UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
ZEN MAGNETS, LLC	)	CPSC Docket No: 12-2
	)	
Respondent.	)	

OPINION AND ORDER DENYING RESPONDENT'S MOTION TO DISQUALIFY THE COMMISSION OR SOME OF ITS MEMBERS

INTRODUCTION

Respondent Zen Magnets, LLC filed its Motion to Disqualify the Commission or Some of its Members on May 16, 2016 ("Motion to Disqualify"). Respondent requests that the Commission disqualify itself and decline to hear the appeal of the Initial Decision and Order entered in this case by an Administrative Law Judge ("ALJ"). Respondent argues that by promulgating the Final Rule: Safety Standard for Magnet Sets, 79 *Fed. Reg*. 59,962 (Oct. 3, 2014) ("Final Rule for Magnet Sets"), shortly before an administrative hearing seeking a recall of small rare earth magnets sold by Respondent, the Commission made factual and legal findings that prejudged questions of fact and law in this adjudication. Resp't's Mem. 3. Alternatively, Respondent requests that Chairman Elliot Kaye and Commissioners Robert Adler, Joseph Mohorovic, and Marietta Robinson disqualify themselves from hearing the Appeal based on their public statements which Respondent argues demonstrate prejudgment and bias against Respondent and the magnets sold by Respondent. *Id*. at 1.

After careful review of their public statements referenced in the Motion to Disqualify and Respondent's arguments, Chairman Kaye and Commissioners Adler, Mohorovic, and Robinson have each declined to recuse themselves from participation in this matter.

For the reasons set forth below, we deny in full Respondent's Motion to Disqualify.[1]

[1] The Commission voted (4-1) to issue the Opinion and Order Denying Respondent's Motion to Disqualify the Commission or Some of its Members in *In re Zen Magnets, LLC* ("Order Denying Motion to Disqualify") by section.

Vote One is comprised of the Introduction, Background, Procedure, Legal Standard, Discussion I, Discussion II (first three paragraphs only), and Order, of the Order Denying Motion to Disqualify. Chairman Kaye, and Commissioners Adler, Mohorovic and Robinson, voted to issue the sections included in Vote One; Commissioner Buerkle voted to not issue the sections included in Vote One.

Vote Two relates to Discussion, section II.A regarding statements made by Chairman Kaye. Commissioners Adler, Mohorovic and Robinson voted to issue this section. Chairman Kaye abstained from voting on Vote Two. Commissioner Buerkle voted to take other action – disqualify Chairman Kaye for the reasons set forth in Commissioner Buerkle's dissenting opinion.

BACKGROUND

Presented below are the facts relevant to the Motion to Disqualify, including the timing of statements made by the Commissioners, which Respondent argues demonstrate prejudgment and bias.

I. Adjudication Under Section 15 of the Consumer Product Safety Act ("CPSA") and Rulemaking Under Sections 7 and 9 of the CPSA

In 2012, the Commission staff ("Complaint Counsel") filed administrative complaints against Maxfield and Oberton Holdings, LLC ("Maxfield"), Star Networks USA, LLC ("Star"), and Respondent. The complaints sought "public notification and remedial action," *i.e.*, a recall, of aggregated masses of high-powered, small rare earth magnets ("SREMs"), imported and distributed by the firms. *See, e.g.*, Aug. 6, 2012 Compl. against Zen Magnets, LLC ¶ 1. The cases were subsequently consolidated. We refer to the consolidated cases as the "Magnet Adjudication."

Regarding Respondent, Complaint Counsel alleges that the SREMs, imported and distributed by Respondent (the "Subject Products"), are a substantial product hazard under Sections 15(a)(1) and 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(1) and (a)(2). Second Am. Compl. ¶¶ 1, 126, 134.

On September 4, 2012, approximately one month after Complaint Counsel filed the Magnet Adjudication against Respondent, the Commission commenced a rulemaking on magnet sets by issuing a notice of proposed rulemaking titled, Safety Standard for Magnet Sets, 77 *Fed. Reg.* 53,781 (Sept. 4, 2012) ("NPR for Magnet Sets"). At various times throughout the rulemaking, Mr. Qu, the founder of Zen Magnets, LLC, submitted comments on the NPR for Magnet Sets.[2]

Vote Three relates to Discussion, section II.B regarding statements made by Commissioner Adler. Chairman Kaye, and Commissioners Mohorovic and Robinson, voted to issue this section. Commissioner Adler abstained from voting on Vote Three. Commissioner Buerkle voted to take other action – disqualify Commissioner Adler for the reasons set forth in Commissioner Buerkle's dissenting opinion.

Vote Four relates to Discussion, section II.C regarding statements made by Commissioner Mohorovic. Chairman Kaye, and Commissioners Adler and Robinson, voted to issue this section. Commissioner Mohorovic abstained from voting on Vote Four. Commissioner Buerkle voted to take other action – disqualify Commissioner Mohorovic for the reasons set forth in Commissioner Buerkle's dissenting opinion.

Vote Five relates to Discussion, section II.D regarding statements made by Commissioner Robinson. Chairman Kaye, and Commissioners Adler and Mohorovic, voted to issue this section. Commissioner Robinson abstained from voting on Vote Five. Commissioner Buerkle voted to take other action – disqualify Commissioner Robinson for the reasons set forth in Commissioner Buerkle's dissenting opinion.

[2] For example, on November 30, 2012, Mr. Qu filed comments on the NPR for Magnet Sets in the rulemaking docket. In addition, comments, including oral presentation comments, from Mr. Qu were placed in the rulemaking record on December 6, 2013, February 5, 2014, and February 12, 2014. Comments in the rulemaking record are available at:

In May and July 2014, the Commission entered into consent agreements with Maxfield and Star, which settled the Magnet Adjudication against those firms. (Respondent urges that Commissioner Robinson must be disqualified because of her statement of May 14, 2014, regarding the consent agreement with Maxfield.[3] Resp't's Mem. 24.)

In September 2014, the Commission held two meetings regarding staff's draft final rule for magnet sets–a briefing meeting, held on September 10, 2014, during which Commission staff briefed the Commission on the draft final rule;[4] and a decisional meeting, held on September 24, 2014, during which the Commission voted (4-0-1) to approve publication of the Final Rule for Magnet Sets in the *Federal Register*.[5] Chairman Kaye and Commissioners Adler, Mohorovic, and Robinson voted to approve publication of the Final Rule for Magnet Sets. Commissioner Buerkle abstained, asserting in a separate statement that, in her view, voting on the final rule for magnet sets would be inappropriate while the magnet adjudication was pending. Chairman Kaye and Commissioners Adler and Mohorovic issued separate statements on the Final Rule for Magnet Sets.[6]

Respondent asserts that Chairman Kaye and Commissioners Adler, Mohorovic, and Robinson must disqualify themselves because they have prejudged this adjudication and are biased against Respondent and the Subject Products. Resp't's Mem. 3. Respondent argues that statements made during the rulemaking public hearings, as well as in Commissioners' written statements, evidence such prejudgment and bias. *Id.* at 18-25.

From December 1, 2014 to December 18, 2014, approximately 2 months after the Commission voted to issue the Final Rule for Magnet Sets, the ALJ held an administrative hearing on the case against Zen Magnets, LLC, the only remaining Respondent in the Magnet Adjudication. Initial Decision and Order 4.

