

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

)
Grid Reliability and Resilience Pricing) Docket No. RM18-1
Grid Resilience in RTO/ISOs) Docket No. AD18-7
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Comment of the Harvard Electricity Law Initiative¹

To protect the Commission’s decisionmaking process, Commissioner McNamee must recuse himself from these dockets and from other matters about rates for “fuel-secure” generators. As a matter of law, Commissioner McNamee cannot be an impartial adjudicator in these proceedings. His “serv[ice] as the lawyer for the Department of Energy” (DOE) “[d]uring the development and filing of” the Grid Reliability and Resilience Pricing Rule” (NOPR),² disqualifies him for two independent reasons: 1) in signing the NOPR, he is a party to the proceedings and may not act as a judge in his own case,³ and 2) in serving as DOE’s lawyer for the NOPR’s development and filing, he has “prejudged the ultimate issue of a just and reasonable rate.”⁴

His recusal must extend beyond these two dockets. The NOPR’s sweeping conclusions prejudice issues that could appear before the Commission in ratemaking proceedings. This prejudgment is substantially different from a Commissioner’s public statements about policy issues, which the Commission has recently determined were not a basis for recusal.⁵

¹ The Harvard Electricity Law Initiative is an independent policy organization based at Harvard Law School’s Environmental & Energy Law Program. We produce legal analysis to inform public debate and promote practical approaches to solving legal challenges. This comment does not represent the views of Harvard University or Harvard Law School.

² U.S. Senate Committee on Energy and Natural Resources, Answers to Questions for the Record Submitted by Mr. Bernard L. McNamee, Questions from Sen. Cantwell and Sen. Sanders (see Appendix to this filing).

³ *Trans World Airlines v. Civil Aeronautics Board*, 254 F.2d 90 (D.C. Cir. 1958); *American General Ins. Co. v. FTC*, 589 F.2d 462 (9th Cir. 1979).

⁴ *Skelly Oil Co. v. FPC*, 375 F.2d 6, 18 (10th Cir. 1967) *aff’d in part rev’d in part on other grounds*, In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968); *see also* *Lead Industries Ass’n. v. EPA*, 647 F.2d 1130, 1178 (D.C. Cir. 1980) (noting that EPA official had not “prejudged” air quality standard and was not disqualified).

⁵ *PJM Interconnection*, 137 FERC ¶ 61,145 at PP 151–157 (2011); Memorandum of Sidney Rocke to Commissioner Moeller, Dockets No. ER11-2875-000 and EL11-20-000, filed Apr. 11, 2011.

Recusal is not an admission of *actual* bias.⁶ Recusal protects against the “appearance”⁷ of bias “from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.”⁸ The Due Process Clause demands an over-inclusive standard for recusal that “may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.”⁹ The Commission must “always endeavor[] to prevent even the probability of unfairness,”¹⁰ and it cannot rely on the “the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice.”¹¹

Recusal Standards Governing Commission Proceedings Disqualify Commission McNamee from these Pending Resilience Dockets (RM18-1, AD18-7) and Ongoing Efforts to Pay “Fuel-Secure” Generators

Commission proceedings must meet due process standards.¹² As a threshold matter, according to the D.C. Circuit, due process “might be said to mean at least ‘fair play,’”¹³ which “requires an ‘impartial and disinterested’ adjudicator.”¹⁴ The “classic disqualification standard . . . [is] whether a disinterested observer may conclude that [a decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.”¹⁵ Such bias is disqualifying in two distinct scenarios at independent commissions:

⁶ *Capteron v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 883–84 (2009) (“In lieu of exclusive reliance on [] personal inquiry, or on appellate review of the judge’s determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.”).

⁷ *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964) (quoting *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962)); *see also Municipal Elec. Utilities Ass’n. of N.Y. v. Power Authority of N.Y.*, 22 FERC ¶ 61,331, Statement of Chairman Butler, Mar. 10, 1983. Chairman Butler recused himself because “charges of taint have been leveled at the entire Commission on the basis of [his] correspondence” and those charges had “greatly complicated the Commission’s deliberations, have distracted it from the substantive issues, and have enmeshed it in a suit in the U.S. District Court.” Chairman Butler decided that “under the circumstances . . . it is in the best interest of the Commission and in the public interest that [he] withdraw, so that the Commission can focus its attention again on the merits of this important and long-pending case, where it belongs.”).

⁸ *Cheney v. U.S. Dist. Ct. for Dist. Of Columbia*, 541 U.S. 913, 924 (2004) (Memorandum of J. Scalia) (quoting *Microsoft Corp. v. US* 530 U.S. 1301, 1302 (2000) (Statement of the Chief Justice)).

⁹ *Republican Party of Minnesota v. White*, 536 U.S. 765, 815 (2002) (J. Ginsburg, dissenting) (quoting *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 815 (1986)).

¹⁰ *Id.* (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

¹¹ *Id.* (quoting *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927)).

¹² *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975) (“[A] fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness.” (citations omitted)).

¹³ *Amos Treat & Co. v. SEC*, 306 F.2d 260, 264 (D.C. Cir. 1962) (summarizing *In re Murchison*, 349 U.S. 133, 136–137 (1955)).

¹⁴ *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 111 (D.C. Cir. 2018) (quoting *Marshall v. Jericho, Inc.*, 446 U.S. 238, 242 (1980)).

