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

FEDERAL ENERGY REGULATORY COMMISSION,	)	
Petitioner,	)	Civil Action 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 SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES REGARDING REVIEW PROCEDURES MANDATED BY THE FEDERAL POWER ACT

FEDERAL ENERGY
REGULATORY COMMISSION

Larry R. Parkinson
Director
Lee Ann Watson
Deputy Director
Office of Enforcement

David A. Applebaum
Director
Courtney Spivey Urschel
Deputy Director
Division of Investigations

(Not counsel of record)

Samuel G. Backfield (Virginia Bar No. 46626)
Steven C. Tabackman (Virginia Bar No. 16448)
Lisa L. Owings (Virginia Bar No. 73976)
Elizabeth K. Canizares (*Pro Hac Vice*)
Daniel T. Lloyd (*Pro Hac Vice*)

888 First Street, N.E.
Washington, DC 20426
Telephone: (202) 502-8100
Facsimile: (202) 502-6449

Attorneys for Petitioner
Federal Energy Regulatory Commission

Dated: January 21, 2016

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INTRODUCTION

Pursuant to the Court's Memorandum Order of January 8, 2016 (ECF 44) ("Memo Order"), Petitioner Federal Energy Regulatory Commission ("FERC" or the "Commission") hereby submits this Supplemental Memorandum of Points and Authorities regarding the Court's de novo review procedure under § 31 of the Federal Power Act ("FPA"), 16 U.S.C. § 823b(d)(3)(B) (2012).

This Memorandum addresses each of the issues specified in the Memo Order, along with various issues raised by Respondents in their Memorandum filed December 31, 2015. Resp. Mem., ECF 38.[1] For the reasons stated below and those stated in the Commission's Memorandum, filed on December 31, 2015 (Pet. Mem., ECF 39), the Court should adopt the Commission's interpretation of FPA § 31(d)(3): "de novo review" is merely the standard of review to be applied by the Court to the administrative record, and cannot be interpreted to require discovery from scratch and a de novo trial.

ARGUMENT

I. The Legislative History and Purpose Supports the Commission's Interpretation

A review of the history and purpose of the statutory provisions relevant to this case – FPA §§ 31, 222, and 316A – reveals that Congress intended to grant broad enforcement and adjudicatory powers to FERC to detect, deter, and punish manipulative conduct.

A. Legislative History of FPA § 31(d) [Memo Order ¶ 2.c.][2]

Although there is little discussion of the specific language of FPA § 31(d) in the legislative history of the Electric Consumers Protection Act of 1986 ("ECPA"), which created

[1] Each of the issues specified in the order is addressed herein, but not in the precise order that they were listed by the Court. Consequently, these issues are identified for the Court's convenience by subheadings and/or footnotes. For ease of reference, question (a) is addressed at 13; (b) at 6-11; (c) at 1-4; (d) at 4-5; (e) at 12-13; (f) at 5-6; and (g) at 14-15.

[2] To the question posed by the Court, "whether legislative history of § 823b(d) exists, and whether such information sheds light on the interpretation of the statute," the answer is yes, as discussed herein.

that provision, as noted in our prior Memorandum, the overall legislative history demonstrates a clear emphasis on enhancing FERC's enforcement powers. Pet. Mem., ECF 39 at 18-19.

The purpose of expanding and enhancing FERC's authority to act decisively and independently is reinforced throughout the legislative history. According to the House Committee Report on the ECPA,[3] one stated purpose of the bill was to "provide[] the Commission with new authority to enforce license terms and conditions and [to] require[] the Commission to investigate violations." H.R. REP. NO. 99-507 at 20 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496. To this end, the House Report states explicitly that FPA § 31 is "not intended to reduce, restrict, or limit the authority of the Commission under other provisions of the Act. It supplements that authority, including section 309 of the Federal Power Act." *Id.* at 22. The House Report further states that, "the purpose of this section" is to provide "buttressing and improvement" for "FERC enforcement efforts," among other concerns. *Id*. at 23.[4]

B. Legislative History of the Energy Policy Act of 2005

The Energy Policy Act of 2005, Pub. L. No. 90-618, codified in part at 16 U.S.C. §§ 824v, 825*o*-1 ("EPAct 2005") arose in large part out of the western energy crisis of 2000-2001, which brought the Commission under close scrutiny and harsh criticism from Congress. While chiding the Commission for not being more aggressive in policing its markets, Congress also

[3] The specific language of 31(d) was not added until April 1986, but the Commission has stated that this "House Committee Report is the most authoritative legislative history as to the civil penalties provisions." *Procedures for the Assessment of Civil Penalties Under Section 31 of the Federal Power Act*, Oder No. 502-A, 45 FERC ¶ 61,407, at 62,270 (1988).

