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 BRIEF IN RESPONSE TO AMICI CURIAE

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INTRODUCTION

Petitioner has urged this Court to construe Section 31(d)(3) of the Federal Power Act ("FPA") as authorizing this Court to conduct a "review de novo" of the Commission's Order Assessing Penalties (the "Order"), rather than compelling this Court to conduct a plenary trial. *See* ECF 39 and 52. Section 31(d) of the FPA was developed during a period of significant change in the manner in which civil penalties were assessed by administrative agencies; more authority was being given by Congress to agencies to adjudicate and assess civil penalties in recognition of the expertise and efficiency that agencies bring to bear when enforcing their own rules and regulations, and as a means to reduce the burden on the judicial system. Section 31(d) exemplifies this movement, providing respondents the choice between a trial-type hearing before an Administrative Law Judge ("ALJ"), or an informal adjudication before the Commission. In both cases, the civil penalties are assessed by *the Commission*, in recognition of its primary jurisdiction over the complex energy regulatory regime it oversees. This context, much of which is confirmed by the very resources upon which Amici rely, gives meaning to the FPA's structure, and significance to a respondent's ability to choose how a penalty is assessed by the Commission.

By contrast, Amici's insistence that the statute instead provides two avenues to a plenary trial, allowing respondents to choose either the Commission or a district court to make penalty assessments, runs counter to the text, structure, and purpose of the FPA. *First*, Amici fail to draw the necessary and important distinction between civil penalty systems where respondents have no avenue to an evidentiary hearing before the agency, and systems like the FPA that provide a clear path to such a hearing before an ALJ. *Second*, Amici – while relying on their "keen interest in the proper development of federal administrative law and policy" – entirely ignore that Section 31(d) is the enforcement mechanism of a complex and comprehensive

regulatory regime designed to enable the Commission to fulfill its mandate to ensure just and reasonable rates in wholesale electricity markets. Amici's interpretation would undermine that regime. *Third*, while Amici claim to have due process concerns, those concerns are grounded in a fundamental misunderstanding of the Commission's process: Amici fail to account for the availability of trial-type proceedings under Section 31(d)(2), and mischaracterize the Administrative Record compiled under Section 31(d)(3) as a mere investigative record compiled without input from Respondents. *Fourth*, Amici ask the Court to construe the FPA based on the legislative history of different statutes enacted by different Congresses, despite no evidence supporting that interpretation. *Finally*, Amici wrongly frame the question before the court as whether the Federal Rules of Civil Procedure ("FRCP") "should apply," not as how those Rules should be used to facilitate the Court's review.

ARGUMENT

I. Amici Misstate the History of Administrative Civil Penalty Assessments.

Amici argue that interpreting the FPA to allow district courts to perform a review of the Commission's Order in anything less than a plenary trial "runs counter to the traditional understanding of court enforcement actions for civil penalties." Amici Br. at 4. Instead, Amici argue that Section 31(d) of the FPA "gives a defendant the choice of challenging FERC's penalty assessment in a full trial-type proceeding before either an administrative law judge or a federal district court." Amici Br. at 4. Amici's conclusions do not follow from the material cited in their brief. Rather, that material, including the Recommendations of the Administrative Conference of the United States ("ACUS"),[1] supports the Petitioner's construction.

[1] While Amici state that they "have long been active in the" ACUS, they do not purport to speak on behalf of the ACUS as to its views, or the applicability of its prior Recommendations to the FPA. Amici Br. at 4. The ACUS has not expressed a view on the matter before the Court.

A. The FPA is not a "hybrid regime."

Amici express concerns about administrative enforcement programs employing so-called "hybrid regimes" whereby "agencies would assess civil penalties without a formal APA-style hearing, and the only judicial review of the agency's assessment was deferential, being limited to substantial evidence or arbitrary and capricious standards. In other words, under these hybrid regimes, the defendant 'does not receive a full trial anywhere.'" Amici Br. at 7 (citation omitted). Amici caution that such regimes are "contrary to the considered judgment of the ACUS and [have] been roundly criticized." Amici Br. at 7. Amici's implication is that the Petitioner's interpretation of the FPA would render it such a "hybrid regime." They are mistaken: the FPA clearly provides the option of a "full trial," by giving respondents the opportunity for a formal adjudication before an ALJ under Section 31(d)(2).

The ACUS's concern has not been with regimes allowing such a choice. The ACUS's 1993 Recommendations disapproved of enforcement regimes that allowed for the imposition of civil penalties "without a formal APA hearing, without an ALJ, and without de novo judicial review." ACUS Rec. 93-1, *Use of APA Formal Procedures in Civil Money Penalty Proceedings*, 58 Fed. Reg. 4509, at 2-3 (Aug. 30, 1993) ("ACUS Rec. 93-1"). The ACUS's concerns focused on mid-1980s environmental legislation that authorized agencies to assess certain categories of civil penalties (particularly low-dollar penalties) administratively, without trial-type procedures, and with deferential review by the district courts. *Id.*; *see also* Funk, *Close Enough for Government Work?*, 24 SETON HALL L. REV. 1, at 3 and n.15 (1993). Professor Funk described the system as follows: once a respondent in a "hybrid regime" had penalties assessed against it by an agency, the respondent's only recourse was a substantial evidence review before a Federal district court. *Id*. at 3. These statutory regimes stand in stark contrast to Section 31(d) of the FPA, which allows respondents the *option* of: (1) a trial-type proceeding under the APA

followed by deferential review in the court of appeals, or (2) an informal proceeding before the Commission followed by non-deferential de novo review of a penalty assessment order in district court.[2]

