Record No. 18-2326

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL ENERGY REGULATORY COMMISSION, Petitioner-Appellee,	)	On Appeal from the United States District Court for the Eastern District of Virginia
v.	)	
POWHATAN ENERGY FUND, LLC, et al., Respondent-Appellants.	)	

REPLY BRIEF OF APPELLANTS

Patrick R. Hanes
WILLIAMS MULLEN
Williams Mullen Center
200 South 10th Street, Suite 1600
Richmond, VA 23219
(804) 420-6000
phanes@williamsmullen.com

Counsel for Appellant Powhatan Energy Fund, LLC

John N. Estes III
Donna M. Byrne
Jonathan Marcus
Juliana Brint
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000
john.estes@skadden.com
donna.byrne@skadden.com
jonathan.marcus@skadden.com
juliana.brint@skadden.com

Abbe David Lowell
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006-3817
(202) 282-5000
adlowell@winston.com

Counsel for Appellants Houlian Chen, HEEP Fund, Inc., and CU Fund, Inc.

April 17, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ADMINISTRATIVE ORDERS

STATUTES AND REGULATIONS

INTRODUCTION

FERC's principal argument for upholding the district court's ruling—like the ruling itself—fails to come to grips with the Supreme Court's holding that the statute of limitations for enforcing civil penalties, 28 U.S.C. § 2462, imposes a *fixed*, five-year time limit. *Gabelli v. SEC*, 568 U.S. 442, 448-49 (2013). The *Gabelli* Court established that fixed time limit by construing "claim[s]" under § 2462 to "first accrue[]" when "a defendant's allegedly fraudulent conduct occurs." *Id.* FERC's argument—that its claim against appellants for allegedly violating the Federal Power Act ("FPA") did not "accrue[]" until 60 days after it assessed a penalty—disregards § 2462's plain language as construed in *Gabelli*. Indeed, FERC effectively concedes that, under the district court's approach, § 2462 imposes *no time limit* for filing FERC's district court action (offering instead the ill-conceived proposal of a potential defendant seeking judicial relief for unreasonable agency delay). That result flies in the face of *Gabelli* and the core purpose of statutes of limitations, which require diligence by plaintiffs to promote "repose, elimination of stale claims, and certainty." *Id*. at 448.

Recognizing that its reading of § 2462 provides no protection to those who select district court adjudication of a penalty assessment under the FPA's "Alternate Option," FERC offers reasons this Court purportedly should not be concerned. But none of the reasons FERC offers—including that FERC can be

trusted to pursue its claims "expeditiously," FERC Br. 33—justify nullifying § 2462's fixed five-year limit.

FERC's alternative argument—that its FPA claim accrues at the time of the alleged violations, but FERC's non-statutory "order to show cause" commences an "action, suit or proceeding for the enforcement" of civil penalties—similarly contravenes § 2462's plain meaning and purpose. Contrary to FERC's protestations, the show-cause-order process—which the FPA neither contemplates nor requires, which has none of the hallmarks of an adversarial adjudication, and which does not result in a final or binding determination—does not constitute an "action, suit or proceeding" under § 2462. And FERC's alternative position also would impose *no time limit* for initiating its district court action. This Court should thus reject FERC's show-cause-order argument as a fig leaf designed to obscure that its alternative position—no less than its principal position—would allow FERC to delay indefinitely appellants' right to a district court adjudication of FERC's FPA claim.

Ultimately, FERC's position rests on the view that it is different from other federal agencies subject to § 2462 because the conduct it investigates is "complex," FERC Br. 20, and potential violations are "serious," *id*. at 27. FERC's assertions provide no basis to distinguish it from other civil enforcement agencies that similarly police complex markets for potentially serious violations. And even if

FERC is different, Congress did not consider that sufficient to justify a separate, longer statute of limitations for FPA claims. Unless and until Congress does so, FERC, like its civil enforcement agency cohorts, must comply with § 2462's five-year limitations period.

Because the district court decision effectively abolishes time limits on civil penalty actions under the FPA's Alternate Option and allows FERC to pursue untimely claims against appellants, this Court should reverse.

I. FERC'S PRINCIPAL ARGUMENT—AND THE DISTRICT COURT'S RULING—WOULD EVISCERATE THE STATUTE OF LIMITATIONS IN § 2462

A. FERC Has No Answer to the Fact that the District Court's Ruling Creates an Open-Ended Statute of Limitations

In arguing that its claim for civil penalties for alleged FPA violations did not "first accrue[]"—and thus § 2462's five-year statute of limitations did not begin to run—until 60 days after the Commission issued its penalty assessment, *FERC II* at 13, JA 384, FERC refuses to acknowledge the fatal flaw in the district court's decision. While insisting that "the Commission has no authority whatsoever to hold anyone 'forever liable,'" FERC Br. 20, FERC defends a position that would allow it to do exactly that. Under the district court's decision, there is no restriction on the amount of time that may elapse between the alleged violations and the date when FERC's claim "first accrue[s]" and the limitations period begins under § 2462. Instead of confronting this, FERC argues that (1) *Gabelli*'s

interpretation of § 2462 is irrelevant, *id.* at 28-30; and (2) the FPA's requirement for FERC to "promptly assess" a penalty curbs FERC's ability to endlessly delay filing suit, *id.* at 31-33. Neither contention is well-founded and neither refutes the fact that the district court's interpretation provides FERC unlimited time for pursuing FPA claims.

