



Office of the Chair

**Internal Statement of Chair Lina M. Khan
Regarding the Petition for Recusal from
Involvement in the Proposed Merger Between
Meta Platforms, Inc. and Within Unlimited, Inc.
Commission File No. D09411**

Deliberative and Confidential

November 18, 2022

A year after its unsuccessful petition¹ seeking my recusal from *Federal Trade Commission v. Meta Platforms, Inc.*² (“*Meta I*”), Meta Platforms, Inc. (“Meta”) once again seeks my recusal, this time in connection with the Commission’s review of Meta’s proposed acquisition of Within Unlimited, Inc. (“Within”).³ In so moving, Meta largely recycles the same arguments rejected by the federal district court in *Meta I*.⁴ Both for the reasons stated by Judge Boasberg in *Meta I* as well as the additional reasons discussed below, I reject Meta’s petition and decline to recuse myself from this matter.

As it claimed when seeking my recusal in *Meta I*, Meta contends that my participation in this matter “violate[s] both due process” and my obligations of “impartiality under the federal ethics rules.”⁵ In support of its petition, Meta once again cites my prior role as counsel to the U.S. House Judiciary Committee’s Subcommittee on Antitrust, Commercial, and Administrative Law, where I worked on a congressional report on competition in digital markets, as well as statements that I made prior to joining the Commission regarding Meta’s role as a dominant social networking platform.⁶ The court concluded that those arguments were meritless in *Meta I*; the same is true of this latest petition.

First, Meta argues that my participation in a Commission vote to authorize Commission staff to seek a temporary restraining order and preliminary injunction in federal court, as well as

¹ In re Petition for Recusal of Chair Lina M. Khan from Involvement in the Pending Antitrust Case Against Facebook, Inc. (July 14, 2021) [hereinafter “*Meta I* Recusal Petition”].

² First Amended Compl. For Injunctive and Other Equitable Relief, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590-JEB (D.D.C. 2021).

³ In re Petition for Recusal of Chair Lina M. Khan from Involvement in the Proposed Merger Between Meta Platforms, Inc. and Within Unlimited, Inc. (July 25, 2022) [hereinafter “*Meta/Within* Recusal Petition”].

⁴ *FTC v. Facebook, Inc.*, No. 1:20-cv-03590-JEB, 2022 WL 103308 (D.D.C. Jan. 11, 2022). Meta made the same arguments again in the federal district court litigation with respect to the FTC’s federal court challenge to Meta’s acquisition of Within. Defendants’ Opposition to FTC’s Motion to Strike Defendants’ Affirmative Defenses, *FTC v. Meta Platforms, Inc.*, No. 5:22-cv-04325-EJD, 2022 WL 16637996 (N.D. Cal. Sept. 23, 2022) [hereinafter “*Meta/Within* Opposition to Motion to Strike”].

⁵ *Meta/Within* Recusal Petition at 2.

⁶ *Id.* at 3-4.

to issue an administrative complaint, is improper.⁷ Meta claims that I must recuse myself because I have “prejudged the propriety of the pending merger between Meta and Within.”⁸

The *Meta I* court dismissed essentially the same prejudgment argument,⁹ concluding that in voting to file the amended federal district court complaint, my role was analogous to that of a prosecutor who “has ‘simultaneous involvement in investigative and prosecutorial aspects of federal enforcement proceedings.’”¹⁰ The court noted that the behavior of prosecutors “is ‘not immunize[d] from judicial scrutiny in cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law.’”¹¹ Reviewing my past work and statements, the court concluded that my views “do not suggest the type of ‘axe to grind’ based on personal animosity or financial conflict of interest that has disqualified prosecutors in the past” and that would render my voting out a complaint improper.¹²

Meta has offered no fresh evidence or arguments that would warrant a contrary outcome here. Indeed, Meta’s arguments in this instance appear even *less* persuasive, given that none of my prior work or statements involved the transaction at issue in this matter. As in *Meta I*, Meta has presented no evidence that my action to vote out a complaint is “based on anything other than [my] belief in the validity of the allegations.”¹³ Because “[s]uch behavior does not necessitate recusal,”¹⁴ my participation in the Commission vote authorizing the filing of the complaint was proper.¹⁵

Second, Meta argues that work I did and statements that I made prior to joining the Commission warrant my recusal from serving as an adjudicator in this matter.¹⁶

As the district court noted in *Meta I*, recusal from an adjudicatory proceeding is required only where “a disinterested observer” would conclude that the adjudicator “has in some measure

⁷ *Id.* at 1 (seeking recusal “from participating in any decisions concerning the FTC’s review of Meta’s proposed merger with Within Unlimited, Inc. (‘Within’), including any upcoming agency action or vote related to the merger.”).

