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

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

ADDITIONAL MEMORANDUM OF LAW ON PROCEDURES FOR DISTRICT COURT ACTIONS UNDER FEDERAL POWER ACT SECTION 31(d)(3)

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INTRODUCTION

This memorandum answers the Court's questions and explains that FERC's litigation position here contradicts the plain meaning of the statute, the cases, FERC's prior statements outside of litigation, due process, and common sense. Congress did *not* authorize FERC to impose the quasi-criminal sanction of civil penalties, in very large amounts—here, approximately $30 million, but potentially hundreds of millions, or even billions, of dollars—without the defendants *ever* having their "day in court" as that phrase is commonly understood.

There was a purely paper process at FERC, with no discovery (for the defendants) or evidentiary hearing. The defendants elected the district court option under the Federal Power Act ("FPA"), with plenary adjudication under the federal rules, not the administrative option, with discovery and an administrative law judge ("ALJ") trial. Civil penalty actions have, since the early days of the Republic, been court proceedings with a right to trial by jury. *See* ECF No. 38 at 20. While some statutes have, in the last several decades, provided for administrative agencies to adjudicate and impose civil penalties, those statutes do so expressly. *Id*. at 4-5. FERC has not pointed to any civil penalty case where there was a purely paper process at the agency, with no discovery or evidentiary hearing, and then a summary review process in district court—notwithstanding the existence of disputed issues of material fact.

That is no accident. It would be unconstitutional, fundamentally unfair, and at war with the fabric of the American legal system for the government to be able to extract millions, perhaps even billions, of dollars in quasi-criminal sanctions without a defendant ever having the opportunity to litigate the case against it in anything approaching a normal fashion.

Congress nowhere authorized the extra-statutory show-cause process that FERC points to as the basis for truncating litigation in this case. To the contrary, the statute requires FERC to "promptly" issue its penalty assessment order when a respondent elects the district court option,

16 U.S.C. § 823b(d)(3)(A)—a requirement FERC itself has described as "immediate," ECF No. 38 at 13. And FERC itself has acknowledged that its show cause order process is its own contrivance, not required by the statute. *Process for Assessing Civil Penalties; Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties,*, 117 FERC ¶ 61,317 at P 5 (2006). FERC cannot alter the FPA's plain words by injecting its own extra-statutory process, then claiming that changes the defendants' statutory rights. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").

Nor did Congress authorize the Court to truncate this civil action into a "summary affirmance" process untethered to the FPA, the Federal Rules of Civil Procedure and Evidence, or even any FERC order. FERC seeks to shoehorn its senseless scheme into the statute by claiming that the phrase "de novo review of the facts and the law involved" necessarily gives this Court discretion to follow a summary process outside the federal rules. But as we explain below, the Fourth Circuit's decision in *Stone v. Instrumentation Laboratory Co*., 591 F.3d 239 (4th Cir. 2009), forecloses that position foursquare.

It makes no sense to imagine that Congress intended to afflict the district court path with a double dose of discretion, where FERC may adopt whatever purportedly "adversarial" or "adjudicative" procedures it might like to use prior to issuing a penalty assessment order, and the district court may adopt whatever procedures it might like to use to decide the resulting action filed by FERC—with no rules or governing principles constraining either set of choices. That would turn the district court path into a cypher no one ever would elect—all without even a shred of statutory text setting forth that senseless scheme.

We do not argue that every civil penalty case using the district court option must go to trial. We plan to refile our motions to dismiss, which should end the case. This case might also be amenable to summary judgment. FERC is free to move for summary judgment too, following the federal rules. But this case must proceed as a normal civil action.

ARGUMENT

I. RESPONSES TO THE COURT'S QUERIES

A. Whether the Phrase "In Lieu of" Contained in FPA § 31(d)(1) Constitutes a Waiver of Any Particular Right

The phrase "in lieu of" means "[i]n place of; instead of." American Heritage College Dictionary at 783 (3d ed. 1993). There is no basis in the statute's plain language for construing this to imply a waiver of the right to adjudication. To the contrary, the statute uses the terms "elect," "election" and "elected" to refer to the right of the party facing potential penalties to determine the procedures that will apply. 16 U.S.C. § 823b(d). The term elect means "[t]o pick out; select," American Heritage College Dictionary at 441; "election" is "[t]he right or ability to make a choice." *Id*. This connotes the opposite of a "waiver," which is the "[i]ntentional relinquishment of a right, claim, or privilege." *Id*. at 1517.[1]

