

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

<b>Grid Reliability and Resiliency Pricing</b>	)	<b>Docket No. RM18-1-000</b>
	)	
<b>Grid Resilience in RTO/ISOs</b>	)	<b>Docket No. AD18-7</b>
	)	

**Motion for Recusal of Commissioner McNamee**

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”), 18 C.F.R. § 385.212 (2016), Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists (collectively, “Clean Energy Advocates”) respectfully submit this motion requesting Commissioner McNamee recuse himself from dockets RM18-1 and AD18-17. As described more fully herein, Commissioner McNamee’s role signing the submission of the Grid Resiliency Pricing Notice of Proposed Rulemaking<sup>1</sup> (the “DOE NOPR”) on behalf of the Department of Energy (“Department” or “DOE”) is, on its own, grounds for his recusal from these proceedings. Second, Commissioner McNamee’s direct work in developing the DOE NOPR, advocacy in support of the proposed rule, and later advancement of an alternate Department of Energy proposal to halt retirements of coal and nuclear plants under the Federal Power Act and/or the Defense Production Act provide independent grounds for recusal, because these actions objectively create the appearance that Commissioner McNamee has prejudged central matters of law and fact that remain at issue in these proceedings. Recusal is called for under these circumstances absent any finding of actual

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<sup>1</sup> Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940 (Oct. 10, 2017) (“DOE NOPR”). The Proposed Rule published in the Federal Register is also located in Docket RM18-1 at Accession No. 20171011-3068.

bias. One can presume, as Clean Energy Advocates hope is the case, that Commissioner McNamee intends to decide these matters impartially, but nevertheless conclude recusal is warranted. Maintaining public confidence in the integrity and impartiality of the Commission and its decisionmaking is paramount, and recusal under these circumstances serves as a critical prophylactic to safeguard due process, rule of law, and perception of fairness.

In support for the motion, Clean Energy Advocates provide herein a statement of law and facts and draw additional support from the December 6, 2018 Comment of the Harvard Electricity Law Initiative.<sup>2</sup>

### **Statement of Relevant Facts**

In his position as the Deputy General Counsel for Energy Policy at the Department, Commissioner McNamee “served as the lawyer for the Department of Energy” throughout the development and filing of the DOE NOPR.<sup>3</sup> In that capacity, Commissioner McNamee signed the DOE NOPR submission on behalf of the Department, requested the Commission file it appropriately, and indicated he was the primary contact with respect to the proposal.<sup>4</sup> The DOE NOPR set forth certain factual findings as the basis for the proposed action. Commissioner McNamee, on behalf of the Department, asserted *inter alia* that:

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<sup>2</sup> Comment of the Harvard Electricity Law Initiative, RM18-1, AD18-7 (Dec. 6, 2018) (“Harvard ELI Comment”).

<sup>3</sup> *Id.*, App. at 2 (excerpts of 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, pagination in original).

<sup>4</sup> See Letter submitted by DOE proposing a rule for final action and providing a copy of the Notice of Proposed Rulemaking at 1, located in RM18-1 at Accession No. 20171002-0006 (Sept. 29, 2017). In the letter, Commissioner McNamee requested that the Commission “register the filing of these documents” and indicated that he should be contacted with “any questions” regarding the matter. *Id.*

- “[t]he resiliency of the nation’s electric grid is threatened by the premature retirements of power plants that can withstand major fuel disruptions caused by natural or man-made disasters . . . ”<sup>5</sup>

- “These fuel-secure resources are indispensable for the reliability and resiliency of our electric grid . . . ”<sup>6</sup>

The DOE NOPR also reached legal conclusions regarding the adequacy of compensation for the identified categories of resources under existing rates. On behalf of the Department, Commissioner McNamee asserted that:

- “[O]rganized markets do not necessarily pay generators for all the attributes that they provide to the grid, including resiliency.”<sup>7</sup>

- [W]holesale pricing in those [organized] markets does not adequately consider or accurately value those benefits [of resiliency] . . . ”<sup>8</sup>

- “Fuel-secure generation resources are often not compensated for those benefits [of resiliency]”<sup>9</sup>

- “[I]t is the Commission’s immediate responsibility to take action to ensure that the reliability and resiliency attributes of generation with on-site fuel supplies are fully valued.”<sup>10</sup>

The DOE NOPR concluded by providing the Department’s proposed remedy to address the identified legal failings. Specifically, Commissioner McNamee proposed on behalf of the Department that eligible fuel-secure units within the PJM Interconnection (“PJM”), New York

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<sup>5</sup> DOE NOPR, 82 Fed. Reg. at 46,941.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 46,942

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 46,945.