On March 25, 2016, the ALJ issued an Initial Decision and Order, finding, in part, that the agency did not prove that the Subject Products, "when sold with appropriate warnings, including proper age recommendations, are substantial product hazards." *Id*. at 36. Complaint Counsel filed a Notice of Intent to Appeal on March 29, 2016, and perfected the appeal on May 4, 2016, by filing an Appeal Brief ("Appeal").

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https://www.regulations.gov/searchResults?rpp=25&so=DESC&sb=postedDate&po=0&s=Qu&dct=PS&a=CPSC&dkt=R&dktid=CPSC-2012-0050 and https://www.regulations.gov/document?D=CPSC-2012-0050-2592.

[3] May 14, 2014 Statement of Marietta Robinson, *available at*: http://www.cpsc.gov/en/About-CPSC/Commissioners/Marietta-Robinson/Commissioner-Robinson-Statements/Statement-of-Commissioner-Robinson-on-the-Order-in-Maxfield-and-Oberton-Holdings-LLC-and-Craig-Zucker/?utm_source=rss&utm_medium=rss&utm_campaign=Robinson+Statements.

[4] September 10, 2014 staff briefing on the Final Rule – Safety Standard for Magnet Sets, *available at*: http://www.cpsc.gov/en/Newsroom/Multimedia/?vid=70660.

[5] September 24, 2014 decisional matter on the Final Rule – Safety Standard for Magnet Sets, *available at*: http://www.cpsc.gov/en/Newsroom/Multimedia/?vid=70718.

[6] September 24, 2014 Commission Meeting Minutes: Decisional Matter – Safety Standard for Magnet Sets Final Rule, *available at*: http://www.cpsc.gov/en/Newsroom/FOIA/Records-of-Commission-Action-and-Commission-Meeting-Minutes/2014/2014-DOCs/Commission-Meeting-Minutes-Decisional-Matter-Safety-Standard-for-Magnet-Sets-Final-Rule/ (summarizing the meeting and attaching Commissioner Statements).

On May 6, 2016, Respondent filed a Motion to Disqualify the Commission or Some of Its Members. Complaint Counsel filed a response on May 13, 2016 ("Complaint Counsel's Response").

Subsequently, on May 16, 2016, Respondent withdrew its May 6, 2016 Motion, without prejudice, and re-filed the Motion to Disqualify, a Memorandum in Support of Motion to Disqualify the Commission or Some of Its Members ("Respondent's Memorandum"), and an Affidavit from Mr. Shihan Qu, founder of Zen Magnets, LLC. Complaint Counsel filed a brief response to the Motion to Disqualify on the same day, indicating that Complaint Counsel intended to rely on the arguments set forth in Complaint Counsel's Response.

II. U.S. Department of Justice ("DOJ") Enforcement Matter

In addition to the rulemaking on magnets and the Magnet Adjudication, on March 22, 2016, the U.S. District Court for the District of Colorado issued a permanent injunction, ordering Respondent and Mr. Qu to stop selling and to recall SREMs that were the subject of a previous recall issued by Star. *United States v. Zen Magnets, LLC*, No. 15-cv-00955, 2016 WL 1114560 (D. Colo. Mar. 22, 2016) (order granting plaintiff's motion for summary judgment, including permanent injunction). On March 23, 2016, DOJ issued a press release announcing the decision of the district court.[7] Respondent argues that a statement from Chairman Kaye, which appears in the press release, demonstrates that the Chairman has prejudged the Magnet Adjudication, and thus, should be disqualified. Resp't's Mem. 21.

PROCEDURE

The Commission does not have a regulation governing the disqualification of the entire Commission or disqualification of individual Commissioners in an appeal of a Section 15 adjudication. The Administrative Procedure Act ("APA") is silent on this issue as well.

Both the APA and the Commission's regulations, however, address the disqualification of a *presiding officer* overseeing an adjudicative proceeding. Section 556(b) of the APA provides the following:

> A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. § 556(b). Thus, if a presiding officer refuses to disqualify him or herself, the APA requires the agency to determine a motion for disqualification.

[7] Press Release, U.S. Dep't of Justice, Judge Orders Recall of Dangerous Magnets (Mar. 23, 2016), *available at*: https://www.justice.gov/opa/pr/judge-orders-recall-dangerous-magnets.

The Commission's regulation on the disqualification of a presiding officer is consistent with the APA approach, requiring the presiding officer to first address the motion for disqualification. *See* 16 C.F.R. § 1025.42(e)(2). If the presiding officer refuses to disqualify him or herself, the Commission's regulations require the agency to determine the matter. *Id*; *see also* 16 C.F.R. § 4.17(b)(3) (Federal Trade Commission ("FTC") regulation requiring the agency, without the participation of the challenged Commissioner, to determine the motion to disqualify if the Commissioner declines to recuse himself or herself).

Because the Commission does not have a regulation governing the disqualification of a Commissioner, the Commission reviewed APA and CPSC procedures regarding the disqualification of a presiding officer, as well as the FTC regulations regarding motions to disqualify a Commissioner, and found them instructive. *See* 5 U.S.C. § 556(b); 16 C.F.R. §§ 4.17(b), 1025.42(e)(2). Chairman Kaye and Commissioners Adler, Mohorovic, and Robinson first each independently considered his/her own statements that Respondent alleges evidence bias and prejudgment and declined to recuse himself/herself from participation in this matter. The Commissioners then reviewed the statements of the other challenged Commissioners that Respondent alleges demonstrate bias. Each challenged Commissioner abstained from voting on his or her own disqualification.

LEGAL STANDARD

The parties dispute the appropriate legal standard to apply in this case. Respondent asserts that the test for disqualification announced in *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (*Cinderella II*), "whether 'a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it,'" applies in this case. Resp't's Mem. 4. Complaint Counsel argues that Respondent's reliance on the test cited in *Cinderella II* is misplaced, in that *Cinderella II* involves "unusual facts evidencing extreme bias," and that courts have repeatedly distinguished this opinion in rejecting motions to disqualify. Complaint Counsel's Resp. 11. According to Complaint Counsel, a Commissioner should only be disqualified based on comments evidencing that the decision-maker's mind was "'irrevocably closed.'" *Id.* at 10 (citing *NEC Corp. v. United States*, 151 F.3d 1361, 1373, 1375 (Fed. Cir. 1998)).

Our analysis of the relevant legal standard begins with the definitions of "bias" and "prejudgment." The U.S. Supreme Court has stated that judicial bias[8] arises out of a "wrongful or inappropriate" favorable or unfavorable disposition or opinion. *Liteky v. United States*, 510 U.S. 540, 550 (1994). Such opinion may be wrongful or inappropriate, for example, when the opinion rests upon knowledge that the judge should not possess. *Id*. However, opinions formed "on the basis of facts introduced or events occurring in the course of the current proceedings, or

[8] Although instructive, the judicial recusal standard, codified at 28 U.S.C. § 455, applies only to federal "judges of the courts of appeals, district courts, Court of International Trade and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior." 15 U.S.C. § 451. *Cf. Greenberg v. Board of Governors of the Federal Reserve System*, 968 F.2d 164, 166-67 (2d Cir. 1992) (refusing to apply heightened judicial recusal standard to an ALJ, and instead applying Section 554(d) of the APA).

of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id*. at 555. In the administrative context, prejudgment is a type of bias resulting from a decision-maker who suggests that he or she has reached a conclusion regarding the facts about a particular party before a pending matter has completed. *Cinderella II*, 425 F.2d at 590 (finding prejudgment occurred in Commissioner speech suggesting that specific facts of a pending appeal violated the law).