[1] While FERC gets no deference regarding the meaning of § 31(d) (as explained below), it bears noting that FERC itself has indicated the phrase "in lieu of" means "between," which countermands any contention that that phrase poses a waiver. *Procedures for the Assessment of Civil Penalties Under Section 31 of the Federal Power Act*, Order No. 502, 53 Fed. Reg. 32,035, 32,036 (Aug. 23, 1988), FERC Stats. & Regs. ¶ 30,828 (1988) (an entity facing a potential civil penalty has the "right to make an election *between* the Commission's administrative procedures under section 31(d)(2) and trial court procedures in United States District Court under section 31(d)(3)") (emphasis added).

B. Whether Other Agency Review Statutes Are Similar to FPA § 31(d)(2) and (3)

The 1988 amendments to the Atomic Energy Act of 1954 ("AEA")[2] added a civil penalty provision that is almost identical to § 31(d). *See* 42 U.S.C. § 2282a(c) (1988) (Attachment A). The AEA's legislative history is instructive because it confirms that Congress used virtually identical administrative and district court options, and virtually identical "review de novo" language, to convey that the entity facing the risk of a civil penalty under the AEA has the right to choose between an agency hearing and a "*trial de novo*" in a federal district court. Specifically:

> Any person subject to such penalty under this amendment may elect administrative assessment of the penalty by the Secretary after opportunity for an agency hearing before an administrative law judge, *or a trial de novo* in the appropriate district court of the United States.

S. Rep. No. 100-70, at 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1424, 1436 (codified at 42 U.S.C. § 2282a) (emphasis added).

C. Whether Legislative History of FPA § 31(d) Exists, and Whether Such Information Sheds Light on the Interpretation of the Statute

Congress amended the FPA in 1986 to add § 31, thereby providing FERC with authority to impose civil penalties of up to $10,000 for violations of Part I of the Act. The legislative history for the 1986 amendments does not directly address the alternative procedural options in § 31(d). However, the legislative history for another FERC-administered statute, the Natural Gas Policy Act of 1978 ("NGPA"), addresses a provision, 15 U.S.C. § 3414(b)(6)(E)-(F), that is substantively nearly identical to the district court option under § 31(d) (though lacking an option for an administrative hearing before an ALJ) (Attachment B).

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[2] Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, § 17, 102 Stat. 1066, 1082 (1988).

Prior to enacting the NGPA, Congress considered competing House and Senate bills, and adopted a compromise bill. *See* S. Rep. No. 95-1126 (1978); H.R. Rep. No. 95-1752 (1978), *reprinted in* 1978 U.S.C.C.A.N. 8983; *see* 124 Cong. Rec. 31,847 (Sept. 27, 1978) (Senate approval); 124 Cong. Rec. 38,504 (Oct. 14, 1978) (House approval). "The Commission is given authority to assess civil penalties. V[i]olators may obtain review of the Commission's assessment through a trial *de novo* in Federal district court." 1978 U.S.C.C.A.N. at 9038. The "Explanation Statement" noted that "the *trial de novo* judicial enforcement mechanism of section 504(b)(6)(F) is intended to be the exclusive mechanism for judicial review of FERC orders assessing a civil penalty." 124 Cong. Rec. 38,367 (Oct. 14, 1978) (emphasis added).

While the foregoing legislative history applies to the civil penalty assessment action under NGPA § 504, there is no basis for concluding that Congress intended something different when it later used virtually identical language in setting forth the district court option under § 31(d)(3). To the contrary, in 1992, when Congress expanded the scope of FPA civil penalty authority to cover violations of certain provisions of FPA Part II, the legislative history states that it was "modeled on similar provisions of the Natural Gas Policy Act of 1978." H.R. Rep. No. 102-474, pt. I, at 196 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954, 2019 (to accompany the Energy Policy Act of 1992).

D. Whether Any FERC Statements or Records, Including Relevant Proposed Rulemaking or Notice and Comment Records (if Any), Shed Light on the Interpretation of FPA § 31(d)

FERC has repeatedly acknowledged that the district court option under § 31(d)(3) is a trial de novo. ECF No. 38 at 17-18.[3] In contrast, there is *no* FERC order advancing the contrary

[3] *See, e.g.*, Order No. 502, 53 Fed. Reg. at 32,038; *Burt Dam Power Co.*, 49 FERC ¶ 61,007 at 61,025 (1989); *Consumers Power Co.*, 68 FERC ¶ 61,077 at 61,380 (1994); *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 at P 34 (2007); 18 C.F.R. § 1b.19; *Submissions to* *(cont'd)*

position the lawyers representing FERC assert here. Because FERC speaks through its orders, the litigation position its lawyers are now taking is *ultra vires*.