First, FERC tries to paint *Gabelli* as a "narrow decision" limited to "SEC enforcement cases under the Investment Advisors Act." FERC Br. 20, 29, 30. But *Gabelli* expressly recognized that § 2462 is a statute of limitations that "governs many penalty provisions throughout the U.S. Code," 568 U.S. at 445, and repeatedly referred to "Government enforcement" efforts and "Government penalty actions" generally, *id.* at 448-54. *See also id.* at 451 (referring to the SEC as an "example"). The Supreme Court's approach is not surprising, given that § 2462 provides the default limitations period for the government's "enforcement of *any* civil fine, penalty, or forfeiture" unless "as otherwise provided by Act of Congress," 28 U.S.C. § 2462 (emphasis added), not merely for SEC enforcement cases.

Gabelli concluded § 2462's "natural reading" is that the five-year limitations clock starts ticking—and the government's "claim first accrue[s]"—when the defendant engaged in the allegedly offending conduct. *Id.* at 448. And it is well-established that "the meaning of words in a statute cannot change with the statute's

application…. To hold otherwise 'would … [establish] the dangerous principle that judges can give the same statutory text different meanings in different cases….'" *United States v. Santos*, 553 U.S. 507, 522-23 (2008) (plurality opinion) (quoting *Clark v. Martinez*, 543 U.S. 371, 382, 378, 386 (2005)). Yet that is precisely what the district court did here, ruling that the phrase "claim first accrue[s]" means something different for FERC than what the Court concluded in *Gabelli*, and permitting FERC to bring its FPA actions "at any distance of time" from the alleged violations. 568 U.S. at 452.[1]

Second, FERC points to the FPA provision requiring it to "promptly assess" penalties once federal district court adjudication is elected. 16 U.S.C. § 823b(d)(3)(A). While FERC claims this provision is a "meaningful check" that allays concerns about indefinite liability, FERC Br. 31-33, it is no substitute for the fixed, five-year period *Gabelli* construed § 2462 to impose. Even if the FPA's prompt assessment provision has the teeth that FERC seemingly claims, its bite is meaningless for purposes of § 2462 because it is wholly untethered from the time

[1] The district court decisions FERC cites as narrowly construing *Gabelli* are distinguishable. *See United States v. Worldwide Indus. Enters., Inc.*, 220 F. Supp. 3d 335, 345 (E.D.N.Y. 2016) (addressing a statute that required the agency to begin the administrative process by issuing a notice "within one year of the violation"); *Groves v. United States*, No. 16 C 2485, 2017 WL 1806593, at *2 (N.D. Ill. May 5, 2017) (finding § 2462 inapplicable to certain tax-related penalties). The *Silkman* decisions, which, as here, involve § 2462's application to FPA claims, were incorrect for reasons explained *infra* Part II.A.

of the alleged violations. Under the FPA, FERC's obligation to "promptly assess" the penalty arises only after FERC issues the statutorily required notice of proposed penalty and the recipient elects de novo review in federal district court. 16 U.S.C. § 823b(d)(3)(A). But there is *no* limitation on the time between the alleged violations and when FERC must issue the notice. *See FERC II* at 33, JA 404 (observing that FERC can issue the required notice "at any time"). FERC does not dispute this, nor could it. Accordingly, the FPA's prompt assessment provision is not a "meaningful check," and FERC's reliance on it is a quintessential red herring.

In any event, FERC appears uncertain about whether the FPA's instruction that it assess a penalty "promptly" is anything more than hortatory. *Compare* FERC Br. 33 (FPA does not "contain[] a set time-limit nor inflict[] any sanction on the agency for not acting promptly"), *with id.* at 35 (asserting that "in the event of any extraordinary delay" in issuing the assessment, the subject of the investigation could pursue mandamus and ask the court to direct FERC to enter an order of no liability). FERC does not define "extraordinary delay," and, in the absence of any applicable statute of limitations, the legal basis for a mandamus action or the coercive sanction that FERC itself said Congress did not authorize is entirely unclear. *See* Opening Br. 34-35; *In re City of Va. Beach*, 42 F.3d 881, 885-86 (4th Cir. 1994) (FERC's delay of more than four years from receipt of application was

not "so egregious as to meet the demanding standard" for court to issue writ of mandamus).

FERC thus provides no basis for avoiding the conclusion that the district court's decision directly conflicts with *Gabelli*'s holding: that § 2462 "set[s] a fixed date when exposure to the specified Government enforcement efforts ends." *Gabelli*, 568 U.S. at 448 (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)); *see United States v. Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir. 2013) (*Gabelli* "tells us not to read statutes in a way that would abolish effective time constraints on litigation"); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 50, 54-55 (D.C. Cir. 2016) (rejecting interpretation that would permit agency "to pursue an administrative enforcement action for an indefinite period of time after the relevant conduct took place" and citing *Gabelli*), *petition for rehearing en banc granted on other grounds*, 881 F.3d 75 (D.C. Cir. 2018).

