

DW 01-054

WEST EPPING WATER COMPANY

Investigation into Status of Franchise

Order Denying Motion for Staff Designation

O R D E R N O. 23,873

December 21, 2001

I. BACKGROUND AND PROCEDURAL HISTORY

This Order concerns a motion filed by the West Epping Water Company (WEWC), focus of the subject investigation by the New Hampshire Public Utilities Commission (Commission), to designate one of the Commission's Staff Attorneys as a Staff Advocate in connection with this docket pursuant to RSA 363:32, I. Such a designation would have the effect of precluding the affected Commission employee from advising the Commission "with respect to matters at issue" in the case. RSA 363:35. For the reasons that follow, we deny the motion.

We opened this docket on March 15, 2001 in response to a complaint from Paul R. Wright, owner of property on which one of the Company's wells is located. The Order of Notice by which we opened the docket noted that the proceeding would involve all aspects of WEWC's operations, an inquiry into whether the Company should be placed in receivership pursuant to RSA 374:47-a, and a determination of whether it would be consistent with the public good to exempt WEWC from Commission regulation pursuant to RSA 362:4, I.

Following a pre-hearing conference on April 11, 2001, the Commission entered Order No. 23,682 (April 20, 2001), granting the intervention petition of Mr. Wright as well as that of Rick St. Jean and approving a procedural schedule to govern the remainder of the case. Discovery ensued but the parties and Commission Staff (Staff) had difficulty completing it according to the schedule established by the Commission. Accordingly, there were several revisions to the procedural schedule. The parties and Staff submitted pre-filed direct testimony on July 11, 2001 and a settlement conference took place on August 15, 2001. Settlement was not achieved.

On October 9, 2001, at the threshold of hearing, WEWC submitted a petition to discontinue business and to transfer its assets to a users' association. A merits hearing took place as scheduled on October 12, 2001, with the Commission determining that it would treat the Company's October 9 filing as having been made in this docket (as opposed to opening a separate proceeding to consider the request contained in the submission). Additional hearings took place on November 2 and 7, 2001.

At hearing on November 7, WEWC made an oral motion pursuant to RSA 363:32, I to designate as Staff Advocates two members of the Commission Staff who have participated extensively in the docket: Douglas Brogan, a water engineer who submitted pre-filed testimony and also testified at hearing, and Donald

Kreis, a Staff Attorney. We granted the motion as to Mr. Brogan but not as to Mr. Kreis, although we treated Mr. Kreis as if he had been designated a Staff Advocate, pending resolution of the motion. The Company objected to the determination as to Mr. Kreis, and the Commission granted the Company's request to submit a written brief stating its reasoning. WEWC submitted such a brief on November 13, 2001. Mr. Wright filed a brief in opposition to the motion on November 16, 2001 and on November 30, 2001 Staff submitted a letter indicating its position on the Company's request.

II. POSITIONS OF THE PARTIES AND STAFF

a. West Epping Water Company

In its written motion, WEWC indicates that its "fundamental rights to due process of law would be undermined and threatened" if Mr. Kreis is not designated as a Staff Advocate pursuant to RSA 363:32, I. According to the Company, "[t]his position is not meant as a criticism of attorney Kreis, but rather [is] a recognition of the amount of work and energy both he and Mr. Brogan invested in this proceeding and the level of commitment both made to the position they felt obligated to take with regard to the Company in this matter." Motion to Designate Staff Counsel As Advocate (Motion) at 2. In his testimony, Mr. Brogan advocated divesting the Company of its utility franchise.

WEWC contends that, absent designation of Mr. Kreis, he

"will have the responsibility of drafting the Commission's orders in this highly contested matter, and the obligation to provide legal and other advice and information to the Commissioners as part of [their] deliberations in this matter." *Id.* at 3.

