

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE d/b/a EVERSOURCE ENERGY

**Petition for Approval of Gas Infrastructure Contract Between Eversource Energy and
Algonquin Gas Transmission LLC**

Docket No. DE 16-241

Motion for Designation of Staff Advocates Pursuant to RSA 363:32

NOW COMES the Office of the Consumer Advocate (“OCA”), a party in this docket, and moves pursuant to RSA 363:32, I and N.H. Code Admin. Rules Puc 203.07, for an order designating Staff Attorney Alexander Speidel and Utility Analyst George McCluskey as Staff Advocates in this proceeding. In support of this Motion the OCA states as follows:

1. RSA 363:32 authorizes, and in some circumstances requires, the New Hampshire Public Utilities Commission (“Commission”) to designate employees of the agency as “staff advocates” or “decisional employees” upon request of a party to an adjudicative proceeding. When a Commission employee is designated as a staff advocate she or he is “specifically assigned to advocate as a party with respect to issues arising in an adjudicative proceeding,” RSA 363:30, VIII, and is prohibited pursuant to RSA 363:35 from advising the Commission, its presiding officer, its individual commissioners, or any other decisional employee with respect to matters at issue in the case. Staff advocates are subject to the statutory prohibition of *ex parte* communications with decisional employees. RSA 363:34.

2. Pursuant to RSA 363:32, I, the Commission *must* designate one or more of its employees as staff advocates upon the request of a party if “such members of its staff may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding.” In addition, under RSA 363:32, II the Commission *may* make such designations upon the request of a party for “good reason.” For this purpose, the term “good reason” includes but is not limited to circumstances in which “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 that such designations may increase the likelihood of a stipulated agreement by the parties.” *Id.*
3. This proceeding is at a relatively early stage, with reply briefs due on May 12, 2016 concerning threshold legal issues that may render the remainder of the proceeding moot. Therefore, it is too early to tell whether RSA 363:32 designations would increase the likelihood of resolving the case by stipulation. All of the other grounds for such designations, including the one making designations mandatory, are present with respect to Messrs. Speidel and McCluskey.
4. As the Commission is aware, this proceeding is not *tabula rasa*. Rather, it follows a generic investigation in Docket IR 15-124, captioned “Investigation into Potential Approaches to Ameliorate Adverse Wholesale Electricity Market Conditions in New Hampshire.” Messrs. Speidel and McCluskey were the key Staff participants in Docket IR 15-124.
5. On May 14, 2015, Mr. Speidel filed a letter in Docket IR 15-124 seeking “stakeholder input” to Commission Staff and appending a pleading Mr. Speidel filed with the Federal Energy Regulatory Commission (“FERC”) on March 20, 2015 in which Mr. Speidel

castigated regional transmission organization ISO New England (“ISO-NE”) for failing to propose “a plan that definitively empowers gas generators to enter into firmer natural gas supply arrangements going forward,” without which “the region’s economy will be placed at a profound competitive disadvantage compared to its North American neighbors.”¹ The pleading concluded by arguing that “it is critical that ISO-NE, FERC, and stakeholders develop complementary market reforms that provide for recovery of the costs of economic firm fuel arrangements for gas generators.” *Id.* at 8.

6. On July 10, 2015, Mr. Speidel authored a memorandum, addressed to Mr. McCluskey, concluding that (a) the Electric Industry Restructuring Act, RSA 374-F, does not prohibit an electric distribution utility (EDC) from acquiring gas capacity; (b) an EDC has the power under RSA 374-A to acquire gas capacity; and (c) an EDC has the authority under RSA Chapter 378 to recover the costs of gas capacity in EDC ratepayer rates.²
7. On September 15, 2015, Commission Staff issued its Report on Potential Approaches to Mitigate Wholesale Electricity Prices.³ Although the document does not identify its authors by name, on information and belief Messrs. Speidel and McCluskey are substantially responsible for this document. In this report, Staff reviewed the comments from stakeholders regarding the legality of an EDC purchasing gas capacity and nevertheless re-confirmed the conclusions Staff reached in the July 10 memorandum, namely (a) “that the Commission *could* conceivably hold that RSA 374-F allows such

¹ The letter is available at <http://www.puc.nh.gov/Regulatory/Docketbk/2015/15-124/LETTERS-MEMOS-TARIFFS/15-124%202015-05-14%20STAFF%20INSTRUCTIONAL%20LETTER.PDF>. The referenced quote appears at page 2 of the FERC pleading attached to the letter.

² The memorandum is available at <http://www.puc.nh.gov/Electric/Wholesale%20Investigation/20150710%20IR%2015-124%20Staff%20Legal%20Memorandum%20on%20Authorities%207-10-15.pdf>.