E. Whether the Statutory Directive for FERC to Promptly "Assess" the Penalty in FPA § 31(d)(3)(A) Means to "Evaluate" or "Impose"

The word "assessment," "assess," or "assessing" appears sixteen times in § 31(d). But the statute draws a distinction between the "prompt[]" assessment required upon a party's election of district court procedures under "paragraph (3)," and a "*final* assessment order," which is "a final and unappealable order under paragraph (2)." 16 U.S.C. §§ 823b(d)(3)(A), (d)(5). In both cases, "assess" means setting a penalty amount.[4] And the significance of "assessing" the penalty is different, depending on which statutory procedures apply.

Under the administrative option in paragraph (2), the Commission makes a "determination of violation . . . on the record" after an agency hearing "before an administrative law judge," and issues an "assessment order." 16 U.S.C. § 823b(d)(2)(A). The subject of the order has the express right to appeal it to a United States Court of Appeals within 60 days "in accordance with" the judicial review provisions of the Administrative Procedure Act ("APA"). *Id.* § 823b(d)(2)(B). If no appeal is taken, or if the appellate court affirms, the assessment order

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the Commission upon Staff Intention to Seek an Order to Show Cause, Order No. 711, 73 Fed. Reg. 29,431 (May 21, 2008), FERC Stats. & Regs. ¶ 31,270 (2008).

[4] *See* Webster's New College Dictionary at 85 (2007) (defining "assess," among other definitions, "1 to set an estimated value on (property, etc.) for taxation 2 to set the amount of (a tax, a fine, damages, etc.) 3 to impose a fine, tax, or special payment on (a person or property) 4 to impose (an amount) as a fine, tax, etc."); *see also* William Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Administrative Penalties*, 1993 ACUS 43, 48 (1993) (when an agency assesses "a penalty after informal or no procedures at all . . . the administrative assessment is more like an administrative complaint; it is what the agency *thinks* to be the case . . . .") (emphasis added).

becomes a "final" order[5] and may be enforced in a "collection action under paragraph (5)," 16 U.S.C. § 823b(d)(6)(A), in which the "validity and appropriateness of such final assessment order . . . shall not be subject to review," *id.* § 823b(d)(5).

In sharp contrast, the "prompt[]" assessment order under the district court procedures in paragraph (3) is *not* a final agency action because that order has no effect on its own. If FERC does not file an action in district court, the penalty it is seeking has no legal force or effect. And if FERC prevails in a district court action, the civil penalty collected is *not* on the basis of the preliminary assessment order required by statute to be assessed "promptly" (or, in FERC's word's, "immediate[ly]"); it is, instead, the district court's "final judgment in favor of the Commission under paragraph (3)." *Id*.

The Fourth Circuit's decision in *Stone* confirms the significance of distinguishing between final and non-final action when determining how this Court must "review de novo" the assessment order here. *Stone* involved a Sarbanes-Oxley whistleblower provision permitting an employee to pursue a retaliation claim by "filing a complaint with the Secretary of Labor," or "if the Secretary has not issued a final decision within 180 days of the filing of the complaint . . . bringing an *action* at law or equity for *de novo review* in the appropriate [U.S.] district court." 591 F.3d at 244 (quoting 18 U.S.C. § 1514A(b)(1) (emphasis altered)). Agency rules set forth the process for administrative review of such complaints, including preliminary findings by the Occupational Safety and Health Administration, an opportunity to challenge those findings

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[5] Generally speaking, judicial review of administrative orders is only available once agency action becomes final. *See, e.g.*, *Bell v. New Jersey*, 461 U.S. 773, 778 (1983) (citations omitted); *see also* 5 U.S.C. § 704. Among other things, for agency action to be considered "final," the "action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted).

before an ALJ, and an opportunity for further challenge to an Administrative Review Board ("ARB"). The employee in *Stone* actually litigated his claim fully before an ALJ, lost, and then appealed to the ARB. When the Secretary missed the 180-day deadline, the employee filed an action in federal district court. The district court granted the employer's motion to dismiss, ruling that, because the employee had "'a full and fair opportunity to litigate his claims before an ALJ, which resulted in a final judgment on the merits, it would be wasteful to relitigate the[ ] claims.'" *Id*. at 245 (citation omitted).