Allowing Mr. Kreis to perform these functions would be "fundamentally unfair," according to WEWC. *Id.*

In the view of WEWC, over the course of this proceeding Mr. Kreis has "so committed himself to a particular result that he can no longer fairly advise the Commission." *Id.* WEWC avers that Staff's position in the case is based on issues of fact that were the subject of "intense dispute" and, "toward that end Mr. Kreis[] orchestrated the Staff case issuing interrogatories, preparing responses and objections to interrogatories, and conducting the cross examination of the Company witness," Richard Fisher. *Id.* According to WEWC, over the course of this proceeding "the Staff has acted not as an impartial investigator, but rather as the prosecutors of perceived violations of Commission jurisdictional statutes, rules and regulations." *Id.* WEWC alleges that "Mr. Kreis . . . stated on several occasions during the hearings" that Staff's "positions and actions were based upon his "trial strategy" designed to achieve a certain goal, revocation of the Company's franchise." *Id.*¹

¹ In addition to the assertions contained in its motion, WEWC has submitted an affidavit from its counsel as an attachment to the motion itself. The affidavit describes the Settlement

In support of its position, WEWC relies upon *Burhoe v. Whaland*, 116 N.H. 222 (1976). The Company acknowledges that the designation of Mr. Kreis as a Staff Advocate "may create an administrative burden on the Commission," but that this "must be balanced against the due process rights guaranteed the Company" by the federal and New Hampshire constitutions. Motion at 4.

b. Paul Wright

Mr. Wright objects to the granting of WEWC's motion. According to Mr. Wright, the facts of the instant case are easily distinguishable from those in *Burhoe*, which involved a hearing examiner who was the only person within the agency in question who had dealt with the proceeding.

According to Mr. Wright, the New Hampshire Supreme Court has already decided the issue presently before the Commission in *Appeal of Office of Consumer Advocate*, 134 N.H. 651 (1991). Mr. Wright contends that the *Consumer Advocate* case requires a showing of actual bias, which WEWC has failed to make.

Further, according to Mr. Wright, WEWC has failed to

Conference of August 15, 2001 and alleges that Mr. Kreis declined to engage in substantive negotiations with the Company and instead advised WEWC that it intended to move forward at hearing with presenting its recommendation for franchise revocation. According to the affidavit, WEWC thereupon advised Staff that it would be seeking one or more Staff Advocate designations pursuant to RSA 363:32, I. Also appended to the Company's motion are certain objections by the Staff to Company data requests, as well as Staff's letter of July 20, 2001 transmitting these objections to the Company.

make a showing as to the factors specifically enumerated in RSA 363:32, I. Mr. Wright points to Mr. Kreis's cross examination of Mr. Fisher, in which Mr. Kreis asked the witness questions about WEWC's proposed users' association and indicated a desire to understand it fully. Responding to WEWC's allegation that Mr. Kreis orchestrated Staff's case, Mr. Wright states that Mr. Kreis "did not do anything that is not allowed pursuant to the . . . Commission's own procedural rules." Intervenor Paul Wright's Objection to West Epping Water Company's Motion to Designate Staff Counsel An Advocate at 3.

According to Mr. Wright, to the extent that the proceedings in this case have been adversarial, this is attributable to WEWC and not Staff. Mr. Wright asserts that WEWC's witness refused on numerous occasions at hearing to respond to questions. Further, Mr. Wright dismisses as "farcical" WEWC's suggestion that it responded to hundreds of data requests in an effort to facilitate Staff's investigation. *Id.* at 4. According to Mr. Wright, "West Epping Water failed to answer or answered incompletely so many data requests that the questions had to be re-asked." *Id.* "For example," according to Mr. Wright, "in the Staff's Second Set of Data Requests, which totaled 33 requests, more than half of the requests (17) were questions previously asked and not responded to or responded to in an inconsistent or incomplete manner, which required follow-up

questions." *Id.*

c. Staff

Staff responded to the WEWC motion via a letter from Mr. Kreis, in which he indicated that Staff neither supported nor opposed the Company's request. In his letter, Mr. Kreis averred that

[t]he adversarial positions about which WEWC is concerned are contained in the testimony of Mr. Brogan. My role in the proceeding to date has been to serve as counsel to the two Staff witnesses, one of whom was Mr. Brogan, and thereby to facilitate the presentation of their positions. No circumstances of which I am aware make me unable to provide fair and neutral advice to the Commission on all positions advanced in this proceeding and I am confident of my ability to do so.

