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## Danly Issues a Clarion Call for Fearless Advocacy—And Adds Come See Us Before You File!

Will FERC Practice Ever be the Same Again?

By Gary E. Guy and David Martin Connelly

Paine wrote that his was a time that tries men’s souls. For The Honorable James P. Danly (who never himself drew the analogy to this 18<sup>th</sup> century sage that we see in his comments), this is again such a time for the energy sector. Paine called for Common Sense. Danly calls for a return to traditional ratemaking by the Federal Energy Regulatory Commission akin to that exercised by state public utility commissions for distribution rates. He also has much to tell us about effective advocacy. In addition, he warns of capacity shortfalls ahead, the result, in his opinion, of the agency’s own policy mistakes and jurisdictional overreaching. However, he sees these ominous portents as preventable with course corrections. This significant wake-up call from this leading luminary of the energy field deserves the greatest attention.

Your humble scriveners Gary E. Guy and David Martin Connelly (aka “Donald Graham and Otis Chandler”), late in the day on December 28, were honored to interview Mr. Danly, long-time private practitioner before the FERC, General Counsel of that agency under three successive Chairmanships, and both a Chairman and a Commissioner himself until the closing *sine die* of the current Congress. With the building nearly empty, and his belongings largely packed, Commissioner Danly graciously permitted this interruption of his waning hours in office – only the second interview he has consented to during his term.

The reason he made this rare exception to his general no-interviews policy is so that the EBA can maintain its perfect record of having interviewed every FERC Commissioner since Pat Wood was Chairman in the second Bush Presidency. (His only other interview was with *Public Utilities Fortnightly*, so we are in good company.)

## First: The Character of the Man

He is scrupulously above-board and frank, what you might call "intellectually honest." He does not waiver, equivocate, flatter, or temporize. He speaks as would a man given a shot of truth serum, sacrificing what is politic or diplomatic for what is precisely and wholly true. Not only does he bluntly say exactly what he thinks but he does exactly what he believes is his duty without hesitation. He makes immediate life-altering decisions, and speaks consistently, without fear or favor, be it controversial or not, be it the prevailing view or not.

Our interpretation is that he believes that energy practitioners should adopt these same personal characteristics. That is, we should be equally brutally frank in pleadings before FERC, not butter up the Commission before getting to the point that something that the Commission is doing or proposing to do should be altered. And he is quite convincing in articulating this advice.

## Danly Family Origins

But to back up a little for background purposes, of his wife, Frankie, we did not ask him if it was love at first sight, but there must have been compatibility between the two undergraduates at Yale when they met over a quarter of a century ago, in that they have been together since, now with a 9-year-old son to boot. He bravely (our word, not his) and instinctively "out of sheer patriotic enthusiasm" volunteered for military service after America was hit on 9/11. He was in California and drove to the recruiting station and asked that the Officer Candidate School papers be drawn up so he can start "tomorrow." As you will see below, he also gave an immediate yes to, "Can you come to FERC as GC?" In these two incidences of rapidly committing to serve a challenging cause, we see that he has core values that enable him to act decisively and quickly.

He served not one, but two, tours to Iraq, receiving a Bronze Star and a Purple Heart. Frankie selflessly sacrificed for her country as well as she endured the travails of his absence and dangerous endeavors.

Adding to his pedigrees, Mr. Danly earned a law degree at Vanderbilt. Then he was a Managing Director of the Institute for the Study of War, and an International Affairs Fellow at the Council on Foreign Relations. After clerking for Sixth Circuit Judge Danny Boggs, he practiced in the energy regulation and litigation group of Skadden, Arps, Slate, Meagher, and Flom, then was importuned to head up OGC at FERC, and rose to the attention of the President for appointment to FERC. And the rest is history.

## Arguably The Most Experienced FERC Office Holder Ever

Mr. Danly rotated through various areas of the law when he was at Skadden but glommed onto energy as the field that most interested him. He “found the technical subjects, gritty market design arguments, and nuanced jurisdictional questions” to his liking.

