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

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| FEDERAL ENERGY REGULATORY COMMISSION,<br><br>Plaintiff,<br><br>v.<br><br>POWHATAN ENERGY FUND, LLC, et al.,<br><br>Defendants. | ) | Case No.: 3:15-CV-00452-MHL |

*DEFENDANTS' REPLY IN SUPPORT OF*
*MOTION TO DISMISS IN PART FIRST AMENDED COMPLAINT*

Jonathan T. Lucier (Va. Bar No. 81303)
WILLIAMS MULLEN
Williams Mullen Center
200 South 10th Street, Suite 1600
Richmond, VA 23219
(804) 420-6000
jlucier@williamsmullen.com

*Counsel for Powhatan Energy Fund, LLC*

Robert W. Warnement (Va. Bar No. 39146)
John N. Estes III (admitted *pro hac vice*)
Donna M. Byrne (admitted *pro hac vice*)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000
robert.warnement@skadden.com

Abbe D. Lowell (admitted *pro hac vice*)
Michael Bhargava (admitted *pro hac vice*)
NORTON ROSE FULBRIGHT
799 9th Street, N.W.
Washington DC 20001
(202) 662-0200
ad.lowell@nortonrosefulbright.com

*Counsel for Defendants Houlian Chen, HEEP Fund, Inc., and CU Fund, Inc.*

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*INTRODUCTION*

FERC urges an untenable view of how 28 U.S.C. § 2462 applies in federal district court actions under the "Alternate Option" in Federal Power Act ("FPA") § 31(d)(3). Under FERC's construction of § 2462, if a statute authorizes an agency to seek civil penalties for alleged statutory violations, and if the statute includes any type of prerequisite before the agency can pursue its court claim, then § 2462 affords the agency two separate five-year limitations periods, separated by an indefinite period in between. As discussed below, FERC's arguments in support of that position (and its disgorgement arguments) miss the mark by a wide margin. To capture a few highlights:

*First*, FERC inexplicably declines to mention to this Court a relevant point concerning the case FERC urges should govern here: *Federal Energy Regulatory Commission v. Silkman*, 177 F. Supp. 3d 683 (D. Mass. 2016) ("*Silkman I*"). FERC discusses *Silkman I* at length, *see* FERC Opp. at 6, 9, 12-13 (ECF No. 99), asserting that it presents the "rule" to follow for purposes of applying § 2462 in cases like the one at bar. *Id.* at 9. Buried in a footnote, *id.* at 6 n.3, FERC correctly states that *Silkman* was transferred to a different federal district court, and "[c]ross-motions for summary judgment are currently pending." FERC does not, however, explain what those motions are about.

And the subject matter is relevant. Those motions, by court order, seek a ruling "*on the statute of limitations issue*." *FERC v. Silkman*, Case No. 1:16-cv-00205-JAW, Order (D. Me. Jan. 29, 2018) (ECF No. 132) (emphasis added). FERC urges this Court to follow *Silkman I* on that issue. But the court now presiding over the *Silkman* case may well reach the opposite outcome, following the decision in *Federal Energy Regulatory Commission v. Barclays Bank PLC*, No. 2:13-cv-02093-TLN-DB, 2017 WL 4340258 (E.D. Cal. Sept. 29, 2017) ("*Barclays*"), rather than *Silkman I*.

The new court in *Silkman* already has diverged from *Silkman I* regarding the nature of FERC's FPA assessment process under the Alternate Path—in a decision this Court recently cited with approval. Mem. Op. at 29-30 (ECF No. 89) (*citing FERC v. Silkman*, 233 F. Supp. 3d 201 (D. Me. 2017) ("*Silkman II*"). And as we pointed out in our February 28, 2018 brief (ECF No. 96), the ruling by this Court and numerous others—that FERC cannot truncate a civil action by interjecting an extra-statutory show-cause-order process—is closely related to our argument here: that FERC cannot satisfy § 2462 by injecting that very same extra-statutory show-cause-order process. FERC's response is to deny that there is any relationship, but that *ipse dixit* lacks any rational basis.

*Second*, FERC errs in brushing aside the Supreme Court's decision in *Gabelli v. Securities and Exchange Commission*, 568 U.S. 442 (2013), as involving a different statute of limitations issue. *Gabelli*'s unanimous, full-throated reminder—that § 2462 exists to prevent the government from bringing civil penalty actions "at any distance of time," *id.* at 452—cannot be set aside so cavalierly because FERC's reasoning would do precisely what *Gabelli* forbids.

As we observed in our February 28, 2018 brief (at 11), by FERC's statute-of-limitations math, there is an initial five-year period, allegedly satisfied by the issuance of an order to show cause. After FERC issues its statutorily-required notice of the right to elect, if a target elects the Alternate Option, FERC is supposed to issue a penalty assessment order "promptly." Then, after waiting 60 days, FERC can file a court action. One might distill this into an overall limitations period amounting to (1) five years, plus (2) whatever period of time it takes FERC to issue a penalty assessment order "promptly," plus (3) another five-year period. But the requirement to act "promptly" carries no sanction if it is not followed.