Independent System Operator (“NYISO”), Midcontinent Independent System Operator (“MISO”), and ISO New England (“ISO-NE”) receive “full recovery of costs” including a return on equity.<sup>11</sup> Such provision, he asserted, were important to “ensure rates remain just and reasonable.”<sup>12</sup> As such, the DOE NOPR provided for implementation of the new tariffs no more than fifteen days after compliance filings.<sup>13</sup>

Commissioner McNamee briefly departed the Department of Energy, before returning as the Executive Director of the Office of Policy. In both positions, Commissioner McNamee continued to represent the Department with respect to the DOE NOPR after its submission to the Commission, advocating in support of the proposal at public and professional events throughout 2017 and 2018.<sup>14</sup>

Between his return to the Department on June 6, 2018, and through August 2018, Commissioner McNamee worked on a second “proposal to use emergency and national security authorities under the Federal Power and Defense Production Acts to support generation resources on the electric grid.”<sup>15</sup> His work on the proposal included, “researching and trying to work through the substantive issues, as well as examining the statutes and legal justifications contained in the proposal.”<sup>16</sup> The second proposal again set forth its factual underpinnings, including, for example, Department determinations that:

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<sup>11</sup> *Id.* at 46,948. The amended version of the DOE NOPR submitted to the Federal Register clarified that the proposal would apply only to those RTO/ISOs with capacity markets.

<sup>12</sup> *Id.* at 46,946.

<sup>13</sup> *Id.*

<sup>14</sup> Commissioner McNamee spoke in support of the DOE NOPR at a National Association of Regulatory Utility Commissioners meeting and two Senate hearings. Harvard ELI Comment, App. at 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

- “Recent and announced retirements of fuel-secure electric generation capacity across the continental United States are undermining the security of the electric power system because the system’s resilience depends on those resources.”<sup>17</sup>

- “[I]t is necessary to maintain fuel-secure generating stations across each interconnection within the continental United States to ensure adequate system-wide resilience in the event of major disruptions.”<sup>18</sup>

The second Department proposal has not, to date, been issued.

Commissioner McNamee was confirmed by the Senate on December 6, 2018, and sworn in to the Commission on December 11, 2018.<sup>19</sup>

### **Legal Background**

“A fair trial in a fair tribunal is a basic requirement of due process.”<sup>20</sup> Due process protections apply to administrative agency adjudications<sup>21</sup>, and mandate recusal not only where an adjudicator has a “direct, personal, substantial, pecuniary interest” that may affect her

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<sup>17</sup> Draft Addendum at 2 (May 29, 2018), <https://www.scribd.com/document/380740746/DOE-Coal-Nuke-Subsidy-Plan-1>; Gavin Bade, *Trump administration preparing 2-year coal, nuke bailout*, Utility Dive (June 1, 2018), <https://www.utilitydive.com/news/trump-administration-preparing-2-year-coal-uke-bailout/524788/>.

<sup>18</sup> *Id.*

<sup>19</sup> *Senate Votes to Confirm McNamee to FERC*, FERC News Release (Dec. 6, 2018), <https://www.ferc.gov/media/news-releases/2018/2018-4/12-06-18.asp#.XBU5FGhKg2w>; *see also* About Commissioner Bernard L. McNamee, FERC, <https://www.ferc.gov/about/com-mem/McNamee.asp>.

<sup>20</sup> *In re Murchisen*, 349 U.S. 133, 136 (1955).

<sup>21</sup> *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Antoniu v. SEC*, 877 F.2d 721, 724 (8th Cir. 1989).

impartiality,<sup>22</sup> but under any circumstances that create the “appearance of bias”<sup>23</sup> or “probability of bias.”<sup>24</sup> These protections are implemented by “objective standards that do not require proof of actual bias.”<sup>25</sup> While such a “stringent rule” may sometimes force recusal by adjudicators “who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,” endeavoring to prevent “even the probability of unfairness” safeguards critical values including public confidence in the institution.<sup>26</sup> As the Supreme Court succinctly explained: “[T]o perform its high function in the best way ‘justice must satisfy the appearance of justice.’”<sup>27</sup>

As relevant here, due process considerations require that an adjudicator “who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or

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<sup>22</sup> *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876-77 (2009) (“the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances “in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”) (quoting *Withrow*, 421 U.S. at 47).

<sup>23</sup> *Mitchell v. Sirica*, 502 F.2d 375, 382-83 (D.C. Cir. 1974) (“This circuit also has adopted the appearance of bias test, with specific reference to the prejudgment of issues in administrative agency disqualification cases.”) (citations omitted); *Kennecott Copper Corp. v. F.T.C.*, 467 F.2d 67, 79-80 (10th Cir. 1972) (“The rule is that a Commissioner must be disqualified if he or she has prejudged the case or has given a reasonable appearance of having prejudged it.”).

<sup>24</sup> *Caperton*, 556 U.S. at 883-84.

<sup>25</sup> *Id.* at 883; *Hurles v. Ryan*, 752 F.3d 768, 789 (9th Cir. 2014) (must assess risk of bias “under a realistic appraisal of psychological tendencies and human weakness”) (internal quotation omitted).

<sup>26</sup> *Murchisen*, 349 U.S. at 136; see *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”); *Wersal v. Sexton*, 674 F.3d 1010, 1022 (8th Cir. 2012) (“maintaining the appearance of impartiality is systemic in nature, as it is essential to protect the judiciary’s reputation for fairness in the eyes of all citizens . . . public confidence in the judiciary is integral to preserving our justice system.”); *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 468-69 (2d Cir. 1959) (failing to address appearance of prejudgment opens “the Commission’s reputation for objectivity and impartiality” to challenge).