[4] The referenced "concerns" are reflected in a series of reports which emphasized the need for more aggressive Commission enforcement and expedited Commission action. *See* The U.S. General Accounting Office Report, *Federal Energy Regulatory Commission Has Expedited Case Processing; Additional Improvements Needed* (Jun. 10, 1983) http://www.gao.gov/assets/150/140229.pdf; The Comptroller General Report to the Congress of the United States, *Additional Management Improvements Are Needed to Speed Case Processing At The Federal Energy Regulatory Commission* (Jul. 15, 1980) http://www.gao.gov/assets/130/129840.pdf.

acknowledged that the Commission needed additional enforcement tools.[5] Congress enacted EPAct 2005 to give the Commission those tools. Specifically, Congress created a broad anti-manipulation provision, FPA § 222, 16 U.S.C. § 824v, and amended FPA § 316A, 16 U.S.C. § 825*o*-1, to increase the maximum penalties nearly a hundredfold and to make them applicable to all violations of Part II of the FPA, including the new anti-manipulation provision.

In all of the extensive legislative history of EPAct 2005, the references to the need to enhance FERC's enforcement authority and its ability to detect, deter, and punish manipulation, are too numerous to recite.[6] By contrast, we have not identified any reference to a Congressional desire to ensure jury trial rights or plenary adjudicative rights in Article III courts for respondents, or for giving such respondents a choice of forum for the adjudication of their alleged misdeeds. Indeed, the legislative history of EPAct 2005 did not address the election procedure at all. Congress simply provided, without discussion, that the enhanced penalties would be assessed using the existing procedures of FPA § 31. *See* 16 U.S.C. § 825*o*-1.

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[5] *See, e.g.*, 151 CONG. REC. S7451 (2005) at S7454 (Statement of Sen. Feinstein: "As we learned during the Western energy crisis, Federal energy regulators did not have enough authority to prevent widespread market manipulation"); Memorandum from Majority Staff, *Senate Comm. on Governmental Affairs, Investigation of the Federal Energy Regulatory Commission's Oversight of Enron Corp.*, at 47 n.154 (Nov. 12, 2002) (supporting FERC's request for expanded authority because "it is important to give FERC additional and/or stronger enforcement tools.")

[6] *See, e.g.*, 151 CONG. REC. S 7451 (2005) at 7454 (Statement of Sen. Feinstein, lauding the bill's "consumer protections" including "a broad ban on manipulation in the energy markets; stronger criminal and civil penalties in the energy markets to provide stronger deterrents to violations of the Federal energy laws . . ."); S7474 (Statement of Sen. Cantwell, preferring the Senate bill to the House bill because it included "a broad statutory ban on all forms of market manipulation in the Nation's electricity and natural gas markets," whereas the House bill prohibited "only one type of manipulation scheme made infamous by Enron – roundtrip trading"); *see also*, *Asleep at the Switch, FERC's Oversight of Enron Corporation – Vol. I: Hearing on S.HRG. 107-854*, at 3 (2002) (Statement of Sen. Lieberman: potential manipulators "need to understand that FERC will be a sophisticated and sharp watchdog, not a listless and lackadaisical bystander"); 54 (Statement of Sen. Collins, expressing concern about "a scenario where the gamers continually come up with new schemes and the regulators are constantly scrambling to catch up with the latest innovative scam."); 73 (Appx.) (Statement of Sen. Bunning: "FERC needs more legal authority to go after those who engage in anti-competitive or illegal activities").

