

128 FERC ¶ 61,163
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Brian Hunter

Docket No. IN07-26-004

ORDER DENYING MOTION TO DISQUALIFY PRESIDING JUDGE

(Issued August 18, 2009)

1. On August 14, 2009, Brian Hunter filed a motion to disqualify Presiding Administrative Law Judge Carmen A. Cintron from adjudicating the enforcement proceeding before her in this proceeding. The hearing is scheduled to begin on August 18, 2009, before Judge Cintron.
2. As stated by Mr. Hunter, his counsel was notified on June 23, 2009 that at Judge Cintron's request, two economists from the Commission's Office of Administrative Litigation had been detailed to assist Judge Cintron with the instant proceeding. After twice seeking information from Judge Cintron (on August 3 and 11) about the communications between Judge Cintron and the economists, counsel for Mr. Hunter expressed his concern in a letter dated August 11, 2009 that Judge Cintron may be engaged in improper *ex parte* consultations with them in violation of the Administrative Procedures Act and inconsistent with the requirements of procedural due process.
3. Mr. Hunter argues that Judge Cintron's consultations with the economists are prohibited *ex parte* communications. Mr. Hunter argues that the Commission's Rules of Practice and Procedure do not authorize administrative law judges to enlist other Commission employees with regard to matters in a contested, on-the-record proceeding, and that the Administrative Procedures Act prohibits such communications.¹ Even if she has authority to enlist them as advisors, Mr. Hunter argues, she should not be permitted to do so on an *ex parte* basis, without procedural safeguards.²

¹ Hunter Motion at 9 (citing 5 U.S.C. § 554 (d)(1)).

² *Id.* at 10-11 (citing *Reilly v. U.S.*, 863 F.2d 149, 160 (1st Cir. 1988); *In re Kensington Int'l, Ltd.*, 368 F.3d 289, 310 (3d Cir. 2004)).

4. Mr. Hunter contends that Judge Cintron must be disqualified from this case because: (1) the circumstances of the economists' appointment are not sanctioned by Commission rules, conflict with the Administrative Procedure Act, and they were not communicated to counsel; (2) it appeared that Judge Cintron consulted the economists on an *ex parte* basis before ruling on a motion; and (3) Judge Cintron's responses to counsel's letters about the economists suggest that she intends to base her decision on this matter, at least in part, on the economists' advice and guidance.³ This arrangement, says Mr. Hunter, denies him due process because he will not have an opportunity to review and respond to case-specific information that Judge Cintron considers important to ruling on the disputed evidentiary issues of the case. He contends that she must be disqualified because she has already engaged in damaging *ex parte* communications, and cannot now purge from her mind or disregard the guidance she has improperly received.

Discussion

5. The Administrative Procedure Act, which Mr. Hunter contends has been violated, prohibits an employee who presides at the reception of evidence from consulting a person or party on a fact in issue, unless there has been notice and an opportunity for all parties to participate.⁴ Here Judge Cintron has enlisted the service of two economists from the Commission's Office of Administrative Litigation to assist her in the course of considering this proceeding. In her own words, the economists "have been separated from their Office of Administrative Litigation [and] are acting in the capacity of my law clerks. . . . [The] economists are here to be used as sounding boards to help me in the decision in this case. . . . They are not submitting testimony; they are not using evidence outside the record."⁵

6. We agree with Judge Cintron's view that, in an appropriate case, she may enlist the service of technical advisors as described in *Reilly v. United States*.⁶ This practice is

³ Mr. Hunter cites, in particular, Judge Cintron's statement at an August 12, 2009 hearing that she is using the economists "in a manner 'akin to law clerks' and as 'sounding boards.'" *Id.* at 7 (citing Transcript of Oral Argument Before Judge Cintron on Aug. 12, 2009 at 127:23 – 129:17, Docket No. IN07-26-004).

⁴ 5 U.S.C. § 554(d)(1) (2006).

⁵ Transcript of Oral Argument Before Judge Cintron on Aug. 12, 2009 at 128:6-25, Docket No. IN07-26-004.

⁶ 863 F.2d 149 (1st Cir. 1988).

familiar to the Commission. Administrative law judges occasionally use Commission staff members to assist them in settlement proceedings⁷ or in hearings.⁸

7. In this case, the Office of Enforcement has conducted the investigation of Mr. Hunter and served as Trial Staff. While the economists assisting Judge Cintron are from the Office of Administrative Litigation, they are not serving as litigation staff in this particular proceeding.⁹ Because they have assisted Judge Cintron in a technical advisory capacity, they will be precluded from advising the Commission or any advisory staff regarding the issues in this proceeding, other than through on-the-record communications. We see no practical or legal reason to prohibit the case-specific designation of staff members to serve in a particular role if their expertise would be helpful in fulfilling the agency's statutory responsibilities. Indeed, the use of expert staff members as technical advisers has the potential to substantially ease the presiding judge's task of becoming conversant with technically complex evidence.

8. Mr. Hunter appears to be concerned that Judge Cintron will accept evidence from her advisors that is not accessible to the parties to this proceeding. Mr. Hunter, however, provides no basis for this supposition. The transcript of the August 12 hearing makes abundantly clear that Judge Cintron is aware of the limitations of advisors. Citing *Reilly v. United States*, she stated that the advisors will not be submitting testimony or relying on evidence from outside the record, and that they will act as law clerks.¹⁰ Her statement is consistent with the court's holding in *Reilly v. United States* that advisors differ from

⁷ See, e.g., Notice of Designation of Certain Commission Personnel as Non-Decisional, Docket No. ER07-521-000 (Dec. 11, 2007) (designating a staff member from the Office of Energy Market Regulation non-decisional for purposes of helping to resolve issues concerning the New York Independent System Operator's proposal for long-term firm transmission rights, and specifying that the staff member would not further advise the Commission on this proposal or any related settlement); Order of Chief Judge Appointing Settlement Judge, Docket No. ER07-521-000 (Dec. 11, 2007) (appointing settlement judge on same day Commission personnel designated non-decisional).

⁸ Notice of Designation of Certain Commission Personnel as Non-Decisional, Docket Nos. ER04-691-000 and EL04-104-000 (June 8, 2004) (designating four Commission staff members non-decisional "[f]or purposes of the above-captioned dockets (and all subdockets in these dockets), and specifically, the hearing procedures established in the May 26 Order" (emphasis added)).

⁹ Transcript of Oral Argument Before Judge Cintron on Aug. 12, 2009 at 122:14-25, Docket No. IN07-26-004.

¹⁰ *Id.* at 128:6-25.

expert witnesses in that they do not provide evidence; rather, they may “help the jurist to educate [her]self in the jargon and theory disclosed by the testimony and to think through the critical technical problems.”¹¹

9. Moreover, Mr. Hunter was plainly given adequate notice of the appointment. Indeed, by his own admission, he has been aware of the economists’ appointment as advisers to Judge Cintron since June 23, 2009, but he waited until late in the day on August 14, 2009 (two business days before the scheduled start of the hearing) to raise his concerns about *ex parte* communications before the Commission. Mr. Hunter should not have waited until the last moment to make this filing, and his delay in pursuing this argument is unjustified.

The Commission orders:

We deny Mr. Hunter’s motion to disqualify Judge Cintron from this proceeding.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹¹ *Reilly v. United States*, 863 F.2d at 158.