¹⁵ *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co., v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959)); *see also* 28 U.S.C. § 455a (a judge “shall

- 1) When the commissioner worked in a different capacity on a matter that she is later called upon to decide.¹⁶
- 2) When the commissioner “has prejudged, or at least appeared to have prejudged, specific facts at issue.”¹⁷ As applied to this Commission, prejudgment is disqualifying when the subject is the justness and reasonableness of a rate.¹⁸

Commissioner McNamee is disqualified from these dockets under both tests. His recusal is necessary to protect the Commission’s decisions. Parties “are entitled to an impartial tribunal . . . and there is no way [a court] may know of whereby the influence of one upon others can be quantitatively measured.”¹⁹ Commissioner McNamee’s participation would provide a court with a procedural basis for invalidating a Commission decision, even an order with unanimous support. Carrying this legal risk in both pending resilience dockets (RM18-1, AD18-7) would needlessly amplify uncertainty around an emerging area of Commission policy.

Although the outgrowth of Commissioner McNamee’s work at DOE is currently in an administrative (AD18-7) docket, there are two reasons that he is immediately disqualified. First, the docket includes at least three requests to revive the NOPR.²⁰ Because he is disqualified from ruling on the NOPR itself, Commissioner McNamee must also be disqualified from reviving it in a different docket. Second, and more fundamentally, the ultimate issue at the heart of the docket is the justness and reasonableness of resilience-related RTO/ISO tariff provisions. In the NOPR, DOE decided this issue, concluding that “fuel-secure” generators are “*necessary* to maintain [] resiliency”²¹ in RTO/ISOs and therefore “*requir[ing]* the organized markets to establish just and reasonable rate tariffs for the recovery of costs and a fair rate of return.”²² Through his “intimate involvement”²³ with these issues at

disqualify himself in any proceeding in which his impartiality might reasonably be questioned”); Marshall J. Breger and Gary Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1189 (Fall 2000).

¹⁶ Breger and Edles, note 15 (citing *Trans World Airlines v. Civil Aeronautics Board*, 254 F.2d 90 (D.C. Cir. 1958)).

¹⁷ *Id.* (citing *Cinderella Career & Finishing Schools*, 425 F.2d at 591).

¹⁸ *Skelly Oil Co.*, 375 F.2d at 18.

¹⁹ *American Cyanamid Co. v. FTC*, 364 F.2d 757, 767 (6th Cir. 1966) (citing *Berkshire Employees Association of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941)).

²⁰ Reply Comments of FirstEnergy Solutions Corp., Docket No. AD18-7 (May 9, 2018); Surreply Comments of FirstEnergy Solutions Corp., Docket No. AD18-7 (May 24, 2018); First Energy Solutions Corp. Renewed Request for Emergency Action, Docket No. AD18-7 (Jun. 15, 2018). The company also filed its May 2018 letter to Secretary Perry advocating for “urgent action” to preserve coal and nuclear plants as an attachment to its reply comments.

²¹ Notice of Federal Register Publication, Docket No. RM18-1, Oct. 11, 2017, at III, p 18 of 33 (hereinafter NOPR) (emphasis added).

²² NOPR at III, p 20 of 33 (emphasis added).

²³ *Lead Industries Ass’n.*, 647 F.2d at 1177 (D.C. Cir. 1980) (summarizing *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962) and *American Cyanamid v. FTC*, 363 F.2d 757 (6th Cir. 1966) and quoting *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)).

DOE, Commissioner McNamee has prejudged the just and reasonable rate and is disqualified from deciding the issue as a Commissioner.

The potential for this issue of a just and reasonable rate for “fuel-secure” generators to be on the Commission’s docket again through another DOE order is very real. Three months after the Commission rejected the NOPR, FirstEnergy asked DOE to provide essentially the same relief that DOE had proposed.²⁴ Two months later, a leaked DOE memo indicated that another 202(c) order mandating cost-of-service contracts for certain “fuel-secure” generators was under discussion. Shortly after that memo surfaced, the White House Press Secretary stated the President has “directed Secretary Perry to prepare immediate steps to stop the loss of these [‘fuel-secure’] resources.”

Commissioner McNamee is a central figure in this long-running campaign to subvert the Commission’s exclusive authority over wholesale rates and carve “fuel-secure” generators out of RTO/ISO price-setting mechanisms. DOE’s efforts began publicly in April 2017 when Secretary Perry declared that “baseload power is necessary to a well-functioning grid”²⁵ and directed staff to study whether markets “are adequately compensating [for] attributes such as on-site fuel supply and other factors that strengthen grid resilience.”²⁶ DOE staff found that “more work is needed to define, quantify, and value resilience”²⁷ and recommended that RTO/ISOs “further define criteria for resilience.”²⁸ But the NOPR hijacked those efforts by reasserting that “fuel-secure” generators are “necessary” and purporting to set a just and reasonable rate that assured profits regardless of each generator’s value to the system.

After the Commission rejected the NOPR, DOE and FirstEnergy continued to press for alternatives to just and reasonable market-based rates. As part of their efforts, Commissioner McNamee explained that he “reviewed [DOE’s May] draft memorandum and began researching and trying to work through the substantive issues, as well as examining the statutes and legal justifications contained in the

²⁴ DOE regulations stipulate that parties required to act under a 202(c) order (presumably PJM and a generator) “are encouraged to utilize the rates and charges contained in approved existing rate schedules or to negotiate mutually satisfactory rates.” If the entities are unable to agree, DOE shall “prescribe the conditions of service and refer the rate issues to the” Commission. 10 CFR § 205.376. Even if the parties did agree on the rate, the issue might still reach the Commission. A party aggrieved by the rate could file a complaint under section 206.