FERC denies this makes the limitations period limitless, but its rationale is both wrong and absurd. According to FERC, if a potential target thinks FERC has not acted "promptly," the

target can file a mandamus action asking a federal district court to compel FERC to issue a penalty assessment order and file a court action. But a decision to prosecute an enforcement action generally is devoted to absolute agency discretion, and is therefore "presumptively unreviewable." *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985). Mandamus would not lie. *See In re City of Virginia Beach*, 42 F.3d 881, 884 (4th Cir. 1994). If it did, it would lie only after substantial delay. *Id.* at 885-86 (delay by FERC of four-and-one-half-years not unreasonable so writ of mandamus denied). And in any event, this entire notion is nonsensical. If the subject of a FERC enforcement investigation makes show-cause-order submissions and nothing happens, that is consistent with victory. Why would anyone in that posture go to court to try to require FERC to "promptly" assess penalties and then file a lawsuit? Seeking court intervention would require the potential target to argue that it has the "clear and indisputable" right, *id.* at 884, to be sued by FERC for civil penalties. That is absurd on its face.

*Third*, FERC's current position on § 2462 is different from what FERC argued before this Court in response to the defendants' 2015 motion to dismiss on the same issue. In 2015, FERC argued that *Gabelli* was distinguishable because of the "wholly different roles played by the judiciary" under the FPA versus the Investment Advisers Act at issue in *Gabelli*. FERC's Opp. to Mot. to Dismiss at 3 (ECF No. 29). FERC argued that "under the IAA it is the district court that determines liability and 'imposes' any penalty in the first instance, whereas under the FPA those decisions are made by the Commission, subject to district court *review*." *Id*. at 3 n.1 (emphasis in original). And that, FERC concluded, "*necessarily changes the act that ultimately tolls the statute*." *Id*. (emphasis added). But this Court rejected FERC's "assertion that [the] Court's review is limited to the so-called (but statutorily undefined and unaddressed) 'administrative record,'" and ruled that the defendants are "entitled to a trial *de novo* in the

district court," Mem. Op. at 27, 30. So FERC now claims that the nature of and statutory basis for the administrative "proceeding" do not matter for purposes of applying § 2462.

The correct answer flows directly from *Gabelli*'s instruction that the fundamental purpose of § 2462 is to require the government to commence an action or proceeding for civil penalties before memory fades and evidence recedes, and to "set a fixed date," five years from the alleged misdeeds, when civil penalty exposure ends. 568 U.S. at 448. Because the FPA permits the potential subject of penalties to choose between an administrative adjudication of liability or one in federal district court, and because the defendants here chose district court, FERC was required to commence this action within five years of the alleged violations. Nothing else satisfies the fundamental animating purposes of § 2462.

*Fourth*, FERC's plea for deference proves too much. According to FERC, it has discretion to adopt whatever procedures it deems appropriate to issue a penalty assessment order under FPA § 31(d)(3). And that discretion, according to FERC, includes the power to adopt procedures sufficient to satisfy the requirements § 2462, even though FPA § 31(d)(3) does not grant FERC authority to decide the merits of anything. To state that argument is to refute it. Congress cannot possibly have intended to give agencies a blank check to invent whatever extra-statutory procedures they desire as a means of satisfying § 2462's five-year clock. And even putting aside the broader question whether deference can apply in a *de novo* case, FERC cannot possibly merit deference on the meaning of § 2462.

*Finally*, FERC fails to show its disgorgement claims are either timely or authorized.

## *ARGUMENT*

### *I. FERC FAILS TO ESTABLISH ITS CLAIMS ARE TIMELY*

#### *A. FERC Errs in Dismissing* Gabelli

In *Gabelli*, the Supreme Court examined the meaning of § 2462, and when a claim "first accrue[s]" thereunder. The specific question presented in *Gabelli* was whether the "discovery rule" tolled the statute of limitations, and we have never argued that the instant case involves a discovery rule issue. But *Gabelli* still bears directly on this case.

*Gabelli* speaks forcefully about § 2462's purpose, which is to "set a fixed date" when "exposure to the specified Government enforcement effort ends." 568 U.S. at 448. "[G]rafting the discovery rule onto § 2462" conflicts with that purpose because "[i]t would leave defendants exposed to Government enforcement action not only for five years," but for "an additional uncertain period into the future." *Id.* at 452. As depicted in the chart below, that also is true of FERC's interpretation of § 2462, which would at least double the limitations period, and possibly delay it much further, depending on how "promptly" FERC acts:

| | **FERC's 1st § 2462 Clock** | | ***Period Not Governed by Any Statute of Limitations*** | | | **FERC's 2nd § 2462 Clock** | |
|---|---|---|---|---|---|---|---|
| **Trigger Event** | Alleged Violations ("X") | FERC-Created Show Cause Order (with or without Statutory Notice of Proposed Penalty) | *Notice of Proposed Penalty Triggers Statutory 30 Days to Elect FPA § 31(d) Procedures (statutory and definite)* | *If § 31(d)(3) Alternate Option, FERC "promptly" issues Assessment Order (statutory and indefinite)* | *FERC issues Assessment Order, initiating 60-day period to pay (statutory and definite)* | End of 60-day period to pay ("Y") | FERC Commences Federal District Court Action |
| **Running of FERC's Two Claimed § 2462 Clocks** | X (1st § 2462 clock starts ticking) | FERC claims timely if commenced within 5 years of X | *§ 2462 not applicable* | | | Y (2nd § 2462 Clock starts ticking) | FERC claims timely if commenced within 5 years of Y |

FERC's unlimited limitations period cannot be squared with *Gabelli*.[1]

It also bears noting that although FERC, in the instant case, issued the statutory notice of proposed penalty as part of a non-statutory show cause order, there is no requirement to do so. FERC claims its show cause order commenced an "administrative adjudication required by the FPA." FERC Opp. at 9-10. But no show cause order or proceeding is mentioned anywhere in FPA § 31(d)(3); none is mentioned in the FERC regulations implementing § 31(d)(3) (discussed *infra*); and none is mentioned in the description of FPA § 31(d)(3) set forth in FERC's *Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006) ("Assessment Procedures Policy"). Because the statute says nothing about show cause orders, it does not dictate their timing, and there is no express requirement that they be issued along with the statutory notice. Thus, under FERC's reading of the statute, the agency could issue a show cause order at any point within five years of the alleged violations, and allegedly commence what FERC now labels a "proceeding" within the meaning of § 2462. It then would have an unlimited time to conduct that proceeding, which would not be subject to *any* limitations period. If FERC issued the statutory notice of proposed penalty at the end of that "proceeding" (rather than with the show cause order), only then would the non-binding requirement for a prompt assessment come into play. Even *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987), which FERC relies upon heavily, does not countenance that outcome.

Apparently having no valid response, FERC asserts that the threat of a government enforcement action is not indefinite because the would-be subject of the penalty can file a

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[1] FERC claims, without support, that the statutory requirement to issue an assessment order "promptly" affects the time it would take to bring a court action. FERC Opp. at 16. But courts have held otherwise. *See Office of Foreign Asset Control v. Voices in the Wilderness*, 382 F. Supp. 2d 54, 59-61 (D.D.C. 2005) (*citing Brock v. Pierce Cty.*, 476 U.S. 253, 262-63 (1986)).

mandamus action to force the agency to commence a district court action. But "an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion." *Heckler*, 470 U.S. at 831. Mandamus would not lie as a matter of law. *See In re City of Virginia Beach*, 42 F.3d at 884. And even if that were not the case, FERC's delay would have to last quite a few years to prompt judicial action. *Id.* at 885-86 (delay of over four years insufficient to be action unreasonably delayed).

In any event, FERC's argument on this point makes no sense. The only way to be free from untimely FERC claims for civil penalties is to file a mandamus action asserting that FERC has unreasonably delayed suing the target for civil penalties? The target not only has no "clear and indisputable right" to that discretionary act, *id.* at 884, but opposes it in the first place. FERC's resort to this absurd argument only serves to highlight our point that FERC's interpretation of § 2462 would leave FERC ungoverned by any binding time limit. And that cannot be the law.

*Gabelli* also is instructive because it disposes of FERC's contention that § 2462 should be construed in FERC's favor. FERC purports to rely on "the long-enshrined rule" that statutes of limitations "are intended to be strictly construed in favor of the government." FERC Opp. at 21. FERC cites five cases, but none involve § 2462, whose *purpose* is to constrain the government.

One of those cases, *Schafer v. Astrue*, 641 F.3d 49 (4th Cir. 2011), does not involve any statute of limitations at all. There a widow sought review of a Social Security Commissioner's decision denying survivorship benefits to her son, who was conceived through in vitro fertilization after the father was deceased. The case discusses "time limitations" imposed "on posthumously conceived children's inheritance rights," *id.* at 59, but there is no discussion of any statute of limitations; nor is there any discussion of statutes of limitation being construed in the government's favor. It is hard to imagine a case ranging farther afield from this one.

The other cases FERC cites do involve disputes about a statute of limitations, but none of them involve § 2462, and none of them involve government claims for civil penalties.[2] Those cases thus fail to contravene *Gabelli's* full-throated emphasis on the need to strictly enforce statutes of limitations on government actions for civil penalties. *See* 568 U.S. at 452 (quoting and discussing "Chief Justice Marshall['s] forceful language in emphasizing the importance of time limits on penalty actions").

