

**THE STATE OF 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**

**COMMISSION STAFF'S OBJECTION TO MOTION FOR DESIGNATION
OF STAFF ADVOCATES PURSUANT TO RSA 363:32**

Staff of the Public Utilities Commission (Staff) hereby objects to the Motion for Designation of Staff Advocates Pursuant to RSA 363:32 (Motion), filed on January 12, 2017 by the Office of Consumer Advocate (OCA). The OCA seeks to have the Commission designate as staff advocates Staff's expert witness Stan Faryniarz of Daymark Energy Advisors, Sustainable Energy Division Director Karen Cramton, and Staff Attorney David Wiesner, under the provisions of RSA 363:32 (Staff Designation Statute). Motion at 5. The Motion correctly notes that this proceeding was initiated by the Commission under RSA 362-A:9, XVI, as adopted by 2016 N.H. Laws Ch. 31 (HB 1116). *Id.* at 2.

According to the Motion, Mr. Faryniarz, in his rebuttal testimony filed on behalf of Staff on December 21, 2016,¹ has taken a "highly controversial position" regarding the current and near-term levels of cost-shifting attributable to net-metered distributed generation (DG) in what the OCA characterizes as a "contentious proceeding of high visibility" that is "particularly controversial and significant in consequence." *Id.* at 4. The Motion requests that the Commission designate Mr. Faryniarz as a staff advocate and, "based on the assumption that it is Mr. Wiesner and Ms. Cramton who have been working with Mr. Faryniarz and who approved his

¹ Staff's rebuttal testimony was originally filed in both non-public confidential and public redacted versions, based on Staff's belief that it included a sentence containing information considered confidential by Unitil Energy Systems, Inc. (UES) and/or its outside consultant, Black & Veatch. Following confirmation by UES that the information was not considered confidential, Staff filed a complete and unredacted version of its rebuttal testimony on January 4, 2017.

testimony,” that the Commission also designate them as staff advocates “so that [Mr. Faryniarz] has adequate supervision and so as to facilitate settlement discussions in which Staff should participate.” *Id.* at 5.

The Motion should be denied because, as described in more detail below, it misapprehends the nature of the instant proceeding and the applicability of the Staff Designation Statute, it fails to state any valid basis for mandatory designation of staff advocates under RSA 363:32, I, and it further fails to provide sufficient grounds for the Commission to designate staff advocates pursuant to its discretionary authority under RSA 363:32, II.

1. The Instant Proceeding is Not an “Adjudicative Proceeding” to Which the Staff Designation Statute is Even Applicable

The Staff Designation Statute applies “[w]henver the commission conducts an *adjudicative proceeding* in accordance with the provisions of RSA 541-A:31 through RSA 541-A:35.” RSA 363:32, I-III (emphasis added). “Adjudicative proceeding” is defined as “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 (emphasis added). “Contested case” is defined in the Administrative Procedure Act as “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 (emphasis added).

The Commission has long recognized a distinction between its legislative and investigatory functions and its adjudicative function, and has concluded that it is required to conduct adjudicative proceedings only in contested cases, even if it elects to conduct adversarial proceedings in all but rulemaking proceedings as a means of establishing a record for decision. *Generic Investigation into IntraLATA Toll Competition Access Rates*, 77 NH PUC 553, 555-556 (1992) (Order No. 20,608). The Commission’s practice of conducting adversarial proceedings in

most proceedings other than formal rulemakings, however, “should not be construed by parties that appear before us as the conversion of a legislative function into an adjudicative function.” *Id.* at 555. It is well-settled that “in setting rates, the [Commission] is performing essentially a legislative function.” *Appeal of the Office of the Consumer Advocate*, 134 N.H. 651, 659 (1991) (citing *Appeal of Pennichuck Water Works*, 120 N.H. 562, 565-566 (1980)). The Commission has explicitly rejected the argument that ratemaking proceedings are adjudicative in nature because they involve the legal rights of utilities and their ratepayers. Order No. 20,608, 77 NH PUC at 555.

If the instant proceeding does not meet the definition of an “adjudicative proceeding,” then the Staff Designation Statute is not applicable and the Motion fails on that ground alone. This docket was opened pursuant to the directive in HB 1116 for the Commission to initiate “a proceeding to develop new alternative net metering tariffs, which may include other regulatory mechanisms and tariffs for customer-generators, and determine whether and to what extent such tariffs should be limited in their availability within each electric distribution utility's service territory.” RSA 362-A:9, XVI. This proceeding essentially involves tariff development and rate-setting, with prospective effect for the regulated electric distribution utilities and their customers. It is not a “contested case” in which the legal rights, duties, or privileges of any party must be determined by the Commission after notice and an opportunity for hearing.

The instant docket therefore is not an adjudicative proceeding, but an exercise of the Commission’s legislative function using adversary litigation process to develop a supporting record. The Staff Designation Statute is not applicable and the Motion relying on that statute must be denied.