²⁵ Secretary Perry Memo to Staff, Apr. 14, 2017 (see appendix to this filing).

²⁶ *Id.*

²⁷ DOE, Staff Report to the Secretary on Electricity Markets and Reliability, at p. 100, https://www.energy.gov/sites/prod/files/2017/08/f36/Staff%20Report%20on%20Electricity%20Markets%20and%20Reliability_0.pdf.

²⁸ *Id.* at 126.

proposal.”²⁹ He has also defended both the NOPR and leaked memo before Congress and at a conference of his regulatory peers.³⁰

Whether these experiences motivate *actual* bias is beside the point. Recusal protects against the “appearance”³¹ of bias “from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.”³² Courts have developed “objective”³³ tests for recusal that disqualify Commissioner McNamee for two independent reasons: 1) he signed the NOPR filing and 2) has “prejudged the ultimate issue of a just and reasonable rate.”³⁴ The latter reason is grounds for a broad recusal that covers future proceedings about rates for “fuel-secure” generators.

Commissioner McNamee’s Signature on the NOPR Filing Is Disqualifying

On September 29, 2017, Bernard McNamee, then DOE’s Deputy General Counsel for Energy Policy, filed the NOPR at the Commission.³⁵ Under the principle that a party may not be judge in his own case, Mr. McNamee’s signature on the NOPR filing disqualifies him from participating in these dockets. Federal appeals courts have applied this pillar of justice to proceedings of independent commissions and held that an attorney signing a filing may not later decide that matter as a commissioner. At least one FERC Commissioner has adopted this view.³⁶

In *Trans World Airlines*,³⁷ the D.C. Circuit vacated an order for that reason. At issue were payments under federal law to Trans World Airlines (TWA) for transporting mail, a matter under the jurisdiction of the Civil Aeronautics Board (CAB). An attorney for the Post Office signed a brief filed at CAB advocating the government’s position. By the time the TWA matter came before CAB, that attorney had become a CAB Member. TWA moved for his disqualification. CAB denied the motion, and the attorney cast decisive votes in 3-2 decisions to decide the matter and to deny the company’s motion for reconsideration.

²⁹ U.S. Senate Committee on Energy and Natural Resources, Answers to Questions for the Record Submitted by Mr. Bernard L. McNamee, Questions from Sen. Cantwell and Sen. Sanders (see Appendix to this filing)

³⁰ *Id.*

³¹ See note 7.

³² *Cheney v. U.S. Dist. Ct. for Dist. Of Columbia*, 541 U.S. 913, (2004) (Memorandum of J. Scalia) (quoting *Microsoft Corp. v. US* 530 U.S. 1301, 1302 (2000) (Statement of the Chief Justice)).

³³ *Caperton*, 556 U.S. at 883 (“The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules . . . the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.”).

³⁴ *Id.*

³⁵ See DOE Filing, Docket No. RM18-1, Sep. 29, 2017 (showing that as Deputy General Counsel for Energy Policy Mr. McNamee signed the cover letter accompanying DOE’s NOPR).

³⁶ Commissioner Hussey recused himself from a proceeding because he had filed a statement of position in the matter at an earlier stage of the proceeding when he was a Louisiana state official. He wrote that was recusal was “proper” given his prior role. 23 FPC 73, 77 (1960).

³⁷ *Trans World Airlines v. Civil Aeronautics Board*, 254 F.2d 90 (D.C. Cir. 1958).

The D.C. Circuit vacated CAB's orders. In a short decision, the panel explained that:

It is plain that in this statute Congress contemplated an adjudicatory proceeding and conferred upon the Board in this respect quasi-judicial functions. The fundamental requirements of fairness in the performance of such functions require at least that one who participates in a case on behalf of any party, whether actively or *merely formally by being on pleadings or briefs* take no part in the decision of that case by any tribunal on which he may thereafter sit.

Commissioner McNamee is disqualified under *Trans World Airlines* from both pending resilience dockets. In the NOPR docket, a request for rehearing is pending. In the Grid Resilience docket, FirstEnergy explicitly asks the Commission — in three separate filings — to adopt the NOPR as an interim measure.³⁸ Commissioner McNamee's participation in these proceedings would be akin to the attorney's participation in the TWA case. Having “formally” participated in the NOPR proceeding by signing DOE's filing, Commissioner McNamee may “take no part in the decision of that case,” such as by deciding a request for rehearing.

The Commission's filing of the NOPR in a “rulemaking” docket does not trigger a different result.³⁹ In rejecting the NOPR, the Commission acted pursuant to its ratemaking authority under section 206 of the Federal Power Act. Ultimately, RTO resilience issues will be decided in ratemaking proceedings, similar to the proceeding at issue in *Trans World Airlines*.⁴⁰ Whether the Commission's ratemaking authority is characterized as “entirely judicial or [] legislative [] or a combination of the two” is irrelevant “for in any event the need for an impartial decision is obvious.”⁴¹

³⁸ *Supra* n. 20.