II. Commission Implementation of ECPA 1986 and EPAct 2005

A. FERC Statements, Records, Etc. [Memo Order ¶ 2.d.][7]

The Commission implemented new FPA § 31 by order, following notice-and-comment rulemaking. *Procedures for the Assessment of Civil Penalties Under Section 31 of the Federal Power Act,* Order No. 502, 53 Fed. Reg. 32,035, FERC Stats. & Regs. ¶ 30,828 (1988). In that Order, the Commission made reference to § 31(d)(3) as providing for the election of "trial court procedures," which it described as "Collection Actions." *Id*. at 32,039. The Commission stated that, "[w]hen filing an action in district court, the Commission will include in that pleading a request to the district court to order the defendant to pay a civil penalty. District courts permit applicants to incorporate into one pleading both a petition affirming a civil penalty assessment and a petition ordering the recovery of the civil penalty assessment." *Id*.

The single reference in that Order to "trial de novo" is in the context of explaining that respondents will have access to judicial review subsequent to a penalty assessment but before such penalty can be collected. Order No. 502, FERC Stats. & Regs. ¶ 30,828 at 32,038.[8] Indeed, the Commission says nothing in its *Procedures* to support Respondents' position that the district court procedures in FPA § 31(d)(3) nullify the Commission's penalty assessment or diminish its authority to expeditiously enforce and adjudicate violations of its regulations. To the contrary, the *Procedures* reflect the Commission's understanding, based on the text of the FPA, that the district court would provide the Commission with an opportunity to seek to "affirm[]" and "recover" its "civil penalty assessment." *Id*.

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[7] To the question posed by the Court, "[w]hether any FERC statements or records, including relevant Proposed Rulemaking or notice and comment records (if any) shed light on the interpretation of § 823b(d)," the answer is a qualified yes, as discussed herein.

[8] As for the handful of references to "trial court," they simply distinguish the district court (which is a "trial court" even when it is not conducting a trial) from the court of appeals.

Similarly, all references in Respondents' brief to Commission orders mentioning "trial de novo" under FPA § 31(d)(3) are to dicta.[9] In none of those orders was the Commission adjudicating either an FPA § 31(d)(3) or a post-EPAct 2005 matter. When implementing its authority under EPAct 2005, the Commission was clear that only "review" de novo was contemplated, and made no reference at all to "trial." *See Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006). In any case, it is for the Court, not the Commission, to determine what procedures to follow once a petition for affirmance has been filed under FPA § 31(d)(3).

B. Respondents' Objections Were Lodged Before FERC [Memo Order ¶ 2.f.].[10]

In their Notice of Election, Administrative Record ("AR") Tab 21, Respondents acknowledged and objected to the Commission's interpretation of FPA § 31(d)(3) advanced here, so they cannot claim to have relied to their detriment on any of the prior Commission statements they cite.[11]

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[9] *See* Resp. Memo at 17-18 *citing Burt Dam Power Co*., 49 FERC ¶ 61,007, at 61,025 (1989) (reciting respondent's unexercised right to elect Paragraph 2 procedures); *Consumers Power Co*., 68 FERC ¶ 61,077, at 61,380 (1994) (Paragraph 3 procedures were not selected, and noting that "Congress clearly intended, and so provided, that the Commission, and *only* the Commission, would be able to assess penalties against licensees for noncompliance with license orders and terms") (emphasis added); *Energy Transfer Partners, L.P*., 121 FERC ¶ 61,282 (2007) (analyzing proper procedures under the Natural Gas Act); and *Submissions to the Commission Upon Staff Intention to Seek an Order to Show Cause*, Order No. 711, 73 Fed. Reg. 29,431 (May 21, 2008) (relating to the provision of notice under 18 C.F.R. § 1b.19 and containing no discussion of what happens after notice is given there is an opportunity to respond).

[10] To the question posed by the Court, "[w]hether, notwithstanding objections on the merits, objections to the manner in which FERC procedurally undertook its assessment were lodged before FERC," the answer is yes, as discussed herein.

[11] In their election, Respondents cited the Commission's position "that the Commission's show cause order process constitutes an adjudication, that a penalty assessment order constitutes an agency determination that violations occurred as well as a determination of sanctions, and that, as a result, there is no need for federal district court adjudication of anything." *See* Notice of Election, AR Tab 21 at 1-2. They objected generally to the Commission's "mangled" view of its own adjudicatory procedures. *Id*. We addressed those contentions (also made in Resp. Mem., ECF 38 at 11-12) in our prior memorandum. (Pet. Mem., ECF 39 at 21-24).