B. FERC's "Claim First Accrued" at the Time of the Alleged Violations

Under the district court and FERC's approach, the date FERC's claim accrues cannot be determined until the potential subject of penalties elects its procedural path. The district court held that when the Default Option is chosen, FERC's FPA "claim first accrue[s]" at the time of the alleged violations. *FERC II* at 19, JA 390 ("action" before an ALJ under Default Option "clearly accrued at the time of the purported violations"). But if the Alternate Option is elected, FERC's

FPA claim based on the same alleged violations does not accrue until after FERC issues a penalty assessment order. *Id*. at 20, JA 391. Having different dates for "first accru[al]" of the same FPA claim, based on the forum the respondent selects for the adversarial adjudication of that claim, makes no sense.

It is equally odd for the very nature of FERC's claim to turn on the forum selected for adjudication of that claim. Yet that is the upshot of the district court and FERC's approach: If the potential subject of penalties selects an *administrative* adjudication, FERC's FPA claim arises (and accrues) from the alleged violations; but if that party elects *district court* adjudication, FERC's claim arises (and accrues), instead, from FERC's subsequent penalty assessment, *not* from the alleged violations. The FPA's plain language refutes this interpretation, directing the district court to review "the law and the facts involved," 16 U.S.C. § 823b(d)(3)(B), which is FERC's claim that the alleged conduct violated the statute. *See FERC I* at 17-31, JA 34-48 (rejecting FERC's argument that "the law and the facts involved" are limited to its self-styled "Administrative Record" and "findings" in its penalty assessment order). The district court therefore erred in concluding that the relevant "claim" for evaluating the application of § 2462 is a "claim for 'an order affirming the assessment of the civil penalty,'" *FERC II* at 33, JA 404, rather than a claim for alleged FPA violations.

It bears underscoring that the district court action here "gives Respondents their *first* opportunity for an adversarial adjudication of their allegedly manipulative activities." *FERC II* at 29, JA 400. It is *not* a collection action,[2] while many of the cases FERC relies on are. In those cases, the courts determined that the collection claim did not accrue until there was a final agency order imposing penalties after a statutorily authorized adjudication.[3]

That is not the case here. Because this action is not a collection action, FERC's FPA claim arises from appellants' purported violations, *not* from a final agency adjudication. *See FERC v. Barclays Bank PLC*, 247 F. Supp. 3d 1118, 1125 n.18, 1128 (E.D. Cal. 2017) ("*Barclays I*") (explaining why "there is no final

---

[2] *See FERC II* at 31-32 & n.30, JA 402-03 (discussing FPA collection actions brought under a separate provision, 16 U.S.C. § 823b(d)(5)); *id.* at 35-36, JA 406-07.

[3] *See, e.g.*, *United States v. Meyer*, 808 F.2d 912, 913, 914, 919 (1st Cir. 1987) ("enforcement suit" brought after defendant "refused to pay the sanction" following "final administrative assessment of a civil penalty" through "administrative adjudication"); *SEC v. Mohn*, 465 F.3d 647, 654 (6th Cir. 2006) (citing *Meyer* for proposition that "a claim accrues and the period of limitations begins to run on any collection proceeding to which § 2462 applies once the underlying administrative action establishing liability becomes final"); *United States v. Godbout-Bandal*, 232 F.3d 637, 640 (8th Cir. 2000) (suit brought under provision allowing "the government to begin a collection proceeding [when] the defendant fails to pay an assessment after [the] penalty imposed … has become final" (internal quotations omitted)); *Dep't of Labor v. Old Ben Coal Co.*, 676 F.2d 259, 261 (7th Cir. 1982) (describing the action as "akin to a collection proceeding"); *see also FERC II* at 36, JA 407 (distinguishing cases that "involved the enforcement of civil fines, assessed via final agency action").

agency action at all" under the Alternate Option and noting that "FERC concedes that the [penalty assessment] order under review here is not 'final'"). Consistent with *Gabelli,* FERC's claim "first accrued" at the time of the alleged violations, regardless of the forum appellants selected for adjudication.

While it is true that the FPA imposes certain pre-conditions to the district court action, those pre-conditions do not forestall claim accrual because they are within FERC's control. *See* Opening Br. 20-22 & n.5. The statutory requirements boil down to two simple steps: "notice" and a penalty assessment order after the election of procedures. *See* FERC Br. 24. FERC does not dispute that the timing of these steps is within its control, arguing instead that Congress delegated to FERC authority to control its own administrative procedures. *Id.* at 27, 32. But that argument just underscores the problem: If the statute of limitations is not triggered until the conclusion of procedures the agency controls, "a respondent could theoretically remain exposed to punishment in perpetuity—a Damoclean dilemma of alarming proportions." *Fed. Election Comm'n v. Nat'l Right to Work Comm., Inc.*, 916 F. Supp. 10, 13-14 (D.D.C. 1996) (statutorily mandated "administrative prerequisites to litigation" do not delay accrual under § 2462 because they are "entirely within the control of the Commission").

