

Federal Energy Regulatory Commission  
Washington, D.C. 20426

Office of General Counsel  
General and Administrative Law

MEMORANDUM TO: Commissioner Willie L. Phillips

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

CHARLES BEAMON  
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BEAMON  
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CONTACT: (b) (6)  
Staff Attorney (b) (6)

SUBJECT: Authorization pursuant to 5 C.F.R. § 2635.502(d) to  
Participate in Docket No. EL19-47

This memorandum addresses your request for authorization to participate in *Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.*, Docket No. EL19-47. Organization of PJM States, Inc. (OPSI) intervened in Docket No. EL19-47 on March 3, 2019; filed comments on April 15, 2019; and then filed an initial brief on May 3, 2021. According to your ethics agreement executed on September 21, 2021, you may not for a period of one year from your resignation from OPSI, “knowingly participate personally and substantially in any particular matter involving OPSI, unless first authorized by the Designated Agency Ethics Official (DAEO) pursuant to 5 C.F.R. § 2635.502(d).” As explained below, authorization is granted.

Docket No. EL19-47 (Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.)

On March 18, 2021, the Commission issued an order granting complaints from the Independent Market Monitor for PJM Interconnection, L.L.C. (Market Monitor) and the Joint Consumer Advocates. The Commission found unjust and unreasonable certain provisions of the PJM Interconnection, L.L.C. (PJM) Open Access Transmission regarding the calculation of the default market seller offer cap in the capacity market. In determining that the existing tariff is unjust and unreasonable, the Commission also found that additional record evidence was needed to set the appropriate replacement rate and ordered briefing. On September 2, 2021, the Commission adopted the Market Monitor’s Unit-Specific Avoidable Cost Rate proposal and required PJM to revise its tariff accordingly.

While OPSI did not request rehearing nor has filed anything in the docket since the underlying September 2, 2021 order, the issues discussed in OPSI’s comments are at issue on rehearing. For example, in its comments OPSI argued that the Commission should not

be swayed by arguments about administrative burden, given the high stakes involved. On rehearing, several parties have argued against OPSI's position, which the Commission adopted at least in part.

### Discussion

The Office of Government Ethics (OGE) regulations provide that where an employee knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter without written authorization from the DAEO. *See* 5 C.F.R. § 2635.502, Personal and business relationships. An employee has a covered relationship with any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee. *See* 5 C.F.R. § 2635.502(b)(iv).

As the Chairman of the D.C. Public Service Commission, you were automatically assigned to serve as an OPSI Board member. Given that your service as an OPSI Board Member ended in October 2021, you have a covered relationship with OPSI until October 2022. Accordingly, written authorization from me is necessary for you to participate in this proceeding. *Id.* In order to grant an authorization to allow your participation, I must first determine that the government interest in your participation outweighs the concern that a reasonable person might question the integrity of the Commission's programs and operations. In particular, I may consider the following factors outlined in 5 C.F.R. § 2635.502(d):

- (1) The nature of the relationship involved;
- (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) The sensitivity of the matter;
- (5) The difficulty of reassigning the matter to another employee; and
- (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

As an initial matter, I reiterate that your board membership with OPSI has ended and you have no financial interest concerning OPSI. I also understand that you were automatically assigned as an OPSI Board member by way of being Chairman of the DC Public Service Commission, which is not a party to this proceeding. While you voted to approve OPSI's filings as one of fourteen board members entitled to vote on the

submissions, you were not personally and substantially involved in the development of OPSI's filings, their content, or the formulation of OPSI's position in this proceeding. I also understand that you did not deliberate with your fellow board members or others as to these submissions, and you do not even recollect the submissions. Under these circumstances, there was no personal and substantial participation, nor a presumption thereof. Moreover, OPSI's comments were filed in the umbrella docket, not the specific subdocket at issue here.

Importantly, your staff has explained that this proceeding has great institutional significance for the Commission. Not only is the offer cap itself an important issue that affects the entire PJM market, but this proceeding also addresses an important issue around the legal filing rights of public utilities that has ramifications beyond PJM and has also been described by staff as "the fate of the markets" being at stake. Also, of note, over 30 different entities have filed motions to intervene and comments in this proceeding.

As a Commissioner, you have a uniquely important role in the regulatory process and were appointed by the President to apply your personal judgments in Commission decision-making. Your vote will be one of five votes in determining the ultimate outcome in this particular matter. I find that the secondary nature of your position on the board and any appearance concern resulting there from do not preclude nor outweigh the need for your participation in this particular matter under the circumstances described herein. I reiterate that you only served on the OPSI board due to your service as Chairman of the DC Public Service Commission, and notably the DC PSC is not a party in this proceeding.

In light of the great institutional significance of this proceeding, the volume of parties participating, the diverse interests of those parties, and the precedential value of the matter, I accept your view that your participation in Docket No. EL19-47 would further the Commission's interests, and therefore the interest of the public at large. I note that I am granting this authorization to participate in the proceeding despite your one-year recusal from OPSI matters as detailed in your ethics agreement. In line with your ethics agreement, I anticipate the need for such authorizations only on an infrequent basis.

### Conclusion

In light of all relevant circumstances, including the facts you have presented and the findings set forth above, I find that the Government's interest in your participation in Docket No. EL19-47 outweighs the concern that a reasonable person may question the integrity of the Commission's decision-making process, programs, or operations. *See* 5 C.F.R. § 2635.502(d). Accordingly, you are hereby authorized to participate in Docket No. EL19-47.

As a caution, please note that many state bar associations may impose more stringent restrictions than the Office of Government Ethics with regard to various types of

matters, including those involving prior clients. This authorization does not negate any obligations you might have under your state bar requirements, comparable authority, or any post-employment agreement you may have had with your former clients. If you have any further questions about these proceedings or whether your participation in any matter is appropriate, please let me know.