UNITED STATES OFFICE OF
GOVERNMENT ETHICS

Federal Energy Regulatory Commission

Review of Ethics-related Advice and Counseling Provided to Presidentially Appointed, Senate-confirmed Officials

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The United States Office of Government Ethics (OGE) reviewed the ethics-related advice and counseling provided from January 28, 2017, through November 26, 2019, to Presidentially appointed, Senate-confirmed (PAS) officials at the Federal Energy Regulatory Commission (FERC). This report summarizes the findings of OGE's review.

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Objectives, Scope and Methodology

Objectives: OGE provides overall leadership and oversight of the executive branch ethics program designed to prevent and resolve conflicts of interest. The Ethics in Government Act gives OGE the authority to evaluate the effectiveness of executive agency ethics programs.[1]

OGE was made aware of concerns that FERC Commissioners[2] were receiving advice and counseling that was not consistent with applicable statutes, regulations, and other governing authorities. OGE's objective in conducting this limited scope review was to determine whether the advice and counseling provided to FERC's PAS officials was consistent with applicable statutes, regulations, and other governing authorities. OGE did not seek to determine the impact or outcome of any advice that was not consistent with applicable statutes, regulations, or other governing authority.

Scope: The scope of this review was all ethics-related advice provided by FERC's Office of General Counsel (OGC) to FERC's PAS officials during the period January 28, 2017, through November 26, 2019.

Methodology: OGE requested that FERC provide all records of ethics-related advice and counseling given by FERC's OGC to PAS officials from January 28, 2017, through November 26, 2019. This included any advice and counseling provided by any employee within FERC's OGC that relates to the criminal conflict of interest statutes (18 U.S.C. §§ 202-209), 5 C.F.R. parts 2634 through 2641, or Executive Order 13770 titled, "Ethics Commitments by Executive Branch Appointees."

FERC provided OGE approximately 370[3] instances of advice in response to OGE's request. OGE examined this advice to determine whether it was consistent with applicable

[1] *See* 5 U.S.C. app. § 402 and 5 C.F.R. part 2638.
[2] All of FERC's Commissioners are PAS officials.
[3] Much of the advice provided to PAS officials was provided via email. It was not uncommon for an initial question to result in several exchanges between the person seeking advice and the

statutes, regulations, and other governing authorities. OGE discussed its initial findings with FERC ethics officials to obtain any necessary clarifications.

Agency Background

FERC is an independent agency that regulates the transmission and wholesale sale of electricity and natural gas in interstate commerce, and regulates the transportation of oil by pipelines in interstate commerce. FERC also reviews proposals to build interstate natural gas pipelines, natural gas storage projects, and liquefied natural gas terminals and licenses non-federal hydropower projects. Congress assigned these responsibilities to FERC in various laws enacted over nearly 100 years. These laws include the Federal Power Act, Public Utility Regulatory Policies Act, Natural Gas Act, and Interstate Commerce Act. More recently, as part of the Energy Policy Act of 2005, Congress gave FERC additional responsibilities to protect the reliability and cybersecurity of the bulk-power system through the establishment and enforcement of mandatory reliability standards, as well as additional authority to enforce FERC regulatory requirements through the imposition of civil penalties and other means.

Who Provides Ethics-related Advice

FERC's ethics program is administered by its Designated Agency Ethics Official (DAEO). The DAEO is an Associate General Counsel who also heads the General and Administrative Law component of FERC's OGC. An attorney-advisor within the General and Administrative Law component serves as the Alternate Designated Agency Ethics Official (ADAEO). The DAEO and ADAEO are supported by 11 other General and Administrative Law staff members who serve as ethics officials. The DAEO, ADAEO, and staff are responsible for providing advice and counseling to FERC's Commissioners.

FERC's General Counsel is not involved in the day-to-day operations of FERC's ethics program. However, based on OGE's examination, the General Counsel has been consulted concerning the advice provided to FERC's Commissioners and is usually copied when ethics officials provide substantive advice to them. On one occasion, the DAEO consulted with the General Counsel regarding a determination as to whether the Chairman should be recused from a matter because a "close affiliate" of one of the Chairman's former clients was involved. The General Counsel concurred with the DAEO's assessment that the Chairman should be recused.

Findings of OGE's Review

OGE examined advice and counseling that addressed a variety of topics. Recusals, gifts, and financial disclosure requirements were among the more common issues addressed. After having examined all of the advice and counseling provided by FERC, OGE's concerns were

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ethics official responsible for responding. Therefore, the number of "instances" of advice included in such an exchange can be highly subjective. All of the material in FERC's response was examined by OGE.

focused on one area: how FERC applied the restrictions found at 5 C.F.R. § 2635.502 and at Paragraph 6 of the Ethics Pledge. These concerns are discussed below.

