

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

January 7, 2019

The Honorable Catherine Cortez Masto  
United States Senate  
Washington, D.C. 20510

Dear Senator Cortez Masto:

This correspondence responds to your December 12, 2018, letter requesting an update from me as to the guidance that I sought and received from the Federal Energy Regulatory Commission's Designated Agency Ethics Official (DAEO) concerning matters I may hear as a Commissioner. As required by the Office of Government Ethics regulations and my Ethics Agreement, I met with the DAEO on December 12, 2018, to receive a pre-scheduled ethics briefing and ethics training. A summary of that meeting and the DAEO's guidance as to my recusal obligations are enclosed for your information.

As I stated in my confirmation hearing, I pledge to be a fair, objective, and impartial arbiter in the cases and issues that will come before me as a Commissioner, and my decisions will be based on the law and the facts, not politics. Consistent with these ends, I will continue to seek the guidance of the DAEO as to recusal issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Bernard L. McNamee", written in a cursive style.

Bernard L. McNamee  
Commissioner

Enclosure (1)

FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, DC 20426

MEMORANDUM TO: Bernard L. McNamee  
Commissioner

FROM: Charles A. Beamon   
Designated Agency Ethics Official  
Associate General Counsel  
General and Administrative Law

DATE: January 2, 2019

SUBJECT: Summary of Ethics Guidance

You have asked for a summary of the ethics guidance that you have sought and received from me as to any potential recusal obligation that may apply to you as a FERC Commissioner. As we discussed and as detailed below, based on the Office of Government Ethics (OGE) regulations, ethics statutes, applicable case law, and your ethics pledge, recusal determinations are made on a case-by-case basis.

**FACTUAL BACKGROUND**

**A. Pre-scheduled Ethics Briefing and Training**

Pursuant to the OGE regulations and your Ethics Agreement, you met with me on December 12, 2018 to receive a pre-scheduled ethics briefing and ethics training. *See* 5 CFR § 2638.308(e)(2). During that meeting, I described to you the legal standards for recusal determinations. In the course of that briefing, you informed me that you are recusing yourself from Commission proceeding *Grid Reliability and Resilience Pricing* (Docket No. RM18-1) because, as a lawyer for the Department of Energy (DOE), you were involved in drafting the DOE Notice of Proposed Rulemaking (NOPR) for the Grid Reliability and Resilience Pricing Rule, and you signed the transmittal letter for the NOPR. We also discussed Commission proceeding *Grid Resilience in Regional Transmission Organizations and Independent System Operators* (Docket No. AD18-7), which was initiated in the same Commission order that terminated the proceeding in Docket No. RM18-1,<sup>1</sup> and similar matters that could come before you as a

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<sup>1</sup> *Order Terminating Rulemaking Proceeding, Initiating New Proceedings, & Establishing Additional Procedures re Grid Reliability & Resilience Pricing under RM18-1 et al.*, 162 FERC ¶ 61,012 (January 8, 2018).

Commissioner.

Although Docket No. AD18-7 is related to Docket No. RM18-1, I advised you that I do not view the relationship as requiring your recusal in Docket No. AD18-7. I emphasized that Docket No. AD18-7 is a different proceeding than Docket No. RM18-1. I also noted that Docket No. AD18-7 is an administrative inquiry in which the Commission received over 200 comments suggesting various outcomes. Moreover, based on the facts known to me, I do not view your prior position and statements as demonstrative of an unalterably closed mind as to that administrative docket. *See Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979). I cautioned you that we must exercise continued oversight to ensure that Docket No. AD18-7 does not develop in such a way as to replicate or closely resemble Docket No. RM18-1, which given your prior participation would require your recusal. Notably, you consistently expressed appreciation for my guidance and repeatedly encouraged me to recommend recusal in any instances of doubt or in any areas where I lack certainty as to the propriety of your participation.

