



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

Office of the
General Counsel

James P. Danly, Esq.
General Counsel
Federal Energy Regulatory Commission
Washington, DC 20426

July 11, 2018

Dear Mr. Danly:

This responds to your June 28, 2018 request for the Office of Personnel Management (OPM) to approve the Federal Energy Regulatory Commission's (FERC's) appointment of two administrative law judges, Patricia French and Stephanie Nagel, by means of a transfer from the Social Security Administration. The accompanying appointment documentation is signed by FERC Chairman Kevin McIntyre.

In your cover letter you asserted that the Supreme Court's recent decision in *Lucia v. Securities and Exchange Commission*, No. 17-130 (S. Ct. June 21, 2018) -- holding that the SEC's administrative law judges are inferior officers of the United States, who must be appointed by the head of the agency under the Appointment's Clause, U.S. Const. art. II, § 2 -- is not specifically applicable to FERC. You also renewed an assertion which you initially made in discussions with the Justice Department, that even if FERC's administrative law judges are inferior officers of the United States, the Department of Energy Organization Act makes your chairman the head of the agency and responsible for appointing administrative law judges, notwithstanding the general principle that multi-member boards and commissions make "collective appointments" of their inferior officers or collectively "approve" the appointments. See *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 512 & n.13, 513 (2010).

Your request suggests that you would like OPM to adjudicate constitutional questions on which the Justice Department has already authoritatively opined. We decline to do so.

Respectfully,

A handwritten signature in blue ink, appearing to read "Theodore M. Cooperstein".

Theodore M. Cooperstein
General Counsel