

REPORT OF THE FERC PRACTICE & ADMINISTRATIVE LAW JUDGES COMMITTEE

In *Brian Hunter*,¹ an Administrative Law Judge (ALJ) withstood a motion for disqualification made because the ALJ relied ex parte on staff economists that the ALJ described as “law clerks” that the Federal Energy Regulatory Commission (Commission) determined were properly acting in a “technical advisory capacity.”

In advance of the hearing, the ALJ enlisted two economists from the Commission’s Office of Administrative Litigation to serve as “sounding boards” and help to parse the testimonial “jargon and theory” in the impending case.² Mr. Hunter, the subject of the enforcement proceeding, received notice of the ALJ’s action before the hearing, and filed a motion opposing the advisory arrangement.³ Mr. Hunter sought to disqualify the ALJ by invoking the Administrative Procedure Act (APA),⁴ procedural due process, and *Reilly v. United States*.⁵

The Commission dismissed Mr. Hunter’s APA claim because the economists were acting as technical advisors, and would not be reaching substantive issues *per se*, “other than through on-the-record communications.”⁶ In particular, the Commission found the ALJ’s reliance on experts to be within the scope of *Reilly*, particularly given the ALJ’s statement that the economists would be serving educational and not evidentiary ends.⁷ The Commission also denied Mr. Hunter’s due process claim, noting that he himself was unjustified in the delay by which he filed his motion.⁸

1. *David Hunter*, 128 F.E.R.C. ¶ 61,163 at PP 5 & 7 (2009).

2. *Id.* at PP 5 & 8.

3. *Id.* at PP 1 & 2.

4. *See* Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2006).

5. *Reilly v. United States*, 863 F.2d 149 (1st Cir. 1988).

6. 128 F.E.R.C. ¶ 61,163 at P 6.

7. *Id.* at P 8.

8. *Id.* at P 9.

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