<sup>27</sup> *Murchisen*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit.”<sup>28</sup>

This legal principle is deeply rooted in the “venerable tradition” that no man shall judge his own cause.<sup>29</sup> Cases upholding this legal principle reflect that, as a matter of law and independent from any (or lack of) evidence of actual bias, participating both as advocate and as decisionmaker in the same matter poses a constitutionally unacceptable risk of bias.<sup>30</sup>

Recusal is also required where “a disinterested observer may conclude that [the adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.”<sup>31</sup> Again, the standard is an objective one and focuses on an “average” decisionmaker without presumption of superior honesty or integrity.<sup>32</sup> The factfinder need not determine, or even inquire, whether an adjudicator’s mind is *actually* closed on the matters at

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<sup>28</sup> *Trans World Airlines, Inc. v. Civil Aeronautics Bd.*, 254 F.2d 90, 91 (D.C. Cir. 1958); *see also Laird v. Tatum*, 409 U.S. 824, 828-29 (1972) (standard for judicial disqualification includes merely signing a brief or pleading or actively participating even without signing a brief or pleading); *Lead Industries Ass’n. v. EPA*, 647 F.2d 1130, 1176 (D.C. Cir. 1980) (emphasizing that the EPA official had “never appeared in or in any way participated on NRDC’s behalf in the EPA proceedings” to establish a particular pollution standard in upholding a decision not to recuse); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 266-67 (D.C. Cir. 1962).

<sup>29</sup> *Am. Gen. Ins. Co. v. F.T.C.*, 589 F.2d 462, 463-65 (9th Cir. 1979).

<sup>30</sup> *Id.* at 465 (“mere responsibility for administrative supervision of the Department, regardless of the extent of his knowledge and his approval of the acts of his subordinates, has been deemed sufficient to activate the disqualification rule”); *State ex rel. Ellis v. Kelly*, 145 W. Va. 70, 75-76 (W. Va. 1960) (“It can hardly be contended that the commissioner, in the making of the investigation and in testifying before the deputy commissioner appointed by him and responsible to him, beyond any reasonable probability, did not become biased and prejudiced in the matter being heard.”); *Anderson v. Indus. Comm’n of Utah*, 696 P.2d 1219, 1221 (Utah 1985) (“In other words, when a judge has previously been involved in a case as an attorney, there is no need to show actual prejudice. The law presumes prejudice in such circumstances.”)

<sup>31</sup> *Cinderella Career & Finishing Sch., Inc. v. F.T.C.*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co.*, 267 F.2d at 469); *Texaco, Inc. v. F.T.C.*, 336 F.2d 754, 760 (D.C. Cir. 1964), vacated and remanded on other grounds, 381 U.S. 739 (1965); *Mitchell*, 502 F.2d at 387.

<sup>32</sup> *Caperton*, 556 U.S. at 885 (“Due process requires an objective inquiry” into whether the circumstances “offer a possible temptation to the average judge.”) (Internal quotation omitted).

issue; recusal is called for where an “equally fair interpretation” of the circumstances reflects “prejudgment of a material issue.”<sup>33</sup>

Moreover, in most circuits confronting the issue, the failure of even a single adjudicator on a multi-member body to recuse where due process so requires warrants reversal of the decision, regardless of whether the member affected by an appearance of bias is the deciding vote.<sup>34</sup>

The Commission is also separately obligated to follow rules issued by the Office of Government Ethics (“OGE”). Under OGE’s regulation, 5 C.F.R. § 2635.502, an employee is prohibited from participating in matters in which the employee knows a reasonable person is likely to question his impartiality, without first obtaining approval from the Designated Agency Ethics Official (“DAEO”). In adopting these provisions, OGE recognized that “employees have long been obligated to act impartially and to avoid even the appearance of loss of impartiality” and sought to put in place “a specific mechanism to resolve difficult issues of whether, in particular circumstances, a possible appearance of loss of impartiality is so significant that it

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<sup>33</sup> *Mitchell*, 502 F.2d at 387.

<sup>34</sup> *Berkshire Employees Ass’n of Berkshire Knitting Mills v. N.L.R.B.*, 121 F.2d 235, 239 (3rd Cir. 1941) (“Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured”); *Cinderella Career & Finishing Sch.*, 425 F.2d at 592 (no way of determining the extent to which one biased member’s views affect the deliberations of a supposedly impartial tribunal); *Hicks v. City of Watonga*, 942 F.2d 737, 748 (10th Cir. 1991) (concluding that the plaintiff could make out a due process claim by showing bias on the part of only one member of the tribunal); *Wilkerson v. Johnson*, 699 F.2d 325, 328-29 (6th Cir. 1983) (bias of one member of a four person application board sufficient to deny due process); *Antoniu*, 877 F.2d at 726 (vacating commission decision even though biased commissioner belatedly recused himself); *Stivers v. Pierce*, 71 F.3d 732, 748 (9th Cir. 1995) (“plaintiff need not demonstrate that the biased member’s vote was decisive or that his views influenced those of other members”).