To succeed on the Motion to Disqualify, Respondent must overcome the presumption that Commissioners "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *United States v. Morgan*, 313 U.S. 409, 421 (1941); *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (holding "presumption of honesty and integrity" applies to administrative decision-makers). Absent a showing of bias stemming from an "extrajudicial source," decision-makers are not precluded from making decisions in the course of exercising their statutory obligation. *Bowens v. North Carolina Dep't of Human Res.*, 710 F.2d 1015, 1020 (4th Cir. 1983) ("To be disqualifying, personal bias must stem from a source other than knowledge a decision-maker acquires from participating in a case.").

We conclude that the context of a Commissioner's statement determines the applicable legal standard. In *Cinderella II*, the D.C. Circuit concluded that the standard for prejudgment was "whether 'a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" The "disinterested observer" test espoused in *Cinderella II*, however, applied to Commissioner statements unrelated to official agency functions and responsibilities, such as a Commissioner's speech before a trade association. *See Cinderella II*, 425 F.2d at 590. In contrast, a Commissioner's statements, made in an on-the-record hearing on the magnet rulemaking, or in a statement made in connection with an official vote on a Commission action, are related to official agency activities. For statements made in connection with official agency functions and responsibilities, courts have set forth a less stringent test – namely, that Respondent must establish that such "in-role" statements demonstrate that "the decision maker is 'not capable of judging a particular controversy fairly on the basis of its own circumstances.'" *NEC Corp.*, 151 F.3d at 1373 (quoting *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976)). This standard may be met by showing, for example, that the decision-maker's mind is "irrevocably closed" on a disputed issue. *Id.* (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948)); *see also In re Whole Foods Market, Inc. and Wild Oats Market, Inc.*, 2008 WL 4153583, at *1-2 (F.T.C. Sept. 5, 2008) (denying motion to recuse for bias and prejudgment and, citing *Cement Institute*, stating that the movant's burden was high, and: "[t]he test for recusal is different where the movant attacks statements made in the course of the agency's official duties").

DISCUSSION

I. Disqualification of the Commission

Fundamentally, the outcome of Respondent's Motion to Disqualify the Commission based on findings the Commission made in the Final Rule for Magnet Sets and Commissioners' related statements, turns on whether the Commission has the statutory authority to pursue rulemaking concurrent with an adjudicative proceeding related to the same class of products. If the Commission has such authority, a claim of prejudgment must fail because nothing "wrongful or inappropriate" attaches to the Commission's actions. *Liteky*, 510 U.S. at 550-55. Similarly, if the Commission has such authority, Commissioners' rulemaking-related statements reflecting the rulemaking record and acknowledging the action taken by issuing a rule would not evidence bias against a specific firm or its products, or prejudgment of the law or facts at issue in the adjudication. *Id*.

Respondent has not cited any law, nor have we found any support in the CPSA or the case law, to suggest that it was improper or contrary to law for the Commission to use its authorities concurrently to address the risk of injury presented by SREMs. The CPSA provides the Commission with statutory authority to protect consumers through enforcement actions, by seeking a recall of a product that has already been sold and presents a "substantial product hazard." The CPSA also authorizes the Commission to protect consumers from a product that presents an "unreasonable risk of injury," by setting prospective performance and labeling standards through rulemaking. Each proceeding has a distinct purpose, procedure, factual record, and legal analysis. Additionally, each proceeding requires due process to the relevant stakeholders. In this case, the Commission followed, and Respondent took full advantage of, all required processes.

Accordingly, we conclude that the Commission has the authority to conduct concurrent rulemaking and a Section 15 adjudication and to issue a final rule before the completion of an adjudicative proceeding. Accordingly, Respondent has failed to overcome the presumption that the Commissioners are "assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances," simply by participating in the Commission's rulemaking proceeding. *Morgan*, 313 U.S. at 421.

A. The Commission Cannot Be Disqualified

At the outset, even if we concluded that a majority of the Commissioners should be disqualified, the Commission must issue a Final Decision and Order in this case. 16 C.F.R. § 1025.55(b). Respondent has not cited any law that supports the proposition that an Appeal to the Commission is effectively erased, or that the Initial Decision and Order becomes the Commission's Final Decision and Order, if the Commission or Commissioners are disqualified. Indeed, Supreme Court precedent states that in the worst-case scenario, where all Commissioners are disqualified, or where enough Commissioners are disqualified such that the agency lacks a quorum to act, the "rule of necessity" provides that the Commission should proceed with hearing the Appeal. *United States v. Will*, 449 U.S. 200, 211-17 (1980) (holding that the Supreme Court should not disqualify itself where all federal judges had a pecuniary interest); *Cement Inst.*, 333

U.S. at 701 (recognizing that if the Court disqualified the entire agency, the decision could not be made as intended by Congress).

Here, Congress has not provided the Commission with a contingency plan to take final agency action in this matter, such as authorizing another government agency to hear an appeal if all or a majority of the CPSC Commissioners are disqualified. *See Cement Inst.*, 333 U.S. at 701. A district court cannot hear the Appeal because a district court's authority is limited to review of a final decision of the Commission. *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 731 (D.C. Cir. 2003) (stating district court's authority to review agency conduct is limited to cases challenging final agency action and that "[a]gency action is considered final to the extent that it imposes an obligation, denies a right, or fixes some legal relationship") (citing *Role Models Am., Inc. v. White*, 317 F.3d 327, 331-32 (D.C. Cir. 2003)). Thus, the Commission is the only entity with jurisdiction over the Appeal.

B. Concluding the Rulemaking Did Not Result in the Commission or Individual Commissioners' Prejudgment of the Adjudication

To support the argument that the Commission prejudged the instant Magnet Adjudication by issuing the Final Rule for Magnet Sets, Respondent attempts to detail overlap between the facts and issues the Commission considered on the rulemaking record and the findings of the ALJ in the Initial Decision and Order. Respondent argues that the Commission considered the same issues and evidence, and made factual and legal findings, in the Final Rule for Magnet Sets. Therefore, according to Respondent, the Commission has "necessarily prejudged numerous questions of fact and law in the administrative adjudication." Resp't's Mem. at 3. We disagree.

1. Use of Statutory Authority to Fulfill the Agency's Mission Does Not Evince Prejudgment

We reject Respondent's argument that the Commission and individual Commissioners have prejudged the adjudication by issuing the Final Rule for Magnet Sets before the Magnet Adjudication has concluded. There is nothing "wrongful or inappropriate" with the agency exercising its statutory authority to protect consumers using all available statutory provisions.

First, neither Sections 7 and 9 of the CPSA or Section 15, nor any other provision of the CPSA, prohibits the Commission from concurrent rulemaking and adjudication.

Second, the CPSA provides the Commission with the authority to conduct two distinct proceedings–rulemaking and adjudication–for two distinct purposes. Rulemaking proceedings under Sections 7 and 9 are generally prospective in nature and represent the Commission's statement of policy in general and with respect to a larger product class. Adjudication under Section 15, on the other hand, is the form of agency process which results in an enforceable order against a specific company and/or product. Adjudications are conducted vis-à-vis a trial-type proceeding, and the resulting order is based upon findings of facts, and conclusions of law, as rendered by an ALJ.