³⁹ The Commission's characterization of the NOPR as a “rule” follows from 42 U.S.C. § 7173(a), which allows the DOE Secretary to “propose rules, regulations, and statements of policy of general applicability.” The NOPR, however, was none of those. It purports to “establish[] rates” (§ 7173(c)), a function that is beyond the scope of DOE's authority under 7173(a). Characterizing the NOPR as a “rule” about the Commission's “establishment of rates” ignores the text of the NOPR itself, which purports to set just and reasonable rates for only three public utilities (ISO-NE, NYISO, PJM), although it primarily targeted one (PJM). In docketing the NOPR, the Commission opened a ratemaking proceeding. Legislative history supports this understanding of DOE's limited authority. The Senate's version of the DOE Organization Act allowed the Secretary to “*propose prices or other rules.*” The Conference Committee retained the spirit of the Senate's provisions that gave DOE a role in FERC proceedings (which were absent from the House bill) but scaled them back, allowing DOE only to propose “rules, regulations, and statements of policy of general applicability,” but not prices. Clark Byse, *The Department of Energy Organization Act: Structure and Procedure*, 30 Admin. L. Rev. 193, 198–202 (1978); Sharon Jacobs, *Statutory Separation of Energy Powers*, U. of Colorado Law Legal Studies Research Paper No. 18-28, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3229255 (summarizing Congress's debate about which body would regulate interstate rates).

⁴⁰ If the proceeding is about a NERC reliability standard under section 215, the legal analysis about Commissioner McNamee's participation might be different. That hypothetical is beyond the scope of this comment.

⁴¹ *American Public Gas Ass'n v. FPC*, 567 F.2d 1016, 1069 (D.C. Cir. 1977).

That the Post Office Department in *Trans World Airlines* was a party while DOE was technically a non-party in the NOPR proceeding is not a legally meaningful distinction. The Ninth Circuit reached the same result as the *Trans World Airlines* court about a proceeding where the FTC General Counsel signed the FTC's brief in federal court and later decided that matter as a Commissioner.⁴² The Ninth Circuit emphasized that the attorney's signature was itself disqualifying. Recusal is appropriate even when the attorney has "mere responsibility for administrative supervision,"⁴³ and it is not dependent on the "extent of the [attorney's] knowledge" of the matter.⁴⁴ "That the judge's or quasi-judicial officer's participation in the case as counsel may have been superficial rather than substantial does not affect the applicability of the principle" that a party may not act as a judge in his own case.⁴⁵

To reach these conclusions, the Ninth Circuit analogized to Supreme Court Justices' recusals from cases pending in the Department of Justice during their tenures as Attorneys General. Although the court did not decide the question, it noted that the FTC conceded at oral argument that commissioners must follow the same recusal standards as judges. The commissioner's recusal was therefore compelled, according to the Ninth Circuit, not only by the "customary practice" adopted by the Justices but also by a statute "requiring disqualification in any case in which [the judge] has participated as counsel."⁴⁶ Independent commissions have applied this statute to their proceedings.⁴⁷

Commissioner McNamee's signature on the NOPR is, by itself, disqualifying. As discussed in the next section, his substantial involvement in the NOPR's development provides an independent basis for his disqualification.

Commissioner McNamee Is Disqualified Because He Has Prejudged the Ultimate Legal and Factual Issues

Commissioner McNamee has "prejudged the ultimate issue of a just and reasonable rate"⁴⁸ for "fuel-secure" generators and is therefore disqualified from ruling on this issue as a Commissioner. In responses to the Senate Energy and Natural Resources Committee, Commissioner McNamee explained that he "served as the lawyer for

⁴² *American General Ins. Co. v. FTC*, 589 F.2d 462 (9th Cir. 1979); *see also* *American Cyanamid v. FTC*, 363 F.2d 757 (6th Cir. 1966).

⁴³ *Id.* at 465.

⁴⁴ *Id.* at 465.

⁴⁵ *Id.* at 463–64.

⁴⁶ *Id.* at 463 (citing to 28 U.S.C. § 455 disqualifying a judge "where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding").

⁴⁷ *See* *Bieber v. Dept. of the Army*, 287 F.3d 1358 (Fed. Cir. 2002) (holding that caselaw interpreting the statute governs agency proceedings); *In the Matter of Houston Lighting and Power Co.*, 15 NRC 1363 (1982); *Interlocutory, Modifying, Vacating, and Miscellaneous Orders, Intel Corp.*, 149 FTC 1548 (2010); *In the Matter of the Bartlett Farmers Bank*, FDIC-92-357j (1994) (stating that the caselaw interpreting the statute is not binding but provides "important guidance concerning disqualification for bias"); *Secretary of Labor v. Sun Petroleum Products*, 1979 OSHD(CCH) P23502.

⁴⁸ *Skelly Oil Co.*, 375 F.2d at 18; *Lead Industries Ass'n.*, 647 F.2d at 1178.

DOE” in the “development and filing” of the NOPR. His role in developing the NOPR’s legal conclusions is grounds for recusal from any matter about rates for “fuel-secure” generators, including the two pending resilience dockets.

The NOPR “*require[d]* the organized markets to establish just and reasonable rate tariffs for the recovery of costs and a fair rate of return”⁴⁹ in order to “accurately price [‘fuel-secure’] generation resources.”⁵⁰ Embedded in those statements are three distinct legal conclusions. First, DOE concluded that paying “fuel-secure” generators a cost-of-service rate is just and reasonable. Second, DOE decided that failing to provide cost-of-service rates to “fuel-secure” generators resulted in inaccurate rates that are unjust and unreasonable.⁵¹ Third, DOE determined that the just and reasonable rate *must* include a return on equity. The Commission’s swiftly rejected the first two conclusions and implicitly disclaimed the third.⁵²