*Gabelli* also refutes FERC's claim that the Court should toll § 2462's application based on two brief time periods that the FPA specifies: (1) a 30-day period for electing penalty assessment procedures (§ 31(d)(1)); and (2) a 60-day period, following the penalty assessment, during which the subject may pay the penalty before FERC files a federal district court action (§ 31(d)(3)(B)). *Gabelli* states:

> As we held long ago, the cases in which "a statute of limitation may be suspended by causes not mentioned in the statute itself . . . are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it." *Amy v. Watertown (No. 2)*, 130 U. S. 320, 324 [] (1889) (internal quotation marks omitted).

568 U.S. at 454. In *Barclays*, the court cited this very language when it rejected FERC's request for tolling in that case, stating it was "directly contrary to the Supreme Court's admonition." *Barclays*, 2017 WL 4340258, *14; *see also 3M Co. (Minn. Mining & Mfg.) v. Browner*, 17 F.3d

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[2] *See Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 391-96 (1984) (construing exception to three-year period of limitations for assessment of income taxes for false or fraudulent tax returns); *E.I. DuPont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924) (action by Director General of Railroads to recover "demurrage charges" on behalf of government "subject to no time limitation"); *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 734-35 (D.C. Cir. 2005) (order directing federal land lessees to pay additional royalties was not subject to statute of limitations on government actions to recover money damages), *aff'd sub nom. BP Am. Prod. Co. v. Burton* 549 U.S. 84 (2006); *FDIC v. Former Officers & Dirs. of Metro. Bank*, 884 F.2d 1304, 1307 (9th Cir. 1989) (addressing whether FDIC claims associated with alleged mismanagement of loan portfolios were subject to 3-year statute of limitations for money damage claims based in tort or 6-year limit for claims based in contract).

1453, 1461 (D.C. Cir. 1994) (rejecting argument that discovery rule tolls § 2462's limitations period as inconsistent with the statute, and concluding the court's role was limited to interpreting the statute, "not creating some federal common law" for a limitations statute applicable "to the entire federal government"). We submit that the same ruling is appropriate here.

### *B. FERC's Reading of* Meyer *is Not Tenable*

#### *1.* Meyer *Appropriately Distinguishes Between Statutory Prerequisites That Are "Adjudicative" and "Administrative Decisions to Bring Suit"*

FERC repeatedly asserts that, under *Meyer*, a court does *not* need to consider the nature of the administrative "proceeding" that supposedly stops the first of the two limitations clocks that *Meyer* contemplates. *See* FERC Opp. at 8 ("[T]he *Meyer* Court did not evaluate or place any requirements on the sufficiency of a 'proceeding' for purposes of § 2462."). FERC cites a district court case as support for this position, *United States v. Worldwide Indus. Enters., Inc*., 220 F. Supp. 3d 335 (E.D.N.Y. 2016). Both FERC and the *Worldwide* court misread *Meyer*.

In *Meyer*, unlike in this case, "[b]oth parties concede[d] that, as applied to the [Export Administration Act, or "EAA"], [the § 2462 statute of limitations] at least requires that any administrative action aimed at imposing a civil penalty must be brought within five years of the alleged violation." 808 F.2d at 914 (footnote omitted). The parties in *Meyer* thus agreed that the EAA provided for an ALJ hearing, and agreed it was initiated within five years of the alleged violation. *Id*. The question in *Meyer* was whether, under those circumstances, § 2462 affords an additional five-year limitations period. *Id*. *Meyer* concluded it does, but *only if* "an administrative penalty is a statutory prerequisite to the bringing of an action judicially to enforce such penalty." *Id*. at 922. And *Meyer* was specific about the types of statutory prerequisites that do or do not matter for purposes of applying § 2462.

The FPA's penalty assessment procedures are different from those at issue in *Meyer*. The FPA does not provide for FERC to adjudicate alleged penalty liability in cases where the Alternate Option for district court procedures governs. In those cases, FERC's role is limited to promptly assessing the penalty, and the court is charged with adjudicating the case.

Given that FERC is asking the Court to apply *Meyer*, it cannot colorably avoid *Meyer*'s bright dividing line between "prosecutorial decisionmaking" and "mandatory administrative adjudication." *Id.* at 920-21. Even the court in *Silkman I* acknowledges that *Meyer* requires consideration of the nature of the statutory prerequisites for imposing civil penalties:

> In *Meyer*, the First Circuit contrasted the "adjudicatory administrative proceedings" required prior to suit under the Export Administration Act—after which a new five year limitations period for the suit in federal court commenced—with "prosecutorial determinations" made prior to suit. 808 F.2d 912 at 920. Where only a prosecutorial determination is needed before bringing suit, only the original five–year limitations period, dated from the violation, applies. Such determinations are "nothing more or less than decisions to bring suit." *Id.*

*Silkman I*, 177 F. Supp. 3d at 700. FERC's assertion that this distinction was not fundamental to *Meyer*'s outcome is not credible.