2. The Motion States No Basis for Mandatory Designation of Staff Advocates Under the Staff Designation Statute

Even assuming *arguendo* that the Staff Designation Statute does apply in this proceeding, the Motion fails to state a valid basis for mandatory designation of staff advocates. Under RSA 363:32, I, the Commission is required to designate one or more members of its Staff as a staff advocate in an adjudicative proceeding when it determines that such Staff members “may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding.”

In a recent order denying a motion to designate staff advocates, the Commission reiterated the correct view of Staff’s dual roles in litigated proceedings, stating that “Staff’s expert role takes two forms, often in the same case.” *See Public Service Company of New Hampshire*, Order No. 25,954 (October 18, 2016) at 2. One such role is to “develop [] proposals for resolution of issues before the Commission, and to promote those proposals ... where possible.” *Id.* at 2-3 (citing *Verizon New Hampshire*, 87 NH PUC 11, 19 (2002)). Staff’s other role is to “advise the Commission fairly and neutrally as to the positions of the parties, the status of the docket, the law applicable to the situation, the policy considerations that should be taken into account, and other aspects of the case.” *Id.* at 3 (citing *Verizon New Hampshire* at 19; *Public Service Company of New Hampshire*, Order No. 25,630 (February 14, 2014) at 5-7).

Staff continues to have this “duty of neutral advice even when they hold a particular conflicting view, and even when it is clear the Commission is seriously entertaining a contrary position.” *Id.* To avoid designation in every case in which it takes a position, Staff is “entitled to the presumption that they are ‘of conscience and capable of reaching a just and fair result.’” *Id.* (citing *Verizon New Hampshire* at 17-18). The Commission has emphasized that the presumption of fairness “should not be lightly overcome.” *Id.* Nor is the presumption of fairness the same as a presumption that Staff will remain impartial; although Staff must “observe the

same standards of fidelity and diligence that apply to the Commissioners,” Staff need not “observe the same duty of impartiality.” *Id.* The Commission has also stated that

Professional staff do not have to be impartial in order to be able to fairly and neutrally advise, and we will not impose such a requirement. Thus, even if there were facts alleged that were sufficient to demonstrate lack of impartiality, that alone would not have been sufficient to rebut the presumption that [Staff] is able to fairly and neutrally advise the Commission.

Id. (citing *Verizon New Hampshire* at 19; *Public Service Company of New Hampshire*, Order No. 25,630 at 6).

According to the OCA, Staff has taken a “highly controversial position” in a contentious proceeding that is “particularly controversial and significant in consequence.” Motion at 4-5. As evidence of this “highly controversial position,” the Motion offers only the following statement included in the rebuttal testimony of Mr. Faryniarz filed on behalf of Staff:

Staff recommends that the Commission consider whether the current and near-term levels of cost-shifting are significant enough to address at this time or rather, given the current relatively low levels of DG resource penetration, whether an approach based on the net metering compensation mechanism currently in place should be sustained for the nearer term until DG resource penetration levels increase to a threshold (e.g., 10% of utility peak load) that might result in more substantial cost-shifting.

Id. at 3 (citing Staff Rebuttal Testimony at 79 (Bates page 80), lines 12-13). The Motion characterizes this statement as consistent with the conclusions of solar industry advocates and allied nonprofits, “which have generally argued in their testimony that the Commission should leave the status quo in place because the utilities have failed to produce evidence of unreasonable cost-shifting that requires an immediate solution,” and contrasts this view with the positions advocated by the utilities, the OCA, and the City of Lebanon, which have all concluded “to various extents that in light of [HB 1116] the Commission should take prompt steps to reduce the shifting of costs from customers with distribution generation to those without distributed generation.” *Id.* at 4.

Staff submits that the quoted excerpt from Mr. Faryniarz's rebuttal testimony represents a measured and qualified recommendation based on his assessment of the evidence of potential cost-shifting proffered by parties through their direct testimony and the limited data and analysis supporting such proffered evidence. The quoted statement is congruent with the tenor and content of Staff's entire rebuttal testimony, the focus of which is to critique the proposals of parties described in their direct testimony, to analyze the positions supporting their proposals, and to evaluate the studies, data, and analyses they rely upon, all from a neutral and objective perspective. The fact that the OCA or another party may disagree with any particular statement, conclusion, suggestion, or recommendation of Mr. Faryniarz on behalf of Staff does not compel the conclusion that he or any individual Staff member "may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding."

The Commission has long recognized that 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 IntraLATA Toll Competition Access Rates, 77 NH PUC at 555. More recently, the Commission has confirmed that a moving party "must show more than mere disagreement in testimony before we will draw an inference that Staff cannot perform its duties in a neutral and fair manner." *Public Service Company of New Hampshire*, Order No. 25,630 at 8. "The fact that a staff member's ultimate recommendation favors one party or another does not

mean that the employee has committed to a particular result and should be designated a staff advocate.” *Id.* at 8-9 (citing *Carleton Water Company Trust*, 75 NH PUC 393, 394 (1990)).

Rather, in order to establish mandatory designation, a moving party must demonstrate that “the staff member in question has done something beyond simply stating a contrary position.” *Id.* at 9.