Although the NOPR was only a proposal, there are indications that these legal conclusions represent the “consummation’ of the agency’s decisionmaking process”⁵³ about the justness and reasonableness of a rate for “fuel-secure” generators. Most tellingly, the NOPR “urges the Commission to *issue the rule proposed herein* as an interim final rule, effective immediately.”⁵⁴ That DOE “*required*” the just and reasonable rate to include cost recovery and a return on equity, rather than asking for comments on that issue,⁵⁵ and provided exceedingly short comment and compliance periods further suggest that DOE had reached legal conclusions. Moreover, DOE’s rulemaking authority that allows it to propose but not finalize “rules, regulations, and statements of policy of general applicability” incentivizes the agency to reach final conclusions in a proposal.⁵⁶

As the attorney serving DOE in the NOPR’s development, Commissioner McNamee is disqualified from ruling as a Commissioner on whether rates for “fuel-secure” generators are just and reasonable. His “intimate involvement . . . [with] the same factual and legal issues . . . [would] make it inevitable for ‘a disinterested observer’

⁴⁹ NOPR at III, p 20 of 33; *see also* NOPR at p 32 of 33 (proposing to amend 18 § CFR 35.28 by requiring RTO/ISOs with capacity markets to include a “reliability and resiliency rate” that “*shall* include . . . a fair return on equity” and reiterating that requirement in part (iv)).

⁵⁰ NOPR III, p 19 of 33.

⁵¹ The NOPR does not explicitly state that rates were unjust and unreasonable. That finding, however, is legally necessary for the Commission to impose a new rate. Either DOE’s proposal was facially invalid because it failed to include this finding, or its conclusion that rates were unjust and unreasonable was implicit. In rejecting the NOPR, the Commission took the latter approach.

⁵² *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 at P 15–16 (2018).

⁵³ *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Chicago & Southern Air Lines, Inc. v. Watermann S.S. Corp.*, 333 U.S. 103, 113 (1948)).

⁵⁴ NOPR at IV.A, p 20 of 33 (emphasis added).

⁵⁵ *In Re Murray Energy*, 788 F.3d 330, 336 (D.C. Cir. 2015) (noting that EPA’s statements in a proposed rule were its “proposed view of the law” and that “EPA recognized as much . . . when it asked for further input.”).

⁵⁶ *See* note 39.

to conclude that [he] had ‘in some measure adjudged the facts as well as the law.’”⁵⁷ His work at DOE, testimony before Congress, and advocacy before his peers “may have the effect of entrenching [him] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record.”⁵⁸

As mentioned above, a rehearing request is pending in the NOPR docket, and the Grid Resilience in RTO/ISOs docket includes requests to revive the NOPR. The “ultimate” factual and legal conclusions at issue in these requests are identical to those that Commissioner McNamee reached while developing the NOPR at DOE. Even if FirstEnergy had not thrice requested in the Grid Resilience docket that the Commission revive the NOPR,⁵⁹ Commissioner McNamee would nonetheless be disqualified. Any further order in the docket is likely to require the Commission to adjudicate whether RTO/ISO resilience-related tariff provisions are just and reasonable. Commissioner McNamee has prejudged this issue, concluding that resilience in RTO/ISOs *requires* contracts for “fuel-secure” generators and that such contracts are just and reasonable when they include a rate of return. He is disqualified from imposing this decision as a Commissioner.

The scope of Commissioner McNamee’s recusal must include future proceedings about the “same facts, issues, and parties.”⁶⁰ For example, if DOE adopts FirstEnergy’s proposed 202(c) order, the Commission will have a duty to ensure that all mandated contracts are just and reasonable. Rates may not be confiscatory, but apart from that stricture, the Commission enjoys wide discretion to set just and reasonable rates.⁶¹ Commissioner McNamee would be disqualified from those ratemaking proceedings because he has already concluded that just and reasonable rates for “fuel-secure” generators include cost recovery and a return on equity.

A broad recusal is appropriate due to the unusually expansive conclusions in the NOPR. DOE determined that providing cost recovery and a return on equity “regardless of need or cost to the system” is just and reasonable.⁶² DOE’s blanket just and reasonable determination, which disregards the value of each resource and the terms of its service, would seemingly apply to any set of rates, terms, and

⁵⁷ *Lead Industries Ass’n.*, 647 F.2d at 1177 (D.C. Cir. 1980) (summarizing *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962) and *American Cyanamid v. FTC*, 363 F.2d 757 (6th Cir. 1966) and quoting *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)).

⁵⁸ *Cinderella Career & Finishing Schools*, 425 F.2d at 591.

⁵⁹ See note 20. In addition, at least three commenters endorsed DOE’s conclusion that resilience in RTO/ISOs requires “fuel-secure” generators. See Docket No. AD18-7, comments filed by American Coal Council (May 7, 2018); North American Coal Corp. (May 9, 2018); PSEG Companies (May 9, 2018).

⁶⁰ *American Cyanamid*, 363 F.2d at 763; see also MODEL RULES OF PROF’L CONDUCT R. 1.11 cmt. [10] (noting that for purposes of conflicts a “matter may continue in another form” and determining whether two separate proceedings are the “same matter” requires consideration of the “extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed”).

⁶¹ See, e.g., *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

⁶² *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 at P 16 (2018).

conditions that provide “fuel-secure” generators a return on equity. This sweeping conclusion that rates for “fuel-secure” generators must provide profits regardless of value would apply to a range of matters, from contracts mandated by a 202(c) order to the relief recently granted by the Commission in the ISO-NE region.⁶³ DOE’s legal conclusions are unconstrained by facts and prejudice any contract or payment for “fuel-secure” generators.