*2. The "Collection Action" and Ripeness Cases FERC Cites Do Not Apply*

FERC seeks to draw support from a number of cases which, like *Meyer*, construe § 2462 in the context of a collection action. Because these cases involved statutorily authorized adjudication within the five-year limitations period, followed by a subsequent collection action, and because this action is *not* a collection action, *see* FPA 31(d)(5), 16 U.S.C. § 823b(d)(5), these cases do not support FERC's position that the applicable limitations period only began running after the 60-day period following the May 29, 2015 assessment order.

For example, in *United States v. Godbout-Bandal*, 232 F.3d 637 (8th Cir. 2000), there was a hearing before an ALJ, judicial review by a federal appellate court, and a petition for certiorari to the Supreme Court, which was denied. The FDIC later commenced a district court

action to enforce the penalty. The Eighth Circuit adopted the *Meyer* analysis, holding that "where an Act which authorizes the assessment of a civil penalty also provides for an administrative procedure for assessing that penalty, the statute of limitations period set out in § 2462 will not begin to run until that administrative process has resulted in a final determination." *Id.* at 640 (footnote omitted).

Unlike in *Godblout-Bandal*, there has been no "final determination" in the instant case. FERC's assessment order has no independent legal significance, does not affix rights, and has no binding force and effect. If it did, the defendants would have had the right to seek judicial review of that order. It is a bedrock principle of administrative law that, absent a clear congressional statement to the contrary, a party aggrieved by agency action has the right to judicial review. *See, e.g.*, 5 U.S.C. § 702; 16 U.S.C. § 825*l*. The assessment order, by its terms, was not subject to agency rehearing, Am. Compl. Ex. 1 at P 193, and the defendants had no right to seek judicial review. *Godblout-Bandal* and other collection action cases thus do not advance FERC's position.[3]

FERC also cites several cases addressing the doctrine of ripeness, which "seeks to separate matters that are premature" from those that are "appropriate for federal court action." *TOTAL Gas & Power N. Am., Inc., v. FERC*, 859 F.3d 325, 333 (5th Cir. 2017), *petition for cert. filed*, 86 U.S.L.W. 3369 (U.S. Jan. 5, 2018). FERC asserts that these cases support its view that FERC's civil penalty claims did not accrue until 60 days after it issued the penalty assessment order. FERC is wrong.

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[3] *See also SEC v. Mohn*, 465 F.3d 647 (6th Cir. 2006) (civil penalty collection action following agency adjudication and opportunity for appeal, where parties agreed the government's claim accrued "once the underlying administrative action establishing liability becomes final" and question for court was *when* the SEC's administrative action became final).

The plaintiff in *TOTAL* was the subject of a FERC enforcement investigation for alleged violations of the Natural Gas Act ("NGA"). And the NGA and FPA have different penalty assessment schemes—notwithstanding FERC's claim that they are "parallel, in relevant part," FERC Opp. at 6. NGA § 22(b) provides, in relevant part, that "[t]he penalty shall be assessed by the Commission after notice and opportunity for public hearing." 15 U.S.C. § 717t-1(b). FPA § 316A provides, in relevant part, that "[s]uch penalty shall be assessed by the Commission, after notice and opportunity for public hearing, *in accordance with the same provisions as are applicable under section 31(d) in the case of civil penalties assessed under section 31*." 16 U.S.C. § 825*o*-1 (emphasis added). FPA § 316A therefore expressly provides that the required "notice and opportunity for public hearing" is implemented by the detailed procedures in FPA § 31(d). The NGA does not have a comparable provision, which is why FERC concluded it would provide for an administrative penalty assessment process under the NGA, with no option for a district court action. Assessment Procedures Policy, 117 FERC ¶ 61,317 at P 6.

In *TOTAL*, while the investigation was ongoing, and before FERC issued any show cause order or penalty assessment, *TOTAL* filed a federal district court declaratory judgment action, asking the court to declare that FERC was required to bring an action in federal district court to pursue the penalty claim, and that FERC was not authorized to conduct an administrative assessment. 859 F.3d at 330-32. The district court granted FERC's motion to dismiss for lack of subject matter jurisdiction, finding TOTAL's claim was not ripe on three separate grounds. *Id.* at 331. The Fifth Circuit affirmed. But *TOTAL* had *nothing* to do with any statute of limitations.

FERC also purports to rely on another, equally inapposite ripeness case, *Franks v Ross*, 313 F.3d 184 (4th Cir 2002). The question in *Franks* was whether a citizen suit against a county was barred by the applicable statute of limitations, which was *not* § 2462. The court was called upon to identify "when the final agency action occurred that gave rise to th[e] controversy." 313

F.3d at 195. That is not the issue here. The defendants here are not seeking to challenge final agency action. Instead, FERC has the burden of making its case before this Court in accord with the Federal Rules of Civil Procedure and the Federal Rules of Evidence, and the Court is charged with reviewing "the law and the facts involved" in order to reach a "judgement." *See generally* FPA § 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B). Under § 2462, FERC was required to bring this action within five years of the alleged violations. The ripeness cases FERC cites fail to refute that conclusion.

