UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FEDERAL ENERGY REGULATORY COMMISSION, Petitioner, v. POWHATAN ENERGY FUND, LLC, HOULIAN "ALAN" CHEN, HEEP FUND, INC., and CU FUND, INC. Respondents.	)	Civil Action No. 3:15-cv-00452 (MHL)

PETITIONER'S OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE ADMINISTRATIVE LAW PROFESSORS.

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Dated: December 19, 2016

Petitioner Federal Energy Regulatory Commission ("Commission" or "FERC") hereby opposes the December 7, 2016 Motion for Leave to File Brief of Amici Curiae Administrative Law Professors Jeffrey S. Lubbers, *et al.*, *FERC v. Powhatan Energy Fund, LLC, et al*., No. 3:15-cv-452 (2016), ECF No. 70 ("Motion").

"The Court has broad discretion in deciding whether to allow a non-party to participate as an *amicus curiae*," *Tafas v. Dudas*, 511 F. Supp. 2d 652, 659 (E.D. Va. 2007) (citations omitted), although in district court "the aid of *amicus curiae* may be less appropriate than at the appellate level where such participation has become standard procedure." *Bryant v. Better Bus. Bureau of Greater Maryland, Inc*., 923 F. Supp. 720, 727 (D. Md. 1996) (citations omitted). "[A] motion for leave to file an *amicus curiae* brief should not be granted unless the court deems the proffered information timely and useful." *Tafas*, 511 F. Supp. 2d at 659 (internal quotations, citations, and alterations omitted). The Court should deny the Motion.

The brief is not timely. The Parties extensively briefed the question of what procedures are required for this Court's de novo review under section 31(d)(3) of the Federal Power Act ("FPA"), 16 U.S.C. § 823b(d)(3)—first on December 31, 2015 (ECF Nos. 38, 39), and again on January 21, 2016 (ECF Nos. 52, 53). The Court conducted a hearing on the question on April 18, 2016. Transcript of Oral Argument, *FERC v. Powhatan Energy Fund, LLC, et al*., No. 3:15-cv-452 (Apr. 18, 2016), ECF No. 65. Notwithstanding a brief pause for settlement procedures before Magistrate Judge Novak which concluded on May 25, 2016 when the parties advised chambers that they had reached an impasse, the matter remains ripe for decision.[1] In fact, at the

[1] A further brief teleconference was held with Magistrate Judge Novak on May 31, 2016 at which he advised the parties that further settlement procedures may be productive following issuance of an order on FPA Section 31 procedures.

April 18, 2016 hearing, the Court emphasized the extent of the briefing and indicated that it had all the information it needed to rule on the question.[2]

Movants say nothing about the tardiness of their filing, much less to justify submitting their brief nearly *one year* after briefing on this issue commenced and nearly *eight months* after a hearing was held. Nor can they. In similar circumstances, District Courts frequently exercise their discretion to reject amicus briefs as untimely. *See Centeno-Bernuy v. Perry*, 302 F. Supp.2d 128, 131 n.1 (W.D.N.Y. 2003) (rejecting proposed amicus brief because "the hearing has been completed and the [relevant] preliminary injunction motion has been submitted for decision"); *O Centro Espirita Benficiente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp.2d 1271, 1274 (D.N.M. 2002) (denying as untimely a motion filed after multiple rounds of briefing and a hearing); *American Humanist Association v. Maryland-Nationals Capital Park*, 147 F. Supp. 3d 373, 389 (D. Md. 2015) (denying motion for leave to file amicus briefs, because "the issues have been comprehensively and fully briefed by all parties. . . . [and] there are no indications that the proposed memoranda would provide helpful legal analysis beyond the thorough job done by the parties' counsel."). By contrast, courts accepting amicus briefs over timeliness objections have noted that the briefs were proposed early enough in the process to be considered together with the party's argument on the issues to which they pertain. In *Tafas*, for example, the Court accepted the briefs of *amici* over one plaintiff's objection, "[b]ecause these amicus briefs were

[2] *Id*. at 86:19 – 87:22 ("I certainly have your arguments, and your many briefs, and your supplemental briefs . . . I'm going to consider everything. Everybody has had an opportunity to say their point, to rebut it, to add, even in this oral argument, and so I will consider the entirety of what's before me . . . . And so I will issue an order that carefully articulates my reading of how this statute is meant to be read, which I think is largely based on the language in the statute itself. . . . I will say, though, I have reviewed it carefully.")

filed a relatively short time after the case began," and "before the first hearing." 511 F. Supp. 2d at 660.

The brief is not useful. The proposed brief is based on a nearly identical brief in the *FERC v. Barclays* matter currently pending in the Eastern District of California. The *Barclays* court denied the motion without responsive briefing or oral argument because "[t]he parties have already provided the Court with sophisticated and thorough briefing on the pertinent issues. The Court does not believe that further briefing by the proposed amici would be helpful." Order, *FERC v. Barclays Bank, PLC*, No. 2:13-cv-2093-TLN-DB (E.D. Cal. Nov. 17, 2016), ECF No. 185, at 1. This Court should deny the present Motion for the same reason.