should disqualify them from participation in particular matters.”<sup>35</sup> The Commission’s practice is to take steps to avoid even the appearance of impartiality.<sup>36</sup> As DAEO Charles Beamon described agency practice, “FERC . . . must prioritize integrity, impartiality, fairness, transparency, and due process in their proceedings” and participants in the proceedings must be “above reproach” avoiding “even the slightest appearance of impropriety.”<sup>37</sup>

## Argument

### **I. Commissioner McNamee must recuse himself from the DOE NOPR and resilience proceeding because of his representation of the Department of Energy in the same matter.**

There is no dispute that Commissioner McNamee signed the DOE NOPR and served as the Department’s legal representative in its filing of the proposal with the Commission pursuant

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<sup>35</sup> Standards of Ethical Conduct for Employees of the Executive Branch, 56 Fed. Reg. 33778, 33786 (July 23, 1991).

<sup>36</sup> See, e.g., Letter from Kevin J. McIntyre to DAEO Charles A. Beamon (Aug. 22, 2017) (agreeing to recuse from all matters in which his former firm is a party or represents a party for one year pursuant to 5 C.F.R. § 2635.502(d)); *Re Union Oil Co. of California*, 23 F.P.C. 73, 77 (1960) (Commissioner Hussey recused himself based on his appearance on behalf of a party in an earlier hearing related to the case); *Mun. Elec. Utilities Ass’n of the State of New York v. Power Auth. of the State of New York*, 22 FERC P 61331 (March 10, 1983) (Chairman Butler concludes it is “in the public interest” to recuse himself due to “charges of taint”); Letter from Chairman Kelliher to Senator Cantwell, Accession No. 20060517-0315, at 2 (May 5, 2006) (explaining the Commission will “go even further in this instance,” than just ensuring a former Enron employee is prohibited from working on all matters “in which she was personally and substantially involved” at Enron); Documentation of Communication, *Tennessee Gas Pipeline Co.*, RP99-328-000 (July 15, 1999) (documenting senior attorney’s recusal from decisional process where she “gave an opinion on application of regulation to the facts” that became a contested issue in the case when raised in a protest).

<sup>37</sup> Charles Beamon, Michael Korwin, & Jeffrey Pienta, *Ethics Issues Common to Regulatory Agencies*, Presentation at the 2014 National Government Ethics Summit, at Slide 4 (Sept. 23, 2014), [https://www.oge.gov/web/OGE.nsf/0/7C20A2E3883343F78525815A0059B76A/\\$FILE/PR\\_Korwin\\_Issues%20Regulatory%20Agencies.pdf](https://www.oge.gov/web/OGE.nsf/0/7C20A2E3883343F78525815A0059B76A/$FILE/PR_Korwin_Issues%20Regulatory%20Agencies.pdf); see also *FERC Chairman Kevin McIntyre Charges Full Steam Ahead*, ENERGY BAR ASSOCIATION UPDATE (Chairman McIntyre described as cheerfully following these requirements for recusal because, as McIntyre explained, he is “very much a ‘rule of law’ guy.”), <https://www.eba-net.org/assets/1/6/2018EBAMemberAuthoredArticleChairmanMcIntyreInterview.pdf>.

to Section 403 of the DOE Organization Act. As a matter of law, Commissioner McNamee cannot participate as decisionmaker on the same case in which he previously participated on behalf of a separate entity, the Department of Energy.<sup>38</sup> The Commission’s denial of the DOE NOPR in Docket No. RM18-1 is subject to a still-pending request for rehearing.<sup>39</sup> Commissioner McNamee’s participation in these rehearing requests would violate the venerable prohibition against a man standing in judgment of his own cause, and due process. The Commissioner must recuse himself.

This legal conclusion applies with equal force to Commissioner McNamee’s participation in the resilience docket, Docket No. AD18-7. The resilience proceeding was launched to further evaluate precisely the same set of issues addressed by the DOE NOPR, providing the Commission opportunity to independently assess the premises of the DOE proposal. Thus, where the Department has concluded that market rules—and more particularly, PJM, NYISO, MISO, and ISO-NE rates—are not adequately valuing generators for the contribution to resilience, the Commission proposes to “specifically evaluate the resilience of the bulk power system in the regions operated by regional transmission organizations (RTO) and independent system operators (ISO).”<sup>40</sup> The resilience docket therefore encompasses the very same factual questions that were answered by the Department, and by Commissioner McNamee on behalf of the Department, in the DOE NOPR: whether the grid is threatened by retirements of so-called “fuel secure” power plants and whether and to what extent such “fuel secure” resources are necessary

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<sup>38</sup> *Trans World Airlines, Inc.*, 254 F.2d 90; *Re Union Oil Co. of California*, 23 F.P.C. 73.

<sup>39</sup> Foundation for Resilient Societies Request for Rehearing, RM18-1-000, RM-18-1-001, AD-18-7-000 (Feb 7, 2018); *see also* Order Granting Rehearing for Further Consideration, RM18-1-001, AD18-7-001 (Mar. 8, 2018).