### *C. FERC Cannot Bring This Matter Within* Meyer*'s Framework by Inventing Extra-Statutory Processes and Applying Convenient Labels*

While maintaining that the outcome in *Meyer* was not dependent on the nature of the statutory prerequisites that preceded the federal district court action, FERC at the same time tries to convince the Court that the FPA requires FERC to adjudicate the defendants' alleged penalty liability, even when the defendants elect the Alternate Option for a federal district court action. According to FERC, "[t]he Federal Power Act . . . requires the Commission to undertake a proceeding to adjudicate and impose penalties." FERC Opp. at 1; *see also id*. (referring to "the required administrative proceeding"); *id*. at 3 ("the Commission's assessment proceeding is precisely the type of assessment proceeding contemplated by *Meyer* and its progeny"); *id*. at 9-10 ("The Commission could not have brought suit against Defendants without first completing the necessary *administrative adjudication required by the FPA*.") (emphasis added). That claim has no basis in the FPA, no basis in the regulations FERC promulgated to implement FPA § 31(d), and no basis in FERC's Assessment Procedures Policy.

We begin with the FPA. Under the Alternate Option, the statute never mentions any administrative "hearing" or "proceeding." *See* FPA 31(d)(3), 16 U.S.C. § 823b(d)(3). Instead, it requires FERC to commence an "action" in federal district court. As this Court has observed, the

Alternate Option "includes no reference to an 'administrative record,' either expressly . . . or implicitly," Mem. Op. at 22, provides "*no additional factfinding*," and affords the subject "'no authority to compel the production of evidence or testimony,' nor can the subject 'compel any witness to give an affidavit [] or a deposition, or . . . submit to cross-examination." *Id.* at 24 (*citing FERC v. Barclays Bank PLC*, 247 F. Supp. 3d 1118, 1121 n.7, 1129 (E.D. Cal. 2017)).

Notwithstanding what FPA § 31(d)(3) does, and does not, authorize, FERC suggests the Court should focus on a different section of the FPA. Citing FPA § 316A, 16 U.S.C. § 825*o*-1(b), FERC asserts that "[t]he FPA requires a proceeding: it requires that the Commission provide 'notice and opportunity for public hearing' prior to any civil penalty assessment." FERC Opp. at 17. There are at least two problems with this argument.

First, this is a partial quote from FPA § 316A, and it leaves out critical statutory language (quoted in full elsewhere in FERC's brief). FPA § 316A authorizes civil penalties for violations of FPA Part II, and incorporates the penalty assessment procedures of FPA § 31(d):

> Such penalty shall be assessed by the Commission, *after notice and opportunity for public hearing, in accordance with the same provisions as are applicable under section 31(d) in the case of civil penalties assessed under section 31.*

16 U.S.C. § 825*o*-1(b) (emphasis added). The "notice and opportunity for hearing" language in § 316A therefore is not a separate statutory requirement mandating that FERC hold a hearing before assessing a penalty. It is, instead, the same hearing provided for under the Default Option and Alternate Option. And under the Alternate Option, it occurs before this Court.

In fact, FERC has told this Court that § 316A's "opportunity for public hearing" requires FERC to provide the *opportunity* for an ALJ hearing, emphasizing the opportunity, not the hearing:

> [The FPA] guarantees formal adjudication for all respondents unless they "affirmatively" and "in writing" opt out of such adjudicative processes, and provides

> for penalty assessment after only the "*opportunity* for public hearing." 16 U.S.C. § 825*o*-1 (emphasis added).

Pet'r Suppl. Mem. of Points and Authorities at 13 (ECF No. 52) (footnote omitted). The FPA's plain language, and FERC's past statement, refute FERC's argument here that the FPA requires the agency to conduct a hearing before assessing a civil penalty under the Alternate Option.[4]

FERC's own regulations also contradict its argument. Congress enacted FPA § 31 and granted FERC civil penalty authority for violations of FPA Part I in 1986, Electric Consumers Protection Act, Pub. L. No. 99-495, 100 Stat. 1243 (1986). Thereafter, FERC instituted a formal rulemaking to promulgate regulations to implement FPA § 31. *Procedures for the Assessment of Civil Penalties Under Sec. 31 of the Fed. Power Act*, Order No. 502, FERC Stats. & Regs. ¶ 30,828 (1988). Those regulations are set forth in 18 C.F.R. §§ 385.1501–1511, and they "apply to and govern proceedings for the assessment of civil penalties pursuant to section 31 of the [FPA]." 18 C.F.R. § 385.1501. There are separate rules governing the (1) required notice of proposed penalty (Rule 1506); (2) election of procedures (Rule 1507): (3) "Commission administrative procedures" option (Rule 1508); and (4) "District Court procedures" option (Rule 1509). Notably, Rule 1509 says nothing about an administrative hearing or proceeding: "After receipt of the notification of election to apply the provisions of this section pursuant to Rule 1507 [election of procedures], the Commission will promptly assess *the penalty it deems appropriate*, in accordance with Rule 1505," which sets forth "factors" for determining "the nature and