Attempting to divert attention from its own control over the pace of the investigation and preliminary assessment process, FERC asserts that investigation

subjects have the ability to "'run out the clock' on government enforcement actions." FERC Br. 36. That is inaccurate. The FPA gives the subjects of FERC investigations a set 30-day period to elect the Alternate Option and a set 60-day period to decide whether to pay the civil penalty FERC assesses. 16 U.S.C. §§ 823b(d)(1), 823b(d)(3)(B). And because FERC entirely controls the process, and has exclusive subpoena authority (enforceable in court), it has ample tools to prevent the kind of gamesmanship it purports to imagine. *See FERC II* at 42, JA 413; *id.* at 20 n.23, JA 391. Nothing prevented FERC from timely filing the district court action. For example, approximately 10 months elapsed between issuance of staff's "preliminary findings" and the notice that staff would recommend that FERC issue a show-cause order. FERC Br. 10. Had staff acted within eight months instead of ten, FERC's district court action easily could have been timely initiated.

C. FERC's Asserted Policy Reasons Cannot Justify an Indefinite Limitations Period

While denying that the district court's ruling would create an unlimited limitations period, FERC paradoxically offers reasons to support that outcome. Those assertions lack merit.

FERC invokes its "various (and crucial) responsibilities," contending that its enforcement process "involve[s] weighty decisions as to the actions of sophisticated traders in complex energy markets" that "take both time and

thoughtful consideration." FERC Br. 20, 44. The D.C. Circuit correctly rejected a similar argument in *3M*, observing that "nothing in the language of § 2462 even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations." *See 3M Co. (Minn. Min. & Mfg.) v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994). If Congress thought the nature of FERC's enforcement responsibilities required the agency to have more than five years to pursue FPA civil penalties, Congress could have provided a longer limitations period. It did not. FERC therefore must abide by § 2462's five-year deadline.

It is equally unavailing for FERC to assert that a "truncate[d]" limitations period might mean "fewer (or more limited) opportunities for subjects of [its] investigations to defend themselves." FERC Br. 28. The adjudication in federal district court—not the agency investigation or show-cause-order process—is where a party electing the Alternate Option has the right to take discovery, hold FERC to its burden of proof, and mount a defense. *See FERC I* at 25, JA 42; *id.* at 28, JA 45; s*ee also infra* Part II.A. It is disingenuous—and bizarre—for FERC to suggest that permitting indefinite delay of a party's right to its day in court somehow provides greater procedural protections than enforcing § 2462's five-year limitations period.

FERC also suggests this Court should not be concerned about the absence of formal procedural protections because FERC "consistently pursues [its penalty actions] expeditiously" and it would be contrary to its interests to delay. FERC Br. 33, 35. FERC's "trust us" approach is no substitute for enforcing § 2462's fixed limitation.

FERC mistakenly suggests that its interpretation is acceptable because appellants had early awareness of its investigation and thus "the core concern of *Gabelli*—to 'prevent[] surprises'"—is not implicated. FERC Br. 30. The applicability of § 2462 does not hinge on case-by-case assessments of actual notice or surprise. Moreover, *Gabelli* recognized that statutes of limitations protect against far more than surprise; they also guard against indefinite legal exposure and circumstances where "evidence has been lost, memories have faded, and witnesses have disappeared." 568 U.S. at 448 (citation omitted). Given the one-sided nature of discovery at the agency level and the absence of any requirement for FERC to seek out exculpatory evidence, these concerns are present in full force.

Finally, the fact that FERC has authority to assess "civil penalties of up to $1 million per day for each violation," FERC Br. 36, does not support an open-ended limitations period. To the contrary, FERC's robust penalty authority reinforces the importance of the due process protections that are afforded by federal district court

adjudication. As *FERC I* explained, federal district court adjudication under the Federal Rules of Civil Procedure, "including the use of compulsory process and the ability to subpoena information and witnesses," is necessary under the Alternate Option because "denying the Respondents access to a truly adversarial proceeding … would likely violate due process." *FERC I* at 29-30 n.28, JA 46-47. To comport with due process, such protections must be provided "at a meaningful time." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citations omitted). Allowing FERC to seek million-dollar-per-day-per-violation penalties "at any distance of time" from the alleged misconduct will not do. *Gabelli*, 568 U.S. at 452 (citation omitted).

FERC blithely dismisses this concern, noting that "[a] party concerned about delay in reaching district court is, of course, free to choose" an adjudication before an administrative law judge, FERC Br. 31, which the district court determined—and FERC does not dispute—must be held within five years of the alleged FPA violations. *FERC II* at 20, JA 391. But FERC cannot force the subjects of its investigations to forego the right to a district court adjudication in order to secure the benefit of § 2462's protection. *Cf. Barclays I* at 1127 n.21 (FERC does "not explain why Defendants can be deprived of process when, as they are expressly permitted to do by statute, they … elected to come to federal court"); *FERC v. Maxim Power Corp.*, 196 F. Supp. 3d 181, 197 (D. Mass. 2016) ("*Maxim Power*")

("Respondents must be given a meaningful choice between two options that each secure their due process rights.").