It is noteworthy what objections Respondents did *not* lodge before the Commission. At no point did Respondents identify any evidence they needed to rebut any element of the manipulation allegations made against them in the Staff Report. As for the contention raised by Respondents at the status conference that, "the supposed victim of the supposed fraud, PJM, has never been questioned by FERC. There's been no discovery. We don't know whether they were fooled by anything," Hearing Trans., ECF 48 at 9:24 – 10:2, it is neither accurate nor apt. PJM reported Respondents' conduct to FERC as soon as it was discovered, and while no PJM employee gave investigative testimony, PJM did produce, under oath, numerous responses to data requests – responses that have been produced to Respondents and made part of the Administrative Record in this case. *See* Pet., ECF 1 at ¶¶ 4, 47-49; AR Tab 23 Att. A (PJM Referral) and Att. C (Market Monitor Referral); AR Tabs 77-81B (PJM data responses).

III. Other Statutory Schemes [Memo Order ¶ 2.b.]

The Court directed the parties to examine "[w]hether other agency review statutes are similar to § 823b(d)(2) and (3), with case law analyzing the statutes." Memo Order ¶ 2.b. Numerous statutes could be analogized in some way to the FPA, but few directing a "review de novo" and even fewer that have given rise to case law that would allow inferences to be drawn about the meaning of FPA § 31(d)(3). This memo does not purport to address them all,[12] but examines below several statutes of interest.

The Natural Gas Policy Act of 1978 ("NGPA") contains language describing the district court's "authority to review de novo the law and the facts involved" in a Commission penalty assessment order that is substantively identical to that of the FPA, but never been examined by

[12] Our prior memorandum addressed two statutes not discussed herein. Pet. Mem., ECF 39 at 27 n.29.

the courts.[13] Because there is only a single path to judicial review under the NGPA (not a dual option, as here), and the NGPA does not provide for an on-the-record formal adjudication pursuant to APA § 554, the single passing reference in its legislative history to "trial de novo," H.R. REP. NO. 95-1752 at 120-21 (1978), *reprinted in* 1978 U.S.C.C.A.N. 8983, 9037-38, sheds no light on the meaning of "review de novo" under the bifurcated structure of the FPA. Moreover, the NGPA, like the other acts cited by the parties in this proceeding, was enacted at a different time, by a different Congress, for different remedial purposes.[14] Therefore, the NGPA does not provide guidance on the application of "de novo review" under the FPA.

The Employee Retirement Income Security Act of 1974, Pub. L. 93–406, 88 Stat. 829 (codified in part at 29 U.S.C. Chapter 18) ("ERISA"), which protects individuals enrolled in employee benefit plans, allows a plan participant who has been denied benefits to file a "civil action . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). "In *Firestone* [*Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 155 (1989)], the Supreme Court decided that a district court should review *de novo* a plan administrator's denials of benefits under § 1132(a)(1)(B) of ERISA." *Quesinberry v. Life Insurance Company of North America*, 987 F.2d 1017, 1021 (4th Cir. 1993). The Fourth Circuit has since adopted the

[13] The NGPA provides that the Commission shall assess a penalty after providing notice (but not an opportunity for public hearing). 15 U.S.C. § 3414(b)(6)(E). If, following Commission assessment of the penalty, "the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (E), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have the authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment." 15 U.S.C. § 3414(b)(6)(F).

[14] By contrast, the Natural Gas Act ("NGA"), which is not only patterned after the FPA, but was amended simultaneously and in parallel with the FPA by EPAct 2005, also proscribes market manipulation and provides for increased civil penalties for market manipulation. *See* 15 U.S.C. §§ 717c-1, 717t-1. Congress did not provide an option for district court review under the NGA.

view that the de novo review required by *Firestone* allows for additional discovery "only when circumstances clearly establish that additional evidence is necessary to conduct an adequate de novo review of the benefit decision." *Id.* at 1025. The *Quesinberry* Court cited ERISA's purpose of "promoting the interests of employees and their beneficiaries" and "providing prompt resolution of claims," among others, as supporting its interpretation of de novo review. *Id.* Because similar considerations of the public interest in strengthening FERC's enforcement and adjudication authority, and providing efficient resolution of enforcement actions, are present here, the interpretation of "review de novo" applied to ERISA cases provides significant guidance to application of that standard of review under the FPA.