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[4] *See also Consumers Power Co.*, 68 FERC ¶ 61,077 at 61,380 (1994) ("The [FPA] requires many procedures to be used in making an assessment and gives to the Commission only limited discretion in choosing them"; "[Section 31] requires, for example, the issuance of notice to the party assessed, *the opportunity for a hearing on the record before an Administrative Law Judge or a trial de novo in federal court*, and the use of certain standards by the Commission in determining the appropriate amount of the penalty.") (emphasis added).

seriousness of the violation," as required by § 31(c). *Id.* §§ 385.1505, 385.1509(a) (emphasis added). In contrast, Rule 1508 [addressing the Default Option] states:

> (a) If the respondent is not entitled to an election pursuant to Rule 1506(b)(3)(ii) or does not timely elect to have the procedures of Rule 1509 apply, *the Commission will commence a proceeding* in accordance with the provisions of subpart E of this chapter.
>
> (b) The Commission's Rules of Practice and Procedure in part 385 of this chapter will apply, as appropriate, to any evidentiary proceeding to assess a civil penalty.

*Id.* § 385.1508(a)-(b) (emphasis added). Thus, according to FERC regulations, the only agency "proceeding" contemplated after the election of procedures is the administrative hearing before an ALJ.[5] *See also id.* § 1b.19 (referencing an administrative "proceeding" or a "civil action").

Finally, FERC's Assessment Procedures Policy contradicts its assertion that the FPA requires FERC to undertake proceedings to adjudicate and impose penalties. FERC cites its Assessment Procedures Policy (with no pin cite) in support of the statement that "the Commission has concluded that FPA 31(d)(3) requires an adjudicative paper hearing before it can apply the statutory criteria and assess a civil penalty." FERC Opp. at 19. But the Assessment Procedures Policy does not say anything like that. The word "adjudicative" does not appear anywhere in the Policy Statement. The term "paper hearing" appears seven times, all regarding potential procedures for an *NGA* civil penalty assessment. In contrast, the procedures under § 31(d)(3) are described over ten times as entailing an "immediate penalty assessment."

Apparently undeterred by the fact that its present position is contradicted by the FPA's plain language, its own implementing regulations, and its own Assessment Procedures Policy, FERC argues that the FPA requires an adjudicative proceeding because the statute uses the word

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[5] FERC has taken the position that those regulations apply only in cases involving violations of FPA Part I. Assessment Procedures Policy, 117 FERC ¶ 61,317 at P 4 n.12. But that does not change the fact that FERC promulgated those regulations through formal rulemaking to implement FPA 31(d), the requirements of which are at issue here.

"order," and this purportedly demonstrates that Congress intended to require an adjudicative proceeding. FERC Opp. at 18. That argument lacks merit. Where Congress has granted the subject of the proposed penalty the right to elect between an administrative adjudication or one in federal district court, it is not credible to suggest that FERC has implied authority to interject a hearing of its own design, in a single stroke allegedly satisfying the limitations period in § 2462, while also at least doubling it for purposes of the required court action.

FERC further argues that the FPA requires consideration of "mandatory statutory factors" for determining the civil penalty amount, and that doing so in a manner that survives "arbitrary and capricious" review "necessarily mandates a proceeding that allows for a detailed assessment of the relevant facts and law." FERC Opp. at 17. But that argument is badly mistaken. There *is* no arbitrary and capricious judicial review in an Alternate Path case. Instead, FERC must prove its case like a normal litigant.[6]

*D. FERC Is Not Entitled to* Chevron *Deference*

FERC errs in claiming deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). That case ruled that courts must defer to an agency's reasonable interpretation of an ambiguous statute to which it has been delegated the authority to speak with the force of law. *Chevron* instructs that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id*. at 843-44. In such cases, an agency determination

[6] FERC claims that *Clifton Power Corp. v. FERC*, 88 F.3d 1258 (D.C. Cir. 1996), supports its "arbitrary and capricious" point. To the contrary, it establishes our contrary point. *Clifton* involved the FPA's *Default* Option, *not* the Alternate Option. The alleged violations in that case were adjudicated before a FERC ALJ. An arbitrary and capricious standard applied in that case on judicial review before the D.C. Circuit. So *Clifton* does not support FERC's claim that the FPA requires an agency hearing under the Alternate Option. In fact, *Clifton* expressly refutes that reading of the FPA: "In the alternate route, the Commission promptly assesses a penalty *without a hearing*. § 823b(d)(3)(A)." 88 F.3d at 1263-64 (emphasis added).

will be "given controlling weight unless . . . arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. FERC's claim for *Chevron* deference fails here for a number of reasons.

First, while the Court need not reach the issue, deference does not apply in a de novo review case.