* * * * *

FERC warns that "[a]dopting Powhatan's view … would truncate the time available" for its investigations and enforcement process. FERC Br. 27. But that is precisely what statutes of limitations are intended to do; otherwise, "actions for penalties could 'be brought at any distance of time,'" a result the Supreme Court has rejected for over 200 years as "'repugnant to the genius of our laws.'" *Gabelli*, 568 U.S. at 452 (quoting *Adams v. Woods*, 2 Cranch 336, 342 (1805)).

II. FERC'S ALTERNATIVE ARGUMENT ALSO FAILS

FERC alternatively argues that it complied with § 2462 because it issued a show-cause order within five years of the alleged violations. This argument lacks merit because (1) the show-cause-order process is not an "action, suit or proceeding for the enforcement" of a civil penalty under § 2462, and (2) just like FERC's principal argument, the alternative argument flouts appellants' right to hold FERC to a fixed deadline for asserting alleged FPA violations. Because appellants exercised their right to district court adjudication, that is the only "action, suit or proceeding" that can satisfy § 2462.

A. FERC's Alternative Argument Contravenes § 2462's Plain Language

In its alternative argument, FERC switches sides, agreeing with appellants that its FPA claim "first accrues" at time of the alleged violations. That switch is consistent with *Gabelli*. But FERC's alternative argument nevertheless runs into a plain meaning problem because its non-statutory show-cause-order process does not constitute an "action, suit or proceeding for the enforcement" of its FPA claim within the meaning of § 2462. In fact, the FPA does not contemplate *any* administrative adjudication under the Alternate Option, much less require FERC's show-cause-order process. Because the Alternate Option provides that a federal district court will adjudicate FERC's FPA claim, FERC must bring any federal district court action within five years of the alleged violations. Put differently, because the FPA's Alternate Option does not contemplate administrative adjudication, FERC's discretionary show-cause-order process cannot be an "action, suit or proceeding" within the meaning of § 2462.

"[B]y its terms section 2462 applies only to 'action[s], suit[s] or proceeding[s].' These terms implicate some adversarial adjudication, be it administrative or judicial." *3M*, 17 F.3d at 1459 n.11 (citation omitted). The FPA's Default Option provides for an adversarial administrative adjudication, *see* 16 U.S.C. § 823b(d)(2), but appellants did not elect that option. In contrast, under the Alternate Option at issue here, appellants are entitled to an adversarial *judicial*

determination in district court. *Id*. § 823b(d)(3)(B). The court below rejected FERC's arguments to the contrary in *FERC I*—joining an unbroken string of district court orders.[4] The court reiterated that conclusion in *FERC II*.[5]

Indeed, the FPA does not contemplate *any* administrative adjudication under the Alternate Option; the statute does not mention the word "hearing" in the context of the Alternate Option and instead directs FERC to "promptly assess" the penalty after the notice of election of that option. *Id*. § 823b(d)(3)(A); *see FERC I* at 12, 25-26, JA 29, 42-43 (Alternate Option imposes "no procedural requirements" except that a penalty order be "promptly assessed"); *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1263-64 (D.C. Cir. 1996) (Under FPA's "alternate route, the Commission promptly assesses a penalty without a hearing.");[6] *Barclays*

---

[4] *See FERC I* at 29-30 & n.28, JA 46-47 (federal district court proceeding provides defendants with "access to a truly adversarial proceeding"); *id.* at 8 & n.16, JA 25; *FERC v. Coaltrain Energy, L.P.*, No. 2:16-cv-732, Slip Op. at 7-8 (S.D. Ohio Mar. 30, 2018) (ECF No. 45) (subsequent decision reaching same result).

[5] *FERC II* at 30-31, JA 401-02 ("Under the Default Option, the propriety and amount of the civil penalty is adjudicated before an Administrative Law Judge in accordance with the Administrative Procedures Act. Under the Alternate Option, the adjudication occurs before a federal district judge in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence.").

[6] FERC cites *Clifton Power* for vacating a FERC penalty order that did not adequately explain the basis for the penalty, suggesting that *Clifton Power* stands for the proposition that FERC must meet certain standards of reasoned decision-making in the show-cause-order process. But *Clifton Power* was a Default Option case. It is relevant for its analysis of the FPA's penalty assessment provisions, but *(cont'd)*

I at 1125 n.36 ("FERC's [Penalty] Assessment here is 'informal, no hearings in the customary sense' having been conducted." (citation omitted)); *Maxim Power* at 190 (under the Alternate Option, "an adversarial hearing before FERC" is a protection "which FERC itself says is not required by the FPA and is within FERC's discretion to grant (or presumably deny)"); *id.* at 197 ("[B]y directing FERC to 'promptly assess' penalties under [the Alternate Option], the statute tells FERC not to spend time on proceedings prior to assessing the penalty.").