<sup>40</sup> Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Different Procedures, 162 FERC ¶ 61,012 at P 1 (Jan. 8, 2018).

to the reliability and resiliency of the grid. Depending on the outcome of that inquiry, the Commission may well adjudicate the same ultimate legal questions that the DOE NOPR reached: whether the RTO/ISO rates are just and reasonable in light of their provision for and compensation of “fuel secure” resources.<sup>41</sup> The overlap in the scope of these two dockets is further demonstrated by comments filed in the resilience docket requesting that the Commission reach the same legal findings and materially the same relief as the DOE NOPR.<sup>42</sup>

Indeed, Commissioner McNamee’s testimony before the Senate Energy and Natural Resources Committee confirms his understanding that the Commission is continuing its deliberation over those very factual and legal issues in the resilience docket. When asked whether the Commission “did the right thing” by rejecting the DOE NOPR, Commissioner McNamee testified that the Commission “recognized resiliency as an issue that deserved further study,” which was taking place in the new resilience docket.<sup>43</sup> Asked as a follow-up whether the

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<sup>41</sup> Commissioner Chatterjee’s concurring opinion voices a clear expectation that Docket No. AD18-7 will ultimately reach a determination of the just and reasonableness of RTO/ISO rates in light of the compensation of resource for their resilience characteristics; indeed, he would have preferred a show cause order providing for interim measures “to remedy any potentially unjust and unreasonable compensation practices” during the pendency of Docket No. AD18-7. 162 FERC ¶ 61,012 (Chatterjee, Commissioner, concurring at 3).

<sup>42</sup> Reply Comments of FirstEnergy Solutions Corp., AD18-7 (May 9, 2018) (requesting the Commission mandate out-of-market compensation of so-called “fuel secure” units, originally proposed in RM18-1, on an interim basis); Motion to Intervene and Reply Comments of the PSEG Companies, AD18-7 at 4 (May 9, 2018) (calling on the Commission to “direct PJM to act quickly to address” pending retirement of nuclear fleet); Comments of the Nuclear Energy Institute, AD18-7 at 21 (May 9, 2018) (requesting that the Commission “compel” tariff changes to provide out-of-market cost recovery to “retain generating units that propose to retire, but whose retirements would compromise system resilience”); Surreply Comments of FirstEnergy Solutions Corp., AD18-7 (May 24, 2018) (requesting interim compensation be offered at least in PJM, if not nationally); First Energy Solutions Corp. Renewed Request for Emergency Action, AD18-7 (Jun. 15, 2018) (renewing request to adopt RM18-1 proposal).

<sup>43</sup> U.S. Senate Committee on Energy and Natural Resources, Hearing Recording at 50:10, questioning by Ranking Member Cantwell (Nov. 15, 2018), <https://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=A984BE6C-7AF0-4048-B556-E33A716AD752> (Senator Cantwell: “Mr.

DOE NOPR could fall “within just and reasonable rates,” Commissioner McNamee stated that “FERC’s examination of the issue is still outstanding. The issue I think needs to be, and what they are looking at, is what are the attributes that are necessary for resilience.”<sup>44</sup>

The mere technicality that the two proceedings have different docket numbers, where the substantive matters at issue are materially the same, does not make the resilience docket a sufficiently distinct matter for the purposes of the due process inquiry.<sup>45</sup> The two dockets entail investigation of substantially “the same facts and issues and of the same parties,” and that is what matters in determining the scope of the required recusal.<sup>46</sup>

The Commission has previously rejected constrained readings of the scope of the same “matter” in determining whether disqualification is required. In assessing compliance with a different ethics rule, one Administrative Law Judge rejected arguments that a newly active docket was not the same matter as one that had long been closed.<sup>47</sup> Rather than “plac[e] form over substance,” he held “the most important consideration” in determining the scope of a matter

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McNamee. On the FERC’s . . . [decision] to turn down the resilient pricing proposal by the Secretary, did they do the right thing?” McNamee: “I think that clearly the Commission acted within its authority. And I think what the Commission did is that they recognized that resiliency was an issue that deserved further study, and that’s my understanding of their order, why they opened up a new docket on the issue.” Senator Cantwell: “Do you think that you can meet the standards of just and reasonable rates if in fact that resolution, I mean that proposal, went through and you actually raised prices on individuals—would that be within just and reasonable rates?” McNamee: I believe that FERC’s examination of the issue is still outstanding. The issue I think needs to be, and what they are looking at, is what are the attributes that are necessary for resilience.”).

<sup>44</sup> *Id.*

<sup>45</sup> *Am. Cyanamid Co. v. F.T.C.*, 363 F.2d 757, 767 (6th Cir. 1966) (rejecting arguments that proceedings before a Senate subcommittee “had no relationship to” Commission proceedings, where the decisionmaker “investigated and developed many of [the] same facts” in each set of proceedings).

<sup>46</sup> *Id.* at 763.

