Federal Communications Commission
Washington, D.C. 20554

MEMORANDUM FOR ANNA GOMEZ, COMMISSIONER

FROM: P. Michele Ellison
General Counsel and Designated Agency Ethics Official

P. Michele Ellison Digitally signed by P. Michele Ellison Date: 2024.02.21 16:06:29 -05'00'

SUBJECT: Limited Ethics Pledge Waiver Pursuant to Section 3, Executive Order 13989

DATE: February 21, 2024

Pursuant to delegated authority under Section 3 of Executive Order 13989 (January 20, 2021) (Executive Order), and for the reasons stated below, I hereby grant you a limited waiver of the requirements of Section 1, Paragraph 2 of the Executive Order. After consultation with the Counsel to the President, I have determined that a limited waiver is necessary and in the public interest to permit you to effectively carry out your duties as a Commissioner of the Federal Communications Commission (FCC). Specifically, this limited waiver permits you to participate in certain enforcement proceedings[1] and matters relating to hearing designation orders (HDOs)[2] in which one of your former clients is a party or in which your former employer, Wiley Rein LLP (Wiley Rein), is representing a party. This waiver does not apply to any enforcement proceeding, matter related to an HDO, or other specific party matter involving a former client if you personally served the former client in that same underlying matter while in the private sector. I therefore conclude that this limited waiver reflects an appropriate balance of the relevant public interest considerations.

In addition, this limited waiver does not otherwise affect your obligations to comply with all other applicable federal ethics laws and regulations, provisions of Executive Order 13989, or applicable bar rules, including other applicable recusals. If you have any questions about the requirements of this waiver or any other ethics obligations, you must consult with my Office prior to participating in the relevant matter.

[1] The FCC has authority to conduct proceedings that address violations of the Communications Act of 1934 (the Communications Act or Act), the Commission's rules, regulations, or related orders, as well as violations of the terms and conditions of any license, certificate, or other Commission authorization, among other things. These proceedings can result in the revocation or cancellation of a license or authorization, the issuance of an order to cease and desist from engaging in certain conduct, the imposition of a monetary forfeiture for willful or repeated violations, or other remedial action. *See, e.g.,* 47 U.S.C. §§ 214, 312, 503.

[2] The Communications Act provides that the Commission shall, in the case of applications to use radio frequencies, formally designate the application for hearing under certain circumstances – for example, if a substantial and material question of fact is presented or the Commission for any reason is unable to find that the public interest, convenience, and necessity will be served by the granting of such application. 47 U.S.C. § 309(e). The Communications Act also requires notice and opportunity for a hearing before the Commission may deny an application to renew a broadcast license or revoke an FCC license, 47 U.S.C. §§ 309(k), 312. For purposes of this waiver, a matter relating to an HDO includes the issuance of an HDO pursuant to sections 309 or 312 of the Act, any review by the full Commission of an HDO issued on delegated authority, or any review by the full Commission of a decision issued by an Administrative Law Judge in response to or in connection with an HDO, including any review of interlocutory rulings.

Background and Facts

Ethics Pledge Restrictions

The Executive Order imposes ethics requirements beyond federal ethics laws and regulations and attorney bar obligations. All individuals appointed to political positions on or after January 20, 2021 are required to sign the ethics pledge in the Executive Order (Ethics Pledge), which sets forth the following restriction at Section 1, Paragraph 2:

> I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

With the approval of the White House, the Director of the Office of Management and Budget (OMB) has delegated to each executive branch Designated Agency Ethics Official the authority to exercise Section 3 waiver authority after consultation with the Counsel to the President.[3] Such waivers from the restrictions contained in Section 1, Paragraph 2 may be granted upon certification either that the literal application of the restriction is inconsistent with the purpose of the restriction or that it is in the public interest to grant the waiver.

As defined in the Executive Order, a former client is any person or entity for whom you have served personally as an agent, attorney, or consultant within two years prior to your date of appointment.[4] It does not include clients of a former employer for whom you did not personally provide services. Prior to joining the Biden Administration, you were a partner at Wiley Rein from May 2013 to June 2022. On September 25, 2023, you were appointed as a Commissioner of the FCC, a Senate-confirmed presidential appointee position. During the two years prior to your appointment, your former clients included several entities that regularly participated in or were impacted by Commission proceedings.[5] However, your personal representation of these clients with respect to enforcement and HDO-related matters under the purview of the Commission was very limited.

As also defined in the Executive Order, a former employer is any person for whom the appointee has within the two years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner.[6] As such, Wiley Rein is your former employer for the purposes of the Ethics Pledge restrictions.

Therefore, absent a waiver of the applicable Ethics Pledge restrictions and until the expiration of your Ethics Pledge recusals after September 25, 2025, you would be restricted from participating in specific party matters in which any former client is a party, or in which Wiley Rein is representing a party.

Your Commission Duties

In your role as Commissioner, you act as one of the five persons entrusted to lead the Commission in regulating interstate and international communications by radio, television, wire, satellite, and cable in all 50 states, the District of Columbia, and U.S. territories. In enforcement proceedings where the Commission investigates violations of the Communications Act and relevant implementing rules, you (along with your fellow Commissioners) may be called upon to analyze issues and vote on final

[3] *See* OGE Legal Advisory LA-21-04, *Waiver Authority and Making Waivers Public under Section 3 of Executive Order 13989, "Ethics Commitments by Executive Branch Personnel"* (Feb. 18, 2021).

[4] Executive Order at Section 2, Paragraph (l).

[5] You have disclosed your former clients at Wiley Rein to my Office and I understand you have abided by your recusal requirements.