FERC expressly recognized the FPA's bifurcation of administrative and judicial adjudication when it adopted regulations to implement the FPA's civil penalty provisions. FERC observed that when "district court procedures are [elected], the assessment of civil penalties by the Commission merely triggers the process leading to a de novo trial." *Procedures for the Assessment of Civil Penalties Under Section 31 of the Fed. Power Act*, 53 Fed. Reg. 32,035-01, 32,038 (Aug. 23, 1988). The regulations adopted in that rulemaking address the notice of proposed penalties, 18 C.F.R. § 385.1506; the election of procedures, *id.* § 385.1507; and the "administrative procedures" and "district court procedures" governing the Default and Alternate Options respectively, *id.* §§ 385.1508, 385.1509. Notably, the rule for the Alternate Option states that "[a]fter receipt of

---

(cont'd from previous page)
not for analyzing the extra-statutory show-cause-order process FERC adopted years after *Clifton Power*.

the notification of election … the Commission will promptly assess *the penalty it deems appropriate*." *Id.* § 385.1509(a) (emphasis added). Like the FPA provision on the Alternate Option, there is no mention of any adjudication, hearing, or show-cause-order process; nor is there any suggestion that "the penalty [FERC] deems appropriate" is based on an adjudicative process.

FERC nevertheless suggests that there is a statutory basis for a hearing under the Alternate Option because the FPA generally requires FERC to "provide notice and an opportunity for a hearing." FERC Br. 40. FERC is mistaken. The statutory "*opportunity* for public hearing" before a penalty is assessed, 16 U.S.C. § 823b(c) (emphasis added), is satisfied when FERC issues the statutory notice that includes the opportunity to elect the Default Option, which provides for a hearing before an ALJ before a penalty is assessed. The FPA thus does not require a hearing before the penalty assessment, as FERC asserts; it requires the opportunity for a public hearing before the assessment.

In the face of the FPA's bifurcated statutory regime, FERC nevertheless argues that it has discretion to interpose a non-statutory administrative process under the Alternate Option—its show-cause-order process—and thereby supplant the FPA's district court adjudication as the "action, suit or proceeding for enforc[ing]" its claim. But nothing in *Gabelli*, or general principles governing statutes of limitations, supports the notion that an agency can change the five-year

deadline for a government civil penalty claim by interposing—between the date of the alleged violation and § 2462's "action, suit or proceeding"—a non-statutory administrative process invented as a matter of agency discretion. *See FERC II* at 42, JA 413 (distinguishing cases "in which statutes *allowed* but did not *require* administrative procedures" prior to "bringing a case in district court").

Assuming FERC has discretion to engraft the show-cause-order process on the Alternate Option, it cannot be used to strip the rights defendants have under the FPA's civil penalty provisions or § 2462. FERC recognized this principle in *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 (2007), a decision construing the Natural Gas Policy Act ("NGPA"). There, FERC recognized that "the provision of any additional process at the Commission in no way impedes the ability of a person to obtain de novo review by a district court as expressly permitted by the NGPA." *Id*. at P 33.

In defending its show-cause-order process, FERC previously has invoked 16 U.S.C. § 825h, which grants it authority "to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate." *See* FERC Mar. 21, 2018 Br. 14 (ECF No. 99). The SEC has strikingly similar authority under the Investment Advisors Act, the statute at issue in *Gabelli*. *See* 15 U.S.C. § 80b-11(a). Under FERC's approach, the SEC could avoid the result in *Gabelli* simply by establishing its own show-cause-order process to develop its

claim administratively before filing (at any distance of time) the district court action. That cannot be right.

Even assuming FERC could push back the deadline for the statutorily-mandated district court adjudication by providing a discretionary administrative process, the show-cause-order process is not an adversarial administrative adjudication. As several courts have explained, for purposes of § 2462, there is a key distinction between adjudicatory administrative determinations and determinations that essentially are decisions to prosecute. *See, e.g.*, *Meyer*, 808 F.2d at 920; *United States v. Great Am. Veal, Inc.*, 998 F. Supp. 416, 422 (D.N.J. 1998) (characterizing statute requiring the agency to determine the amount of penalty in reliance on enumerated factors as providing for "'prosecutorial determinations,' as opposed to 'adjudicatory administrative proceedings'") (quoting *Meyer*, 808 F.2d at 920)); *Fed. Election Comm'n v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 20 (D.D.C. 1995) ("no [limitations period] extension is appropriate 'where prosecutorial determinations, rather than adjudicatory administrative proceedings, constitute[ ] the precondition to suit'" (citation omitted)).

The district court here correctly held in *FERC I*—when rejecting FERC's request for summary review rather than a de novo trial in district court—that FERC's district court action, not the show-cause-order process, "gives

Respondents their *first* opportunity for an adversarial adjudication of their allegedly manipulative activities." *FERC II* at 29, JA 400; *id.* at 30-31, JA 401-02 *see also FERC I* at 29-30 & n.28, JA 46-47 (holding that district court action provides first chance for "truly adversarial proceeding"). In arguing otherwise before this Court, *see* FERC Br. 46, FERC does not even acknowledge the district court's ruling on this score.