⁸ *Id.* at 2.

⁹ *FTC v. Facebook, Inc.*, 2022 WL 103308.

¹⁰ *Id.* at *46-47 (quoting *In re Perlin*, 589 F.2d 260, 265 (7th Cir. 1978)). Though not addressed in *Meta I*, Commission precedent has previously held that the vote to file an administrative complaint is a non-adjudicative act. See Opinion and Order of the Commission Denying Motion for Disqualification, *In re Intel Corp.*, Docket No. 9341 (Jan. 19, 2010) at 1 n.1 (noting that Intel filed a motion seeking “to disqualify Commissioner Rosch both from participating in the current adjudication and from voting on whether to issue a complaint,” but that “[because] the latter act is non-adjudicative, it does not fall under FTC Rule 4.17, 16 C.F.R. § 4.17, and, therefore, Commissioner Rosch’s denial of that request was final.”). See also *FTC v. Cinderella Career & Finishing Sch., Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968) (recognizing that voting out an administrative complaint is an action taken “in an accusatory capacity,” as opposed to the adjudicatory function of ultimately deciding a case on the merits).

¹¹ *Id.* at *46 (alteration in original) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980)).

¹² *Id.* at *46.

¹³ *Id.* at *47.

¹⁴ *Id.* at *47.

¹⁵ As previously noted, my participation in the Commission vote to issue the administrative complaint is proper because Commission precedent holds that such a vote is a non-adjudicative act. See *infra* note 10.

¹⁶ *Meta/Within* Recusal Petition at 2.

adjudged the facts as well as the law of a particular case in advance.”¹⁷ Moreover, agency officials “are presumed objective and ‘capable of judging a particular controversy fairly on the basis of its own circumstances.’”¹⁸ A party “cannot overcome this presumption with a mere showing that an official ‘has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute.’”¹⁹ Rather, “[a] party asserting prejudgment must show that the agency official has ‘demonstrably made up [her] mind about important and specific factual questions and [is] impervious to contrary evidence.’”²⁰

None of the statements that Meta cites shows that I have prejudged “the facts as well as the law”²¹ of the case at hand. Indeed, none of my prior work involved any analysis of the specific markets at issue in this matter. Unable to cite any statements relating to the specific facts and law at issue in this matter, Meta points to a general statement I made in 2018 while working for a nonprofit advocacy organization. Against the backdrop of significant public discussion about Meta’s dominant market position in social networking, its prior major acquisitions, and a seemingly hands-off approach to these issues by antitrust enforcers, I said in an interview, “[O]ne of the first steps is to make sure Facebook is not acquiring further power. So, if Facebook tomorrow announces that it’s acquiring another company, I would hope the FTC would look at that very closely and block it.”²² Meta also cites a letter that I signed in 2017 alongside other colleagues at the same nonprofit advocacy group, stating, “The most obvious immediate step to address Facebook’s current power is to prohibit mergers between Facebook [and] other potentially competitive social networks or other new and promising products and services.”²³

These statements show that several years before joining the Commission I had general views, based on publicly available information, on Facebook’s market position and the steps that enforcers and policymakers should take to address it. These views were expressed in my capacity as an employee working for a nonprofit organization that generally advocates for vigorous enforcement of antitrust laws. These remarks do not show, as the legal standard requires, that I have “demonstrably made up” my mind about “important and specific factual questions” in this matter and that I am “impervious to contrary evidence.” Indeed, much has changed since 2018,

¹⁷ *FTC v. Facebook, Inc.*, 2022 WL 103308, at *43-44 (quoting *Cinderella Career Coll. & Finish Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.D. Cir. 1970)) (internal quotation marks omitted).

