

**BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 16-576

**Development of New Alternative Net Metering Tariffs and/or
Other Regulatory Mechanisms and Tariffs for Customer-Generators**

**NEW HAMPSHIRE SUSTAINABLE ENERGY ASSOCIATION'S
OBJECTION TO MOTION FOR DESIGNATION OF STAFF ADVOCATES
PURSUANT TO RSA 363:32**

NOW COMES the New Hampshire Sustainable Energy Association (“NHSEA”), by its attorneys, Primmer Piper Eggleston and Cramer PC, and hereby objects to Motion for Designation of Staff Advocates Pursuant to RSA 363:32 (the “Motion”) filed by the Office of the Consumer Advocate (“OCA” or “Movant”).

A. BACKGROUND.

On January 12, 2017, the OCA filed the Motion with the Public Utilities Commission (the “Commission”). By letter dated January, 13, 2017, the Commission set January 18, 2017, as the deadline to file responses to the Motion.

B. LEGAL STANDARD.

As is indicated in the Motion, the Commission’s decision is governed by RSA 363:32. RSA 363:32 has a mandatory component:

Whenever the commission conducts an adjudicative proceeding in accordance with the provisions of RSA 541-A:31 through RSA 541-A:35, the commission shall designate one or more members of its staff as a staff advocate, as defined in RSA 363:30, VIII, if requested by a party with full rights of participation in the proceeding, or upon its own initiative, when the commission determines that such

members of its staff may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding.¹

RSA 363:32(I). The statute allows the Commission to designate staff advocates in certain situations:

Whenever the commission conducts an adjudicative proceeding in accordance with the provisions of RSA 541-A:31 through RSA 541-A:35, the commission may designate one or more members of its staff as a staff advocate, as defined in RSA 363:30, VIII, if requested by a party with full rights of participation in the proceeding, or upon its own initiative, 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).

C. ARGUMENT.

The Motion has not met the standard for mandatory designation as set out in RSA 363:32. Movant has argued that the position that Staff adopted in its rebuttal testimony was “highly controversial.” Motion at 4. Setting aside whether a position that roughly half the parties to the docket generally support with and which is supported by the weight of the evidence is “highly controversial,” it is clear that adopting a particular position, even one that contradicts the

¹ Movant did not address whether the current docket is an adjudicative proceeding that would be subject to RSA 363:32. Although it does have features of an adjudicative proceeding (i.e., discovery, evidential hearings), it likely does not meet the definition of “contested case.” “Adjudicative proceeding” means the procedure to be followed in contested cases before the commission, as set forth in RSA 541-A:31 through RSA 541-A:35. RSA 363:30(I). “Contested case” means a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing. RSA 541-A:1(IV). It is closer in nature to a rulemaking proceeding.

Movant's position, does not meet the standard of RSA 363:32. "Because the presumption of fairness 'should not be lightly overcome,' the moving parties must show more than mere disagreement in the testimony before we will draw an inference that Staff cannot perform its duties in a neutral or fair manner." *In Re Public Service Company of New Hampshire (PSNH)*, DE 11-250, Order No. 25,630 (February 14, 2014) at 8. The Movant has not alleged that, other than adopting a position that contradicts its own position, the Staff cannot perform its duties in a neutral or fair manner. See also *In Re West Epping Water Co.*, DW 01-054, Order No. 23,873 (December 21, 2001) at 14 ("[T]he 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."). There is no requirement that the Commission designate Staff Advocates.

Additionally, the Movant has not established that there is "good reason." The Movant's sole basis for arguing that the Commission should designate the Staff as advocates is that the docket is "a contentious proceeding of high visibility." Motion at 2. NHSEA disputes that this has been a particularly contentious proceeding as the parties have worked collaboratively over the past several months to exchange information relevant to the questions at issue. Regardless, a contentious proceeding² is not "good reason" for designating Staff Advocates. "[M]erely 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." *In Re PSNH*, Order No. 25,630 (February 14, 2014) at 10. As discussed above, the Movant has not argued, nor is there any basis to conclude, that the Staff's presumption of fairness has been overcome.

² Nor is a "significant" or "controversial" proceeding enough by itself. *In Re PSNH*, Order No. 25,630 (February 14, 2014) at 10.

Lastly, NHSEA notes that it is late in the process to move for designation of Staff Advocates. The docket has not increased in contentiousness since its beginning in May, 2016. The parties were aware that Staff would evaluate the evidence presented in the docket and make a recommendation to the Commission. None of this changed when the Staff filed its testimony. The parties are only weeks away from the evidentiary hearings in this docket. If the Commission granted the Motion, it would be introducing unneeded complexity and delay into the proceeding and the Commission's decision-making process. The OCA should have filed the Motion much earlier in the docket, which would have allowed the Commission more time to designate Staff Advocates and Decisional Employees, and to establish the appropriate administrative measures to separate the two. See *In Re Public Service Company of New Hampshire*, Order No. 23,551 (September 11, 2000) at 9 ("Granting this motion will not in any way affect the result in this docket, other than to delay the result. We cannot in good conscience allow such a delay and consequent prejudice to the due process rights of the Joint Petitioners to a timely decision.").

WHEREFORE, NHSEA respectfully requests that the Commission deny the Motion for Designation of Staff Advocates Pursuant to 363:32.

Respectfully submitted,

THE NEW HAMPSHIRE SUSTAINABLE ENERGY
ASSOCIATION

By its attorneys,

A handwritten signature in black ink, appearing to read "E. Emerson", written over a horizontal line.

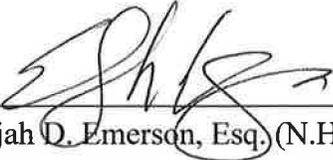
Dated: January 18, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OBJECTION TO MOTION FOR DESIGNATION OF STAFF ADVOCATES has this day been forwarded via e-mail or mail to persons named on the Distribution List of this docket.

Dated: January 18, 2017



Elijah D. Emerson, Esq. (N.H. Bar No. 19358)