find that RSA 363:32 does not apply to the Movant's request. Because the Movants have complained only that Staff has a position regarding matters implicating our legislative function, to which the concerns of 363:32 do not apply, the motion is denied.

**Based upon the foregoing, it is hereby**

**ORDERED**, that the Motion for Designation of Staff Advocates Pursuant to RSA 363:32 is **DENIED**.


By order of the Public Utilities Commission of New Hampshire this eighth day of October, 2020.

  
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 Dianne Martin  
 Chairwoman

  
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 Kathryn M. Bailey  
 Commissioner

  
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 Michael S. Giaimo  
 Commissioner

Attested by:

  
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 Debra A. Howland  
 Executive Director

<sup>4</sup> "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." RSA 374:3, VI.

## Service List - Docket Related

Docket#: 20-092

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