

STATE OF NEW HAMPSHIRE

Before the

PUBLIC UTILITIES COMMISSION

Docket DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

Staff's Objection to Joint Motion for Bifurcation of Commission Staff and its Consultant

The Staff of the New Hampshire Public Utilities Commission (Staff), through counsel, respectfully objects to the *Joint Motion for Bifurcation of Commission Staff and its Consultant* filed by the Office of Consumer Advocate (OCA), TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast, Inc. (TransCanada), the Conservation Law Foundation (CLF), and the Sierra Club (collectively, the moving parties), because the moving parties failed to establish either the mandatory or discretionary grounds for designation under RSA 363:32.

In support of this objection, Staff represents as follows:

Background.

1. This docket involves a dispute over whether and to what extent Public Service Company of New Hampshire (PSNH) can include in its default service rates approximately \$420 million it spent on the Scrubber.
2. The most important issue is the legal dispute over the scope of this case, whether the Commission has the authority to review PSNH's decision to continue construction of the Scrubber once the cost estimates increased or whether the Commission's review is limited to a prudence review of how PSNH spent the

\$420 million. The Commission issued a number of orders on this central issue over the past two years as the moving parties and PSNH - but not Staff - litigated various discovery disputes.

3. The moving parties, Staff and Staff's consultant, the Jacobs Consultancy (Jacobs), filed testimony on December 23, 2013. The moving parties generally argued that the Commission *does* have authority to review PSNH's decisions to build the Scrubber and that PSNH's decisions to proceed were flawed. *See*, Testimony of Sierra Club, OCA and TransCanada filed Dec. 23, 2013.
4. Staff, through Steven E. Mullen, Assistant Director of the Electric Division, for the first time took a position on the scope of this case by testifying that "the discussion of permanent rate recovery should focus on the actual costs, the management of the project, and the rate impacts of the project," Mullen December 23, 2013 prefiled testimony at 12, that PSNH made reasonable decisions in 2008 to continue with the Scrubber project, and that PSNH generally spent the approximate \$420 million prudently.¹ Jacobs' testimony took no position on the scope of this docket or on PSNH's 2008 decisions, but focused on PSNH's management of the project and concluded that PSNH's conduct was prudent. Jacobs December 23, 2013 prefiled testimony at 13.
5. Mr. Mullen's prior involvement in this case was to file testimony in support of a temporary rate of 0.98 cents per kilowatt-hour, Staff Testimony filed February 24, 2013, and to recommend that the Commission not approve an

¹ Mr. Mullen did reduce PSNH's claimed costs, recommending that "the total capital costs [of the Scrubber project] to be considered in this proceeding [should be] \$415,511,889," in light of Audit Staff's report eliminating about \$400,000 in costs and Mr. Mullen's opinion that an additional \$2 million for "The Meeting Place" should not be included as part of the Scrubber project. Mullen testimony at 20-22

accounting statement clarification that PSNH requested, Staff Letter filed April 24, 2013, both of which were adverse to PSNH and were accepted by the Commission. Jacobs' prior involvement was to issue reports of its onsite review of the Scrubber's construction, which reports are similar to its December 2013 testimony. *See* Staff filings of January 20, 2012 and September 12, 2012.

6. The moving parties then filed the motion at issue here and asked that the Commission designate "Mr. Mullen and other Staff members who assisted in developing Mr. Mullen's testimony and Jacobs Consultancy"² as "staff advocates," Motion at 5, which would prevent the commissioners and other "decisional employees" from consulting with Mr. Mullen and Jacobs "except upon notice and opportunity for all parties to participate," RSA 363:34.
7. The moving parties' argument is as follows: this docket involves a large investment for PSNH and threatens an even greater impact on ratepayers, Motion at ¶3, ¶4; there is a high level of interest from the general public and the press making it "particularly important to avoid even the appearance of partiality on the part of staff advising the Commissioners during the decision making process," *Id.* at ¶5; Mr. Mullen filed testimony "which supports PSNH's position that it should receive full recovery" and Jacobs "filed testimony on behalf of the Staff," *Id.* at ¶6; this is a "heavily litigated" docket, the moving parties "must seek further data" from Mr. Mullen, "cross examine him at hearing," and "under these circumstances, to allow Mullen ... to have ex parte communication in advance of the contested hearing ... would create the appearance of bias," *Id.* at ¶7; and that

² Jacobs, as a "consultant" hired by the Commission, falls within the definition of "staff" for purposes of the governing statutes. RSA 363:30, VII

Mr. Mullen and Jacobs “have committed ‘to a highly adversarial position’” which raises “questions about whether Mr. Mullen and any other staff members involved in preparing the testimony would ‘be able to fairly and neutrally advise the commission on all positions advanced in the proceeding,’” *Id.* at ¶8.