FERC's PAS officials are required to sign an Ethics Pledge[4] and are also subject to the Standards of Ethical Conduct for Employees of the Executive Branch[5] (Standards of Conduct). In pertinent part, this means they are subject to two similar but distinct impartiality safeguards. Paragraph 6 of the Ethics Pledge requires appointees to commit that they will not for a period of two years from date of appointment participate in any particular matter involving specific parties that is directly and substantially related to their former employer or former clients, including regulations and contracts. The impartiality regulation in the Standards of Conduct states that an employee should not participate in a matter without informing the agency designee and receiving authorization when an employee knows that their former employer or former client is or represents a party to a particular matter and the employee believes that a reasonable person would question their impartiality.[6] This restriction lasts for one year after the end of the employee's service to the former employer or client.

Based on OGE's evaluation of the advice provided, FERC ethics officials applied the wrong analysis in 29 instances when determining whether Commissioners were required to recuse from certain matters involving former employers or clients as required by the impartiality regulation and Ethics Pledge. In some cases, this may have led to Commissioners participating in matters which could have resulted in them violating the Ethics Pledge they signed as a condition of employment.

Specifically, OGE's analysis indicated that, in 20 cases, FERC ethics officials granted authorizations under the impartiality regulation (5 C.F.R. § 2635.502) without indicating that they had considered the ban imposed by the Ethics Pledge required by Executive Order 13770. There were also 9 cases in which ethics officials mentioned the Ethics Pledge in their analyses, but nevertheless granted authorizations under 5 C.F.R. § 2635.502.[7] In these 29 instances, the circumstances that were deemed to require recusal under 5 C.F.R. § 2635.502 would also have required recusal under the Ethics Pledge. Yet FERC ethics officials improperly advised FERC Commissioners that they could participate in particular matters based on § 2635.502 authorizations alone, even though no Ethics Pledge waivers were apparently sought or granted.[8]

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[4] Executive Order 13770
[5] 5 C.F.R. part 2635
[6] 5 C.F.R. § 2635.502
[7] In OGE's discussions with the DAEO, OGE noted that no one who asked for an authorization was denied. The DAEO explained that if a Commissioner is considering requesting an authorization, the Commissioner or the Commissioner's staff typically has an initial discussion with ethics officials to determine whether it is likely that the authorization would be granted. If it appears that the authorization wouldn't be granted, no formal request is made. This gives the appearance that all requests for authorizations are granted.
[8] OGE notes that some of the 29 involved particular matters of general applicability but we did not assess whether the Ethics Pledge or § 2635.502 restricted the Commissioner's participation.

Actions Taken

OGE conducted a teleconference with FERC's ethics officials upon completion of its initial review of the advice and counseling provided to PAS officials and confirmed its substantive findings. Further, OGE confirmed that FERC officials were now fully aware of the relevant issues and were no longer using the flawed analysis that had been applied to recusal determinations.

Recommendations

- FERC's DAEO and ADAEO, as well as any other ethics official the DAEO identifies, should obtain formal training on how to properly apply the provisions of 5 C.F.R. § 2635.502 and Executive Order 13770. OGE's Institute for Ethics in Government has agreed to provide this training.

Agency Comments

As the DAEO for FERC, I thank OGE staff for this careful review. FERC takes ethics issues seriously, and we are committed to continually improving our processes. I appreciate and accept OGE's offer of training on subjects related to this review.

I also appreciate this opportunity to explain briefly the rationale that, at the time, I determined supported the authorizations under 5 CFR § 2635.502 that are discussed in this review. Section 501 expands the use of section 502 analysis to "other circumstances" that would raise a question regarding an employee's impartiality. 5 CFR § 2635.501(a). Section 502 allows the DAEO to consider, among other factors, the nature of the matter for which authorization is sought, the role of the participant, and the integrity of the process. Applying these factors on a case-by-case basis, I determined that participation by the requesting Commissioner was appropriate after accounting for the institutional and regulatory significance of the matter at issue in each request; the role of a Commissioner, whose individual authority cannot be exercised by others; and the detailed explanation I would provide as to why the Commissioner's participation was appropriate, prior to the Commission making its decision based on a public record. I conducted this analysis consistently with respect to each of the instances identified in this review, which constituted less than 1 percent of all matters pending under each concerned Commissioner's authority and responsibility.

OGE's review finds that the analysis discussed above did not account sufficiently for the Ethics Pledge that FERC PAS officials have signed pursuant to Executive Order 13770. I accept this conclusion and, indeed, I had changed my practice prior to OGE initiating this review on November 27, 2019. During consultations beginning in July 2019, I informed White House Ethics Officials of my prior authorizations based on the analysis discussed above, and I explained that I did not view those authorizations as a waiver of the Ethics Pledge. White House Ethics Officials stated that notwithstanding my case-by-case analysis and authorizations, a separate waiver of the Ethics Pledge also was required. Based on that guidance, I immediately discontinued the practice of granting section 502 authorizations in

situations also covered by the Ethics Pledge without a separate Ethics Pledge waiver granted by White House Ethics Officials.

As to the instances discussed in this review, the Commissioners acted in good faith by seeking my authorization prior to participating in matters that presented a potential recusal concern. Also, the Ethics Pledge states that it does not create a right of action against the U.S. Government, and it is not statutory in nature. Thus, in these instances where a Commissioner participated in a proceeding based on my authorization that did not account sufficiently for the Ethics Pledge, that development does not affect the validity of the Commission's action.