Second, FPA § 31(d)(3) is not ambiguous and FERC's interpretation is manifestly contrary to the statute. *See, e.g., Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 383 (4th Cir. 2004) (no *Chevron* deference where statute was "not ambiguous"). FPA § 31(d) empowers the potential defendant to choose an administrative assessment or a court action. Because this right is unambiguous, and there is no indication Congress delegated authority to FERC to interpret this provision in a way that diminishes the defendants' rights, the statute leaves no room for FERC to "interpret" § 31(d)(3) as requiring "an adjudicative paper hearing" (FERC Opp. at 19). *See, e.g., A.T. Massey Coal Co. v. Holland*, 472 F.3d 148, 166-67 (4th Cir. 2006) ("An agency may try to create the appearance of delegation," but "delegation must appear from the statute itself, not from the agency's actions."). Because this Court will adjudicate the defendants' alleged civil penalty liability, this is the only action or proceeding that matters for purposes for § 2462.

Third, while FERC purports to claim deference to determine whether § 31(d)(3) requires a pre-assessment proceeding, the practical implication is that FERC is seeking deference for its view of what qualifies as a "proceeding" within the meaning of § 2462. FERC has no valid claim to deference on that question. *See, e.g., Verizon*, 377 F.3d at 383 (no *Chevron* deference "when the ultimate question is about federal jurisdiction").

Fourth, "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice" do not receive *Chevron* deference." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988). As demonstrated above, FERC's claim that the FPA's

Alternate Option in § 31(d)(3) requires a hearing has no support in the plain language of the FPA, nor in the regulations that implement § 31(d), nor in FERC's Assessment Procedures Policy. Moreover, interpretations that "lack the force of law" are not entitled to deference, *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000), and FERC has not pointed to any "interpretation" of required procedures under § 31(d)(3) that merits *Chevron* deference.

## II. *FERC FAILS TO ESTABLISH THAT ITS DISGORGEMENT CLAIMS ARE AUTHORIZED AND TIMELY*

FERC argues that FPA § 31(d)(3)(B) does not "limit the Court's inherent authority to fashion appropriate equitable relief in this matter." FERC Opp. at 27. We disagree. The statute is express in describing the Court's jurisdiction, and it does not extend to the equitable remedies FERC requests: "The court . . . shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in Part, such [civil penalty] assessment." 16 U.S.C. § 823b(d)(3)(B).

We also disagree that seeking joint and several liability for disgorgement is not punitive. Under *Kokesh v. Securities and Exchange Commission*, a remedy that is not "solely" remedial, but also serves retributive or deterrent purposes, "is punishment." 137 S. Ct. 1635, 1645 (2017). Because joint and several liability does more than "return[] the defendant to the place he would have occupied," *id.* at 1644, it is a punishment and subject to § 2462's limitations period.

In addition, FERC did not respond to our assertion that disgorgement is a "forfeiture" that is expressly covered by § 2462. The Eleventh Circuit agreed with that reading in *Securities and Exchange Commission v. Graham*, 823 F.3d 1357 (11th Cir. 2016). FERC has not explained why this Court should reach a different conclusion.

*CONCLUSION*

For the reasons set forth here and in the Defendants' Motion to Dismiss in Part the First Amended Complaint, we respectfully request that the Court grant the relief requested therein.

Respectfully submitted,

/s/

Jonathan T. Lucier (Va. Bar No. 81303)
WILLIAMS MULLEN
Williams Mullen Center
200 South 10th Street, Suite 1600
Richmond, VA 23219
(804) 420-6000
jlucier@williamsmullen.com

*Counsel for Powhatan Energy Fund, LLC*

Robert W. Warnement (Va. Bar No. 39146)
John N. Estes III (admitted *pro hac vice*)
Donna M. Byrne (admitted *pro hac vice*)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000
robert.warnement@skadden.com

Abbe D. Lowell (admitted *pro hac vice*)
Michael Bhargava (admitted *pro hac vice*)
NORTON ROSE FULBRIGHT
799 9th Street, N.W.
Washington DC 20001
(202) 662-0200
ad.lowell@nortonrosefulbright.com

*Counsel for Defendants Houlian Chen, HEEP Fund, Inc., and CU Fund, Inc.*

*CERTIFICATE OF SERVICE*

I hereby certify that on April 4, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to counsel receiving notices in this matter, including the following counsel of record:

Samuel G. Backfield, Esq.
Daniel T. Lloyd, Esq.
Lisa Owings, Esq.
Elizabeth K. Canizares, Esq.
Federal Energy Regulation Commission
888 1st St., N.W.
Washington, DC 20426
Samuel.Backfield@ferc.gov
Daniel.Lloyd@ferc.gov
Lisa.Owings@ferc.gov
Elizabeth.Canizares@ferc.gov

/s/

Robert W. Warnement (Va. Bar No. 39146)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7507
robert.warnement@skadden.com

*Counsel for Defendants Houlian Chen, HEEP Fund, Inc., and CU Fund, Inc.*