<sup>47</sup> *Buckeye Power Inc.*, 10 FERC ¶ 63,017 (Jan. 22, 1980) (vacated on procedural grounds by *Buckeye Power Inc.*, 14 FERC ¶ 61,239 (Mar. 17, 1981)).

is “whether the facts necessary to support the two claims are sufficiently similar.”<sup>48</sup> Similarly, Chairman Butler rejected a narrow focus on “case title and docket number” in determining the scope of a matter that could potentially warrant his recusal.<sup>49</sup> Rather, “[w]hether two proceedings or phases of a proceeding constitute the ‘same matter’ or ‘factually related’ matters for purposes of disqualification depends on whether they involve the same basic issues and facts as well as the same or related parties.”<sup>50</sup> A focus on the degree of factual overlap between the two proceedings leaves no doubt that they meet that test: the same factual inquiry underpinning the DOE NOPR remains live and central to the ultimate resolution of resilience docket. Because the resilience docket wholly encompasses the same factual claims at issue in the DOE NOPR docket, Commissioner McNamee’s representation of the Department in filing the DOE NOPR must result in his recusal from both dockets.

## **II. Commissioner McNamee’s intimate involvement in both DOE proposals creates a constitutionally unacceptable appearance of bias that provides independent grounds for his recusal.**

Separate from his representation of the Department of Energy, Commissioner McNamee’s deep and specific engagement on two Department proposals that each conclude, based on an involved factual investigation,<sup>51</sup> that so-called “fuel secure” power plants are necessary to the resilient functioning of the grid creates the objective appearance that he has prejudged factual and legal issues that he will now be called upon to adjudicate in Docket Nos.

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<sup>48</sup> *Buckeye Power Inc.*, 10 FERC ¶ 63,017, 65,089. On appeal of the ALJ’s Order, the Commission vacated it on procedural grounds but endorsed the substance of the analysis on the scope of the “matter.” *Buckeye Power Inc.*, 14 FERC ¶ 61,239.

<sup>49</sup> Statement of Chairman Butler Denying Motion to Disqualify, *United Gas Pipe Line Co.*, 21 FERC ¶ 61,016, at n.7 (Oct. 8, 1982).

<sup>50</sup> *United Gas Pipe Line Co.*, 21 FERC ¶ 61,016, 61,095.

<sup>51</sup> Clean Energy Advocates do not mean to suggest that the Department’s fact-finding has been rigorous or accurate (it is not), but only that it has the markings of the final culmination of the Department’s deliberation on the matter.

RM18-1 and AD18-7. The scope of Commissioner McNamee’s engagement and his determination of the ultimate legal issue of the just and reasonable rates in certain RTO/ISOs each contribute to a constitutionally unacceptable appearance of bias. The Commission need reach this second ground for Commissioner McNamee’s recusal only if it does not fully accept the first.

Again, the Commission needs no record of any actual bias to conclude that the “probability” or “appearance” of bias is too great to be constitutionally acceptable. Under the objective standard, the Commission needs only to conclude that the “intimate involvement of the decisionmaker[] in the investigation of the same factual and legal issues . . . made it inevitable for a disinterested observer to conclude that they had in some measure adjudged the facts as well as the law.”<sup>52</sup> Commissioner McNamee’s work in developing and publicly defending the factual assertions and legal positions set forth in the DOE NOPR, combined with his additional work on “substantive issues” and examination of the “statutes and legal justifications”<sup>53</sup> related to the second DOE project, constitute the kind of “intimate involvement” that produces an appearance of prejudgment. Courts have recognized, for example, that merely having publicly announced a view on a matter may, objectively, make it “difficult for [a decisionmaker] to change his opinion regardless of what may develop when the parties brief and argue the question.”<sup>54</sup> But Commissioner McNamee’s degree of engagement goes beyond public comments in support of the Department’s views; serving as the Department’s lawyer, he was responsible for advising his client regarding and conducting due diligence into the merits of the factual and legal inquiry set

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<sup>52</sup> *Lead Indus. Ass’n, Inc.*, 647 F.2d at 1177 (internal quotation omitted).

<sup>53</sup> Harvard ELI Comment, App. at 2.

<sup>54</sup> *Mitchell*, 502 F.2d at 387.

forth in the DOE NOPR.<sup>55</sup> Indeed, if Commissioner McNamee had considered the factual or legal claims baseless, his professional duties would bar him from signing the DOE NOPR.<sup>56</sup> Moreover, the DOE NOPR offers not only the Department's and, as its representative, Commissioner McNamee's judgment of the facts, but it also sets forth their determinations of the ultimate legal question at issue in these dockets: that the PJM, NYISO, MISO, and ISO-NE rates are not just and reasonable due to their treatment of "fuel secure" resources. Commissioner McNamee, having judged the ultimate legal issue in the DOE NOPR, will undoubtedly appear to have prejudged that legal question before reviewing the factual record developed within the resilience docket. A "uninterested observer" would have little doubt that an "average adjudicator" who engaged in an involved development of a factual record, publicly laid out specific legal conclusions based on that investigation, and then defended the merits of those positions to a wide audience, would face real difficulty changing those conclusions. This inevitable conclusion warrants recusal notwithstanding that Commissioner McNamee may fully

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<sup>55</sup> MODEL RULE OF PROF'L CONDUCT r. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."); *Duran v. Carris*, 238 F.3d 1268, 1272 (10th Cir. 2001) ("Competence requires that a lawyer conduct a reasonable inquiry and determine that a filed pleading is not presented for an improper purpose, the positions taken are nonfrivolous, and the facts presented are well grounded. Ethics requires that a lawyer acknowledge the giving of his advice by the signing of his name.") (internal citation omitted).