Regarding rulemaking under Section 7 of the CPSA, the Commission promulgates consumer product safety standards that prospectively set forth performance and/or labeling requirements for consumer products. 15 U.S.C. § 2056(a). Such standards must be reasonably necessary to prevent or reduce an "unreasonable risk of injury" associated with the product. *Id.* Additionally, Section 9(f) of the CPSA requires the Commission to consider and make numerous findings for inclusion in a consumer product safety standard. 15 U.S.C. § 2058(f). For example, under Section 9, to issue a final rule, the Commission must find that the benefits expected from the rule bear a reasonable relationship to its costs and that the rule imposes the least burdensome requirements that would prevent or adequately reduce the risk of injury. 15 U.S.C. § 2058(f)(3)(E), (F).

In contrast, Section 15 of the CPSA authorizes the Commission to seek an enforceable order for a recall, public notification, and/or a refund where a product presents a "substantial product hazard," after a trial-type hearing in accordance with Section 554 of the APA and the Commission's "Rules of Practice for Administrative Proceedings." 15 U.S.C. § 2064(c)(1), (d)(1), (f)(1); 16 C.F.R. §§ 1025.1-51. Section 15 adjudications are enforcement proceedings applicable to the following: a product that fails to comply with an applicable consumer product safety rule under the CPSA or a similar rule, regulation, standard, or ban under any other act enforced by the Commission which creates a substantial risk of injury to the public; or a product that contains a defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public. 15 U.S.C. § 2064(a)(1), (a)(2).

Under Respondent's theory, the Commission should not issue a final rule until after adjudication has concluded in order to avoid an allegation of prejudgment–even though there is no basis in law or the CPSA for this position. As a practical matter, if we agreed with Respondent's point of view, the Commission would face the impossible choice of which consumers to assist first–those who have already purchased a potentially hazardous product, or those at risk of future harm from the continuing sale of a potentially hazardous product. Consequently, the Commission could be waiting for years to issue a consumer product safety standard. Such a result would severely circumscribe the Commission's ability to create and enforce its rules and would subject consumers to potential safety risks intended to be addressed by the Commission. *Pangburn v. Civil Aeronautics Bd.*, 311 F.2d 349, 358 (1st Cir. 1962) (holding Board was not required to delay publishing a factually related report until the conclusion of an adjudication because it would run contrary to statutory intent and would not be in the public interest).

Third, both rulemaking and adjudication are appropriate, and indeed necessary, in certain situations to serve the agency's mission to protect consumers from serious injury and death associated with consumer products. For example, the Commission may promulgate a consumer product safety rule for a class of products and, in doing so, make the statutorily required factual and legal findings. If the Commission later determines that a product violates the consumer product safety rule, the Commission should be able to use its authority under Section 15(a)(1) to seek public notice, a recall, and/or a refund of the products that violate said rule.

Under Respondent's theory, the Commission could not proceed in the Section 15 enforcement proceeding since it would have "prejudged" the factual and legal issues by promulgating the rule. We disagree with this point of view. If voting to issue a rule where the Commission must make a finding that a class of products presents an "unreasonable risk of injury" is tantamount to the Commission prejudging that a specific product in the class also presents a "substantial product hazard," then the Commission could never use its authority under Section 15 of the CPSA to seek a recall of a noncompliant regulated product. The Commission would always be deemed to have "prejudged" overlapping factual and legal issues attendant to each consumer product. Such a result would prevent the agency from fulfilling its statutory mission. *Cement Inst.*, 333 U.S. at 701 (holding prejudgment claim based on prior congressional testimony must fail because it would defeat the purpose of the FTC Act and would "immunize" industry against the practices being investigated); *Pangburn*, 311 F.2d at 357-58 (holding no prejudgment based on successive factually related actions by the Civil Aeronautics Board, where Board's role was mandated by Congress).

2. Prior Knowledge of Factual and Legal Issues Does Not Evince Prejudgment

Respondent has failed to overcome the presumption that Commissioners act with honesty and integrity, even when the Commission and individual Commissioners have knowledge about magnet sets, generally, through the rulemaking process. Knowledge of specific facts or issues learned while involved in official agency actions does not evince prejudgment. *See, e.g., Cement Inst.*, 333 U.S. at 702-03 (judges "frequently try the same case more than once and decide identical issues each time, although these issues involved questions of both law and fact"); *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 236-37 (1947) (finding no prejudgment when same decision-maker hears case after a court or higher agency authority reviews prior holding and remands).

In *Pangburn v. Civil Aeronautics Board*, the Civil Aeronautics Board ("Board"), in accordance with its statute, initiated two proceedings in connection with an airplane crash: (1) an investigation into the crash, with a public report on the Board's findings, and (2) a proceeding to determine whether to suspend the pilot's license. 311 F.2d at 350-351. Before the conclusion of the suspension proceeding, the Board issued its report on the investigation, finding that the cause of the accident was pilot error. *Id.* at 351. The pilot argued that by issuing the investigation report, the Board had essentially prejudged whether to suspend the pilot's license. *Id.* at 355. The U.S. Court of Appeals for the First Circuit in *Pangburn* disagreed:

> . . . we cannot say that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required. Particularly is this so in the instant case where the Board's prior contact with the case resulted from its following the Congressional mandate to investigate and report the probable cause of all civil air accidents.

Id. at 358; *see also Faultless Div. v. Sec'y of Labor*, 674 F.2d 1177, 1183 (7th Cir. 1982) ("Mere familiarity with legal or factual issues involved in a particular case does not, in itself, evince an adjudicator's biased predisposition.").

The factual and legal issues in this case are even more attenuated than they were in the *Pangburn* case, because, as explained below, the Commission's vote on the policy issues presented in the Final Rule for Magnet Sets did not involve disposition of the Subject Products, the same factual record, the same type of process, the same burden of proof, or the same legal analysis.

3. Procedural and Substantive Differences for Rulemaking and Adjudications Afford Due Process and Prevent Prejudgment

Respondent's due process rights have not been, and will not be, infringed by proceeding with the Appeal. Procedural and substantive differences in each type of proceeding afford Respondent all the process that is due.

a. Adjudications and Rulemakings Involve Different Procedures

Respondent's due process rights have not been infringed because the agency followed the procedural requirements in the APA and in the CPSA for each matter. The Commission followed informal, notice and comment rulemaking procedures under Section 553 of the APA and Sections 7 and 9 of the CPSA to issue the Final Rule for Magnet Sets. For example, in accordance with Section 9(d)(2) of the CPSA, the Commission invited stakeholders to submit written comments and make oral presentations on the NPR for Magnet Sets. *See* NPR for Magnet Sets, 77 *Fed. Reg*. at 53,781 (inviting written comments); Magnet Sets; Notice of Opportunity for Oral Presentation of Comments, 78 *Fed. Reg*. 58,491 (Sept. 24, 2013) (inviting oral presentations). The Commission then considered these comments on the record. *See* Final Rule for Magnet Sets, 79 *Fed. Reg*. at 59,966-72 (responding to comments on the NPR for Magnet Sets). Notably, Mr. Qu, founder of Zen Magnets, took advantage of the rulemaking process and participated in the rulemaking by filing comments. *See supra* note 2.