Commissioner McNamee is incapable of being an impartial adjudicator as a matter of law. The “objective”⁶⁴ test for his disqualification does not hinge on whether he has an “unalterably closed mind.”⁶⁵ Cases that articulate that standard for disqualification are typically about a decisionmaker’s public remarks that express “an underlying philosophy” or a “crystallized point of view”⁶⁶ on a topic set for informal rulemaking.⁶⁷ Here, the standard for recusal cannot be so narrow.

Commissioner McNamee’s disqualification would not chill public debate, prevent Commissioners (or future Commissioners) from expressing their views, or inhibit informal communications that further the Commission’s understanding of emerging policy issues. Disqualification is necessary because Commissioner McNamee’s “impartiality might be reasonably questioned”⁶⁸ by a “disinterested observer”⁶⁹ due to his “intimate involvement”⁷⁰ with DOE’s sweeping conclusions about the same “ultimate issue.”⁷¹ His recusal would “preserve[] both the appearance and reality of fairness, ‘generating the feeling, so important to a popular government, that justice has been done.’”⁷²

⁶³ *ISO New England*, 165 FERC ¶ 61,202 (2018).

⁶⁴ *Caperton*, 556 U.S. at 883.

⁶⁵ *Association of Nat. Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979). That phrase is traceable to *FTC v. Cement Institute*, 333 U.S. 683, 710 (1948), a case that is readily distinguishable from Commissioner McNamee’s situation. In *Cement Institute* allegations of bias were directed against the *entire* commission due to the contents of its reports that were produced in response to a Congressional directive. Here, the source of bias is Commissioner McNamee’s duties at DOE and are unrelated to his role as a Commissioner. “The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source . . .” *U.S. v. Grinnell Corp.*, 384 U.S. 563, 582 (1966). That principle frees FTC reports from scrutiny but it does not save Commissioner McNamee from disqualification.

⁶⁶ *American Cyanamid*, 363 F.2d at 764.

⁶⁷ *Id.*; *Lead Industries Ass’n.*, 647 F.2d at 1179; *Mississippi Comm’n on Environmental Quality v. EPA*, 790 F.3d 138, 183 (D.C. Cir. 2015).

⁶⁸ 28 U.S.C. § 455(a); *see also Texaco*, 336 F.2d at 760.

⁶⁹ *Cinderella Finishing Schools*, 425 F.2d at 591.

⁷⁰ *Lead Industries Ass’n.*, 647 F.2d at 1177.

⁷¹ *Skelly Oil Co.*, 375 F.2d at 18; *Lead Industries Ass’n.*, 647 F.2d at 1178.

⁷² *Marshall v. Jericho*, 446 U.S. 238, 242 (1980) ((quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

Conclusion

As a matter of law, Commissioner McNamee cannot be an impartial adjudicator about the pending resilience dockets and any proceeding about rates for “fuel-secure” generators. His signature on the NOPR filing and work developing the NOPR’s conclusions about just and reasonable rates are disqualifying. He should recuse himself from these matters to protect the Commission’s decisions.

Respectfully Submitted,

/s/ Ari Peskoe

Ari Peskoe
Harvard Electricity Law Initiative
6 Everett St., Suite 4133
Cambridge, MA 02138
617.495.4425
apeskoe@law.harvard.edu

December 6, 2018

cc: James Danly, General Counsel
David Morenoff, Deputy General Counsel
Charles Beamon, Associate General Counsel, Designated Agency Ethics Official

APPENDIX

- Excerpts from Mr. McNamee's Answers to Questions for the Record (referenced on pages 1 and 5)
- Secretary Perry's April 2017 Memo (referenced on page 4)

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Answer: Though I am generally familiar with PURPA issues, I have not studied what changes to FERC’s regulations may be appropriate in light of changing circumstances since PURPA’s enactment in 1978. My understanding is that many in the industry believe that FERC’s one-mile rule and the PURPA pricing provisions are matters that may be ripe for reconsideration, among other matters. I also understand that there have been complaints from all sides—electric utilities, qualifying facilities, and the states—concerning the current implementation of PURPA. I understand that FERC has instituted a re-examination of its regulations, and, if confirmed, I look forward to reviewing the issues related to PURPA implementation with my colleagues.

Questions from Ranking Member Maria Cantwell

Question 1: What role did you play in formulating or promoting the Grid Reliability and Resilience Pricing Rule that Secretary Perry proposed to the Commission last year?

Answer: During the development and filing of Secretary Perry’s Notice of Proposed Rulemaking for the Grid Reliability and Resilience Pricing Rule (submitted to FERC pursuant to Section 403 of the Department of Energy Organization Act), I served as the lawyer for the Department of Energy (DOE) in my position as the Deputy General Counsel for Energy Policy at DOE. After DOE submitted its proposal to FERC, I also represented DOE in explaining the purpose of the proposal, including at a National Association of Regulatory Utility Commissioners (NARUC) meeting in November 2017 and by responding to questions from members of the Senate Energy and Natural Resources Committee during hearings held on October 3, 2017, and July 19, 2018.

Question 2: What role, if any, did you play in formulating or promoting Secretary Perry’s plan to use his emergency and national security authorities under the Federal Power and Defense Production Acts to favor coal and nuclear power plants?

Answer: I was not involved in the drafting of the draft memorandum leaked to the press on or about June 1, 2018 that purported to be a proposal to use emergency and national security authorities under the Federal Power and Defense Production Acts to support generation resources on the electric grid. I was not an employee at the Department of Energy or the federal government at the time it was apparently drafted or leaked. When I returned to DOE as an employee (Executive Director of the Office of Policy), I reviewed the draft memorandum and began researching and trying to work through the substantive issues, as well as examining the statutes and legal justifications contained in the proposal. I stopped work on the draft memorandum in August 2018.

