

McNamee Should Sit Out FERC 'Grid Resilience' Ruling

By **Richard Drom** (April 9, 2019, 6:02 PM EDT)

Federal Energy Regulatory Commission member Bernard McNamee may have to recuse himself from FERC issues concerning fuel security and potential subsidies for fossil-fuel electric generation facilities, due to his prior involvement in such matters. McNamee's extensive involvement at the U.S. Department of Energy, and statements he made before he became a FERC commissioner, appear to require that he not be involved in adjudicating relevant issues in FERC's current proposed rulemaking on fuel security.



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FERC Docket No. AD18-7 is entitled "Grid Resilience in RTO/ISOs." This current proceeding shares many of the same issues with an earlier FERC proceeding, Docket No. RM18-1, which was entitled "Grid Reliability and Resilience Pricing." In both of these proceedings, FERC has grappled with complex questions involving whether certain electricity generation facilities are necessary to ensure the reliability of the electricity grid.

Some have argued that such reliability concerns require making exceptions to the normal FERC-approved energy and capacity market pricing tariff procedures. One approach that has been proposed, for example, would enable "resilient" generation resources (such as nuclear facilities or coal generation facilities that have on-site storage of fuel, so-called "fuel secure" generators) to receive out-of-market payments in order to ensure that they remain economic.

Facilities that generate electricity from coal are economically challenged; recent studies have concluded that such generation facilities may be economically forced to prematurely retire. For example, a March 2019 report from Energy Innovation, a renewables analysis firm, concludes that 74% of the nation's coal generation facilities are providing electricity that is more expensive than wind or solar generated power.[1] The report states:

Due to the rapid recent cost decline of wind and solar, the combined fuel, maintenance, and other going-forward costs of coal-fired power from many existing coal plants is now more expensive than the all-in costs of new wind or solar projects. This cost crossover raises substantial questions for regulators and utilities as to why these coal plants should keep running instead of new renewable power plants.

Regional transmission organizations, or RTOs, such as PJM Interconnection LLC, are also investigating the reliability implications of the potential retirement of coal facilities, which is related to the issues in Docket No. AD18-7. On March 21, 2019, PJM's Markets & Reliability Committee, or MRC, voted to formally investigate the value of "fuel security" at PJM.

The MRC approved a compromise "Valuing Fuel Security" problem statement that, among other things, will examine "proactive measures to value fuel security." According to the problem statement, PJM "believes market-based mechanisms for retaining or procuring the necessary fuel security should be explored along with other mechanisms".[2]

Initial MRC research on this topic is expected to be completed by August 2019. The MRC is expected to set a final deadline for action, if any, to address fuel security at its September 2019 meeting; a PJM FERC filing might be made in response to the Docket No. AD18-7 proceeding.

It is noteworthy that in 2017, McNamee signed the transmittal letter that initiated the DOE's notice of proposed rulemaking, or NOPR, on grid reliability and resilience pricing, while serving as the DOE's deputy general counsel. On Jan. 8, 2018, FERC unanimously voted to terminate the DOE NOPR that had been submitted to the commission by the DOE.

FERC, however, initiated a new proceeding, Docket No. AD18-7-000, to specifically evaluate the resilience of the bulk power system in the regions operated by RTOs and independent system operators. Requests for rehearing of FERC's 2018 decision were filed by several parties; FERC has not yet acted on these rehearing requests.

During the U.S. Senate hearing held to confirm McNamee to FERC, 17 senators signed a letter questioning whether he could be an impartial judge of FERC resiliency proceedings, given that he had: (1) participated in drafting the DOE NOPR; and (2) defended the DOE NOPR at a regulatory conference. McNamee has also acknowledged that before being confirmed as a commissioner, he had a role in the development of the proposals that led to the DOE NOPR. The senators requested that he recuse himself from matters that involved resiliency and fuel security, to avoid the appearance of bias in this matter.

McNamee's preference for coal-fired generation facilities was evidenced in the following remarks that he allegedly made during a 2018 public policy forum in Texas:

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

McNamee responded to the senators' letter by confirming that he would recuse himself from the DOE NOPR matter. He stated in that letter, however, that he would not recuse himself from the broader FERC resilience proceeding unless the records in the DOE NOPR and Docket No. AD18-7 "replicate or closely resemble" one another.

McNamee also pledged to continue to seek the guidance of a FERC ethics officer. As of March 13, 2019, McNamee reportedly told the attendees at the CERAWEEK conference in Houston that he was still working with FERC ethics officials to determine if he will be able to participate in Docket No. AD18-7.

It is important to understand that recusal is required in situations that do not necessarily involve actual bias. Instead, FERC's recusal rules are based upon avoiding the "appearance of bias" by a FERC commissioner, due to the individual's prior involvement in a related matter. As detailed in the Dec. 6, 2018, comments filed by the Harvard Electricity Law Initiative in Docket No. AD18-7, a commissioner is disqualified from adjudicating a matter if either: (1) the commissioner worked in a different capacity on the relevant matter; or (2) the commissioner has at least appeared to have prejudged specific facts that are at issue in the matter.

Recusal is required to protect against the appearance of bias from the perspective of a reasonable observer. However, the decision to recuse is an individual's choice based on

their conscience, regardless of possible advice to the contrary by ethics counsel.

If McNamee fails to recuse himself from the subject fuel security proceeding, his participation in a final FERC order could have serious consequences. If McNamee participated in Docket No. AD18-7, in theory, a federal appellate court reviewing a final FERC order could invalidate such a decision on procedural grounds. Thus, out of an abundance of caution, it would be wise for McNamee to carefully consider whether to recuse himself from taking any part in FERC's decision in Docket No. AD18-7 and related proceedings, such as PJM's fuel security matter.

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Disclosure: The author served as vice president and general counsel of PJM Interconnection LLC from January 1997 until May 2002, and has no connection to PJM's current investigation into fuel security issues.

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[1] See https://energyinnovation.org/wp-content/uploads/2019/03/Coal-Cost-Crossover_Energy-Innovation_VCE_FINAL.pdf.

[2] See <https://pjm.com/-/media/committees-groups/committees/mrc/20190321/20190321-item-02-fuel-security-problem-statement-compromise.ashx>.