In contrast to the notice and comment procedures applicable to rulemaking, the Magnet Adjudication involved a trial-type hearing before an ALJ, in accordance with Section 554 of the APA and the Commission's regulation at 16 C.F.R. part 1025. Importantly, approximately 2 months *after* the Commission issued the Final Rule for Magnet Sets, an ALJ conducted a hearing lasting several weeks. During this hearing, Respondent presented witnesses and testimony and had the ability to cross-examine Complaint Counsel's experts to challenge whether the Subject Products present a substantial product hazard. *See Cement Inst.*, 333 U.S. at 701 (refusing to disqualify the FTC from hearing an adjudication after Commissioners issued statements questioning the legality of the practices at issue in the case, noting that, during the adjudication, respondents produced "volumes" of evidence, presented testimony, and cross-examined witnesses as support that their practices were legal). Even if some of the information presented in the rulemaking was the same as that presented in the trial, similar to *Cement Institute*, Respondent had the opportunity to present witnesses, testimony, and argument to challenge the allegation that the Subject Products present a substantial product hazard.

b. Adjudications and Rulemakings Involve Different Factual Considerations

The Commission has not prejudged the Appeal by issuing the Final Rule for Magnet Sets because the factual considerations for each proceeding are different.[9]

First, the Commission's Final Decision and Order in this case must be based on the adjudicative facts in evidence in this proceeding; the Commission cannot rely on evidence in the rulemaking record. Although the Final Rule for Magnet Sets makes note of the adjudicative cases, stating that only one company, Respondent, continues to market and sell products in the United States, neither the NPR, nor the Final Rule for Magnet Sets, focuses on any particular business or stakeholder. Rather, the magnet rulemaking regulates SREMs, generally, as a product class. The Commission did not single out a particular brand of magnets on the merits of any of the findings that the Commission made. NPR for Magnet Sets, 77 *Fed. Reg*. at 53,797-99, 53,800-01; Final Rule for Magnet Sets, 79 *Fed. Reg*. at 59,987-89.

Although some facts and issues in the rulemaking may overlap with facts and issues in the adjudication, the substance, nature, and consideration of the facts and testimony presented in the Magnet Adjudication, are likely more specific and more substantial regarding the Subject Products, than the facts about SREMs as a product class that the Commission considered during the rulemaking.[10] *See generally Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161-62 (D.C. Cir. 1979) (comparing adjudicative facts, which are specific to the parties involved and are used by a judge or jury to apply the law to specific facts, with legislative facts, which are general in nature and not party-specific, and serve as the basis for agency rules). The Commission has not had the opportunity yet to fully consider in this Appeal, the extensive testimony and exhibits about the Subject Products that the parties presented during the Magnet Adjudication.

Second, the Commission must use different evidentiary standards in weighing and considering adjudicative facts in resolving the Magnet Adjudication than it did in making its decision in the Final Rule for Magnet Sets. On Appeal, the Commission must determine whether Complaint Counsel proved the allegations in the Second Amended Complaint by *a preponderance of the evidence*. *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (interpreting Section

[9] The facts in evidence in this case involve at least one matter not addressed in the rulemaking: whether the Subject Products, specifically, are toys subject to the requirements for magnets set forth in ASTM F-963, *Standard Consumer Safety Specification for Toy Safety*. Applicability of ASTM F-963 to particular products was excluded from the rulemaking proceeding. *See* NPR for Magnet Sets, 77 *Fed. Reg.* at 53,787.

[10] For example, Respondent explains that the facts on the adjudicative record about the utility of the Subject Products are extensive. Resp't's Mem. 6 (stating that in the administrative case "the parties exhausted days of testimony to adduce how the Subject Products are used, who might use or misuse the magnets, and the various applications for the Subject Product in different disciplines, such as research, teaching, art, and therapy"). Complaint Counsel similarly explains that the adjudication was fact-intensive and specific to Respondent and the Subject Products. Complaint Counsel's Resp. at 7-8 (stating that the adjudication "includes three weeks of trial testimony consisting of numerous physical exhibits of the Subject Products; 2,772 pages of trial transcripts; the stipulated testimony of Complaint Counsel's 11 witnesses; extensive written direct testimony and reports by Complaint Counsel's experts; consumer e-mail correspondence with Respondent; Respondent's sales records; testimony regarding the Respondent's websites; and evidence of undercover purchase of the Subject Products.").

556(d) of the APA); *see also Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal*., 508 U.S. 602, 622 (1993) (stating that preponderance of the evidence standard "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'") (quoting *In re Winship,* 397 U.S. 358, 371–372 (1970) (Harlan, J., concurring)).

For purposes of rulemaking, however, the Commission's findings must be supported by *substantial evidence on the rulemaking record as a whole*. 15 U.S.C. § 2060(c). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support [the Commission's] conclusion," even if other reasonable minds could reach a different conclusion. *Southland Mower Co. v. CPSC*, 619 F.2d 499, 508 (5th Cir. 1980).

Third, Respondent's speculation that the Commission's rulemaking findings demonstrate that the Commission will reject Respondent's arguments in the adjudicative matter also fails to establish bias. *See Liteky*, 510 U.S. at 550, 555; *Cement Inst*., 333 U.S. at 702-03; *Pangburn*, 311 F.2d at 355-58. Respondent conflates two distinct proceedings with two distinct records. The Commission's rulemaking findings were supported by substantial evidence on the rulemaking record as a whole, not on the adjudicative record. 15 U.S.C. § 2060(c). Even if Respondent's bias claim rose out of the same adjudication, with the same facts, courts have found that bias is not established by a decision-maker who rejects claims or testimony by a party. *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659-60 (1949) (holding that bias of a trier of fact cannot be established solely based on the rejection of one party's evidence); *Donnelly Garment Co.*, 330 U.S. at 236-37 (holding that a judge is not disqualified from sitting in a retrial because he was reversed on earlier rulings and finding no reason to impose a stiffer standard on administrative agencies just because they ruled strongly against a party in the first hearing). Here, the Commission has not yet considered Respondent's evidence or argument.

Fourth, issuing the Final Rule for Magnet Sets does not bind the agency to a decision in the Magnet Adjudication. The Final Rule for Magnet Sets represents the Commission's policy regarding magnet sets. Courts have found that policy decisions made while acting in an official capacity do not evidence prejudgment. *Hortonville*, 426 U.S. at 493 (stating that even when a decision-maker has taken a public position on a policy issue related to the dispute, they will not be disqualified, absent a showing that they cannot objectively judge the particular controversy); *Rombough v. FAA*, 594 F.2d 893, 900 (2d Cir. 1979) (finding nothing improper where decision-maker holds views on law or policy, based upon previous cases involving similar issues, that may influence a subsequent decision). Indeed, knowledge and experience gained while serving as a Commissioner should not be "a handicap instead of an advantage." *Cement Inst*., 333 U.S. at 702.

c. Adjudications and Rulemakings Involve Different Legal Analyses

Despite the overlap of several concepts, "substantial product hazard" is a term of art in the context of a Section 15 proceeding, and "unreasonable risk of injury" is a term of art in the rulemaking context. These terms require two different legal analyses. *Compare* 15 U.S.C. § 2064(a) (defining a "substantial product hazard" as "a failure to comply with an applicable

consumer product safety rule … which creates a substantial risk of injury to the public" or "a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public") *with* 15 U.S.C. § 2056(a) (stating that performance or labeling requirements in a consumer product safety standard must "be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product") *and* 15 U.S.C. 2058(f)(3) (listing six findings the Commission must make for inclusion in a consumer product safety rule, including "that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product").