Question 3: What role, if any, have you played in supporting or promoting Secretary Perry’s plan since leaving the Department of Energy’s Office of General Counsel, either at the Texas Public Policy Foundation or in the Department of Energy’s Office of Policy?

Answer: In regard to the Section 403 Notice of Proposed Rulemaking for the Grid Reliability and Resilience Pricing Rule (Section 403 NOPR), I do not recall making any public statements

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of support or promoting the proposal while at the Texas Public Policy Foundation (but I do recall talking about the benefits of coal and nuclear to the grid). When I returned to DOE as Executive Director of the Office of Policy, I testified about the proposal before the Senate Energy and Natural Resources Committee during a hearing held on July 19, 2018. I may have discussed the Section 403 NOPR (or grid reliability and resilience) in some other contexts, but I do not recall making any public comments (other than my July 19, 2018 committee testimony) after my return to DOE in my role as Executive Director of the Office of Policy.

In regard to the “leaked memo” regarding the use of emergency powers under the Federal Power Act the Defense Production Act, I was not aware of it while at the Texas Public Policy Foundation and therefore did not comment on it. After I returned to DOE as Executive Director of the Office of Policy on June 6, 2018, I testified about the proposal before the Senate Energy and Natural Resources Committee during a hearing July 19, 2018. I may have discussed resilience issues in some other contexts, but I do not recall making any other public comments (other than my July 19, 2018 committee testimony) about the “leaked memo” after my return to DOE.

Question 4: The Federal Power Act requires FERC to ensure electric rates are just and reasonable. FERC fulfills that obligation by relying on market competition, on the theory that a market-based rate is a just and reasonable one. How can FERC ensure rates are just and reasonable if the Secretary of Energy uses his emergency and national security authorities to require regional transmission organizations and independent system operators to dispatch the high-cost coal and nuclear generation in preference to lower cost alternatives?

Answer: FERC has an obligation to examine any proposal that comes before it under its statutory mandates, including the requirement that rates be just, reasonable, and not unduly discriminatory. As an independent agency, any decisions FERC makes should be based on the law and facts presented to it.

Question 5: Since you have served as counsel and adviser in the Department of Energy on the grid resiliency order and have publicly expressed opinions on the merits of the proposed Defense Production Act and Federal Power Act emergency orders, your participation in any Commission proceedings related to these matters in the future may raise questions about your impartiality on these matters. Will you commit to consult with the Commission’s designated ethics officer to determine if your participation in any such proceedings would warrant your recusal under the Commission’s impartiality rules?

Answer: Yes, I commit to consult with FERC’s Designated Agency Ethics Official to determine if my participation in any matters related to Secretary Perry’s Notice of Proposed Rulemaking for the Grid Reliability and Resilience Pricing Rule would warrant my recusal under FERC’s rules and any relevant statutes. Likewise, I commit to consult with FERC’s Designated Agency Ethics Official to determine if my participation in any matters related to the Defense Production Act and Federal Power Act emergency orders referenced in the “leaked memo” would warrant my recusal under FERC’s rules and any relevant statutes.

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final action with regard to the participation of distributed energy resource aggregations in those markets, but held an April 2018 technical conference on the issue to gather more information for the record. If confirmed, I look forward to reviewing the comments that FERC received on participation of distributed energy resource aggregations in those markets.

Question 3: Given your involvement in DOE's coal and nuclear proposed rule requiring the use of coal and nuclear plants to maintain electric reliability which was subsequently considered and rejected by FERC, will you recuse yourself from all matters that come before FERC relating to the establishment or adjudication of rates and subsidies specific to coal and nuclear plants for reliability?

Answer: The proposed rule that DOE submitted to FERC in the fall of 2017 sought to address resilience of the bulk-power system in a very specific manner, and FERC terminated its proceeding on that specific proposal earlier this year. I commit that prior to making a determination about whether a recusal is necessary in any given proceeding, I will consult with FERC's Designated Agency Ethics Official.

Questions from Senator Bernard Sanders

Question 1: In September 2017, DOE Secretary Perry proposed the Grid Resiliency Pricing Rule to prop up coal and nuclear power plants, falsely arguing that these fuel sources are more secure and reliable than other types of energy resources. In January 2018, FERC unanimously rejected the proposed rule. In June 2018, the Trump Administration announced a new proposed rule to use Section 202(c) of the Federal Power Act to bail out uneconomic coal and nuclear plants.

You previously worked on this proposed rule as DOE's Deputy General Counsel for Energy Policy, and defended the proposal in a Senate hearing earlier this year as DOE's Office of Policy head. Please describe the specific role you played at DOE in developing these proposals and provide the committee with all written documents and correspondence you had with FERC commissioners and employees, as well as with individuals outside the federal government, while working on either proposal.

Have you ever spoken with Murray Energy CEO Robert Murray or any representatives of Murray Energy about either of these proposed rules? If so, please identify each communication and include the date, time, participants, and topics discussed.

Answer: During the development and filing of Secretary Perry's Notice of Proposed Rulemaking for the Grid Reliability and Resilience Pricing Rule (submitted to FERC pursuant to Section 403 of the Department of Energy Organization Act), I served as the lawyer for the Department of Energy (DOE) in my position as the Deputy General Counsel for Energy Policy at DOE. After DOE submitted its proposal to FERC, I also represented DOE in explaining the purpose of the proposal, including a NARUC meeting in November 2017 and responding to

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questions from members of the Senate Energy and Natural Resources Committee during hearings held on October 3, 2017, and July 19, 2018.