And the district court did not view this issue as a close call. It described the FPA's penalty assessment provisions as "unambiguous," *FERC I* at 10 n.19, JA 27, stating that FERC's interpretation "does not withstand even a deferential review," *id*. at 30 n.29, JA 47, and noting that its decision was "consistent with other district courts to decide this issue," *id.* at 8, JA 25. FERC nevertheless contends that its show-cause-order process provides for an "on-the-record proceeding" that allows respondents to "contest factual and legal issues." FERC Br. 44-45; *see id*. at 41 (asserting that show-cause-order process provides for "paper hearing"). But as the district court concluded, the show-cause-order process provides respondents "no opportunity to compel any witnesses or documents or to cross-examine any of the Commission's witnesses," *FERC I* at 28, JA 45, and "no right … to take discovery on any aspect of the case against them or to test that case before an impartial fact-finder," *id*. (citation omitted); *see also* Opening Br. 36-37 n.16 (discussing other procedural shortcomings of show-cause-order process). FERC further contends

that the show-cause order "frames the issues" for adjudication, FERC Br. 45, but to whatever extent it does so, FERC cites no authority providing that such "issue-framing," *id*., constitutes an adversarial adjudication.[7]

The protection that *Gabelli* explained statutes of limitations provide against lost evidence, faded memories, and unavailable witnesses, *see* 568 U.S. at 448, would be illusory if FERC were correct that it only needs to issue a show-cause order to satisfy § 2462, and then gains an additional, unlimited period to determine whether to issue a penalty assessment order and pursue civil penalties against the party that elected a federal district court adjudication. For these reasons, FERC's show-cause-order process is a prosecutorial determination, not an adjudication. *See FERC v. Barclays Bank PLC*, No. 2:13-cv-02093-TLN-DB, 2017 WL 4340258, at *13 (E.D. Cal. Sept. 29, 2017) ("*Barclays II*") (a case FERC never addresses, which concludes that under the Alternate Option, "FERC's determination embodied in the [Penalty] Assessment Order was a decision to prosecute. It was not itself a prosecution.").

[7] FERC cites *Hunter v. FERC*, 527 F. Supp. 2d 9, 18 (D.D.C. 2007), for the proposition that "The [show-cause order] represents the first step of a formal process designed to determine whether [the respondent] actually violated any FERC regulations." FERC fails to mention that *Hunter* involved alleged violations of the Natural Gas Act ("NGA"), which does *not* include an express option for federal district court adjudication. Instead, alleged NGA violations are addressed in agency adjudications before FERC ALJs, and ultimately decided by FERC, subject to appellate court review.

FERC's show-cause-order-process also does not constitute an "action, suit or proceeding *for enforcement*" of a civil penalty, 28 U.S.C. § 2462 (emphasis added), because its show-cause-order process—which is non-statutory, interim, and provisional—does not result in an enforceable judgment.[8] Nor could it, given the FPA scheme, which under the Alternate Option assigns the district court the authority to issue such a judgment. *See* 16 U.S.C. § 823b(d)(3)(B) (authorizing district court to issue judgment "enforcing" penalty); *id.* § 823b(d)(5) (providing for FERC to "institute an action to recover" an unpaid civil penalty imposed under the Alternate Option only "after the appropriate district court has entered final judgment in favor of the Commission"). Indeed, FERC does not even contend that its show-cause-order process yields an enforceable determination. That process thus does not fit § 2462's requirement that the action, suit or proceeding be "for the enforcement" of any "civil fine [or] penalty."

[8] FERC cites *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 663, 669-70 (4th Cir. 1997), for the proposition that an administrative "enforcement process determined by letter with an opportunity to respond in writing" qualified as a "proceeding" for "imposition" of penalties under § 2462. FERC Br. 42. But *Arch Mineral* is distinguishable because the action by the agency that was deemed to fall within § 2462 amounted to an action that was "the means of enforcing th[e] penalty," 104 F.3d at 669, embodied in a previously obtained judgment.

B. Like FERC's Principal Argument, FERC's Alternative Argument Creates an Open-Ended Limitations Period

Under FERC's alternative argument, § 2462's limitations period begins at the time of the alleged misconduct and FERC's claim for civil penalties is timely if the agency initiates a show-cause-order process within five years. FERC Br. 38-46. Like the district court's decision below, that interpretation creates an open-ended limitations period. Even if FERC initiates a show-cause-order process within five years of the alleged violation, the agency would be free to indefinitely delay issuance of a notice of proposed penalty and a respondent's statutory right to adjudication in district court.

FERC does not explain what, if any, time limit applies to the adversarial testing of its penalty assessment in district court. It apparently assumes, however, that this second five-year limitations period would begin 60 days after the penalty assessment. FERC Br. 38. But that still leaves defendants exposed to an open-ended limitations period because the show-cause-order process is not anchored in the FPA. *See supra* Part II.A. Instead, the FPA simply requires that, at a time of FERC's own choosing, the agency must issue a notice of proposed penalty informing the recipient of its right to elect to challenge the penalty before an ALJ or a federal district court. 16 U.S.C. § 823b(d)(1). In recent years, FERC has, as here, provided that notice along with an order to show cause, but no statute or regulation requires that. Thus, under FERC's alternative theory, the agency could

satisfy § 2462 by issuing a show-cause order within five years of alleged misconduct and then do nothing for any number of years before issuing a notice of proposed penalty and "promptly" assessing a penalty.