“*Private practitioner Danly liked FERC’s “technical subjects, gritty market design arguments, and nuanced technical questions.”*”

His representation of clients before FERC was so impressive that Mr. Danly was chosen by FERC Chairman Neal Chatterjee in 2017 to be General Counsel of the 200-plus attorneys in the Office (almost a “start on Monday” phone call as Mr. Danly recalls). Of course, taking a leadership role within FERC put him even more directly into the subject matter that he loves, so he jumped at this opportunity. Plus, he tells us, as we all know, that “we have a good Staff here at FERC; OGC is particularly good.”

He points out that as General Counsel to the agency, he served all the Commissioners, not just the Chairman. He not only reviewed draft orders, but managed the institution, “which takes up a lot of your time,” monitored the orders as they moved through the Staff process and had responsibility for all the other legal functions of the agency, including inter-agency coordination, and general administrative law, from personnel to acquisitions. The GC mainly focuses on the “legal durability” of orders and only to a lesser extent on policy. That means analyzing if an order adheres to statutory and administrative law requirements, and, if necessary, going through the necessary APA requirements to justify any such departure. “As General Counsel, you are an advisor to the Commission; as a Commissioner you are voting on the thing and your name is on it. You own the entire order top to bottom.”

We fondly recall that in 2018 when we interviewed the late lamented Chairman Kevin McIntyre, a very involved member of the EBA when he was in private practice, he happened to be conferring with General Counsel Danly, who he asked to continue in that position, and who he introduced to us, adding that Mr. Danly was doing a “bang-up job.” Understandably, Mr. Danly now tells us that he has no recollection of us (which we note as Exhibit No. 1 that he engages in honesty over flattery). We made a mental note to ourselves to interview this guy too someday. Thankfully, he has now allowed us to do so. When Mr. Chatterjee then succeeded Mr. McIntyre as Chairman for a second time, he again requested that Mr. Danly remain at his post.

Apparently, President Trump agreed with Chairman McIntyre’s and Chatterjee’s assessment of the caliber of Mr. Danly because the President nominated him to be a FERC Commissioner. Mr. Danly took office in March 2020, and then on November 5, 2020, President Trump elevated him to be Chairman upon the departure of Neil Chatterjee. He once again returned to the “Commissioner” title once President Biden assumed office and appointed successive Democratic Commissioners to serve as Chairman. With his private

practice experience and General Counsel experience, Commissioner Danly hit the ground running and never stopped.

## Fidelity to the Law First and Foremost

He has always insisted that FERC maintain “an adherence to the APA, not expand its jurisdiction except when absolutely necessary — and I would be hard pressed to think of a good example when that would be — and explain logically everything it’s doing because that’s the *sine qua non* of a durable administrative order.” He states that “those are the common threads of everything that I’ve written.” He observes that there is a “quasi-legislative” element to all ratemaking, even in an adjudicatory proceeding. And while there is more latitude in a rulemaking proceeding, he adds the caveat that it must be promulgated subject to proper statutory authority. He views many of FERC’s orders and rulemakings over the years to have exceeded that authority “especially given *West Virginia v. EPA*.” He believes that some of the landmark orders on open access and designing markets would not now survive judicial review “because I am not sure that any of that authority was delegated to us by Congress.” He recognizes that Congress has given FERC certain additional authority, such as over reliability, but still maintains that FERC must exercise its “latitude within the box that has been circumscribed by Congress.” He believes that “FERC has departed from its original purpose; the concept that Congress had for a federal ratemaking agency was that it be much like the state ratemaking agencies.”

“ *FERC has departed from its original purpose...I am not sure that any of that authority was delegated to us by Congress.* ”

Commissioner Danly explains that Congress intended FERC’s mission to be to regulate the rate charged by a utility with a monopoly franchise service territory from whom monopoly rents otherwise could be extracted. He sees the need for FERC to balance the real property interests of the monopolists who need to earn sufficient revenue to attract capital sufficient to conduct business by making the rates just and reasonable. He states that this is not the minimal return of investment but a higher bar of return on investment to ensure the long-term viability of the utility. While the utility, being a monopoly, must be constrained, he believes that it also must be given a sufficient return to be viable. He laments that FERC has gotten away from that role: “We have invented methods and processes that are increasingly abstracted from the fundamental purposes of FERC as a ratemaking agency.”