The Motion therefore fails to state a valid basis for mandatory designation of staff advocates under the Staff Designation Statute, RSA 363:32, I.

3. The Motion Provides Insufficient Grounds for the Commission to Designate Staff Advocates Pursuant to its Discretionary Authority under the Staff Designation Statute

Again assuming *arguendo* that the Staff Designation Statute does apply in this proceeding, the Motion fails to provide sufficient grounds for designation of staff advocates pursuant to the Commission’s discretionary authority under RSA 363:32, II. Under that section of the Staff Designation Statute, the Commission *may* designate one or more members of its Staff as a staff advocate in an adjudicative proceeding

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. The three factors specified might suggest that discretionary designation focuses more on the nature of the proceeding itself, independent of Staff’s testimony and positions.

However, the Commission has clarified that, even though the first factor does not expressly make a link to Staff’s role, the “controversial and significant” nature of the case “must be read in light of Staff’s role in providing professional and expert advice to the Commissioners.”

Public Service Company of New Hampshire, Order No. 25,630 at 10 (citing *Verizon New Hampshire* at 17). Merely stating that a case is controversial, significant, or contentious is not

enough; the moving party “must show how the nature of the case is likely to impact Staff’s ability to provide [the Commission] with fair and neutral advice, remembering that Staff still enjoys the presumption of fairness.” *Id.* The second factor by its own terms is not simply concerned with whether the proceeding is contested, but whether the case is “‘so contested’ as to create ‘reasonable concern on the part of any party about the Staff’s role in commission decision making.’” *Id.* at 9 (citing *Verizon New Hampshire* at 17). The primary concern is Staff’s ability to “to fairly and accurately characterize and analyze the competing positions in the case, and overall to maintain its professional objectivity when responding to questions by the Commissioners.” *Id.* The third factor focuses on Staff’s potential role in facilitating a negotiated settlement of litigated proceedings.

In the Motion, the OCA questions both the merits and potentially the legal basis for implementation of Mr. Faryniarz’s suggestion that the Commission “stick with the net metering regime ‘currently in place’ and leave entirely to the future, and the development of a better body of evidence, the implementation of new tariffs and rate structures.” Motion at 4-5. Regardless of whether or not that suggestion has merit, however, the Motion argues that “in the circumstances it is clear this is a textbook example of a situation in which ‘the proceeding is particularly controversial and significant in consequence’ and ‘the proceeding is so contentious as to create a reasonable concern about staff’s role’ pursuant to RSA 363:32.” *Id.* at 5.

Based on those assertions, the OCA asks the Commission to designate Mr. Faryniarz as a staff advocate, and also to designate Mr. Wiesner and Ms. Cramton based on the assumption they are the Staff members “who have been working with Mr. Faryniarz and who approved his testimony, ... so that he has adequate supervision and so as to facilitate settlement discussions in which Staff should participate.” *Id.* According to the OCA, such designation of staff advocates

would “assur[e] a fair process to all parties and giv[e] the public, and the Legislature, confidence that the Commission’s responsibilities under [HB 1116] are being discharged in a fully neutral and fair manner.” *Id.*

Staff submits that the Motion focuses primarily on the “contentious” nature of the instant proceeding, while characterizing as “highly controversial” a single quoted passage from Mr. Faryniarz’s testimony. That quoted statement merely recommends that the Commission consider a potential course of action based on his expert assessment of the state of the record on a single relevant issue. The OCA’s arguments are thus wholly inadequate to demonstrate that the nature of the proceeding is likely to impact Staff’s ability to provide the Commission with fair and neutral advice, in light of the presumption of fairness afforded to Staff. Nor has the OCA sufficiently explained, much less persuasively supported, its contention that designation of staff advocates would “facilitate settlement discussions in which Staff should participate.” Staff notes as well that only two other parties, the City of Lebanon and New England Ratepayers Association, expressed concurrence with the Motion, suggesting there is hardly a groundswell of support among the many parties for bifurcation of Staff in this proceeding. The Motion fails to state sufficient grounds for designation of staff advocates pursuant to the Commission’s discretionary authority under RSA 363:32, II.


Finally, as a more practical concern, if the Commission were to grant the Motion, Staff notes that the Commission would be left without its sole consultant, senior staff, and some legal staff, and it might have to retain another consultant and perhaps even outside counsel to serve in an advisory role, the additional costs of which would likely be borne by the utilities under RSA 363:36 and 365:37, II. The need to retain any such outside assistance at this late stage in the proceeding also would likely delay the proceeding even further.

Based on the foregoing, Staff respectfully requests that the Commission deny the Motion for Designation of Staff Advocates Pursuant to RSA 363:32 filed on January 12, 2017 by the Office of Consumer Advocate.

Respectfully,

STAFF OF THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Date: January 18, 2017

By: 
David K. Wiesner, Esq.
Staff Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objection to Motion for Designation of Staff Advocates Pursuant to RSA 363:32 has this day been served by electronic mail to all persons named on the official service list for this docket.

Dated: January 18, 2017


David K. Wiesner, Esq. (N.H. Bar No. 6919)