And even if FERC issues the statutory notice contemporaneously with a show-cause order, under FERC's logic, there still is no effective limitation on when FERC must commence a district court action under the Alternate Option. As explained above, *see supra* Part I.A, the FPA requires a "prompt[]" penalty assessment following the election of district court adjudication. 16 U.S.C. § 823b(d)(3)(A). But as the court below acknowledged, given the lack of applicable statutory requirements and FERC's control over the show-cause-order process, "the possibility exists that the intended 'prompt[]' penalty assessment might not be prompt after all." *FERC II* at 19, JA 390. Such a vague requirement—which FERC admits gives it "some room" by omitting "a set time-limit," FERC Br. 33—allows FERC to indefinitely delay the trigger for its claimed second limitations period. FERC's alternative interpretation therefore provides no "fixed date when exposure to the specified Government enforcement efforts ends." *Gabelli*, 568 U.S. at 448. And, at a minimum, it would double § 2462's limitations period by allowing FERC two separate five-year periods between the alleged violations and the deadline for bringing a district court action.

III. THE COURT SHOULD REJECT FERC'S TOLLING ARGUMENT

FERC posits in a footnote that the statute of limitations should be tolled during the 60-day period following issuance of FERC's penalty assessment order. FERC Br. 43 n.7. Because this argument is limited "to an isolated footnote," FERC "has waived this argument on appeal." *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 250 n.8 (4th Cir. 2015); *see also Johnson v. Williams*, 568 U.S. 289, 299 (2013) ("Federal courts of appeals refuse to take cognizance of arguments that are made in passing without proper development.").

FERC's tolling argument lacks merit anyway. Congress knows how to draft a limitations statute providing for tolling. And "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." *Barclays II* at *14 (quoting *Gabelli*, 568 U.S. at 454, internal quotations omitted). The FPA does not provide for such tolling, and FERC's failure to factor the statutory waiting period into its prosecutorial timeline is not the type of "extraordinary circumstance[]" in which enforcing the statute of limitations would result in "gross injustice." *Raplee v. United States*, 842 F.3d 328, 333 (4th Cir. 2016).

CONCLUSION

The district court's decision should be reversed.

Respectfully submitted,

John N. Estes III
John N. Estes III
Donna M. Byrne
Jonathan Marcus
Juliana Brint
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000
john.estes@skadden.com
donna.byrne@skadden.com
jonathan.marcus@skadden.com
juliana.brint@skadden.com

Abbe David Lowell
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006-3817
(202) 282-5000
adlowell@winston.com

Counsel for Appellants Houlian Chen, HEEP Fund, Inc., and CU Fund, Inc.

Patrick R. Hanes
WILLIAMS MULLEN
Williams Mullen Center
200 South 10th Street, Suite 1600
Richmond, VA 23219
(804) 420-6000
phanes@williamsmullen.com

Counsel for Appellant Powhatan Energy Fund, LLC

April 17, 2019

CERTIFICATE OF COMPLIANCE

In accordance with Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure, the undersigned counsel for appellant certifies that the accompanying brief is printed in 14 point proportionally spaced typeface, with serifs, and, including footnotes, contains no more than 6,500 words.

According to the word-processing system used to prepare the brief, Microsoft Word, it contains 6,484 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, table of contents, table of citations, signature block, certificates of counsel, and addendum).

John N. Estes III

John N. Estes III
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000
john.estes@skadden.com

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2019, I caused this Brief to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Samuel Graves Backfield
Anand Ram Viswanathan
Lisa Lee Owings
Mark Earl Nagle
Elizabeth Keller Canizares
FEDERAL ENERGY REGULATORY COMMISSION
888 1st Street, N.E.
Washington, DC 20426

Matthew Allen Fitzgerald
MCGUIREWOODS, LLP
800 East Canal Street
P.O. Box 3916
Richmond, VA 23219

I further certify that on this 18th day of April, 2019, the required copies of the Brief were hand filed with the Clerk of the Court.

John N. Estes III
John N. Estes III
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000
john.estes@skadden.com

STATUTORY ADDENDUM

Section 385.1509 of the Federal Energy Regulatory Commission's Regulations, 18 C.F.R. §385.1509, provides:

18 C.F.R. § 385.1509 District court procedures (Rule 1509).

(a) After receipt of the notification of election to apply the provisions of this section pursuant to Rule 1507, the Commission will promptly assess the penalty it deems appropriate, in accordance with Rule 1505.

(b) If the civil penalty is not paid within 60 calendar days after the assessment order is issued under paragraph (a) of this section, the General Counsel, unless otherwise directed by the Commission, will institute an action in the appropriate United States District Court for an order affirming the assessment of the civil penalty.(a) Monitoring and investigation.