¹⁸ *Nuclear Info. & Res. Serv. v. Nuclear Regul. Comm’n*, 509 F.3d 562 (D.C. Cir. 2007) [hereinafter *NIRS v. NRC*] (quoting *U.S. v. Morgan*, 313 U.S. 409, 421 (1941)). See also *U.S. v. Morgan*, 313 U.S. 409, 421 (1941) (“Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.”).

¹⁹ *NIRS v. NRC*, 509 F.3d at 571 (quoting *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980) (citing *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass’n*, 426 U.S. 482, 493 (1976) and *Morgan*, 313 U.S. at 421)).

²⁰ *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (internal quotation marks omitted). Courts also apply the abuse of discretion standard in determining whether a Commissioner should have recused themselves. *Id.* at 1164 (noting that “the court reviews an agency member’s decision not to recuse himself from a proceeding under a deferential, abuse of discretion standard.”).

²¹ *Cinderella*, 425 F.2d at 591 (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959)).

²² *Meta/Within Opposition to Motion to Strike* at 4 n.1.

²³ *Meta/Within Recusal Petition*, Exhibit A, at 8.

including in the markets in which Meta operates.²⁴ Moreover, Meta’s claim that these statements reflect my “belief that the government should block future acquisitions by Meta, *regardless of the merits of the transaction*”²⁵ is belied by the fact that Meta has made multiple acquisitions since I joined the FTC that the agency did not oppose or challenge. It is difficult to square this basic reality with Meta’s claim that I have predetermined that all acquisitions by Meta are unlawful and should be blocked.

Meta’s effort to portray statements that I made in a different capacity, in a different context, and at a notably different moment in time as constituting prejudgment of the instant matter is also at odds with the cases it cites in support of its position. Specifically, Meta cites two instances in which courts held that FTC Chairman Paul Rand Dixon’s participation in two separate adjudicative proceedings amounted to a denial of due process for respondents.²⁶ Both instances are readily distinguishable from the matter at hand.

In *American Cyanamid Co. v. FTC*, the Sixth Circuit reviewed whether Chairman Dixon’s prior role as a congressional staffer investigating the business practices of major drug companies warranted his recusal from a Commission proceeding involving the same conduct by the same firms.²⁷ The court found that (1) Chairman Dixon’s prior work centered on “the same facts and issues”²⁸ that the Commission was later reviewing—specifically the drug companies’ pricing for broad spectrum antibiotics, including tetracycline, and a subsequent agreement between Pfizer and Cyanamid—and that (2) remarks that Chairman Dixon had made while serving on the congressional committee demonstrated that he had formed conclusions of facts, specifically that tetracycline prices were “artificially high and collusive” and that the particular agreement between Pfizer and Cyanamid involved “improper” conduct.²⁹ Because the Chairman’s prior work on and comments stemming from the congressional investigation “involved the same facts and issues concerning the same parties,” the court held that he should have been recused from the subsequent adjudicative proceeding before the Commission.³⁰

By contrast, my prior work on the digital markets investigation conducted by the U.S. House Subcommittee on Antitrust, Commercial, and Administrative Law did not involve any of

²⁴ For example, although Facebook by then had already made initial inroads into virtual reality through its 2014 acquisition of Oculus, commentators at the time noted that this platform “[didn’t] appear to have attracted any real following” and did “not seem to be paying off,” given the relatively small customer base. *See, e.g.,* Todd Haselton, *Facebook’s \$2 Billion Bet on Virtual Reality Looks Like One of Mark Zuckerberg’s Rare Mistakes*, CNBC (Oct. 11, 2017), <https://www.cnbc.com/2017/10/11/facebook-2-billion-bet-on-oculus-not-paying-off-commentary.html>. *See also id.* (“On the other hand, Instagram exploded from 30 million users when Facebook bought it in 2012 to more than 800 million. WhatsApp had 450 million users when Facebook acquired it in 2014 and now has more than 1.3 billion users. The return on those buys in such a relatively short period of time certainly seems to have been greater than what Facebook has received from Oculus.”).

²⁵ *Meta/Within* Recusal Petition at 2 (emphasis added).

²⁶ *Meta I* Recusal Petition at 18.