The Immigration and Nationality Act, 8 U.S.C. § 1421(c) ("INA"), provides that, following denial of an appeal by the Board of Immigration Appeals ("BIA") of an adverse ruling by an Immigration Judge, an applicant may seek de novo review of the BIA's decision in district court. The statute provides that "[s]uch review shall be de novo, and the court shall make its own findings of fact and conclusions of law *and shall, at the request of the petitioner, conduct a hearing de novo on the application.*" 8 U.S.C. § 1421(c) (emphasis added). One feature of this statute is immediately noteworthy: it distinguishes between "review . . . de novo" and "a *hearing* de novo." *Id*. (emphasis added). It provides that the court shall make its own findings of fact and conclusions of law in connection with the de novo review, but also, separately, that "at the request of the petitioner, [shall] conduct a hearing de novo." *Id*. It is clear, then, that under the INA's statutory scheme, a "*review* de novo" does not necessarily entail a "*hearing* de novo," which must be requested separately.[15]

[15] Courts have refused to conduct requested evidentiary hearings when the only questions in dispute are legal ones. *See Chan v. Gantner*, 464 F.3d 289, 295-296 (2d Cir. 2006).

The Atomic Energy Act of 1954 ("AEA") contains language similar to FPA § 31(d), 42 U.S.C. § 2282a(c). Its legislative history includes a passing reference to "trial de novo," S. REP. No. 100-70, at 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1425, 1436, but that language was added by the Price-Anderson Amendments Act of 1988, PL 100-408 (HR 1414), two years *after* the ECPA of 1986, which created the language in FPA § 31. Even if the legislative intent behind the Price-Anderson Amendments Act was clear (it is not), no inference could be drawn with respect to similar language in the FPA, because it was drafted by an *earlier* Congress, at a different time, for a different remedial purpose.[16] Additionally, the Congress enacting the Price-Anderson Amendments Act explicitly intended to limit the scope of penalties to activities subject to specific indemnification agreements. There is no analogue in the FPA. Finally, the "review de novo" language found in the AEA has never been analyzed by the courts.[17] Therefore, the AEA provides little guidance on the meaning of "de novo review" in the FPA.

The Bank Merger Act of 1966, Pub. L. No. 89-356, 64 Stat. 892 ("BMA") provides that, following the decision of the Federal Deposit Insurance Corporation ("FDIC") to approve a bank merger, the district court "shall review de novo the issues presented." 12 U.S.C. § 1828(c)(7)(A). The "review de novo" language of the BMA has been construed (without analysis) by courts as requiring "trial de novo." *United States v. Idaho First Nat. Bank*, 315

[16] "The Court frequently observes that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" CRS Report for Congress, *Statutory Interpretation: General Principles and Recent Trends*, at 44 (Aug. 31, 2008) (www.fas.org/sgp/crs/misc/97-589.pdf) (*quoting Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 840 (1988)).

[17] The only reference to the relevant section of the AEA in any federal court case was in the dissent in *Wilson v. Comm'r of Internal Revenue*, in which AEA is listed – along with FPA – as an example of how Congress knows how to authorize a de novo standard of review, as opposed to a de novo trial. 705 F.3d 980, 1004-05 (9th Cir. 2013) (Bybee, J., dissenting) ("Congress knows how to authorize a trial de novo. Similarly, Congress knows the difference between trial de novo and de novo standards of review, and knows how to specifically authorize a de novo standard of review.") (footnotes omitted).