³ The report is available at <http://www.puc.nh.gov/Regulatory/Docketbk/2015/15-124/LETTERS-MEMOS-TARIFFS/15-124%202015-09-15%20STAFF%20REPORT.PDF>.

activity by EDCs,” (b) that RSA Chapter 374-A does not prohibit an EDC from acquiring gas capacity; (c) that “the Commission could rule that gas capacity purchases were contemplated by RSA 374:57, and therefore allowed;” and (d) that recovery of those costs in EDC rates could be permissible. Staff Report at 9-12 (emphasis in original).

8. Staff also opined that an appropriately competitive procurement process was critical:

Staff, in its July 10 Memorandum, strongly advocated for the requirement that New Hampshire EDCs seeking to acquire gas pipeline capacity do so through a competitive bidding (Request for Proposals, or RFP) process, in which different pipeline companies would compete for the EDCs’ contracts. Staff also pointed to the need by EDCs to maintain compliance with affiliate transaction rules within any gas-capacity acquisition program, an issue also discussed by [the New England Power Generators Association] in its August 10 response. Staff reiterates, in the strongest terms, that Staff views RFP-based competitive processes to be critical to the economic procurement of gas capacity at the lowest cost by EDCs from pipeline developers, and Staff will not support any EDC proposal that fails to incorporate such a competitive process in its capacity procurement structure. Staff strongly disagrees with Spectra’s conclusion that there is an “absence of a legal mandate for an RFP”²³; such processes are critical for protecting ratepayer interests, and ensuring that cost recovery of such investments are just, reasonable, and in the public interest.

Id. at 12.

9. In its Order at the conclusion of Docket IR-15-124, the Commission accepted the Staff Report but made clear that it would not at that time determine whether an EDC funding pipeline infrastructure through the purchase of capacity is authorized under state and federal law:

The Commission thus intends to rule on the question of whether a New Hampshire EDC has the legal authority to acquire natural gas capacity resources to positively impact electricity market conditions, only within the context of a full adjudicative proceeding conducted pursuant to the New Hampshire Administrative Procedure Act, RSA Chapter 541-A, and only in response to an actual (as opposed to hypothetical) petition.

Order No 25,860 (January 19, 2016) at 3.

10. In its Order of Notice in the instant proceeding, the Commission reaffirmed that it would be examining the legal questions as issues of first impression in this docket.

As indicated by the Commission in Order No. 25,860 issued in Docket No. IR 15-124, the Commission will divide its review of this petition into two phases. In the first phase, the Commission will review briefs submitted by Eversource, Staff and other parties regarding whether the Access Northeast Contract, and affiliated program elements, is allowed under New Hampshire law.

Order of Notice at 4.

11. The Commission noted the issues to be examined, which overlap with the issues on which Staff opined in the above-cited documents from Docket IR 15-124:

The filing raises, *inter alia*, issues related to whether Eversource has the corporate authority to enter into the Access Northeast Contract under RSA Chapter 374-A and RSA 374:57; whether Eversource's entering into the Access Northeast Contract, development of the ERSP, and assessment of the LGTSC would violate the Restructuring Principles of RSA Chapter 374-F, or any other New Hampshire law, or any federal law, including the Federal Power Act; whether the LGTSC assessment would be permitted under RSA Chapter 374-A, RSA 374:57, and RSA Chapter 378, and Commission precedential standards for ratemaking, as just, reasonable and in the public interest; whether the RFP process presented by Eversource in support of its selection of the Access Northeast Contract comports with the requirements of N.H. Code Admin. Rules Puc 2100, Order No. 25,860, and the standards of prudence applied by the Commission for such contracting; whether the assertions made by Eversource regarding expected benefits and costs of its participation in the Access Northeast Contract are supported by the evidence, including evidence of economic, engineering, and environmental costs, benefits, and feasibility; and whether ERSP and companion FERC tariff filing comport with relevant federal law, including the Natural Gas Act, and whether FERC approval should be a condition precedent for the enactment of any Commission approval.

Order of Notice at 5.

12. Although Staff did not file an initial brief in connection with the threshold legal issues to be addressed in Phase I of the instant case, it is clear from the IR 15-124 documents that both Mr. Speidel and Mr. McCluskey have committed themselves to a substantive

outcome on the threshold legal issues in this proceeding such that they cannot fairly and neutrally advise the Commission on all positions advanced in the proceeding.

13. On April 28, 2016, Mr. Speidel filed a letter in this docket offering a “clarification” of one of the Phase I briefs previously submitted. Specifically, Mr. Speidel accused intervenor New Hampshire Municipal Pipeline Coalition of “selective quotation/misapprehension of fact” in connection with Mr. Speidel’s July 10, 2015 memorandum in Docket IR 15-124. In the letter, Mr. Speidel emphasizes that he is the author of the Staff memorandum that was referenced in the allegedly offending brief and indicated that he was “charitably” describing the nature of the Municipal Pipeline Coalition’s “selective quotation” and “misapprehension of fact.” Without regard to the merits of these claims, the OCA respectfully suggests that the nature and tone of this letter demonstrates how strongly Mr. Speidel feels about this proceeding. It therefore casts doubt on Mr. Speidel’s neutrality for purposes of RSA 363:32, I -- and underscores how “controversial and significant in consequence” this proceeding is and that the docket is “so contentious as to create a reasonable concern about staff’s role,” both grounds for the requested designations under RSA 363:32, II.