Although the term "unreasonable risk" is not defined in the CPSA, legislative history and case law discuss the term. The House Report on the CPSA discussed "unreasonable risk," as follows:

> It is generally expected that the determination of unreasonable hazard will involve the Commission in balancing the probability that risk will result in harm and the gravity of such harm against the effect on the product's utility, cost, and availability to the consumer. An unreasonable hazard is clearly one which can be prevented or reduced without affecting the product's utility, cost, or availability; or one which the effect on the product's utility, cost or availability is outweighed by the need to protect the public from the hazard associated with the product.

H.R. Rep. No. 92-1153, at 33 (1972).

In a rulemaking proceeding, a product's risk is not considered in isolation. The Commission makes an "unreasonable risk" finding by balancing the likely impact a proposed regulation will have on reducing a hazard with the impact that the regulation will have on the cost and utility of the product. 15 U.S.C. §§ 2056(a), 2058(f)(3)(A); *Southland Mower Co.*, 619 F.2d at 508-09 (stating determination of "unreasonable risk" involves "a balancing test like that familiar in tort law: The regulation may issue if the severity of the injury that may result from the product, factored by the likelihood of the injury, offsets the harm the regulation imposes upon manufacturers and consumers." (internal citation omitted)). For example, in *Forester v. CPSC*, the court examined the Commission's determination that a risk was "unreasonable" by considering the likely effect of each provision of the standard on the risk of injury to consumers and the economic impact of the requirement. 559 F.2d 774, 789-98 (D.C. Cir. 1977). Thus, an "unreasonable risk" finding in the rulemaking context involves an examination of the likely impact of a *proposed standard*, not solely an examination of a consumer product.

The regulatory analysis concerning "unreasonable risk" in the rulemaking context is not applicable in an adjudicatory proceeding seeking an order to address a "substantial product hazard." Where rulemaking is primarily concerned with a balancing of the hazard and economic impact of the proposed regulations, adjudications under Section 15 require no such balancing. In an adjudication under Section 15, the findings of facts and conclusions of law necessary for a "substantial product hazard" are arrived at only after a trial-type proceeding involving the presentation of product-specific evidence and testimony before an ALJ. The adjudication of whether a particular product presents a substantial product hazard involves application of the

factors specified in the Section 15 regulations, including engineering data, safety-related production or design changes, product liability suits, and consumer complaints – information relative to a specific product. 16 C.F.R. § 1115.12(f).

Additionally, when the Commission issued the Section 15 regulations, the Commission specifically declined to adopt the nomenclature "unreasonable risk" when considering the term "defect" under Section 15 of the CPSA. According to the Commission, the term "unreasonable risk" had taken on a "special meaning" within the agency with regard to rulemaking, and "[t]he Commission does not want to give the impression that the extensive cost/benefit analysis in which it engages before promulgating a standard or ban should be undertaken by subject firms before reporting under Section 15(b) of the CPSA." 43 *Fed. Reg*. 34,988, 34,991 (Aug. 7, 1978).

For the reasons discussed above, participation in the Final Rule for Magnet Sets does not demonstrate bias or prejudgment of the facts or issues in the Appeal. Accordingly, neither the Commission, nor any individual Commissioner, must be disqualified from ruling on the Appeal in the Magnet Adjudication.

II. Disqualification of a Commissioner

If the Commission is not disqualified based on issuing the Final Rule for Magnet Sets, Respondent requests that Chairman Kaye and Commissioners Adler, Mohorovic, and Robinson disqualify themselves from hearing the Appeal, based on their public statements. Resp't's Mem.1. Respondent argues that such public statements demonstrate that the Commissioners "have not only prejudged laws and facts at issue in this case, but that they have a bias against Respondent and the Subject Products." *Id.* at 3.

After carefully and thoroughly considering their public statements and Respondent's charges of prejudgment and bias, Chairman Kaye and Commissioners Adler, Mohorovic, and Robinson have determined the following with respect to themselves: that each does not have any personal bias against Respondent or the Subject Products; that each has not prejudged the law or facts at issue in the Appeal, by participating in the rulemaking, or by issuing the challenged statements; and that each has no other basis for disqualification from hearing the Appeal.

The "irrevocably closed" standard applies to the Commissioners' statements challenged by Respondent because they were made in conjunction with official agency functions and responsibilities. However, under either the "irrevocably closed" standard stated in *Cement Institute*, or, in the alternative, the "disinterested observer" standard set forth in *Cinderella II*, these statements do not demonstrate bias against Respondent or the Subject Products, nor do the statements evince prejudgment of the Appeal.

A. Chairman Kaye[11]

1. Rulemaking Statements

To support the claim that Chairman Kaye has prejudged the Appeal, Respondent (1) quotes portions of Chairman Kaye's statements during the decisional meeting on September 24, 2014, and (2) cites Chairman Kaye's written statement dated September 29, 2014, on the passage of the Final Rule for Magnet Sets. Examples of these challenged statements include:

- He was "*proud to join*" with three other Commissioners in "vot[ing] yes to protecting children and teenagers from *the hidden and devastating hazard of magnet ingestion*." Resp't's Mem. 20 (emphasis in Respondent's Memorandum).

- "As a parent and as the Chairman of the CPSC, I hurt so much for [AC's] family. I was so deeply moved that [AC's] mother, brothers, grandmother, aunt, and cousin took the time to drive from Ohio to attend this Commission's vote. I will always think of [AC] when it comes to this rule and the action this Commission has approved, and I am so deeply sorry for [AC's] family's loss." *Id*. at 21.

- "Many are facing financial loss . . . and [there is] one business in particular who is in the future is [sic] likely to bear the brunt of our regulatory action approved today." *Id*. at 3.

- Mr. [Qu] this is what I would like to leave you with. I hope your dreaming will continue and that inspiration will strike again and that there is a path forward that secures for you that elusive childhood wonder *but in a way that can endure*." *Id.* at 14 (emphasis in Respondent's Memorandum).

There is no indication that Chairman Kaye's mind is "irrevocably closed" on a Final Decision on the Subject Products. *See NEC Corp*., 151 F.3d at 1373. Chairman Kaye's statements are solely based upon the rulemaking record, and do not include comments or even suggestions that the Subject Products at issue in the adjudication are a substantial product hazard requiring public notice and refunds. Indeed, there is nothing in Chairman Kaye's rulemaking-related statements to suggest that the Chairman will not issue a Final Decision on the Subject Products based upon the adjudicative record, or that the Chairman is incapable of considering the merits of a factually distinct case based on the merits. *Id.* at 1373 (noting the presumption that decision-makers "will fulfill their obligations with the highest level of integrity and honesty").

In the alternative, we also conclude that Chairman Kaye's statements would not lead a disinterested observer to conclude that he has in some way adjudged the facts and law in this particular adjudication in advance of hearing it. *Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d

[11] Chairman Kaye abstained from voting on this section of the opinion.

562, 571 (D.C. Cir. 2007). We disagree with Respondent's argument that some of the statements above demonstrate that Chairman Kaye "cannot separate his emotional feelings about the Subject Products." Resp't's Mem. 21. The Chairman's acknowledgment of a parent's loss of a child in the rulemaking context does not mean that the Chairman cannot review facts and come to a fair, impartial, and legally cognizable resolution in the adjudication. *See, e.g., Liteky*, 510 U.S. at 555-56 (expressing emotion in a proceeding that is "within the bounds of what imperfect men and women" display does not establish bias); *United States v. Rangel*, 697 F.3d 795, 804-05 (9th Cir. 2012) (holding judge's expression of sympathy for victims did not establish bias and did not imply that the judgment could not be impartial).