The Fourth Circuit reversed, holding that, "'[b]y definition, *de novo* review entails consideration of an issue as if it had not been decided previously.'" *Id*. at 246 (internal quotation marks and citations omitted). The Fourth Circuit found that outcome was compelled, in part, because there was no "final" agency action and the statute called for the court to "consider[ ] the Sarbanes-Oxley complaint as if the complaint had been filed initially in district court." *Id*. 246 n.6. The court called this "starkly different" from situations where "an agency's *final* decision is reviewed by [the appellate court] in the first instance." *Id*.

The Fourth Circuit's analysis in *Stone* applies *a fortiori* here. Unlike *Stone*, here there was no ALJ hearing. And unlike *Stone*, here the defendants had no right to go to court. Because a party has no right to appeal the prompt assessment under § 31(d)(3), and because the assessment order has no legal significance on its own, that assessment is not final agency action. Instead, FERC must institute an action in district court, and it is the court's "judgment" that will ultimately affix any legal liability or rights. An assessment order under § 31(d)(3) is not final agency action and does not affix legal rights or obligations. *Stone* thus compels the conclusion that the FERC assessment order is like a charging document, akin to a grand jury proceeding.

F. Whether Objections to the Manner in Which FERC Procedurally Undertook its Assessment Were Lodged Before FERC

The defendants objected to FERC's procedures in their notice electing the district court process under § 31(d)(3):

> In several recent court cases, Enforcement has contended 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. . . . We object to, and oppose, that mangled view of the statutory scheme. The statute does not authorize any show cause order process. Nor does it authorize the Commission to determine whether any violations occurred. It simply authorizes the Commission to issue an order assessing penalties and, if the penalties are not paid within 60 days, to file an action in federal district court, where the court is authorized to engage in *de novo* review of the facts and the law.

Houlian Chen, et al., FERC Docket No. IN15-3-000, Notice of *De Novo* Election at 1-2 (Jan. 12, 2015). The assessment order ignored those objections.

G. Whether the Court Owes Deference Under Chevron *to Agency Interpretation of FPA § 222*

FERC gets no deference on any legal issues for several reasons. *See* ECF No. 38 at 14-18. Congress can "turn off" *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) deference, and did so here. *See United States v. Haggar Apparel Co*., 526 U.S. 380, 391 (1999) (Congress may "direct the court not to pay deference to the agency's views" by specifying de novo judicial review); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515-16 (1989) (same). In addition, we note the following:

1. FERC is not entitled to deference on the interpretation of FPA § 222

FERC is entitled to no deference on the interpretation of FPA § 222, 16 U.S.C. § 824v, which is the statutory provision the defendants allegedly violated. As discussed in the Chen motion to dismiss (ECF No. 23 at 21-23), FERC does not and cannot point to any ambiguity in § 222. In addition, read with § 31(d)(3), § 222 shows Congress intended the *courts* to determine

whether the conduct at issue constitutes fraud, consistent with the way the courts have construed § 10(b) of the Securities Exchange Act—a statute the courts have applied for decades. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197-201 (1976).

In any event, courts defer to an agency's interpretation only if it is reasonable. FERC's only effort to defend its interpretation—relying on *Dennis v. United States*, 384 U.S. 855 (1966)—is not reasonable. ECF No. 23 at 21-22. As the Supreme Court explained in *Chiarella v. United States*, "[s]ection 10(b) is aptly described as a catchall provision, but what it catches must be fraud." 445 U.S. 222, 234-35 (1980).

2. FERC also is not entitled to deference on the interpretation of § 31(d)(3)

FERC also gets no deference regarding FPA § 31(d)(3) for several reasons. *First*, agencies do not get deference on the role and function accorded by statute to the courts. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990). FERC's claim for deference on whether the statute contemplates an adjudicatory role for the agency under § 31(d)(3) is a back-door attempt to dictate the role of this court.