<sup>56</sup> *Hackman v. Valley Fair*, 932 F.2d 239, 243 (3d Cir. 1991) (Model Rules of Professional Conduct "prohibit an attorney from bringing claims that have no foundation"); *In re Girardi*, 611 F.3d 1027, 1036 (9th Cir. 2010) (Model Rule 3.1 imposes "a duty to investigate the legal and factual bases of his claims"); see also *Bus. Guides, Inc. v. Chromatic Commc'ns Enterprises, Inc.*, 498 U.S. 533, 542-43, (1991) (concluding that "[a] signature certifies to the court that the signer has read the document, has conducted a reasonable inquiry into the facts and the law and is satisfied that the document is well grounded in both, and is acting without any improper motive" regardless of whether inclusion of the signature on the filing was mandatory.)

embrace the task of impartial adjudicator, and his sworn commitment to do so is irrelevant under the objective standard.<sup>57</sup>

Commissioner McNamee’s additional work on the second DOE proposal only strengthens the record of an appearance of bias. The subsequent DOE proposal similarly examined the impacts of retirements of so-called “fuel secure” power generation on the resilience of the grid, but expanded that inquiry to consider the necessity of those plants “across each interconnection within the continental United States” and to new legal implications, such as whether loss of such generation constitutes an “emergency” under section 202 of the Federal Power Act.<sup>58</sup> Commissioner McNamee’s engagement on this second proposal, again concluding that federal authorities must be exercised to halt retirements of “fuel secure” plants, only deepens the basis for an objective observer to conclude a third reweighing of the facts would not produce different conclusions.

As described in Argument Section I above, the facts and legal matters addressed in the DOE NOPR remain at issue not only in the rehearing petition in Docket No. RM18-1, but also in the resilience docket. Recusal based on the appearance of prejudgment stemming from Commissioner McNamee’s engagement on the DOE NOPR must therefore extend to the resilience docket.

Critically, the Commission must distinguish the circumstances here from other recusal requests based on general policy statements or claims of inherent bias due to the structure of regulatory roles. In rejecting prior requests for recusal, the Commission has at times asserted that

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<sup>57</sup> See *Tincher v. Piasecki*, 520 F.2d 851, 855 (7th Cir. 1975) (finding an affidavit swearing that a charge against a committee member had not affected his decision “immaterial” to whether the risk of bias is constitutionally intolerable).

<sup>58</sup> Draft Addendum, *supra* note 17, at 2-3.



requests for recusal must overcome the “presumption of honesty and integrity in those serving as adjudicators.”<sup>59</sup> To the extent that this standard is read to require evidence of actual bias for recusal to be required, it conflicts with the correct, objective standard focused on appearance of bias.<sup>60</sup> Moreover, this presumption has generally been relevant in cases in which the allegation is one of *inherent* bias based on regulatory structure, such as the blurring between investigatory and adjudicatory roles.<sup>61</sup> Faced with such structural allegations, the presumption of regularity is a meaningful standard because it allows for some relaxation of the requirement to separate regulatory functions.<sup>62</sup> Such a presumption, however, does little work when considering the motivations of the “average” decisionmaker, subject to “psychological tendencies and human weakness” under the objective standard.<sup>63</sup>

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<sup>59</sup> See, e.g., Memorandum to File from Commissioner Cheryl A. LaFleur, Accession No. 20110311-4005, Attached Memorandum from Beamon to LaFleur at 3 (Mar. 11, 2011) (quoting *Withrow*, 421 U.S. at 47).

<sup>60</sup> *Utica Packing Co. v. Block*, 781 F.2d 71, 77 (6th Cir. 1986) (“There can be no doubt that the requirement of separation of functions is relaxed in administrative adjudication. However, the requirement of a fair trial before a fair tribunal has not been eliminated. *Withrow v. Larkin*. This concept requires the appearance of fairness and the absence of a probability of outside influences on the adjudicator; it does not require proof of actual partiality.”)

<sup>61</sup> See, e.g., *Utica Packing Co.*, 781 F.2d at 77 (allegation of bias based on combination of investigative and adjudicative functions “has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators”) (quoting *Withrow*, 421 U.S. at 47); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 779-80 (D.C. Cir. 1983) (assessing bias as a result of commingling of investigatory and prosecutor function and concluding that “[a]ny claim of inherent bias must ‘overcome a presumption of honesty and integrity in those serving as adjudicators’”) (quoting *Withrow*, 421 U.S. at 47); *Smith v. Sorensen*, 748 F.2d 427, 436 (8th Cir. 1984) (applying presumption where allegation of bias arose inherently from Commissioner review of the actions of a subordinate).