One of the traditional criteria of helpfulness—whether "existing counsel is in need of assistance," *Tafas*, 511 F. Supp.2d at 659 (quoting *Bryant*, 923 F. Supp. at 727)—is plainly not at issue here. Respondents have been ably represented by no fewer than nine attorneys from four large law firms. *See also*, ECF No. 65 at 88:1-3 ("Clearly, there are many of you working on this matter, and I appreciate your good work on behalf of your clients.").

The proposed amicus brief also does not provide useful legal analysis materially different from that contained in Respondents' own briefing. Movants largely repeat arguments already made and cite authorities already cited. For example, Movants present a nearly page-long block quote from an article by putative amicus William Funk that they contend "deserves a lengthy quotation." Proposed Brief at 5-6. But this very article has already been brought to the Court's attention in briefing and at oral argument. *See* ECF No. 38 at 4-5; ECF No. 53 at 6; ECF No. 65 at 17:4-16, 79:1-12, 85:14-22, 87:2-7.

Moreover, the Proposed Brief is unhelpful to the Court for other reasons. For example, Movants discuss legislative history for statutes not at issue in the current proceeding (*see*

Proposed Brief at 11-14), but ignore the interrelationship of the FPA's provisions and the regulatory scheme it establishes; offer unfounded speculation as to what "Congress clearly contemplated" in passing FPA section 31 (*id.* at 17); misstate the amount of civil penalties at issue in this case (*id*. at 22); misconstrue the findings of an Administrative Conference of the United States ("ACUS") Report (*compare* Proposed Brief at 7, 23-24, *with* ACUS Rec. 93-1, Use of APA Formal Procedures in Civil Money Penalty Proceedings, 58 Fed. Reg. 45,409, 45,410 (Aug. 30, 1993)); and mischaracterize the nature of the Commission's show cause proceeding and the administrative record created there (Proposed Brief at 10, 15-20). Perhaps most egregiously, Movants falsely state (Proposed Brief at 22) that Respondents "have not yet been offered the sort of evidentiary hearing (either before the Agency or in this Court) that is guaranteed by the Constitution before a significant money penalty can be assessed)." Respondents were offered just such a hearing under section 31(d)(2) of the FPA, 16 U.S.C. § 823b(d)(2), but affirmatively declined it.

Movants have no special interest in this case that would justify their input. As the First Circuit has explained, "a district court lacking joint consent of the parties should go slow in accepting . . . an amicus brief unless, as a party, although short of a right to intervene, the amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). Movants' only stated interest in the case is "a keen interest in . . . administrative law and policy." Motion at 3. Courts have rejected amicus briefs in similar circumstances. *See Am. Coll. of Obstetricians and Gynecologists Penna. Section v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983) (denying leave to file amicus in part because "[t]he law professors do not purport to represent any individual or organization with a legally cognizable interest in the subject matter at

issue, and give only their concern about the manner in which this court will interpret the law as the basis for their brief.");[3] *compare Washington Gas Light Co. v. Prince George's Cty. Council*, 2012 WL 832756, *3 (D. Md. March 9, 2012) (granting leave to file amicus to two Maryland counties that would be directly affected by the court's interpretation of state zoning laws).

As Judge Posner explained, "[t]he vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *see also*, Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 366 (2015) (recommending that courts "should exert some restrictions on amicus curiae participation" in light of the increased numbers of putative amici "eager for influence or the limelight"). Movants present this Court with just such a brief. It should not be allowed. If the Court does grant the Motion, Petitioner respectfully requests leave to submit a responsive brief which will demonstrate that Movants' brief is meritless, that its conclusions do not follow from its premises, and that it misconstrues or mischaracterizes much of the authority upon which it ostensibly relies.

[3] Although Movants repeatedly invoke the ACUS, (Proposed Brief at 4, *et seq*.), the ACUS is not a signatory to the Motion or the Proposed Brief. In fact, what the ACUS actually recommended was that (a) formal APA adjudication procedures be "available to parties whenever money penalties may be imposed by administrative agencies," and (b) agencies should prohibit ex parte communications in informal adjudications. ACUS Report on the *Use of APA Formal Procedures in Civil Money Penalty Proceedings* ("ACUS Report") at *2-3. ACUS Report, Rec. No. 93-1 (Adopted Jan. 10, 1993), *available at* https://www.acus.gov/recommendation/use-apa-formal-procedures-civil-money-penalty-proceedings. This recommendation is perfectly consistent with Petitioner's reading of the statute. *Compare* ECF No. 39 at 1-2, 4-6, 17-24 *and* ECF No. 52 at 1-3, 13 *with* ACUS Rec. 93-1, 58 Fed. Reg. at 45,410.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion for Leave to File Brief of Amici Curiae Administrative Law Professors Jeffrey S. Lubbers, *et al.* In the alternative, the Court should permit Petitioner to submit a responsive brief of no more than 20 pages.

Dated: December 19, 2015

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2016, I filed the foregoing Opposition to Notice of Motion and Motion for Leave to File Brief of Amici Curiae Administrative Law Professors, using the CM/ECF system, which will send a notification of such filing to counsel of record, including:

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