Respondent also points to Chairman Kaye's comment that he hopes Mr. Qu can discover a "path forward that secures for you that elusive childhood wonder *but in a way that can endure*," as evidence that the Chairman "already made it clear that Subject Products should not be made available to domestic consumers, *i.e.*, recalled." Resp't's Mem. at 14. However, these statements referring to Respondent and Mr. Qu merely acknowledge a fact included in the briefing package–the potential impact of the Final Rule for Magnet Sets on Respondent's *prospective* sale of magnet sets. Final Rule for Magnet Sets, 79 *Fed. Reg*. at 59,968. Such statements demonstrate an awareness of the potential impact of the Final Rule for Magnet Sets on Mr. Qu's business. Nowhere in these statements does Chairman Kaye conclude or suggest that Respondent must *recall previously sold* products because they are a substantial product hazard. In fact, to the contrary, Chairman Kaye's September 29, 2014 written statement regarding the Final Rule for Magnet Sets included a disclaimer making clear that it was "exclusively directed to the CPSC's rulemaking efforts with respect to high-powered magnets sets." *Supra* note 6.

2. DOJ Enforcement Matter Statement

Respondent quotes Chairman Kaye's statement appearing in a DOJ press release dated March 23, 2016, discussing a district court's decision to issue a permanent injunction on Respondent's sale of recalled magnets, as evidence that Chairman Kaye has prejudged the laws and facts at issue in the Appeal:

> Today's decision puts the rule of law and the safety of children above the profits sought by Zen Magnets... Far too many children have been rushed into hospital emergency rooms to have multiple, high-powered magnets surgically removed from their stomachs. Young children have suffered infections and one child tragically died from swallowing loose magnets that often look like candy. The ruling is a major victory for the safety of consumers. Our pursuit of this case makes clear we will not tolerate the sale of recalled goods in any form. I am pleased that Judge Arguello ordered Zen to issue refunds to consumers, and I urge anyone who purchased these magnets to immediately seek a refund from Zen.

Resp't's Mem. 21.

Again, there is no indication that Chairman Kaye's mind is "irrevocably closed" on a Final Decision on the Subject Products. *See NEC Corp*., 151 F.3d at 1373. Chairman Kaye's statement was made in connection with a DOJ Enforcement Matter–a factually and legally distinct case–which alleged that Respondent violated the CPSA by buying 917,000 magnets from another entity shortly before that entity recalled the magnets and selling those magnets after they were recalled. This statement simply reflects the policy position that the Commission will pursue legal action against companies that resell recalled products. It does not address whether the Subject Products at issue here are substantial product hazards.

Even applying the *Cinderella II* test in the alternative, we conclude that a disinterested observer would not conclude that Chairman Kaye has in any way adjudged the facts and law in this particular adjudication in advance of hearing it based on this statement. *Nuclear Info. & Res. Serv.*, 509 F.3d at 571. Strongly worded statements in a separate case do not overcome the presumption that a Commissioner is capable of "judging a particular controversy fairly on the basis of its own circumstances." *Id*. (applying the "disinterested observer" test espoused in *Cinderella II* and refusing to disqualify Commissioner based on statements in an unrelated proceeding that (1) the petitioner supported its position with "factoids or made-up facts or irrelevant facts"; (2) one of petitioner's witnesses was a "person who doesn't know anything about radiation"; and (3) characterized the petitioner as the "Nuclear Disinformation Resource Service.").

Accordingly, we decline to disqualify Chairman Kaye from the instant matter.

B. Commissioner Adler[12]

To support the claim that Commissioner Adler could not be an impartial trier of fact in the Appeal, Respondent quotes portions of Commissioner Adler's (1) statements during meetings on the Final Rule for Magnet Sets held on September 10, 2014 and on September 24, 2014; and (2) written statement on the passage of the Final Rule for Magnet Sets dated September 29, 2014. Examples of these challenged statements include:

- "I did a little bit of calculation–the cost benefit ratio is still so positive that this rule is easily justifiable." Resp't's Mem. 13-14.

- ". . . it's impossible the [sic] put warnings on the magnets themselves." *Id.* at 12.

- "In short, despite everyone's best effort *the conclusion that I reach is that if these magnet sets remain on the market* irrespective of how strong the warnings on the boxes in which they're sold or how narrowly they are marketed to adults, *children will continue to be at risk of debilitating harm or death from this product.*" *Id.* at 14-15, 22 (emphasis in Respondent's Memorandum).

[12] Commissioner Adler abstained from voting on this section of the opinion.

There is no indication that Commissioner Adler's mind is "irrevocably closed" on a Final Decision on the Subject Products. *See NEC Corp*., 151 F.3d at 1373. Commissioner Adler's rulemaking-related statements do not discuss the adjudicative record in this matter or the Subject Products specifically. As set forth in detail in Section I, the Commission based its findings in the Final Rule for Magnet Sets on the legislative facts summarized in the rulemaking record. These facts applied to SREMs generally, as a product class, and not to a particular brand of magnet. Thus, for example, the statement discussing the cost-benefit analysis for the Final Rule for Magnet Sets is a finding based on analysis of the proposed standard that is particular to the Commission's rulemaking and required under the CPSA. 15 U.S.C. § 2058(f)(2)(A), (f)(3)(E). This specific regulatory analysis is not required in a Section 15 adjudication. *Supra* at 13-15, Section I.B.3.c.

The remaining statements reflect Commissioner Adler's policy position on magnet warning labels, as well as the injury data contained in the briefing package, which staff summarized in the Final Rule for Magnet Sets. *See, e.g.*, Final Rule for Magnet Sets, 79 *Fed. Reg*. at 59,964-65, 59,970, 59,975. Such policy positions do not indicate specific consideration of the Subject Products or the adjudicative record. As discussed above, even strongly worded policy positions do not overcome the presumption that "[a]n administrative official is presumed to be objective and capable of judging a particular controversy fairly on the basis of its own circumstances." *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980) (internal citations omitted). This presumption of objectivity is not overcome by demonstrating 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," or when the allegation of bias stems from participation in an earlier proceeding regarding the same issue. *Id.* at 1208-09 (citing *Hortonville*, 426 U.S. at 493).

Further, even if we were to apply the *Cinderella II* test in the alternative, we conclude that a disinterested observer would not conclude that Commissioner Adler has in any way adjudged the facts and law in this particular adjudication in advance of hearing it. *Nuclear Info. & Res. Serv.*, 509 F.3d at 571. As discussed above, Commissioner Adler's statements solely addressed the legislative facts in the rulemaking record and did not refer to the Subject Products. Further, Respondent fails to address significant portions of Commissioner Adler's September 29, 2014 statement that make clear that he was not prejudging the facts or law in any future adjudications before the Commission. Specifically, addressing the concerns about prejudgment in this matter, Commissioner Adler stated:

> I fully understand the difference between making a determination that a product presents an unreasonable risk of injury and should not be sold in the future versus a determination that a product currently being distributed presents a substantial product hazard and should be recalled from the market. The two determinations involve different facts, different policies and different law. And, in both cases, the full panoply of due process rights applies to anyone affected by Commission action.