F.Supp. 261, 265 (D. Idaho 1970). This statutory scheme is distinguishable from the FPA's in two ways: (1) there is no adversarial process – the FDIC does not conduct a complex adjudication involving determinations of fact and the application of law to those facts in the same way that FERC does in assessing penalties under FPA, and (2) adjudication of antitrust questions is the traditional provenance of the courts and does not necessarily require the expertise of a regulatory agency. In analyzing the BMA, the Supreme Court has emphasized these facts. *See United States v. First City Nat. Bank of Houston*, 386 U.S. 361, 369 (1967) ("no hearing had been held and no record in the customary sense created") and *id*. at 367 (noting that the courts do not customarily defer to agencies in antitrust actions). Therefore, "review de novo" in the BMA cannot be analogized to the FPA.

The Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("Sarbanes-Oxley"). At the January 7, 2016 status conference, counsel for Chen invoked *Stone v. Inst. Lab. Co*., 591 F.3d 239 (4th Cir. 2009), as supporting Respondents' position. Hearing Trans. ECF 48 at 9:15-18. A review of *Stone* and the relevant statute demonstrates that counsel for Chen is wrong: Sarbanes-Oxley is an original cause of action that ripens if the Department of Labor ("DOL") does not act within 180 days, and is thus not really a "review" at all.[18] *Stone* involved a provision of Sarbanes-Oxley governing the filing of whistleblower lawsuits in federal district court. *Stone*, 591 F.3d at 240. Under Sarbanes-Oxley, a whistleblower who believes he has been retaliated against can file a claim with the Occupational Safety and Health Administration ("OSHA"). DOL, acting through OSHA, is required to act on the claim within 180 days of filing; if it fails to

[18] The Patent Act, invoked by Respondents in their Memo (Resp. Mem., ECF 38 at 16 n.14) is similarly distinguishable, because the Patent Act has, since 1836, given disappointed patent seekers an original cause of action in equity to seek an order granting them their requested patent. This is not in any meaningful sense a "review," though courts give due consideration to the record formed before the Patent and Trademark Office. *See Disney Enters., Inc. v. Kappos*, 923 F.Supp.2d 788, 796 (E.D. Va. 2013) (citing *Kappos v. Hyatt*, 132 S.Ct. 1690, 1700 (2012)).

do so, the claimant may "bring[] an action at law or equity for de novo review in the appropriate district court of the United States." 18 U.S.C. § 1514A(b)(1)(B). In *Stone*, OSHA issued its findings more than 180 days after Stone filed his claim. *Stone*, 591 F.3d at 241-42. Stone eventually appealed his claim to OSHA's Administrative Review Board ("ARB"). *Id*. While that appeal was pending, Stone provided notice of his intention to bring a de novo action in federal district court. *Id*. at 242. The ARB subsequently dismissed Stone's administrative appeal on the theory that the federal court claim divested it of jurisdiction, and the district court also dismissed Stone's complaint on the grounds of claim preclusion. *Id*.

The Fourth Circuit reversed, finding that "the plain and unambiguous meaning of § 1514(a)(1)(B)" dictates that the concept of claim preclusion does not apply. *Id*. at 245. Instead, "the *statutory right* . . . to '*de novo review*'" required the court "to consider the merits anew." *Id*. at 245-46 (italics in original). Considering the merits anew is exactly what Petitioner has asked this Court to do.

IV. All Other Issues Should Be Resolved in the Commission's Favor

A. Respondents Have No Right to a Jury Trial

Respondents contend that this Court is not free to employ summary procedures to conduct its de novo review, because doing so would deprive them of their right to a trial by jury under the Seventh Amendment. Resp. Mem., ECF 38 at 18, 20. Respondents are wrong.[19]

The Seventh Amendment provides that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." U.S. CONST. amend. VII. This is not a "suit at common law." It is an action for the enforcement of an administratively-imposed penalty, and "the Seventh Amendment is not applicable to

[19] The jury trial request in the Petition was purely prophylactic in nature. Pet., ECF 1 at ¶¶ 107-08.

administrative proceedings." *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987). In *Atlas Roofing Co. v. Occup. Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977), the Supreme Court considered whether the Seventh Amendment allowed agencies to resolve occupational health violations, subject to judicial review without a jury, and held that "[a]t least in cases in which 'public rights' are being litigated," i.e., when "the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact," Congress may "assign[] the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." The present case is a petition by the sovereign to vindicate public rights created by statute; therefore, there the Seventh Amendment right to a jury trial does not apply here. Moreover, since no Constitutional jury trial right exists under FPA § 31(d)(2), no Constitutional jury trial right can exist under FPA § 31(d)(3).

