

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Scrubber Costs and Cost Recovery

Order Denying Joint Motion to Designate Staff

ORDER NO. 25,630

February 14, 2014

I. PROCEDURAL HISTORY

This docket considers the prudence of the costs and cost recovery for the wet flue gas desulfurization system (Scrubber) installed by Public Service Company of New Hampshire (PSNH) at its coal-fired generation plant known as Merrimack Station.

On January 22, 2014, the Office of the Consumer Advocate, TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc., the Conservation Law Foundation, and the Sierra Club (the moving parties) filed a *Joint Motion for Bifurcation of Commission Staff and its Consultant* pursuant to RSA 363:32. The motion asked the Commission to designate “Steven Mullen and Commission Staff involved in the development of Mr. Mullen’s testimony” and Jacobs Consultancy (Jacobs) as “staff advocates.” Motion at 1; *see* RSA 363:30, VIII. By statute, “staff advocates” may not communicate with “decisional” employees except “upon notice and opportunity for all parties to participate,” and they may not “advise the commission, its presiding officer, individual commissioners, or any decisional employee.” RSA 363:34 and 363:35.

The moving parties, Staff, and Jacobs filed testimony on December 23, 2013. The moving parties’ testimony outlined their legal arguments that the Commission has authority to

review the prudence of PSNH's decisions relating to the Scrubber, and presented facts supporting their claims that PSNH's decision to continue with the project was not prudent. Their testimony also challenged some of the \$420 million spent on the Scrubber. Staff's testimony, filed by Steven E. Mullen, Assistant Director of the Electric Division, included a discussion of the relevant statutes, the information available to PSNH, and PSNH's management of the Scrubber's construction. Mr. Mullen's testimony is largely consistent with PSNH's positions in this docket. Jacobs' testimony focused only on PSNH's management of the Scrubber construction and concluded that PSNH acted prudently in that regard.

The moving parties argued in their motion to designate that the positions taken by Staff and Jacobs, viewed in the unique context of this docket, satisfy the requirements of RSA 363:32. PSNH and Staff disagreed, in objections filed January 30 and February 3, 2014, respectively.

II. POSITIONS OF THE PARTIES AND STAFF

A. The Moving Parties

The moving parties argued, first, that this docket is substantial as it involves a large investment for PSNH and may result in a substantial impact on ratepayers. Motion at 3; *see* December 23, 2013 testimony of Matthew I. Kahal, at 13-14 (discussing the relative size of PSNH's \$420 million investment in the Scrubber to PSNH's current rate base); December 23, 2013 testimony of Mr. Mullen, at 27-28 (recommending a total rate impact of 2.03 cents per kilowatt-hour (kWh)¹ over seven years to pay for the Scrubber).

Second, the moving parties argued that the Scrubber project has generated a high level of interest from the public and the press making it "particularly important to avoid even the

¹ The 2.03 cents per kWh rate impact would represent an incremental increase of 1.05 cents per kWh above the temporary rate of 0.98 cents per kWh in effect since April 2012.

appearance of partiality on the part of staff advising the Commissioners during the decision making process.” Motion at 3.

Third, 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 4. According to the moving parties, Mr. Mullen’s testimony will thus require them to “seek further data” from Mr. Mullen and “cross examine him at hearing.” The moving parties argued that “under these circumstances, to allow Mullen ... to have *ex parte* communication in advance of the contested hearing ... would create the appearance of bias.” *Id.*

Finally, the moving parties argued that 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 4-5 (*quoting* former RSA 363:32, I(a)(1)).

B. PSNH

PSNH’s objection began by observing that RSA 363:32 mandates designation only when Staff “may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding,” and separately grants the Commission discretionary authority to designate Staff “for good reason,” which may include that “the proceeding is particularly controversial and significant” or is “so contentious as to create a reasonable concern about staff’s role.” RSA 363:32, I and II; Objection at 5-6.

PSNH primarily argued that the moving parties presented “no legal or factual basis” to support either mandatory or discretionary designation. Objection at 6, 7. PSNH said that Staff and Jacobs simply filed testimony with which the moving parties were “unhappy” and, absent a

showing of “bias or malevolence” or another “good-faith basis for requiring” designation, the motion should be denied. *Id.*

PSNH also argued that granting the motion would set a bad precedent because the sole basis for designation was that Staff and Jacobs took positions contrary to those of the moving parties. Noting that in every case where Staff files testimony “it is highly likely that some party may be unhappy,” PSNH cautioned that if the moving parties’ theory prevailed, grounds for mandatory designation would exist “in virtually every adjudicative proceeding.” Objection at 9.

PSNH also objected on the basis that the motion was untimely (Jacobs’ position has been clear for about two years through its filing of status reports and Staff’s testimony was filed more than 30 days before the motion to designate), and because designation would deprive the Commission of the advice and “acquired knowledge” of Staff and Jacobs, causing unnecessary delay. Objection at 11; *see Public Service Company of New Hampshire*, 85 NH PUC 609 (2000) (Commission denied a late filed motion to designate as “administratively unworkable” under former RSA 363:32, I(c)).