B. The history of administratively-assessed penalties supports Petitioner's construction of FPA Section 31(d).

The reason that the ACUS recommended, beginning in at least 1973, that Congress shift the locus of civil penalty assessment away from the courts and toward the "administrative imposition of civil money penalties" by agencies themselves was to further fairness and efficiency. ACUS Rec. 93-1 at 1. It reasoned that the existing system, which required agencies to litigate their cases in district court through the Department of Justice, exacerbated "[t]he already critical overburdening of the courts," raised the possibility that parties would be "forced to acquiesce in unfair settlements because of the lack of a prompt and economical procedure for judicial resolution," and therefore militated "against flooding [the courts] with controversies of this type." *See* ACUS Rec. 72-6, *Civil Money Penalties as a Sanction*, 38 Fed. Reg.19792, at 1-2 (Jul. 23, 1973) ("ACUS Rec. 72-6"). So long as there was the possibility of "an adjudication on the record pursuant to the Administrative Procedure Act [] at the option of the alleged offender or the agency," the ACUS concluded that litigation in the district courts would no longer be necessary and the final agency action would be "reviewed in United States Courts of Appeals under the substantial evidence rule." *Id*. at 4. Later, in an attempt to encourage agencies to use

[2] Amici similarly muddle the issue of how the word "review" should be read, stating in support of their interpretation that "review" necessarily means "trial," that "the experts understood the terms 'de novo review' and 'de novo trial' to be interchangeable" and that "[t]he courts have not generally acknowledged" that "de novo review" "restrict[s] the reviewing court to the record compiled by the agency." Amici Br. at 7 (citing a 1979 law review article, which cited *United States v. First City National Bank*, 386 U.S. 361, 368 (1966)). As Petitioners have argued, *First City National Bank* decided the *standard* of review, not the scope of review. *See* ECF 39 at 12, ECF 65 at 7:18 – 9:9.

safeguards in their penalty assessments, the ACUS urged agencies that did *not* employ formal APA procedures, and therefore did not have built-in procedural safeguards, to provide respondents with written notice, standards-based penalty determinations, and evidentiary hearings. ACUS Rec. 93-1.

So, while it is certainly true, as Amici state, that there has been a "strong endorsement from the ACUS for the use of APA procedures when agencies impose civil penalties," Amici Br. at 7, the ACUS has never suggested that such procedures should be mandatory for respondents who do not wish to utilize them or that informal adjudication should not be offered as an additional alternative to formal adjudication. On the contrary, the ACUS's recommendations made clear that "respondents in civil money penalty cases have a right to a trial-type hearing at *either* the administrative *or* judicial level." ACUS Rec. 79-3, *Use of APA Formal Procedures in Civil Money Penalty Proceedings*, 58 Fed. Reg. 45,409 (1993) ("ACUS Rec. 79-3"). The key consideration is that respondents have an opportunity to avail themselves of trial-type procedures, as the ACUS stated in its 1993 guidance: "as a matter of good policy, anyone facing a civil money penalty imposed by a federal administrative agency with judicial review on the record of the administrative proceedings should have *available the opportunity* to have his or her case heard by an ALJ in a formal APA hearing." ACUS Rec. 93-1 (emphasis added) (also stating "The Conference is therefore recommending that, in all cases involving administratively imposed civil money penalties, the *opportunity* for a formal adjudication pursuant to the APA's provisions [] be available to parties," and "*opportunity* for ALJ hearings in civil money penalty proceedings" should be uniformly required) (emphasis added).

Furthermore, the ACUS favors the use of alternative procedures, so long as the option of an APA-style procedure exists. The ACUS notes "the recommendation that the opportunity for a

hearing be afforded is intended to retain flexibility for resolving the case prior to an ALJ hearing, through settlement, alternative dispute resolution processes, *or other processes agreed upon by the parties*." *Id.* at n.3 (emphasis added). By voluntarily opting out of the ALJ procedures available under FPA Section 31(d)(2), Respondents agreed to "other processes," ***i.e.,*** the informal hearing procedures the Commission offered under FPA Section 31(d)(3).

Addressing the ACUS's 1993 Recommendation, the American Bar Association ("ABA") similarly issued a resolution "encourag[ing] the use of administratively-imposed monetary penalty regimes as part of a regulatory program's comprehensive enforcement scheme."[3] The ABA noted that administrative penalties are favored in light of "the volume of cases to be processed, the availability to the agency of more potent sanctions, the importance of speedy adjudications, the need for specialized knowledge, the relative rarity of questions of law, and the desirability of greater consistency of outcomes." *Id.* at 3. The ABA explained that "the fact that an agency has the option of bringing an administrative action may actually make the enforcement program as a whole *fairer*," including because "the lessened resources required for an administrative adjudication, even a formal adjudication under the APA, compared to bringing an enforcement action in federal court, mean that federal agencies can provide effective enforcement more efficiently."[4]

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[3] American Bar Association, Reports with Recommendations, Adopted by the House of Delegates, at 2 (Aug. 9-10, 2004), available at: http://www.americanbar.org/content/dam/aba/directories/policy/2004_am_114.authcheckdam.pdf.