8. Staff objects. As to Mr. Mullen, the moving parties do not present sufficient evidence to satisfy the mandatory or discretionary designation sections of RSA 363:32 and they improperly rely on standards not embodied in the statute. As to Jacobs, in addition to the above, the moving parties only argue that Jacobs “filed testimony on behalf of Staff” even though, substantively, Jacobs’ testimony is largely undisputed. As to the moving parties’ request to designate “other Staff members,” in addition to the arguments above, the request is unduly vague.
9. In the alternative, should the Commission grant the motion to designate, Staff notes that the Commission would be left without senior staff, its sole consultant, and some legal staff and may have to retain another consultant and perhaps outside counsel to serve in an advisory role, the costs of which should be borne by the moving parties. *See* RSA 363:36. Retaining outside assistance would undoubtedly delay the proceedings further.

Discussion.

Legal Standard.

10. The controlling statute is RSA 363:32 which was last amended in 2010. The moving relied on an older version.³ The most significant changes are that, first, the older statute contains solely mandatory language (“the Commission shall

³ On page 5 of their motion the moving parties cite to “RSA 363:32(I)(a)(1).” The current version of RSA 363:32 does not have a subsection (I)(a)(1).

designate” staff when one of four conditions are met, *see* former RSA 363:32, I(a)(1) through (4)), whereas the current statute provides for mandatory designation in only one instance, when “the commission determines that [Staff] may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding.” RSA 363:32, I. This language in the current law is lifted from the first factor in the former statute, *see* former RSA 363:32, I(a)(1), with an important omission, which is the second change in the statute. While the former statute mandated designation when staff “*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,” the current statute omits the italicized language. Thus, the current statute only asks whether Staff “may not be able to fairly and neutrally advise the commission.”

11. The statute otherwise provides for discretionary designation. “[T]he commission *may* designate” Staff for “good cause shown,” which includes the following:

[1] the proceeding is particularly controversial and significant in consequence; [2] the proceeding is so contentious as to create a reasonable concern about staff’s role; or [3] it appears reasonable that such designations may increase the likelihood of a stipulated agreement by the parties.

RSA 363:32, II (emphasis added). These three factors now guiding discretionary designation are the same as the mandatory factors included in the former statute. *See* former RSA 363:32, I(a)(2) through (4).

12. In addition to their confusion over the statutory requirements for designation, the moving parties also cite standards that do not apply. In the

paragraph noting that the Scrubber litigation is well publicized, the moving parties argued that “it is particularly important to avoid even the *appearance of partiality* on the part of staff advising the Commissioners during the decision making process,” Motion at ¶5 (emphasis added); *see also* Motion at ¶7 (“to allow Mr. Mullen/PUC staff to have *ex parte* communication in advance of the contested hearing ... would create the appearance of bias”), and paragraph 8 of the motion claims Staff have “committed to a ‘highly adversarial position.’” The “appearance of partiality” or presence of “bias” never was part of the designation statute, and having taken a “highly adversarial position” is no longer part of the law.

13. Therefore, the proper standard is that the Commission *must* designate if Staff “may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding,” and the Commission *may* designate Staff “for good cause shown” in light of the three factors of RSA 363:32, II. Mandatory designation turns on a review of the positions Staff has taken and a determination of whether Staff can still “fairly and neutrally” advise the Commission. Permissive designation turns on the nature of the case itself, independent of Staff’s testimony.

Analysis.Staff Can “Fairly and Neutrally Advise the Commission.”

14. The moving parties first seek designation based on RSA 363:32, I, the mandatory designation statute, which requires a showing that Staff “may not be able to fairly and neutrally advise the commission.”⁴ The only supporting evidence the moving parties cite is the testimony of Mr. Mullen and Jacobs. A review of that testimony supports Staff’s objection.
15. Mr. Mullen’s testimony can be divided into three parts. The first was a statutory discussion that provided Mr. Mullen with a reference point for the second and third parts, his expert financial and ratemaking testimony. The first part of Mr. Mullen’s testimony was his review of the statutes and his conclusion that they imposed no cost limitation on the Scrubber project and, therefore, that the Commission should review “the decisions that were made [by PSNH], the information available at the times those decisions were made, how the project was managed, and the actual costs incurred” (Mullen testimony at 13). Of course, the Commission will ultimately determine this docket’s scope.
16. The second part of Mr. Mullen’s testimony examined the facts available to PSNH in the 2008 timeframe when the intervenors claim PSNH should have reconsidered the project in light of the increased costs and market changes, Mullen testimony at 14 – 17, and concluded with Mr. Mullen’s opinion that “PSNH’s 2008 financial analyses do not appear unreasonable,” Mullen testimony at 16.

⁴ Although the moving parties confuse the old and new versions of RSA 363:32 and thus do not articulate the difference between its mandatory and permissive sections, they do quote the language that is now the sole grounds for mandatory designation. *See* Motion at ¶8.