C. Staff

Staff similarly distinguished between the mandatory and discretionary sections of RSA 363:32. In addition, Staff emphasized a significant change in what is now the sole basis for mandatory designation. Whereas the former statute required designation when “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,” the current version of the law does not include the italicized language and mandates designation only when staff “may not be able to fairly and neutrally advise the commission.” Former RSA 363:32, I(a)(1) (emphasis added); RSA 363:32, I. Staff

observed that the statute's "good reason" standard otherwise grants the Commission wide discretion whether to designate Staff members as Staff advocates. RSA 363:32, II.

Staff argued that two standards the moving parties cited are not in the statute and should not be considered. Specifically, Staff urged the Commission to ignore the moving parties' arguments 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," and that Staff "committed to a 'highly adversarial position.'" *See* Motion at 3, 4. Staff argued that the "appearance of partiality" was never was part of the designation statute, and whether Staff took a "highly adversarial position" is no longer part of the law, as described above.

Finally, Staff argued that the contents of Staff's and Jacobs' testimony does not support designation and that the moving parties provided no other evidence that would cause anyone to question Staff's or Jacobs' ability give fair and neutral advice.

III. COMMISSION ANALYSIS

A. Applicable Law

The Commission is a statutorily created agency charged with being "the arbiter between the interests of the customer and the interests of the regulated utilities." RSA 363:17-a. To carry out that duty the Commission may employ "such regular staff, including experts, as it shall deem necessary." RSA 363:27, I. Staff's expert role takes two forms, often in the same case. On one hand, Staff is "expected to . . . develop[] proposals for resolution of issues before the Commission, and to promote those proposals . . . where possible." *Verizon New Hampshire*, 87 NH PUC 11, 19 (2002). On the other hand, Staff 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.* 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.* at 17-18 (2002) (quoting *Appeal of Office of Consumer Advocate*, 134 N.H. 651, 660 (1991)). The presumption of fairness “should not be lightly overcome.” *Id.* at 18.

This presumption of fairness is not 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.”

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. at 19.

We turn to the controlling statute at issue with the presumption of fairness in mind. RSA 363:32, I governs mandatory designation:

[T]he commission *shall* designate one or more members of its staff as a staff advocate . . . 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.

RSA 363:32, I (emphasis added). Paragraph II of the same section allows discretionary designation “for good cause shown” and suggests three factors to consider:

[T]he commission *may* designate one or more members of its staff as a staff advocate . . . 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 (emphasis added).

The Legislature made three changes to RSA 363:32 in 2010 that confirm the Legislature's intent to grant the Commission wide discretion in reviewing motions to designate. First, the 2010 amendment reduced from four to one the mandatory grounds upon which we "shall" designate Staff. *Compare* former RSA 363:32, I(a)(1) through (a)(4) *with* current RSA 363:32, I. Second, the 2010 amendment removed the phrase that required us to examine whether Staff "have committed or are likely to commit to a highly adversarial position in the proceeding." Former RSA 363:32, I(a)(1). Third, the Legislature converted the remaining mandatory bases for designation to factors for us to consider when deciding whether there is "good reason" for discretionary designation. *Compare* RSA 363:32, II with former RSA 363:32, I(a)(2) through (a)(4).

The clear purpose of these 2010 amendments was to expand our discretion over motions to designate Staff. Under current law we must designate only if Staff "may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding," otherwise we may designate Staff "for good cause shown" while considering the factors in RSA 363:32, II.

B. Discussion

We first examine whether the moving parties established the sole basis for mandatory designation – whether they proved that Staff and Jacobs "may not be able to fairly and neutrally advise the commission on all positions advanced in the proceeding." RSA 363:32, I.

The case for designating Jacobs is weak. All the supporting evidence as to Jacobs is in the following two sentences:

On that same date Frank DiPalma and Larry Dalton from Jacobs Consultancy filed testimony on behalf of the Staff. In addition, each of the parties to this motion filed testimony that contradicts PSNH's and Staff's testimony in this docket.

Motion at 4. The moving parties wanted us to conclude that Jacobs “may not be able to fairly and neutrally advise the commission” simply because Jacobs filed testimony “on behalf of the Staff” that supposedly “contradicts” the moving parties’ testimony. As stated above, Jacobs did not substantially contradict the moving parties. Jacobs was silent on the legal issues surrounding this docket’s scope and said nothing about PSNH’s decisions in 2008. In testifying that PSNH managed the construction project well, Jacobs only implicitly contradicted the part of Mr. Eckberg’s testimony that challenged costs related to the truck wash (\$2.4 million) and a certain habitat conservation expenses (\$50,000) which, combined, make up only about 0.6 percent of the Scrubber’s \$420 million in costs. Eckberg testimony at 4 and 6. A disagreement over such a small portion of the costs is insufficient to overcome the presumption of fairness.