Second, section 31(d)(3) is neither ambiguous nor silent. FERC has acknowledged that provision sets forth a detailed procedural scheme the Commission is required to follow. *Consumers Power Co.*, 68 FERC ¶ 61,077 at 61,379-80; *see also Clifton Power Corp. v. FERC*, 88 FERC F.3d 1258, 1263-64 (D.C. Cir. 1996) (section 31(d)(3) requires FERC to "promptly assess[] a penalty without a hearing"). The fact that prompt assessment is required "after the date of the receipt of the [district court election] notice" forecloses any argument that there is a gap in the statute that FERC has discretion to fill.

Third, no *Chevron* deference applies to an agency's litigation position. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (deference is unwarranted where interpretation advanced by agency conflicts with prior agency interpretation or "is nothing more

than a 'convenient litigating position'" (citation omitted)). As explained above, the agency's self-serving litigation position here contradicts its prior pronouncements. *Supra* section I.D.

II. FERC IS WRONG ABOUT THE PROCEDURES GOVERNING THIS ACTION

A. FERC's Reading of FPA § 31(d)(3) Is Unfounded

1. "Review de novo of the law and the facts involved" does not dictate an appellate-style review

FERC claims the word "review" suggests this action must be in the nature of an appeal. FERC is wrong. As discussed above, an appeal follows a final agency action—and there has been none here. And an appeal is filed by a party aggrieved by agency action, not—as here—by an agency seeking to take action against a party.

Likewise, on appeal, a reviewing court reviews an order and (where applicable) a record. The FPA directs this Court to "review de novo *the law and the facts involved*." 16 U.S.C. § 823b(d)(3)(B) (emphasis added). FERC attempts to reconcile its position with this statutory language by repeatedly claiming that the statute requires review de novo of the facts and conclusions of law *in the assessment order*. *See, e.g.*, ECF No. 39. at 1, 23, 24. But the statute does not say that.

Nor can FERC support its argument by claiming that because Congress, in some other statutes, has used the term "trial de novo," the phrase "review de novo" necessarily means something *other* than a trial. The legislative history discussed above shows that Congress sometimes uses "review de novo" where it provides for trial de novo in federal district court. The Fourth Circuit's decision in *Stone* strongly supports that conclusion, holding that the statutory language providing for "an action at law or equity for *de novo* review" was "plain and unambiguous," and that the district court must treat the action as "the initiation of a new case." *Stone*, 591 F.3d 245, 246 & n.6 (rejecting arguments that it would be "wasteful" and

"duplicative" to permit *de novo* review in district court following a full hearing before an ALJ).

2. The FPA does not give this Court the discretion FERC posits

FERC's position—that this Court has "broad discretion" to fashion the procedures that will govern this proceeding—makes no sense. According to FERC, because the statute states that the court "shall have authority," the Court has discretion so broad it can choose whether to act as the functional equivalent of an appellate court, but exempt from the federal rules, or as a federal district court *governed* by the federal rules. *See* ECF No. 39 at 16. That cannot be correct. FERC effectively seeks to rewrite the statute to say that the court "shall have *discretion* to review de novo the law and the facts involved." But that proves too much because it would give the court the discretion to decline to engage in any review whatsoever.

FERC fails to rescue its strained construction by referring to other statutes with significantly different structures and purposes. For example, FERC claims that decisions construing the Employee Retirement Income Security Act of 1974 ("ERISA") mean that courts have discretion to craft procedures when conducting de novo review. ECF No. 39 at 24-25. Under ERISA, employee benefit plans are statutorily required to provide "notice" and "specific reasons" for claims denials, 29 U.S.C. § 1133(1), and "a reasonable opportunity" for a "full and fair review" of a claim denial by "the appropriate named fiduciary." *Id*. § 1133(2). If that effort fails, ERISA permits a claimant to bring a "civil action" to seek recovery. *Id*. § 1132. Among many obvious differences, ERISA is fundamentally different from FPA § 31(d)(3) because it contemplates that plan administrators or fiduciaries make the original claims determination, whereas 31(d)(3) does *not* provide for FERC to make any determination of penalty liability.