He would like to see FERC get back to focusing on its core ratemaking duties to “provide clarity to the utilities with a single forum to adjudicate proper returns” rather than to rely on markets “that are poorly designed and badly managed.” He is concerned that neither FERC nor the industry are any longer sure that we have sufficient capacity to maintain future needs based on the admission of the market managers themselves. He sees regulated ratemaking functions being set by “proxies,” thus missing that utilities are an “essential service.” He asks, “Who at PJM or at ISO New England is responsible for making sure that you have enough capacity?” He answers that there is no one responsible but “the market.” This is unacceptable to him because it means that there is no liability for failure to perform.



(L-R) EBA 23-24 President David Martin Connelly, Commissioner Danly, CFEBA Board's Gary Guy

## A Man of Many Dissents

Being against this departure from Congressional intent by FERC, Commissioner Danly has dissented and been a lonely voice when necessary. He states that if he believes that an order falls short of being the kind of durable order it should be, “then I write on it.” As he puts it, “illegality must either be pointed out or remedied.” That means that every objection raised by a party must be responded to in every order. He holds his colleagues to this.

He strongly opposed, for example, what he saw as flaws in proposed revisions to the 1999 Natural Gas Pipeline Certificate Policy Statement, and that led the Commission, under Chairman Glick, to convert those promulgations to drafts (“whatever that means,” observes Commissioner Danly). He opposed those proposed policy statements because they “expanded FERC’s authority or at least identified authority that we didn’t have.” He sees no basis for FERC to impose mitigation of matters “beyond our jurisdiction.” While Section 7 of the NGA allows FERC to impose certificate conditions so that the project will be in the public convenience and necessity, Commissioner Danly charged that the proposed policy statements were being misused as a “fulcrum to achieve policies beyond our jurisdiction.”

He points out that his dissents are not based on party affiliation in that he also dissented in many instances on orders when his fellow Republican Chatterjee was Chairman. He also can trace what he has written in dissents to what he testified to as a Commissioner nominee before the Senate Energy and Natural Resources Committee on November 9, 2019, when he stressed that he viewed his job to be to honor the statutes that the agency is charged with administering, that is, to follow the “black letter” of the law.



We offer this Congressional testimony with the actions subsequently taken in office by Commissioner Danly as additional proofs of his consistency in his legal approach to performing his responsibilities. While orders were approved over the dissent of Commissioner Danly, his fidelity to staying within what he regards as proper legal boundaries has been ultimately vindicated. That is, as he acknowledged when we pointed it out, “there have been several court opinions in which I have been quoted in extenso as the explicit basis for remands.” While he did not name them, we would refer the reader to the 2022 remand by the Fifth Circuit in *Midship Pipeline Co. v. FERC*, where his dissent is extensively quoted as the basis for the adverse ruling from the agency’s standpoint, as but one example.

## How to Practice Energy Law

Commissioner Danly has insightful “admonitions” for those of us in the trade that we would do well to consider. First, “you cannot overestimate the value of prefilings” with OEMR and OGC and the Commissioners. The purpose of these meetings is to “let them know what it is you are asking for and why.” When prefilers come to him, Commissioner Danly “has a habit of giving very candid feedback.” He particularly encourages such prefiling meetings when a complaint by the other side is anticipated. He states that we don’t take advantage of this opportunity as much as we should. He has been urging the industry to come in prior to filing as far back as when he was General Counsel because “we want to hear what you have to say.” While the Staff will not attempt to speak on behalf of the Commissioners, his point is that the opportunity to state your case to the Staff is “critical.”

““ You cannot overestimate the value of prefilings. ””

Second, regarding getting one’s point across in pleadings, “the best pleading I ever read was filed electronically as ‘NO.PDF’.” It was a protest of an FPA Section 205 application by a market participant. When comments are filed on a proposed general rulemaking, he advises listing each issue presented by the NOPR, immediately followed by either “Yes” or “No” -- or no position if any issue is of no concern. It is “bad advocacy” when we “force the Commissioners or Staff to have to go to the trouble of extracting unclear positions.” He tells us that “this happens more than you would think, and it is rather dismaying.” His charge is: “Be absolutely unambiguous!”