B. "Assess" Means "Impose," Not "Evaluate" [Memo Order ¶ 2.e.][20]

Contrary to Respondents' contentions (*see* Resp. Mem., ECF 38 at 13), there is only one meaning of "assess" under FPA § 31, and it means "impose": Paragraph (d)(4) makes reference to a "civil penalty which may be *imposed* under this subsection . . . *prior* to a final decision of the court of appeals under paragraph (2) *or by the district court under paragraph (3).*" 16 U.S.C. § 823b(d)(4) (emphasis added); *see also*, Pet. Memo, ECF 39 at 18 & n.31 (Congress and the courts have used "assess" and "impose" interchangeably), *citing* 16 U.S.C. § 825*o*-1, 15 U.S.C. § 2615, and *Sw. Power Admin. v. FERC*, 763 F.3d 27, 30 (D.C. Cir. 2014).

[20] To the question posed by the Court, "[w]hether shall promptly 'assess' the penalty in § 823b(d)(3)(A) means 'evaluate' or impose,'" the answer is "impose."

C. Respondents' Election Was a Waiver [Memo Order ¶ 2.a.][21]

By electing the FPA § 31(d)(3) procedures "in lieu of" the FPA § 31(d)(3) procedures, which would have afforded them the very opportunities they now seek from this Court, Respondents affected a knowing waiver of their right to all of the features required by the APA for formal, on-the-record adjudications, which were theirs by right under FPA § 31(d)(2). There is no question that they understood not only that those features were not guaranteed under FPA § 31(d)(3), but also that the Commission had taken the position that they would be unavailable in district court procedures. *See* II.B., *supra*. While case law analyzing "in lieu of" in the context of other statutes is inconclusive, examination of the FPA itself is not, as it guarantees formal adjudication for all respondents unless they "affirmatively" and "in writing" opt out of such adjudicative processes,[22] and provides for penalty assessment after only the "*opportunity* for public hearing." 16 U.S.C. § 825*o*-1 (emphasis added).

D. FERC's Interpretation of FPA § 222 Receives *Chevron* Deference [Memo Order ¶ 2.g][23]

Contrary to Respondents' representations (Resp. Mem., ECF 38 at 14), Courts have long held that de novo review does not displace the *Chevron* doctrine. Under the FPA's anti-

[21] To the question posed by the Court, "[w]hether the phrase 'in lieu of' contained in 16 U.S.C. § 823b(d)(1) constitutes a waiver of any particular right (citing similar language in comparable statutes)," the answer is a qualified yes, as discussed herein. That answer, however, is not based on similar language in other statutes, because similar language occurs either in different statutory contexts or in statutes that have not been interpreted by the courts.

[22] *See generally United States v. Thornsbury*, 670 F.3d 532 (4th Cir. 2012) ("The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances, even though the defendant may not know the specific detailed consequences of invoking it."). The FPA even allows respondents to revoke their election of Paragraph 3 procedures with Commission consent. *See* FPA § 31(d)(3)(C) ("Any election to have this paragraph apply may not be revoked except with the consent of the Commission.")

[23] To the question posed in the Memo Order, "[w]hether the Court owes deference under *Chevron U.S.A. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984) to agency interpretation of 16 U.S.C. § 824v," the answer is yes, as discussed herein.

manipulation provision, FPA § 222, 16 U.S.C. § 824v, the Commission's authority to prescribe "rules and regulations" is explicit and hence subject to *Chevron*. *E.g.*, *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 980 (2005); *United States v. Mead Corp.*, 533 U.S. 218, 227, 229 (2001) ("*Mead*").