#### **B. December 12, 2018 Letter from Members of the Senate**

By letter dated December 12, 2018, seventeen members of the United States Senate urged you to recuse yourself from “future matters before FERC that might be characterized as pitting one fuel source against another” as well as any matters in which your “impartiality could be questioned based upon your past statements, positions, or work.”<sup>2</sup> Specifically, the Senators state that they are concerned “about the positions you have taken while serving as the U.S. Department of Energy’s (DOE) Deputy General Counsel for Energy Policy and in the private sector.” The letter notes that the Senators are “troubled by the implications of your involvement in the development of the DOE’s Notice of Proposed Rulemaking (NOPR) for the Grid Reliability and Resilience Pricing Rule.” They are also concerned about statements that you have made in public that they characterize as “favoring fossil fuel and denigrating renewable resources.” In that regard, the letter refers to an “Earth Day op-ed” and quotes the following remarks you made during a 2018 public policy forum in Texas:

[r]enewables, when they come on and off, it screws up the whole the physics of the grid. So when people want to talk about science, they ought to talk about the physics of the grid and know what real science is, and that is how do you keep the lights on? And it is with fossil fuels and nuclear.<sup>3</sup>

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<sup>2</sup> The seventeen Senators are: Catherine Cortez Masto, Maria Cantwell, Charles Schumer, Martin Heinrich, Angus King, Ron Wyden, Chris Van Hollen, Sheldon Whitehouse, Debbie Stabenow, Tina Smith, Jeanne Shaheen, Jeffrey Merkley, Mazie Hirono, Margaret Hassan, Bernard Sanders, Tammy Duckworth, and Edward Markey.

<sup>3</sup> Moreover, I am also aware of the following comments you made during the same speech:

Accordingly, the letter requests that you “recuse yourself from any future FERC proceedings where your impartiality could be questioned based upon your past statements, positions, or work on the DOE NOPR.”<sup>4</sup> The Senators requested that you provide them an update, by no later than January 9, 2019, about the ethics guidance that you sought and received.

### LEGAL STANDARDS

As we discussed, the presumption is that agency officials are honest, impartial and “capable of judging a particular controversy fairly on the basis of its own circumstances.” *U.S. v. Morgan*, 313 U.S. 409, 421 (1941); *Haley v. Dept. of the Treasury*, 977 F.2d 553, 558 (Fed. Cir. 1992).<sup>5</sup> A party challenging the impartiality of an official cannot overcome this presumption by merely showing that an official has “taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute.” *See Nuclear Info. & Resource Serv. & Public Citizen v. NRC*, 509 F.3d 562, 571 (D.C. Cir. 2007) (citing *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1981)).

In fact, the courts have viewed such matters in realistic terms and have explained that “given the roles that agency officials must play in the give and take of sometimes rough and tumble policy debates, courts must tread lightly when presented” with

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[T]he Natural Resources Defense Fund, the Environmental Defense Fund, they’re the ones in court. They’re going out there and they’re battling and they’re making their case in the courts and they’re winning....They’re gonna be put against coal miners. They’re going to try to wait us out, litigate us out, and they’re going to try to return to the administrative tyranny that they’ve been pushing for so long....[T]he green movement is always talking about more government control it’s because it’s the constant battle between liberty and tyranny.

Texas Public Policy Forum, Policy Orientation 2018 (February 7-9, 2018).

<sup>4</sup> The Harvard Electric Law Initiative and the Clean Energy Advocates (Natural Resources Defense Council, Sierra Club, and Union of Concerned Scientists) filed separate comments in Docket Nos. RM18-1 and AD18-7 seeking your recusal. *See* Harvard Electricity Law Initiative on Mr. McNamee’s Disqualification from Certain Pending and Future Matters about “fuel-secure” electric generators, (Dec. 6, 2018); Motion for Recusal of Commissioner McNamee of Natural Resources Defense Council, et al. under AD18-7-000, *et. al.*, (Dec. 18, 2018).

<sup>5</sup> *See also* 5 C.F.R. § 2635.501, 502 (providing the OGE regulations on impartiality in performing official duties).

disqualification challenges. *Id.* at 571; see also *C&W Fish Co. v. Fox*, 931 F.2d 1556, 1565 (D.C. Cir. 1991) (citing *Center for Auto Safety v. FTC*, 586 F. Supp. 1245, 1248 (D.D.C. 1984)). The D.C. Circuit, in particular, has acknowledged that officials are often selected for positions because of their prior experience, which necessarily includes taking positions on certain matters. As the court explained in *Ass'n of Nat'l Advertisers, Inc.*,

the simple fact that the [FTC] Chairman explored issues based on legal and factual assumptions, however, did not necessarily bind him to them forever. Rather, he remained free, both in theory and in reality, to change his mind upon consideration of the presentations made by those who would be affected.

There are two standards that a court utilizes when determining when a recusal is required – one for adjudicatory proceedings and one for rulemaking proceedings.