The grounds raised by the moving parties for Mr. Mullen’s designation are his testimony that “supports PSNH’s position that it should receive full recovery from ratepayers of the money it invested in the scrubber project [and that] each of the parties to this motion filed testimony that contradicts PSNH’s and Staff’s testimony.” Motion at 4. Although Mr. Mullen did contradict the moving parties on substantial issues (the scope of this docket and the prudence of PSNH’s 2008 decisions), the moving parties cited nothing else. The moving parties argue from Mr. Mullen’s conflicting testimony that he is unable to provide fair and neutral advice. We disagree.

Staff regularly files adverse testimony in contested cases. Because the presumption of fairness “should not be lightly overcome,” the moving parties 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. “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.” *Carleton Water Company Trust*, 75 NH PUC 393, 394

(1990). To establish mandatory designation the moving parties must demonstrate that the staff member in question has done something beyond simply stating a contrary position. *See, e.g., Public Service Company of New Hampshire*, 96 NH PUC 722, 728(2011) (“because Commission Staff members ... were involved in negotiating the PPAs on behalf of the state and are one of the Joint Petitioners, they were designated as staff advocates”); *Lakes Region Water Company*, DW 10-141, December 11, 2011 Secretarial Letter (granting a motion to designate staff due to the “nature of the disputes” between Staff and the utility, which dispute included allegations of misrepresentation). The moving parties submitted no such evidence here. Thus, we deny the moving parties’ motion to designate under RSA 363:32, I.

We next examine the moving parties’ request for designation under the discretionary “good reason” standard which directs us to consider whether this case “is particularly controversial and significant in consequence” or is “so contentious as to create a reasonable concern about staff’s role.” RSA 363:32, II.² By its own terms the second factor is not simply concerned with whether the proceedings are 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.’” *Verizon New Hampshire*, 87 NH PUC 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.* Thus, how “contested the proceedings must be in order to merit designation ... is a function of the impact of such litigiousness on the ability of Staff to assist the Commission fairly in the decisionmaking process.” *Id.*

² The third discretionary factor is whether designation “may increase the likelihood of a stipulated agreement by the parties.” RSA 363:32, II. The moving parties did not rely on this factor.

The first factor does not expressly make the same link to staff's role, but we have previously held that 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." *Id.* Therefore, merely 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.

The moving parties recite that this case is controversial ("the scrubber project generates a high level of interest from the general public and receives a great deal of press coverage," Motion at 3), significant (which no party contests), and contentious ("this docket has an extensive procedural history with numerous contested motions to compel and requests for rulings regarding the scope of the prudency review," Motion at 2), but they do not connect how these factors "impact ... Staff's role in providing professional and expert advice." The moving parties have not demonstrated any effect upon Staff from the controversial and substantial nature of this case. To the extent the litigation has been contentious, it has been so only between the moving parties and PSNH, not Staff. Our review of the file and Staff's participation in this case reveals nothing that implicates Staff's ability to provide fair and neutral advice. Therefore, we exercise our broad authority under RSA 363:32, II and deny the moving parties' request for discretionary designation.

Finally, we comment on the moving parties' argument that we should designate Staff in this case due to the "appearance of partiality" that arguably arose from its testimony. Although we agree with Staff that this concept is not a statutory factor we must consider in deciding the motion, we are mindful that appearances play a role in the credibility of the Commission, which

adjudicates disputes with statewide impact. We reaffirm what we said when we denied a request to designate in an equally controversial and substantial case some years ago:

We too are concerned about public perception and confidence in our decision making process. That is one of the reasons that we so often require our Staff to put on the record their independent analyses of issues in the dockets that come before us, through prefiled testimony, subject to cross-examination. These analyses in effect constitute the advice that they would give us in their advisory capacity. It is reasonable to expect that the essential advice that ... Staff would provide to us in this docket is already in the record.

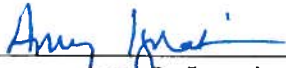
Public Service Company of New Hampshire, 85 NH PUC 609, 612 (2000). Mr. Mullen and Jacobs prefiled their testimony. They will be subjected to cross examination. To the extent the moving parties take issue with what Mr. Mullen and Jacobs say they will have every opportunity to challenge them and to present their own evidence.

We also remind the moving parties that, as in every case, we will personally hear and consider all the record evidence. We will base our final decision on the record presented to us, apply the law as we find it to be, and issue a written order that is subject to post hearing review and appeal.

Based upon the foregoing, it is hereby

ORDERED, that the *Joint Motion for Bifurcation of Commission Staff and its Consultant* is DENIED.

By order of the Public Utilities Commission of New Hampshire this fourteenth day of
February, 2014.



Amy L. Ignatius
Chairman



Martin P. Honigberg
Commissioner

Attested by:



Debra A. Howland
Executive Director