²⁷ *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966).

²⁸ *Id.* at 768.

²⁹ *Id.* at 765.

³⁰ *Id.* at 768. Notably the court added, “We do not hold that the service of Mr. Dixon as counsel for the subcommittee, standing alone, necessarily would require disqualification. Our decision is based upon the depth of the investigation and the questions and comments by Mr. Dixon as counsel, as shown by the record in this case, including Appendix E.” *Id.*

the facts presented by Meta’s proposed acquisition of Within—a deal announced more than a year after the conclusion of the House inquiry.³¹ Indeed, none of the examples of my prior statements that Meta cites in support of its petition even involve any of the relevant markets or products being reviewed here, let alone “the same facts and issues.”³²

In *Cinderella Career & Finishing School, Inc. v. FTC*, meanwhile, the D.C. Circuit reviewed whether statements that Chairman Dixon made while an administrative appeal was pending before the Commission warranted his recusal from the proceeding.³³ Specifically, during the pendency of the administrative appeal in a case alleging false representations and deceptive advertising by Cinderella, Chairman Dixon gave a speech on deceptive advertising in which he used specific behavior by Cinderella as an example of misconduct. The court held that these statements by Chairman Dixon, which were made “after an appeal [was] filed,” created “the appearance that he [had] already prejudged the case.”³⁴ In response to arguments that Chairman Dixon’s speech did not specifically reference the pending case, the court stated that it was “the *timing* of the speech in relation to the proceedings” that gave a “disinterested observer” a “reasonable inference” to view his remarks as connected to the case.³⁵ By contrast, none of the statements that Meta cites in support of its petition were made during the pendency of this matter, let alone during my time serving on the Commission.

Third, Meta claims that my participation in this matter violates federal ethics rules.³⁶

I reject this argument for the reasons articulated above, as well as for the reasons that Judge Boasberg rejected it in the context of *Meta I*. In that matter, the court noted that federal ethics rules instruct federal employees to not participate in any matter that “is likely to affect the financial interests of a member of [their] household” or in which “[the employee] knows a person with whom [they have] a covered relationship is or represents a party.”³⁷ Then, as now, there was “no indication” that the Commission’s lawsuit would affect a member of my household’s financial interests, nor that an individual with whom I have a covered relationship is involved in the case.³⁸ The *Meta I* court also rejected Meta’s “appearance-of-impropriety” argument, holding that nothing that the company pointed to in my prior work or statements “suggests that [my] views on these matters stemmed from impermissible factors.”³⁹ Again, Meta has not cited any evidence or arguments that warrant a contrary conclusion here.

³¹ The House concluded its inquiry and published its findings as a staff report on Oct. 6, 2020. Meta announced its proposed acquisition of Within on Oct. 29, 2021.

³² *Am. Cyanamid*, 363 F.2d at 763.

³³ *Cinderella*, 425 F.2d 583.

³⁴ *Id.* at 590.

³⁵ *Id.* at 592 n.10 (emphasis added).

³⁶ *Meta/Within* Recusal Petition at 2.

³⁷ *FTC v. Facebook, Inc.*, 2022 WL 103308, at *47 (citing 5 CFR § 2635.501(a)).

³⁸ *Id.* at *47-48.

³⁹ *Id.* at *48 (“Although Khan has worked extensively on matters relating to antitrust and technology, including expressing views about Facebook’s market dominance, nothing the company presents suggests that her views on these matters stemmed from impermissible factors. Indeed, she was presumably chosen to lead the FTC in no small part because of her published views. The Court thus concludes that Khan’s participating in the FTC’s vote did not violate ethical rules; as a result, the Amended Complaint was properly authorized.”).

In sum, Meta’s petition seeking my disqualification is without merit. I remain committed to making determinations about this matter and any other enforcement matter on the merits, on a case-by-case basis.⁴⁰ Accordingly, I decline to recuse myself from participation in this matter.

⁴⁰ See *Nominations Hearing Before the S. Comm. on Com., Sci., and Transp.*, 117th Cong. (Apr. 21, 2021) (testimony of Lina M. Khan) (“I would be approaching these issues with an eye to the underlying facts and the empirics, and really be following the evidence.”).