### **A. Adjudicatory Proceedings**

For adjudicatory matters involving specific parties, the test as to whether an official should be disqualified is whether “a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970). In applying that test, the D.C. Circuit has explained that it would “set aside a commission member’s decision not to recuse himself from his duties only where he has *demonstrably made up [his] mind* about important and specific factual questions and [is] *impervious to contrary evidence.*” *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (citing *United Steelworkers*, 674 F.2d at 1209) (emphasis added).

### **B. Rulemaking Proceedings**

For rulemakings, the D.C. Circuit stated that an agency official should only be disqualified when “there has been a clear and convincing showing that the agency member has an *unalterably closed mind* on matters critical to the disposition of the proceeding.” See *Assn of Nat'l Advertisers, Inc.*, 627 F.2d at 1168 (citing *Withrow v. Larkin*, 421 U.S. 35, 55, (1975) (emphasis added); *Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978)). According to the D.C. Circuit, the “unalterably closed mind” test permits rulemakers to carry out their proper policy-based functions while disqualifying those who are unable to meaningfully consider the issues. *Id.* Courts have consistently recognized that agency officials must be able to engage in public debate and discussion about policy matters. See *Ass'n of Nat'l Advertisers, Inc.*, 627 F.2d at 1169 (citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977)).

### C. Due Process Considerations

Moreover, the Administrative Procedures Act provides for due process in administrative proceedings. See 5 U.S.C. § 551-559 (2012). FERC's decisions, like those of other independent regulatory agencies, are made on the public record and parties have an opportunity to raise concerns, including those about an official's bias, during the course of a proceeding. See 5 U.S.C. § 553, 554. Even after an initial decision is made on the record, a party may challenge the decision of the agency on rehearing before the Commission,<sup>6</sup> and then through an appeal to a court with jurisdiction over the matter.<sup>7</sup>

As I explained to you during your ethics briefing, parties have previously made challenges to a Commissioner's participation in a specific proceeding. In each instance, the challenge received proper consideration during the course of the proceeding. See, e.g., *Mississippi Industries v. FERC*, 808 F.2d 1525, 1566 (D.C. Cir. 1987) (rejecting a challenge based on the fact that a Commissioner should have recused himself because his former employer, a Louisiana Senator, was a member of a group that intervened in the proceeding), *vacated in part on other grounds Mississippi Industries v. FERC*, 822 F.2d 1104 (D.C. Cir. 1987); (*PJM Interconnection, LLC, Order on Compliance Filing, Technical Conference, and Rehearing*, 137 FERC ¶ 61,145 (Nov. 11, 2011) (analyzing on rehearing a request that a Commissioner recuse himself, and concluding unanimously that the Commissioner's comments, that a bill before the then-New Jersey Governor would "crater the capacity market," did not show that he "had made up his mind regarding two as-yet-to-be filed proceedings concerning a related, but very separate matter—the specific, region-wide operation of PJM's MOPR..."). Accordingly, I advised you that such issues are considered in each proceeding on a case-by-case basis.

### SUMMARY

As noted above, you are recusing yourself from Docket No. RM18-1. I advised you that your recusal is consistent with the case law. See *Trans World Airlines v. Civil Aeronautics Board*, 254 F.2d 90 (D.C. Cir. 1958) (stating that "fundamentals of fairness...require...that the one that participates in a case on behalf of any party whether actively or merely formally by being on pleadings or briefs takes no part in the decision of that case..."); *American General Ins. Co. v. FTC*, 589 F.2d 462 (9th Cir. 1979) ("The

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<sup>6</sup> See Natural Gas Act (NGA) § 19(a), 15 U.S.C. § 717r(a); Federal Power Act (FPA) § 313(a), 16 U.S.C. § 825l(a); see also 18 C.F.R. § 385.713.

<sup>7</sup> An appeal can be filed in either the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. Court of Appeals for the circuit in which the regulated entity is located or has its principal place of business. See NGA § 19(b), 15 U.S.C. § 717r(b); FPA § 313(b), 16 U.S.C. § 825l(b); see also 28 U.S.C. § 2343 (venue in review of actions under the Interstate Commerce Act).

principle that a party should not be judge in his own case represents a venerable tradition in Anglo-American legal history”). Moreover, I advised you that I do not view Docket No. AD18-7 as requiring your recusal for the reasons noted above, but I cautioned you that we must exercise continued oversight. As to comparable matters, my determination will depend on the facts of each specific matter as analyzed under the appropriate legal standards. I advised you to seek my guidance on any matter related to your past statements, positions, work, or any other concerns that you may have.