17. The third part contained Mr. Mullen's opinion that PSNH spent the \$420 million prudently and included his recommendations regarding recovery of the costs of the Scrubber project in default service rates.
18. Jacobs' testimony contained no statements on the scope of this proceeding nor on the decisions PSNH made in 2008. Jacobs opined only that PSNH managed the Scrubber project well and spent the \$420 million prudently. Jacobs testimony at 12.
19. Taking Jacobs first, the mere fact that Jacobs concluded PSNH managed the Scrubber construction well does not support a finding that Jacobs is unable to "fairly and neutrally" advise the Commission. Indeed, no other witness challenged Jacobs' conclusion, which was already evident to the parties through Jacobs' reports on the project. It is also important to note that not a single discovery request was propounded to Jacobs on its prefiled testimony by any party. No other witness said the Scrubber should have cost, say, \$300 million, or some other figure. Only Stephen R. Eckberg of the OCA testified that two components of the \$420 million should not be included. He testified that \$2.4 million for a truck wash is not "used and useful," and that \$50,000 paid to the New Hampshire Fish and Game Department was a donation and not a necessary expense.
20. Since the only basis offered for Jacobs's mandatory designation is its testimony, with which no party took exception, the request to designate Jacobs should be denied.

21. As for Mr. Mullen, his conclusion that PSNH spent the \$420 million prudently is similarly not a sufficient basis for designation for the same reasons relating to Jacobs. That leaves the legal part of Mr. Mullen's testimony and his review of PSNH's 2008 decisions as the possible grounds for finding that Mr. Mullen cannot "fairly and neutrally" advise the Commission.
22. Staff often takes positions adverse to other parties during litigated cases, 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 ItraLATA Toll Competition Access Rates, 77 NH PUC 553 (1992) (Order No. 20,608).

23. Mr. Mullen's testimony presents just such a case. His opinion on PSNH's 2008 decisions and its underlying analysis helps complete the record before the Commission on what may become an important issue, depending on how the Commission resolves the questions concerning this docket's scope. Given PSNH's argument that it was in "compliance mode" after the Scrubber law passed and that it did not have to re-examine its decision to build the Scrubber along the way, PSNH may not offer rebuttal testimony on the 2008 events and it may turn out that Mr. Mullen's is the only evidence contrary to that of the moving parties. Since presenting such testimony is part of Staff's role, it is insufficient to support

a finding that Mr. Mullen cannot be fair and neutral with his advice to the Commission.

24. Last, the legal section of Mr. Mullen's testimony does not support mandatory designation. Even if the Commission disagrees with Mr. Mullen's interpretation of the statutes and decides to review PSNH's 2008 decision to proceed with construction of the Scrubber as the moving parties wish, Mr. Mullen's testimony that PSNH acted reasonably in 2008 and spent the \$420 million prudently remains sound.
25. Mr. Mullen's statutory analysis provided context for his financial testimony and does not render him unable "to fairly and neutrally advise the commission."
26. The Commission should not designate Mr. Mullen, Jacobs, or other Staff under RSA 363:32, I.

There Are Insufficient Grounds for Permissive Designation.
27. The moving parties also cite the "good reason" standards for permissive designation under RSA 363:32, II: (1) "the proceeding is particularly controversial and significant," (2) it is "so contentious as to create a reasonable concern about staff's role," or (3) designation "may increase the likelihood of" settlement. These factors do not depend on positions taken by Staff nor do they warrant designation.
28. As for factor (2), although this case is "contentious" the contentiousness does not "create a reasonable concern about staff's role." The contentious parties have been the moving parties and PSNH, not Staff. Staff first took a position with

its testimony in December 2013, Staff's testimony is largely undisputed as to the prudence of how PSNH managed the Scrubber construction, and, to the extent Mr. Mullen's review of PSNH's 2008 decisions and statutory discussion conflicts with the moving parties' positions, it falls short of "contentious." Staff simply expressed a contrary opinion. Factor (2) is thus not present here.

29. Factor (3) is also absent. Designation will have no impact on the likelihood of settlement.
30. The remaining basis for designation is factor (1): "the proceeding is particularly controversial and significant." There can be no doubt that this case is controversial and significant. Nonetheless, Staff submits that the mere fact that a case is controversial and significant should not warrant designation. Such an order would set a dangerous precedent. Many dockets involving the larger utilities are contentious and significant. Perhaps if there were facts in this case that colored its contentious and significant nature in an unusual way, then factor (3) may give rise to designation. The moving parties have pointed to no such facts and Staff submits that none exist.
31. Therefore, the moving parties have failed to demonstrate any of the bases for designation under RSA363:32 exist in this case.

Alternative Relief.

32. Should the Commission grant the motion to designate, Staff notes that the Commission would lose the assistance of Mr. Mullen, Jacobs Consultancy, potentially Thomas Frantz, Director of the Electric Division (because Mr. Frantz discussed and reviewed Mr. Mullen's testimony), and some legal staff. The

Commission may have to hire other consultants and outside counsel to replace Staff and Jacobs, which would further delay this proceeding. Staff suggests that the moving parties should bear these costs pursuant to RSA 363:36.

WHEREFORE, Staff requests that the Commission:

- A. Deny the *Joint Motion for Bifurcation of Commission Staff and its Consultant*;
- B. Grant such other relief as may be just.

Dated this 3rd day of February 2014.



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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically served a copy of this objection upon each party on the official service list compiled by the Secretary in this proceeding.

Dated at Concord, New Hampshire, this 3rd day of February, 2014.



Suzanne Amidon