An agency receives *Chevron* deference when pursuant to its delegated authority, it acts with a "lawmaking pretense." *Mead*, 533 U.S. at 233. The Commission acted "with lawmaking pretense" when, through notice-and-comment rulemaking, it issued Order No. 670, promulgating its regulations implementing the anti-manipulation authority Congress granted it in EPAct 2005. *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202 (2006). That Order adopted the anti-manipulation regulations which Respondents violated, and defined fraud under that regulation "generally, . . . to include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market." Order No. 670 at P 50, *citing Dennis v. United States*, 384 U.S. 855, 861 (1966).[24]

Although the Court reviews this matter de novo, the *Chevron* doctrine still applies to the Commission's interpretation of the law. "*De novo* proceedings presume a foundation of law. . . . Deference can be given to the regulations without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, *de novo*." *United States v. Haggar Apparel Co.*, 526 U.S. 380, 391 (1999); *Hui Zheng v. Holder*, 562 F.3d 647, 651 (4th Cir. 2009). "Valid regulations establish legal norms. Courts can give them proper effect even while applying the law to newfound facts, just as any court conducting a trial in the first instance must conform its ruling to controlling statutes, rules, and judicial precedents." *Id.* Although *Haggar Apparel Co.*, 526 U.S. at 391, recognizes that Congress could affirmatively decide not to apply *Chevron*, Congress has not made that choice here. Indeed, Congress, by providing the

[24] Respondents have challenged the Commission's authority to define fraud in this manner on the basis of its putative reliance on *Dennis*. Chen Mot. to Dismiss, ECF 23 at 21-22. But the Commission did not rely on *Dennis*, nor is its authority to define fraud in this manner in any sense derived from *Dennis*. *Dennis* merely contained a verbal formulation that the Commission found apt.

Commission with anti-manipulation authority under FPA § 222, 16 U.S.C. § 824v, and explicitly authorizing it to issue "rules and regulations," affirmatively chose for *Chevron* to apply.

CONCLUSION

For these reasons, the Court should rule that de novo review means a review of the Commission's Order Assessing Penalties and that it will base its review on the administrative record. Further, the Court should adopt the procedures set forth in Petitioners' December 31, 2015 Memo (ECF 39), which are the most "just, speedy, and inexpensive" procedures for resolving this matter. Fed. R. Civ. P. 1, 16. We therefore ask the Court to (1) order the Commission to file a motion to affirm the Order Assessing Penalties within 45 days of Respondents' answers; (2) provide Respondents an opportunity to respond to the Commission's motion to affirm, and (3) for the Commission to file a reply. Once fully briefed, the Court should (4) review de novo the Commission's and Respondents' positions on the motion to affirm, including all supporting evidence sourced from the administrative record, and (5) decide whether to grant or deny the Commission's motion, or otherwise determine whether additional factual development is necessary to resolve a disputed fact. At that time, additional proceedings could be held as ordered by the Court and pursuant to its obligations to review the matter de novo.

Dated: January 21, 2016

FEDERAL ENERGY REGULATORY COMMISSION

Larry R. Parkinson
Director
Lee Ann Watson
Deputy Director
Office of Enforcement

David A. Applebaum
Director
Courtney Spivey Urschel
Deputy Director
Division of Investigations
(*Not Counsel of Record*)

_____/s/_____
Samuel G. Backfield (Va. Bar No. 46626)
Steven C. Tabackman (Va. Bar No. 16448)
Lisa L. Owings (Va. Bar No. 73976)
Elizabeth K. Canizares (*Pro Hac Vice*)
Daniel T. Lloyd (*Pro Hac Vice*)

888 First Street, N.E.
Washington, DC 20426
Telephone: (202) 502-8100
Facsimile: (202) 502-6449

Attorneys for Petitioner
Federal Energy Regulatory Commission

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2016, I filed the foregoing Supplemental Memorandum of Points and Authorities Regarding Review Procedures Mandated by the Federal Power Act, with the Clerk's Office, using the CM/ECF system, which will send a notification of such filing to the following:

William Miller McSwain
Attorney at Law
Drinker Biddle & Reath LLP (PA-NA)
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996
william.mcswain@dbr.com

John Nowell Estes , III
Attorney at Law
Skadden, Arps, Slate, Meagher & Flom
1440 New York Ave, NW , Suite 600
Washington, DC 20005-2111
john.estes@skadden.com

_____/s/_____
Samuel G. Backfield
Virginia Bar No. 46626
Daniel T. Lloyd
Steven C. Tabackman
Lisa L. Owings
Attorneys for Plaintiff
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
Telephone: (202) 502-8100
Facsimile: (202) 502-6449