Letter Response to Motion for RSA 363:32 Designation.

III. COMMISSION ANALYSIS

Our decision on this matter is governed by RSA 363:30 *et seq.*, the statutes which concern the participation of Staff in adjudicative proceedings, and in particular by RSA 363:32, I(a), the provision invoked by WEWC, which provides parties with an opportunity to request the designation of Commission employees as Staff Advocates and requires the Commission to so designate staff members when certain standards are met. In relevant part this statute provides as follows:

I. (a). . . the commission shall designate members of its staff as staff advocates and decisional employees, if requested by a party with full rights of participation in the

proceeding, 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 consequence;

(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

RSA 363:32, I. For the purposes of the instant motion, it is not necessary to address whether designation would have been required under any subparagraph of RSA 363:32, I(a), because the motion was made more than 20 days after Staff filed its prefiled testimony.

RSA 363:32, I further provides that

[a]lthough any party who is a full intervenor may make a motion to designate pursuant to paragraph I at any point during the proceeding, if the motion is made later than 20 days after staff members have filed testimony, the commission may deny the motion solely on the grounds that it is administratively unworkable because such motion has been filed so late in the proceeding.

RSA 363:32, I(c). We deny WEWC's motion on the grounds of administrative unworkability pursuant to this provision of the statute. Staff filed testimony in this proceeding on July 11, 2001, nearly four months before WEWC made its designation motion.

With the limited legal staff that we have available to address the number of important dockets that are pending before us at this time, and the commitment of staff to other projects, it would be administratively unworkable to substitute other legal staff in this case, after the record is closed. If the Staff attorney who is the subject of the Motion were not available to us to assist in appraising the record and preparing drafts of our order subject to our direction and final approval, we believe that this would cause an inordinate delay in the proceeding.

In *Public Service Company of New Hampshire*, Order No. 23,551 (September 11, 2000), we denied an RSA 363:32, I motion on similar grounds in the context of a case involving the proposed purchase of the parent company of New Hampshire's largest electric utility. Similarly, assignment of other counsel here, at this late date in a highly fact-specific case, would require taking an attorney away from other duties and spending time reviewing the entire record, including transcripts. This would be administratively unreasonable.

Moreover, as WEWC itself makes plain in its motion, by the time of the settlement conference on August 15, 2001, nearly three months before the Company made its motion, WEWC was fully aware of the issues it now raises in its request for designation. There is no reason why it could not have brought these issues to the attention of the Commission at a much earlier stage. In these circumstances, denial of the motion on the statutory ground of administrative unworkability is especially justified.

Anticipating a ruling on this ground, WEWC contends that its due process rights would be violated thereby. We disagree. We note that the Company makes broad claims that its constitutional rights would be violated by Mr. Kreis's further participation in this docket, and specifies only one right, the right to a tribunal that has not unconstitutionally combined investigative, accusative and adjudicative functions. We confine

one analysis to this specific claim. *See, State v. Chick*, 141 N.H. 503, 504 (1996) (noting that a "passing reference to 'due process,' without more, is not a substitute for valid constitutional argument.")

With regard to the question of commingled functions, the New Hampshire Supreme Court has repeatedly counseled that "[w]here investigative, accusative, and adjudicative functions are commingled within a single administrative agency, a party alleging a due process violation must show actual bias in order to prevail."² *Appeal of Trotzer*, 143 N.H. 64, 68 (1998) (citing *Consumer Advocate*, 134 N.H. at 660). "The party alleging bias has the burden of presenting sufficient evidence to rebut that presumption." *Id.*

In the *Trotzer* case, the Court noted that the attorney assigned to advise the administrative tribunal in question had