[6] Executive Order at Section 2, Paragraph (k).

determinations with regard to forfeitures or other remedies addressing these violations. You may also be called upon to analyze issues and vote on matters relating to HDOs. Your authority to vote on Commission matters cannot be delegated or reassigned.

Analysis

After careful consideration, appropriate consultation, and in accordance with Section 3 of the Executive Order, I have concluded that it is in the public interest to grant you a limited waiver of the requirements of Section 1, Paragraph 2 of the Executive Order. This will enable you to effectively carry out your Commissioner duties with respect to all applicable determinations and appropriate remedies brought before the full Commission in certain enforcement proceedings or matters relating to HDOs in which one or more of your former clients is a party or in which Wiley Rein is representing a party. (As noted above, this waiver does not apply to any such matter in which you personally served a former client(s) in the same underlying matter while in the private sector.) In making this assessment, I have carefully considered the factors set forth in Section 3 of the Executive Order: (i) the government's need for the individual's services, including the existence of special circumstances related to national security, the economy, public health, or the environment; (ii) the uniqueness of the individual's qualifications to meet the government's needs; (iii) the scope and nature of the individual's prior lobbying activities, including whether such activities were de minimis or rendered on behalf of a nonprofit organization; and (iv) the extent to which the purposes of the restriction may be satisfied through other limitations on the individual's services.

Government Need

The Commission has direct responsibility under the Communications Act for investigating potential violations of the Act and enforcing the FCC's rules, regulations, orders, and terms and conditions of licenses and other authorizations. This responsibility includes protecting consumers from fraudulent, misleading, and other harmful practices involving telecommunications as well as investigating and taking any necessary enforcement action with respect to radio frequency interference, broadcasting of indecent material, operation of unlicensed broadcast stations and other violations involving public safety and national security. Under the Act, the Commission must, in most cases, issue a notice of apparent liability for forfeiture within one year of the alleged violation. To subsequently impose a forfeiture penalty, the Commission must separately adopt a forfeiture order. Therefore, in order to conclude investigations on a timely basis and within the limited period imposed by the statute of limitations, the Commission needs a full complement of Commissioners to be able to act in all of the necessary stages of an enforcement proceeding.

Additionally, the Communications Act generally requires the Commission to initiate a hearing proceeding in connection with certain matters involving FCC licenses, *see* 47 U.S.C. §§ 309, 312. After the matter is designated for hearing in an HDO, the matter is referred to an Administrative Law Judge, who issues an independent decision which can be appealed to the full Commission. If the Commission does not have a full complement of Commissioners who can vote on matters related to HDOs, the status of FCC licenses could remain pending without resolution, and the uncertainty created for licensees and applicants could adversely impact the provision of critical services.

These types of proceedings are of great public interest. It is vital for you to be able to participate, including by exercising your nondelegable and non-assignable authority to vote as a Commissioner, so that the Commission is not unnecessarily constrained in its ability to address these consequential cases and deter harm to the public.

Unique Qualifications

As a Senate-confirmed appointee, your unique qualifications to serve as an FCC Commissioner, professional background, and employment history—including past client representations—were

extensively vetted during your confirmation process. You have extensive experience in domestic and international communications law and policy. In addition to your prior employment with Wiley Rein, you also served for 12 years in various positions at the FCC, including as Deputy Chief of the International Bureau and as Senior Legal Advisor to then-Chairman William E. Kennard. Your expertise with regard to communications matters is deep and wide-ranging, including service as the National Telecommunications and Information Administration Deputy Administrator from 2009 to 2013 and as Counsel on the Senate Committee on Commerce, Science, and Transportation Subcommittee on Communications. Most importantly, you are one of only five currently serving Commissioners confirmed by the Senate to vote on any orders that may come before the full Commission.

Prior Lobbying

You were not a registered lobbyist for Wiley Rein or any other entity within the two years before the date of your appointment.

Other Limitations

This waiver is narrow in scope and limited to your participation in the consideration of all applicable determinations and appropriate remedies brought before the full Commission in enforcement proceedings and matters relating to HDOs. It expressly does not extend to or cover any other specific party matters before the Commission in which any of your former clients is a party or in which Wiley Rein is representing a party. It also expressly precludes you from participating in enforcement proceedings, matters related to an HDO, or other specific party matters in which you personally served the former client in the same underlying matter while you were employed at Wiley Rein.

Conclusion

For the reasons detailed above, the public interest is best served when the Commission is able to explore and exercise the full range of its options with respect to enforcement proceedings or matters relating to HDOs in which a former client is a party or in which your former employer is representing a party (and where you did not personally serve the former client in the same underlying matter). This can only be accomplished effectively and expeditiously with your participation. That is why I have concluded that it is in the public's interest to allow you to fully participate in the consideration of all applicable determinations and appropriate remedies brought before the full Commission in any such proceedings. Accordingly, and under delegated authority, I hereby grant you a limited waiver of the provisions of Section 1, Paragraph 2 of Executive Order 13989 to enable you to effectively carry out your duties as Commissioner of the Federal Communications Commission as stated above.

This limited waiver does not otherwise affect your obligations to comply with all other applicable federal ethics laws and regulations, provisions of Executive Order 13989, or applicable bar rules, including other applicable recusals. If you have any questions about the requirements of this waiver or any other ethics obligations, you must consult with my Office prior to participating in the relevant matter. In accordance with Section 3(b) of Executive Order 13989 and OGE LA-21-04, once issued, this limited waiver shall be publicly posted on the FCC website.