

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

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

**PETITIONER FEDERAL ENERGY REGULATORY COMMISSION’S
OPPOSITION TO RESPONDENTS’ MOTION FOR LEAVE TO FILE
SUPPLEMENTAL MATERIAL**

On March 23, 2016, Respondents Houlian “Alan” Chen, HEEP Fund, Inc., CU Fund, Inc., and Powhatan Energy Fund, LLC (collectively “Respondents”) jointly moved for leave of the Court to file “supplemental material.” Resp. Mot. To Leave, ECF 54. Respondents’ motion should be denied. The supplemental material Respondents purport to have “discovered” is a seven year old brief from an unrelated proceeding where counsel for Chen was not only counsel of record but also the attorney who argued the case before the Fifth Circuit. Respondents cannot show good cause as to why the materials – which are neither newly discovered nor substantively novel – should nonetheless be considered by the Court after two prior opportunities to brief this issue.

I. THE MATERIAL IS NOT NEWLY DISCOVERED

Respondents’ counsel has been aware of the material they seek leave to file for over seven years. Despite Respondents’ claim to have recently “discovered” (Resp. Mem., ECF 55 at

1) the Commission’s Opposition Brief in the Fifth Circuit appeal of Petitions for Review of Orders, *Energy Transfer Partners L.P., et al. v. FERC*, (5th Cir. 2009) (Nos. 08-60730 and 08-60810) (the “*ETP* Brief”), two of Chen’s present counsel represented *ETP* in that matter.¹ In their reply brief in that case, counsel explicitly addressed the specific language Respondents now purport to have recently discovered. Nor can Respondents claim to have simply forgotten about the *ETP* case, given that Respondents directed this Court to Commission orders from the underlying *ETP* proceeding. *See* Resp. Mem. on Procedures, ECF 38 at 2, 15, 17, and 19.

Respondents have not even attempted to suggest why the requested relief should be granted. They cite Local Civil Rule 7, which pertains to motions generally, but that rule contains no provision allowing a party to file supplemental authority or materials, particularly in the manner Respondents seek to do so here.² While Fed. R. Civ. P. 15(d) allows a party to file supplemental pleadings, such filings must involve “transaction[s], occurrence[s], or event[s] that happened after the date of the pleading to be supplemented.” Here, the *ETP* Brief was filed (and publicly-available) well before briefing even began in this case. Thus, Respondents must show “excusable neglect” to justify what is essentially a request to amend their prior briefing to include citation to and argument regarding the *ETP* Brief. *Campbell v. Verizon Virginia, Inc.*, 812 F. Supp. 2d 748, 750 (E.D. Va. 2011) (denying request to amend brief to include citation to evidence that could have been discovered prior to brief’s filing). They have not made, and cannot make, such a showing. Respondents have twice briefed this Court on the issue of “*de*

¹ Mr. Estes and Ms. Byrne (here, “counsel”) signed and filed a reply brief in that appeal on February 9, 2009, and Mr. Estes represented *ETP* at oral argument.

² While some District Courts have adopted rules similar to Federal Rule of Appellate Procedure 28(j), which explicitly allow for a party to file supplemental authority with the court following the completion of a party’s briefing, this Court has not. *See, e.g.*, Local Civil Rule for the District of Kansas 7.1(f).

novo review.”³ They have provided no reason why they were unable to include citations to the *ETP* Brief in those filings. They should not be given a third “bite at the apple.”

II. THE COMMISSION’S POSITION IN THE *ETP* BRIEF ACCORDS WITH ITS POSITION IN THIS LITIGATION

Beyond the procedural irregularity of Respondents’ Motion, their brief inaccurately characterizes the materials in question. Respondents assert that, in the *ETP* Brief, “FERC advocated an interpretation of FPA § 31(d)(3) that directly contradicts its current position before this Court.” ECF 55 at 1. In fact, the Commission’s interpretation of Federal Power Act (“FPA”) § 31(d)(3), 16 U.S.C. § 823b(d)(3) (which is at issue in this proceeding) is consistent with its interpretation of that provision in *ETP* (where it was not at issue), namely that the Commission must adjudicate the violation in the first instance and that the District Court’s role is to review the facts and law underlying that adjudication. *Compare ETP* Brief ECF 55-1 at 54 with Pet. Memo on Points and Authorities, ECF 39 at 9-13, 21-24.