In addition, the ERISA statute does not specify a de novo standard in district court. For years courts applied an arbitrary and capricious standard when a claimant sought to challenge a denial, until the Supreme Court held that district courts should review such challenges de novo

"unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). But the Supreme Court did not address the scope of such review in *Firestone*. And where circuits held that review generally should be limited to the evidentiary record before the administrator, they did so based on considerations that have no analogue in the context of FPA § 31(d)(3). *See, e.g., Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 10226 (4th Cir. 1993). ERISA cases thus are inapposite here.[6]

3. FERC errs in claiming that § 31(d)(3) authorizes it to adjudicate penalty liability by directing it to issue an assessment order

FERC misses the mark in arguing that because § 31(d)(3) requires the Commission to promptly assess penalties "by order," the statute implicitly authorizes FERC to determine liability. ECF No. 39 at 20-21. Not every FERC order decides something. The order to show cause requiring the defendants to respond is a ready example—all it did was order the defendants to answer allegations. The fact that § 31(d)(3) calls for FERC to issue an "order" does not mean Congress intended FERC to adjudicate penalty claims where a party elects a district court action. Instead, the absence of a directive for FERC to "determine" the issues under paragraph (3), in contrast with the express provision for a "determination" under paragraph (2), means FERC is not authorized to determine liability under the district court option.

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[6] In addition, FERC cites *Doe v. United States*, 821 F.2d 694 (D.C. Cir. 1987), for the proposition that de novo review calls for the court to "put itself in the agency's place." *Id*. at 698. But *Stone* controls here, not *Doe*. In any event, *Doe* is inapposite because the underlying statute, the Privacy Act of 1974, is dramatically different. The Privacy Act allows individuals to challenge the accuracy of records that an agency keeps about that person and expressly provides for the agency to make a "determination," which is then subject to "judicial review" where the court "shall determine the matter de novo." Privacy Act of 1974, 5 U.S.C. §§ 552a(d)(3), (g)(2)(A) (1984). Thus, unlike both FPA § 31(d)(3) and the Sarbanes-Oxley provisions at issue in *Stone*, *Doe* involved judicial review of a final agency determination that the agency was expressly authorized to make.

B. FERC's Claim That a Plenary Adjudication Would Be an Unjustified "Do-Over" Misses the Mark

According to FERC, there was "extensive factual development and legal argument that has occurred in this case over the past five years," ECF No. 39 at 2. In reality, FERC enforcement engaged in a lengthy investigation lasting about four-and-a-half years. An investigation is not an adjudication. *See Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1387 (5th Cir. 1971).

Subsequently, after FERC issued its extra-statutory show cause order, there was an exchange of briefing over the span of a few months, but no discovery or evidentiary hearing:

- The defendants had no opportunity to take discovery. For example, although FERC appears to be claiming that PJM Interconnection, L.L.C. was deceived, the defendants had no opportunity for discovery of PJM, and no opportunity to depose or cross-examine a witness that would testify on this issue.

- The alleged "evidence" put forth by enforcement was never tested against any evidentiary standard. ECF No. 39 at 6. And although the defendants submitted twelve expert reports, FERC stated (without elaboration) that it "question[ed] the appropriateness of such statements as evidence," did not find them "persuasive," and "rejected" them. ECF No. 1-1 at P 52 n.121.

- Although FERC is required to prove intent to establish a violation of FPA § 222, there was no opportunity for the presentation of live testimony and FERC concluded that Dr. Chen's affidavit was "not . . . credible" without ever hearing from him in person. ECF No. 1-1 at P 89. It is well-established that issues of intent and credibility are not appropriate for resolution on a written record. *See Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997).

- The Commission denied Dr. Chen's request for oral argument. ECF No. 1-1 at P 192. And when Dr. Chen attempted to submit a notice of supplemental authority after the U.S. Supreme Court issued a new decision addressing what constitutes a wash trade under FERC's rules, FERC rejected it.

The process before FERC was akin to a one-sided grand jury proceeding, which, even if a target provides some information, is nowhere near the adjudication that a subsequent trial affords.

Nor can FERC complain about this Court duplicating the effort FERC expended issuing its penalty assessment order. Any de novo review by a court can involve some duplication. And

here any duplication would be caused by FERC's decision to insert its extra-statutory show cause order process into the FPA's carefully crafted penalty assessment scheme.

In any event, under the Fourth Circuit's decision in *Stone*, where—as here—the statute calls for de novo review, allegations of inefficiency are no basis for denying a plenary adjudication. "Neither the Secretary nor the courts have the authority to engage in creative interpretation of the statute to avoid duplication of efforts, even if the goal for doing so is laudable." *Stone*, 591 F.3d at 248 (citation omitted). The Court therefore should conduct this case like any other civil action under the Federal Rules of Civil Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to counsel receiving notices in this matter, including the following counsel of record:

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