He compares a pleading to a complaint at common law, where there is a Cause of Action and a Prayer for Relief. “If you can’t know at the end of reading a pleading what is wrong and what they want from the Commission, then you wonder what the point of filing it was.”

Third, Commissioner Danly urges us to write boldly, just as he does without any sugar coating. He gives as an example a 14-page pleading in which “the first 12 or 13 are throat-clearing, where the litigant says, we stand solidly behind the Commission’s brave actions to do whatever it is and it is only on page 13 that they say, but, you know, we really don’t think this one thing is that great and here’s one of the problems maybe.” To this temporizing approach, the Commissioner says, “No, the first sentence should be: ‘Issue X will cause the imminent collapse of the United States’ utilities,’ or whatever the problem is.” He does not

advocate hyperbole, but his point is to be clear what you are opposed to and advocate zealously for your client instead of worrying about FERC's feelings. Despite being on a "campaign" about this, he still sees a "desire to soft pedal positions." To those of us who persist, he warns that "you are not doing yourself any favors." If you are worried about offending the Commission, he says, "Get over it!" When we pull punches, he maintains that we "affirmatively reduce the quality of the litigation before the Commission." He calls for vigorous advocacy by all sides to a litigation because "it ultimately results in better orders." He certainly has had no such qualms on his part. This man walks the walk and talks the talk. So, let us practitioners take it from a pro.

*You are not doing yourself any favors soft pedaling positions.* ””

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In addition, the good Commissioner has a view on how the judiciary can also improve. While acknowledging that they are "our betters," the Commissioner allowed that the Courts should sometimes exercise more scrutiny of FERC Orders beyond making sure that the agency explained itself as the only test for affirmance. "I for one would not be sorry to see the Courts remind us as to what the boundaries of our jurisdiction are."

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## The Challenges Ahead

Commissioner Danly sees bad times ahead if the course is not reversed. Specifically, he cautions that the markets are poorly designed, with shortsighted subsidies and the removal of mechanisms to insulate the markets from these subsidies so that price signals are distorted with the inevitable consequences of the market being unable to procure the resources that are needed. He believes that this will cause profound challenges for maintaining resource adequacy. He is not confident that capacity shortfalls will be made up with renewable projects that are in the interconnection queues. Nor is he optimistic that needed long-term transmission lines will be constructed absent a drastic legislative change. He sees litigation and regulatory risk premiums associated with meeting NEPA requirements for both pipelines and transmission projects (with the federal backstop siting authority rulemaking) rendering it difficult for them to succeed. Returning as much construction authority to the states would be optimum in his judgment while FERC's job is to make sure that the rates are set appropriately.

In terms of whether young persons should get into the energy field, Commissioner Danly again put honesty first by declining to presume to give any such advice rather than a perfunctory endorsement. He did say that it is the right field for him and that there is a "type of person who is a utility lawyer, you can identify them and spot them across the room." The upside to all these gloomy tidings is that Commissioner

Danly advises that these are interesting times and that EBA members are going to be dealing with a lot of complicated questions.



Commissioner Danly speaks with 2022-2023 EBA President Delia Patterson at the 2022 Mid-Year Energy Forum

## Summing Up

“I enjoyed my time here; it was great!” he told us. “I liked this field, and I liked being a Commissioner.” He felt “at liberty” to write his opinions on many groundbreaking orders issued by the Commission and he is “genuinely grateful for the opportunity to have done that.”

Of his hires, he states that, “I believe I assembled talented lawyers.” He praised all those on his Office Staff, beginning with Matt Estes, who came from Skadden and from whom Mr. Danly attended his course on utility markets as a first-year associate, as well as Kyrstin Wallach, his second hire. And from there, he continued to amass a strong Staff with the additions of Paul Wight, Kathleen Benard, Carolyn Elizabeth Clarkin, Austin Lipari (whom we thank for assisting us with setting up this interview), and Rebecca Michael.

As for what the future holds for himself, he states matter-of-factly, “I don’t know what I am doing next.” Whatever it is, we hope that he remains in this challenging energy area that he enjoys so much, and to which he has rendered such profound service to our Nation.