Accordingly, we decline to disqualify Commissioner Adler from the instant matter.

C. Commissioner Mohorovic[13]

To support the claim that Commissioner Mohorovic seeks to "remove Respondent's products from the market – the ultimate issue in the administrative adjudication," Respondent quotes portions of Commissioner Mohorovic's written statement on the passage of the Final Rule for Magnet Sets, dated September 29, 2014, including the following:

> While I am confident that this Rule will achieve its intended purpose, I remain troubled about the prevalence of other small, powerful magnets that may persist in the home environment – be it from jewelry, defective or recalled products. Therefore I anticipate and urge the agency to not view this rulemaking as the final step in mitigating this hazard, but rather one element of an overall risk-management strategy.
>
> Furthermore, I hope the harrowing recent history with this product category compels the agency and the entire safety community to reevaluate our collective capabilities to quickly identify and respond to emerging hazards.

Resp't's Mem. 23.

We conclude that this statement does not indicate that Commissioner Mohorovic's mind is "irrevocably closed" on a Final Decision on the Subject Products. *See NEC Corp.*, 151 F.3d at 1373. Respondent's reliance on Commissioner Mohorovic's rulemaking-related statement fails to overcome the presumption of honesty and integrity that applies to administrative decision-makers. *See Withrow*, 421 U.S. at 47. Like the other Commissioners' rulemaking-related statements discussed above, Commissioner Mohorovic's statement is based on the rulemaking record before him, and his statements do not specifically discuss Respondent, the Subject Products, or the adjudicative record.

Additionally, the second paragraph of Commissioner Mohorovic's statement generally concerns the policy behind addressing emerging hazards. Policy statements about the best way to address emerging hazards, in general, do not reflect bias or prejudgment against Respondent or the Subject Products. *See United Steelworkers of Am.*, 647 F.2d at 1189 (noting that officials who work for agencies with express missions to protect health and safety "will almost inevitably form views on the best means of carrying out that mission").

In the alternative, we also find that Commissioner Mohorovic's statement would not lead a disinterested observer to conclude that Commissioner Mohorovic has in some way adjudged the facts and law in this particular adjudication in advance of hearing it. *Nuclear Info. & Res. Serv.*, 509 F.3d at 571. Although Commissioner Mohorovic's statement specifically discusses items containing "small, powerful magnets" remaining in consumers' homes, including "jewelry, defective or recalled products," the statement expresses a broad, unspecific concern about

[13] Commissioner Mohorovic abstained from voting on this section of the opinion.

magnets in general. Indeed, nowhere in the statement does Commissioner Mohorovic mention Respondent or the Subject Products.

Accordingly, we decline to disqualify Commissioner Mohorovic from the instant matter.

D. Commissioner Robinson[14]

1. Rulemaking Statements

To support the claim that Commissioner Robinson could not be an impartial trier of fact in the Appeal, Respondent quotes portions of Commissioner Robinson's statements on the Final Rule for Magnet Sets during the meeting on September 24, 2014, including the following:

- "I would quickly learn that the problem was however that *however they were marketed* that these were items that were being swallowed by young children and ingested by teenagers and were causing some very, very serious injuries and even deaths." Resp't's Mem. at 12 (emphasis in Respondent's Memorandum).

- "So I was really struck with how this hidden hazard was something that as I say however marketed that this was something that needed to be addressed." *Id.*

Again, these statements do not indicate that Commissioner Robinson's mind is "irrevocably closed" on a Final Decision on the Subject Products. *See NEC Corp*., 151 F.3d at 1373. Commissioner Robinson's meeting statements on September 24, 2014, were made in conjunction with the prospective magnets rulemaking. Therefore, similar to the other Commissioners' rulemaking-related statements, her statements are based on the rulemaking record. Commissioner Robinson's challenged statements do not specifically discuss Respondent, the Subject Products, or the adjudicative record. As discussed above, even strongly worded policy positions do not overcome the presumption that "[a]n administrative official is presumed to be objective and capable of judging a particular controversy fairly on the basis of its own circumstances." *United Steelworkers of Am.*, 647 F.2d at 1208 (internal citations omitted).

Even applying the *Cinderella II* test in the alternative, we conclude that a disinterested observer would not conclude that Commissioner Robinson has in any way adjudged the facts and law in this particular adjudication in advance of hearing it. *Nuclear Info. & Res. Serv.*, 509 F.3d at 571. Unlike the statements addressed in the *Cinderella II* decision, Commissioner Robinson's challenged statements do not specifically refer to the Respondent, the Subject Products, or the adjudicative record, but rather a broad class of products that was the subject of a separate and distinct rulemaking record.

[14] Commissioner Robinson abstained from voting on this section of the opinion.

2. Magnet Adjudication Case Settlement

As additional proof that Commissioner Robinson has prejudged the Appeal, Respondent quotes portions of Commissioner Robinson's written statement of May 14, 2014, regarding the Commission's vote to enter into a consent agreement with Maxfield, a firm that also sold high-powered magnet sets. Examples of the challenged statements include:

- "High-powered magnets are responsible for horrific, long-term, and life threatening injuries in infants and children estimated to be in the thousands[.]" Resp't's Mem. 24.

- "The CPSC exists to address just such dangerous products." *Id.*

These statements also do not evince that Commissioner Robinson's mind is "irrevocably closed" on a Final Decision on the Subject Products. *See NEC Corp*., 151 F.3d at 1373. They do not suggest that Commissioner Robinson knew, or had even analyzed, the evidence presented about the Subject Products in the Magnet Adjudication. Indeed, such review and awareness would have been impossible because Commissioner Robinson issued her statement almost 7 months *before* the ALJ hearing. Thus, Respondent has not proven that Commissioner Robinson's acknowledgment of the fact that SREMs cause life-threatening injuries, overcomes the presumption of objectivity, or that her mind is "irrevocably closed" to issuing a Final Decision on the Subject Products based on the adjudicative record. *NEC Corp*., 151 F.3d at 1373.

In the alternative, even if we were to apply the more stringent test set forth in *Cinderella II*, we find that a disinterested observer would not conclude that Commissioner Robinson has in any way adjudged the facts and law in this particular adjudication in advance of hearing it. *See Nuclear Info. & Res. Serv.*, 509 F.3d at 571. Commissioners must rule on settlement offers. 16 C.F.R. § 1025.26(f). In connection with this duty, Commissioners review the facts and issues associated with the settlement. General knowledge or broad policy views about SREMs, acquired while performing official agency duties, do not demonstrate that Commissioner Robinson has prejudged this particular case. The Supreme Court has found that, even for federal judges, "opinions formed . . . on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 552, 555 (1994); *see also Pangburn*, 311 F.2d at 358. Moreover, strongly worded statements do not overcome the presumption that a Commissioner is "capable of judging a particular controversy fairly on the basis of its own circumstances." *Nuclear Info. & Res. Serv.*, 509 F.3d at 571 (citing *Morgan*, 313 U.S. at 421).

Accordingly, we decline to disqualify Commissioner Robinson from the instant matter.

ORDER

Based on the foregoing,

IT IS HEREBY ORDERED THAT Respondent's Motion to Disqualify the Commission or Some of Its Members is **DENIED IN FULL.**

SO ORDERED this 1st day of September, 2016.

BY THE COMMISSION, Commissioner Buerkle dissenting

Todd A. Stevenson
Secretary
Consumer Product Safety Commission