I was not involved in the drafting of the draft memorandum leaked to the press on or about June 1, 2018, that purported to be a proposal to use emergency and national security authorities under the Federal Power and Defense Production Acts to support generation resources on the electric grid. I was not an employee at the Department of Energy or the federal government at the time it was apparently drafted or leaked. When I returned as an employee to DOE (Executive Director of the Office of Policy), I reviewed the draft memorandum and began researching and trying to work through the substantive issues, as well as examining the statutes and legal justifications contained in the proposal. I stopped work on the draft memorandum in August 2018.

As to providing any potential written documents or correspondence I may have had with FERC commissioners and employees or individuals outside the federal government while working on either proposal, in my current position as a Senior Advisor in the Office of Science, I am not the custodian of such potential records.

I have not spoken with Murray Energy CEO Robert Murray about the Notice of Proposed Rulemaking for the Grid Reliability and Resilience Pricing Rule or a proposal to use emergency and national security authorities under the Federal Power and Defense Production Acts to support generation resources on the electric grid. To my knowledge or recollection, I have not spoken to any representatives of Murray Energy about either of those proposals.

Question 2: Federal law requires any judge, justice, or magistrate judge who has “expressed an opinion concerning the merits of a particular case or controversy” to recuse themselves from matters before the commission. Will you commit to recusing yourself according to the law?

If not, what further clarification from ethics counsel would you seek that would allow you to violate U.S. law by participating?

Answer: I commit that prior to making a determination about whether a recusal is necessary in any given proceeding, I will consult with FERC’s Designated Agency Ethics Official.

Question 3: You have worked for, or collaborated with, a number of organizations, such as the Texas Public Policy Foundation, which has funding ties to the Koch Brothers, ExxonMobil, Donors Trust, and other front groups for the fossil fuel industry. Please provide a full list of groups that supported your work or donated to the Texas Public Policy Foundation during your tenure there.

Will you recuse yourself from particular matters involving these former funders?

Answer: The Texas Public Policy Foundation is organized as a 501(c)(3) non-profit, non-partisan research institute and does not disclose its donors. I commit that prior to making a



The Secretary of Energy

Washington, DC 20585

April 14, 2017

MEMORANDUM TO THE CHIEF OF STAFF

FROM:

RICK PERRY *RICK PERRY*
SECRETARY OF ENERGY

SUBJECT: STUDY EXAMINING ELECTRICITY MARKETS AND RELIABILITY

At the most recent G7 Energy Ministerial, my colleagues discussed the need for an energy transition utilizing greater efficiency and fuel diversity. There was also notable concern about how certain policies are affecting, and potentially putting at risk, energy security and reliability. It impressed upon me that the United States should take heed of the policy choices our allies have made, and take stock of their consequences.

A reliable and resilient electric system is essential to protecting public health and fostering economic growth and job creation. The U.S. electric system is the most sophisticated and technologically advanced in the world. Consumers utilize heating, air conditioning, computers, and appliances with few disruptions. Nonetheless, there are significant changes occurring within the electric system that could profoundly affect the economy and even national security, and as such, these changes require further study and investigation.

Baseload power is necessary to a well-functioning electric grid. We are blessed as a nation to have an abundance of domestic energy resources, such as coal, natural gas, nuclear, and hydroelectric, all of which provide affordable baseload power and contribute to a stable, reliable, and resilient grid. Over the last few years, however, grid experts have expressed concerns about the erosion of critical baseload resources.

Specifically, many have questioned the manner in which baseload power is dispatched and compensated. Still others have highlighted the diminishing diversity of our nation's electric generation mix, and what that could mean for baseload power and grid resilience. This has resulted in part from regulatory burdens introduced by previous administrations that were designed to decrease coal-fired power generation. Such policies have destroyed jobs and economic growth, and they threaten to undercut the performance of the grid well into the future. Finally, analysts have thoroughly documented the market-distorting effects of federal subsidies that boost one form of energy at the expense of others. Those subsidies create acute and chronic problems for maintaining adequate baseload generation and have impacted reliable generators of all types.

Each of these and other related issues must be rigorously studied and analyzed, and the Department of Energy is uniquely qualified for the task. The results of this analysis will help the federal government formulate sound policies to protect the nation's electric grid. In establishing these policies, the Trump Administration will be guided by the principles of reliability, resiliency, affordability, and fuel assurance—principles that underpin a thriving economy.

I am directing you today to initiate a study to explore critical issues central to protecting the long-term reliability of the electric grid, using the full resources and relationships available to the Department. By Wednesday, April 19, 2017, present to me an implementation plan to complete this study 60-days from that date, that will explore the following issues:

- The evolution of wholesale electricity markets, including the extent to which federal policy interventions and the changing nature of the electricity fuel mix are challenging the original policy assumptions that shaped the creation of those markets;
- Whether wholesale energy and capacity markets are adequately compensating attributes such as on-site fuel supply and other factors that strengthen grid resilience and, if not, the extent to which this could affect grid reliability and resilience in the future; and
- The extent to which continued regulatory burdens, as well as mandates and tax and subsidy policies, are responsible for forcing the premature retirement of baseload power plants.

I have committed to the President that this report will not only analyze problems but also provide concrete policy recommendations and solutions. I also committed to the President that I will do everything within my legal authority to ensure that we provide American families and businesses an electric power system that is technologically advanced, resilient, reliable, and second to none.