<sup>62</sup> But even in such inherent bias cases, the standard cannot be applied so as to vitiate due process protections. *Utica Packing Co.*, 781 F.2d at 77.

<sup>63</sup> *Hurles*, 752 F.3d at 789 (quoting *Caperton*, 556 U.S. at 883-84) (internal quotation marks omitted).

Similarly, it is not appropriate for the Commission to rely on a standard requiring the demonstration of an “unalterably closed mind” by the decisionmaker.<sup>64</sup> As an initial matter, this substantially less protective standard is, at most, applicable in evaluating bias in the rulemaking context.<sup>65</sup> Where agencies are most clearly performing a legislative task, concerns that disqualification based on statements about “generalized legislative facts, including predictions and underlying views on policy” will chill an administrator’s ability to carry out “policy-based functions” are at their height.<sup>66</sup> The current case raises none of these concerns. Commissioner McNamee’s recusal is sought not from a legislative role, but rather from proceedings that are, or will ultimately be resolved through, adjudication of rates. While the DOE NOPR was styled as a “rulemaking,” what it aimed to achieve was a specific determination that the compensation provided to certain generators under particular RTO/ISO tariffs was not just and reasonable—*i.e.*, an adjudication.<sup>67</sup> Likewise, while currently an administrative docket, the factual inquiry taking place in Docket No. AD18-7 will culminate in particular rate determinations to assess their justness and reasonableness in light of their ability to provide for grid resilience.<sup>68</sup> Moreover, this is not a case in which the appearance of bias arises from banal, generalized policy

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<sup>64</sup> See, e.g., Memorandum from Beamon to LaFleur, *supra* note 59, at 3 (requiring “a clear and convincing demonstration of an ‘unalterably closed’ mind by the decisionmaker”).

<sup>65</sup> *Ass’n of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1154 (D.C. Cir. 1979); *Lead Industries Ass’n*, 647 F.2d at 1180; *but see Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, 821 F.3d 19, 31 (D.C. Cir. 2016) (rejecting “unalterably closed mind” standard and the “higher tolerance for administrative bias” it embodies in finding due process violation).

<sup>66</sup> *Ass’n of Nat. Advertisers, Inc.*, 627 F.2d at 1170 & 1175; *see also Ass’n of Am. Railroads*, 821 F.3d at 28-31 (describing theory of permissible bias underlying *Ass’n of Nat. Advertisers, Inc.*).

<sup>67</sup> See Harvard ELI Comments at 8, n.39 (describing mischaracterization of DOE NOPR as a rule).

<sup>68</sup> As discussed above in Argument Section I, it is contrary to precedent and Commission practice to arbitrarily draw the limits of the scope of a matter based on its case number. Moreover, relying on such a technicality would merely delay recusal until the related adjudicative docket is opened.

statements. Here, concerns about appearance of bias stem from deep engagement by the decisionmaker into matters of adjudicative fact, the clear articulation of specific legal findings stemming from that factual inquiry, and a demonstrated record of public advocacy in support of those factual and legal findings. Limiting those behaviors would not impinge on the Commission's ability to undertake its legislative, policy-making roles.

Finally, the Commission should reject the “unalterably closed mind” standard that is “practically impossible to prove”<sup>69</sup> because it is inconsistent with the Commission's long commitment to safeguarding the institution's integrity and impartiality and avoiding “even the slightest appearance of impropriety.”<sup>70</sup> At a historic moment when public trust in government institutions is at a nadir,<sup>71</sup> prophylactic measures to uphold confidence in fair decisionmaking and rule of law should be shored up, not watered down. Even *non-decisional* staff have been held to stricter standards than those Clean Energy Advocates seek to uphold through this motion. A former Enron employee hired as non-decisional staff was prohibited from working on all matters in which she was “personally and substantially involved” while at Enron<sup>72</sup> – that same standard would recuse Commissioner McNamee from both the DOE NOPR and resilience dockets. Granting this motion is not a hard case. It is the bare minimum called for by due process.

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<sup>69</sup> *Ass'n of Nat. Advertisers, Inc.*, 627 F.2d at 1181-82 (MacKinnon, J., dissenting in part and concurring in part).

<sup>70</sup> Beamon *et al.*, *supra* note 37, at Slide 4.

<sup>71</sup> *See, e.g.*, Pew Research Center, Public Trust in Government: 1958-2017 (Dec 17, 2017), <http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/> (concluding that “[p]ublic trust in the government remains near historic lows” where polls persistently show less than 25% of those surveyed report trust the government “most of the time” since 2010).

<sup>72</sup> Letter from Chairman Kelliher to Senator Cantwell, *supra* note 36, at 2.

## CONCLUSION

For the foregoing reasons, Clean Energy Advocates respectfully request that Commissioner McNamee recuse himself from Docket Nos. RM18-1 and AD18-7.

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**CERTIFICATE OF SERVICE**

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding by electronic means.

Dated at Washington, D.C. this 18<sup>th</sup> day of December, 2018.

*/s/ Kim Smaczniak*

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