² WEWC does not contend in its motion that a different standard would apply under the Due Process Clause of the U.S. Constitution and, accordingly, we treat the cases discussing the New Hampshire Constitution as dispositive of any federal issues as well. We note that when WEWC made its oral RSA 363:32 motion at hearing, its counsel alluded to *Withrow v. Larkin*, 421 U.S. 35 (1975). To the extent that WEWC continues to rely on that case, we discern no standard that is more stringent than that laid out in *Trotzer* or *Consumer Advocate*. *See Withrow*, 421 U.S. at 59 ("the combination of investigative and adjudicative functions does not, without more, constitute a due process violation" but this principle "does not preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high").

made certain comments on the record of the proceeding. The Court concluded that these comments did not reflect actual bias, because they "sought to clarify the proceeding and were intended to assist the [agency] in keeping the proceeding on track and moving along." *Id.* We have the same view of Mr. Kreis's comments on the record in this case, insofar as WEWC alleges to the contrary in its motion.

WEWC contends that Mr. Kreis assumed the role of prosecutor, repeatedly referring at hearing to his "trial strategy" for depriving the Company of its franchise. In fact, a review of the transcripts reveals that Mr. Kreis never used the phrase "trial strategy" at hearing. At one point, at the November 7 hearing, Mr. Kreis used the phrase "legal strategy" in objecting to a question posed by WEWC to Mr. Brogan on cross examination. Transcript of Hearing of November 7, 2001 in Docket No. DW 01-054 at 56-57. Specifically, WEWC asked Mr. Brogan why he had not included certain exhibits, introduced that day at hearing, with his pre-filed testimony. Mr. Kreis said this was part of the Staff's "legal strategy" and objected that it was "totally inappropriate to ask a witness under oath to comment on the way that Staff has chosen to litigate this case." *Id.* at 57. The Chairman ruled that Mr. Brogan's motivation for not including the exhibits with his pre-filed testimony was irrelevant. *Id.* at 57-58. In this context, Mr. Kreis's comments were not those of a

prosecutor advancing a particular 'trial strategy,' but of a responsible regulatory attorney seeking in the interest of fairness and efficiency to keep the focus of a Staff witness's cross examination where it belonged, on the substantive testimony of that witness as opposed to matters appropriate for legal argument.

We have the same view of the discovery disputes and the settlement conference to which WEWC alludes in its motion. Assuming, *arguendo*, that we can consider matters that are not of record, we find nothing that demonstrates actual bias on the part of Mr. Kreis that would require us to preclude his serving in an advisory capacity. The fact that Mr. Kreis objected to certain data requests by WEWC, employing standard bases for interposing such objections, does not demonstrate actual bias on his part, particularly where WEWC acceded to the objections by not pressing a motion to compel discovery as allowed by the Commission's rules.

Likewise, WEWC's assertions about the settlement conference are speculative and do not demonstrate actual bias. At the time of the settlement conference, this case involved a set of irreconcilable positions: a utility struggling to keep its franchise, a landowner (Mr. Wright) seeking to deprive the Company of its right to use a well on his land, and a Staff engineer who had formed the firm opinion over many years of

dealing with the Company that it lacked the necessary qualifications to hold a utility franchise. Whatever one thinks of the merits of these positions, and we reserve judgment about them at this juncture, it is not unreasonable for an attorney on the Commission Staff to forego settlement and proceed to a hearing at which the entire matter could simply be laid before the Commission.

As noted by WEWC, "the constitutional guarantee of due process is violated when the hearing officer presents the case for one party, cross-examines the witnesses of the other party, and then decides the case." *Burhoe*, 116 N.H. at 224. Mr. Kreis did not serve as a hearing officer in this proceeding, and he will not decide the case. That task is the responsibility of the commissioners, and the only question is whether the matters raised in the WEWC motion demonstrate actual bias sufficient to preclude Mr. Kreis on due process grounds from advising us in our deliberations. We answer that question in the negative.

Based upon the foregoing, it is hereby

ORDERED, that the motion of West Epping Water Company for Staff Advocate designation pursuant to RSA 363:32,I is DENIED.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of December, 2001.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director and Secretary