14. Similarly, it is the respectful suggestion of the OCA that the conduct of both Mr. Speidel and Mr. McCluskey at the May 4, 2016 technical session convened in this proceeding confirmed that the two Commission employees are strongly committed to moving this proceeding forward into its second phase, which would require a Commission determination that the Eversource petition is permissible as a matter of New Hampshire law (including, arguably, that authority to grant the petition is not preempted by federal law). No recording or transcript was made of the proceedings at the technical session and

the OCA does not have any particular statements made at the technical session to bring to the Commission's attention. It suffices to say that both Mr. Speidel and Mr. McCluskey appeared to treat the outcome in Phase I as a foregone conclusion and one that would definitely require moving forward with Phase II. In particular they expressed confidence that the Commission would be able to issue a Phase I order by late May, and urged the parties to move forward vigorously and expeditiously with discovery, irrespective of the status of the Phase I determination that could render discovery and other procedural steps moot. They indicated that Staff would be moving forward with discovery regardless, in light of the Commission's plenary authority to conduct independent investigations of utilities under RSA 365:19. This zest to move forward reasonably justifies an inference that Staff supports the demand of Eversource and its counterparty for a final Commission order by October 1, 2016 despite opposition to such expedited treatment by OCA and other parties that oppose the Eversource petition.

15. The OCA does not necessarily disagree with all of the substantive positions Messrs. Speidel and McCluskey have taken in either this docket or Docket IR 15-124 and, indeed, we share their expressed concerns with the hastily conducted RFP process that led to Eversource's choice of a project in which it has a significant financial interest as its preferred alternative for firm natural gas capacity. It is, rather, our respectful contention that the totality of the written and oral statements these two able Commission employees have made in Docket IR 15-124 and Docket DE 16-241 suggest that they are not in a position to render neutral advice to the Commission.
16. Further, the Commission should take note that on February 19, 2016, Commissioner Robert R. Scott filed a letter in this proceeding indicating that he had recused himself

from participation in the docket in light of his “past contacts in representing the State of New Hampshire in regional energy discussions with the other New England states concerning natural gas capacity expansion projects aimed at lowering electricity prices.” It is the understanding of the OCA that both Mr. Speidel and Mr. McCluskey are similarly active in representing New Hampshire in regional and federal forums where efforts are made to promote projects such as the one at issue in the proceeding as a means of reducing electricity prices and improving electric reliability by increasing natural gas pipeline capacity. Obviously, if it was appropriate for Commissioner Scott to recuse himself it is appropriate for Mr. Speidel and Mr. McCluskey to be designated as Staff Advocates for the same reasons. It would be unfair, both to the parties and to Messrs. Speidel and McCluskey themselves, to expect them to provide neutral assistance to the Commission on matters as to which they feel so strongly.

17. Finally, the Commission should consider the fact that Docket DE 16-241 is “particularly controversial and significant in consequence” within the meaning of RSA 363:32, II. The number of intervenors, the public attention the proceeding has engendered, and the unprecedented nature of what Eversource is requesting all justify the Commission using its discretionary authority to grant the requested Staff designations as a means of assuring the parties and the public that this docket will be resolved in a manner that leaves no doubt that agency decisionmakers were as objective as possible.
18. For the foregoing reasons, the OCA contends pursuant to RSA 363:32 that the Commission must designate Alexander Speidel and George McCluskey as Staff Advocates or, in the alternative, should do so in its sound discretion. Such action would allow these two dedicated Commission employees to offer their expertise to the

Commission and the parties as to how to address the wholesale electricity problems the Eversource petition improvidently purports to address – but without imposing on them unrealistic expectations of neutrality. In so doing, the Commission would be assuring a fair process to all parties.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Enter an order designating Staff Attorney Alexander Speidel and Utility Analyst George McCluskey as Staff Advocates in this proceeding pursuant to RSA 363:32, and
- B. Grant any other such relief as it deems appropriate.

Respectfully submitted,



Donald M. Kreis
Consumer Advocate
Nicholas J. Cicale
Staff Attorney

Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, NH 03301
(603) 271-1174
donald.kreis@oca.nh.gov

May 9, 2016

Certificate of Service

I hereby certify that a copy of this Motion was provided via electronic mail to the individuals included on the Commission's service list for this docket.



Donald M. Kreis