At best, the language cited by Respondents merely provides an additional example of a prior Commission statement of the sort that Respondents have previously identified. *See ECF 38 at 13; Resps. Additional Memo on Procedures, ECF 53 at 5-6.* The language of the “new” material concerns an issue that was rendered moot prior to an ultimate decision, from a case that did not adjudicate a claim under the FPA,⁴ and that was resolved before any order to show cause alleging violations of FPA § 222, 16 U.S.C. § 824v, was ever issued. Respondents are wrong to

³ Respondents also discussed the issue of “*de novo* review” in their motions to dismiss, and, thus, could have also presented argument regarding the *ETP* Brief in those filings. *See Chen Mot. to Dismiss, ECF 23 at 4-7 and Joinder of Powhatan, ECF 25* (purporting to adopt the arguments from Chen’s Motion).

⁴ The Commission has previously explained at length that the Natural Gas Policy Act (“NGPA”) provides little guidance towards understanding the application of “*de novo* review” under the FPA. ECF 52 at 6-7.

attach significance to it, for reasons Petitioners have previously explained. *See, e.g.*, ECF 39 at 19 n. 22; Pet. Supp. Memo Regarding Procedures, ECF 52 at 4-5.

Respondents' contention that the Commission "acknowledged" in the *ETP* Brief that it could not conduct the adversarial proceeding used in the proceeding below in *this case* is incorrect. On the contrary, the Commission made clear in the *ETP* Brief that FPA § 31(d)(3) does not "contemplate[] an original *de novo* adjudication" in the district court. *ETP* Br. at 54 (emphasis in original). The Commission explained that its position was that the term "review *de novo*" "goes to the *review* of the Commission's final decision, not to the adjudication leading to that final decision." *Id.* (emphasis in original). In order to reach that "final decision," the Commission explained that the FPA required "the immediate *assessment* of a civil penalty without additional agency procedures." *Id.* at 57 (emphasis added). The Commission did not "acknowledge" that it was not permitted to create the procedures necessary to carry out an "assessment of a civil penalty," merely that it was not permitted to tack on "additional agency procedures" beyond those needed to assess the penalty. There can be no question that the Commission requires a procedural mechanism to evaluate whether to issue a civil penalty consistent with its obligation to apply the statutory factors set forth in FPA § 316A, 16 U.S.C. § 825o-1, even if that mechanism is necessarily less elaborate than a trial-type hearing before an administrative law judge.⁵ *See* ECF 38 at 22. And, here, that procedural mechanism allowed for a thorough but prompt analysis of the enormous factual record developed during the

⁵ In *ETP*, the "additional agency procedures" in question were trial-type procedures before an administrative law judge. *See ETP* Brief at 3 (describing the pertinent issue as "whether the Commission reasonably construed its civil penalty authority under the Natural Gas Policy Act ('NGPA') and, in so doing, reasonably held that the statute allows the agency to conduct additional procedures, including a trial-type hearing before an administrative law judge, between the time it issues notice of a proposed civil penalty and the time it issues an order assessing a civil penalty.").

investigation and the hundreds of pages of briefing, expert reports, affidavits, and other evidence submitted by Respondents. *See id.* at 2-7, Notice of Filing of Administrative Record, ECF 37. Respondents' motion is little more than an attempt to reargue its astonishing proposition that the FPA *prohibits* the Commission from undertaking any sort of process or procedure to ensure that its adjudication of liability and imposition of potentially multi-million dollar penalties for violations of the FPA is based on accurate and fair findings of fact and conclusions of law—that the Commission should, indeed is required to, simply find violations and assess penalties without hearing from the subject first. That baseless and unreasonable outcome cannot be inferred either from an analysis of the FPA or from a single paragraph in a seven year old legal brief involving a different statute.

CONCLUSION

For these reasons, the Court should deny Respondents' Motion for Leave to File Supplemental Material.

Dated: March 29, 2016

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2016, I filed the foregoing Opposition to Respondents' Motion for Leave to File Supplemental Material, with the Clerk's Office, using the CM/ECF system, which will send a notification of such filing to counsel of record, including:

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