[4] *Id*. (emphasis in original). Even though the ABA defines the administrative assessment of penalties as being "not subject to de novo review in a court," it still recognizes two legitimate paths for such assessments: one a "formal adjudication under the APA" and another that is something less than that. *Id*. at 4. That view is consistent with the structure of the FPA.

The Petitioner's construction of Section 31(d) is consistent with the ACUS's recommendation that formal APA-style hearings be available, but that they need not be the exclusive mechanism for administratively-assessing civil penalties. The Petitioner's construction also furthers the values of fairness (especially by allowing respondents to determine their own adjudicative path), efficiency, utilization of the agency's "specialized knowledge," and "greater consistency of outcomes," which led both the ACUS and the ABA to endorse the administrative assessment of penalties in the first place. Though Amici purport to rely on the ACUS Recommendations, they fail to account for this vital context.

II. Amici Ignore the Primacy of the Commission's Role in Administering a Comprehensive Regulatory Scheme Under the FPA.

Despite purporting to root their construction of Section 31(d)(3) in, among other things, the FPA's "structure and purpose," Amici have nothing to say about the Commission's preeminent role in administering the comprehensive regulatory scheme established by the FPA. That role has been consistently acknowledged by the courts, which have found that the Commission has primary or exclusive jurisdiction to address issues arising under the FPA, and is reflected in the very language of the statutory provisions at issue here, which provide that the initial penalty assessment be made by *the Commission* no matter which procedural path is taken. Amici's failure to acknowledge the context and purpose of the FPA, or the Commission's role in it, fatally undermines their proffered construction of the statute, which would give respondents the ability to avoid the Commission's authority and expertise altogether. *Food Town Stores, Inc. v. EEOC*, 708 F.2d 920, 924 (4th Cir. 1983) ("A statute must be interpreted to give it the single, most harmonious, comprehensive meaning possible in light of legislative policy and purpose."). By contrast, Petitioner's view accords with the Supreme Court's recent recognition of the complexity of electric markets, and the primacy of the Commission's role in regulating those

markets, in consideration of its mandate to ensure just and reasonable rates. *See generally FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 773 (2016) ("The FPA delegates responsibility to FERC to regulate the interstate wholesale market for electricity – both wholesale rates and the panoply of rules and practices affecting them."). The principles behind the doctrine of primary jurisdiction apply here, where Congress has required the Commission to assess the civil penalty under both prongs of FPA Section 31(d).

A. The doctrines of primary and exclusive jurisdiction provide useful context to Congress's recognition of the role of agency expertise.

The Commission's preeminence in administering the FPA is reflected in courts' recognition of its exclusive jurisdiction over the wholesale energy markets and of its primary jurisdiction over certain matters otherwise cognizable by the courts. The Commission has exclusive jurisdiction over determining the justness and reasonableness of wholesale electric rates. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988) ("FERC has exclusive authority to determine the reasonableness of rates . . . . This principle binds both state and federal courts."); s*ee also City of Osceola, Ark. v. Entergy Ark., Inc.*, 791 F.3d 904, 909 (8th Cir. 2015) (Commission has primary jurisdiction over matters relating to its core responsibilities and competencies). Questions of enforcement are also committed to the Commission's exclusive jurisdiction. This stands to reason, given the nexus between ratemaking and relevant rules and regulations, as well as the value of the Commission bringing its expert judgment to bear on such questions. *Towns of Concord, Norwood, and Wellesley, Mass. v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) ("The Commission has the primary responsibility for deciding matters concerning enforcement. As to the necessity of refunds to deter violations of the statute, the Act leaves this determination to the Commission's expert judgment. Agency discretion is often at its 'zenith' when the challenged action relates to the fashioning of

remedies.") ("*Towns of Norwood*") (citations omitted); *see also*, *Pub. Util. Dist. No. 1 of Snohomish Cty. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 762 (9th Cir. 2004) (manipulative market practices are "reserved exclusively to FERC, both to enforce and to remedy") (citations omitted).

B. The Commission's "primary expertise" is relevant here.

The primary jurisdiction doctrine, which promotes fairness and efficiency by allowing courts to defer matters pending action by expert agencies *see Cent. Tel. Co. of Va. v. Sprint Commns., Inc*., 759 F .Supp. 2d 772, 786 (E.D. Va. 2011) (describing the doctrine), does not directly arise in this case because Congress has already clearly established by statute that the Commission must act before the Court does. But the prudential purpose of the doctrine is a compelling reason to interpret the language of the statute to allow for court review, as opposed to trial, of the Commission's order – namely, that Congress wanted an initial agency assessment utilizing the agency's expertise and fostering a uniformity of interpretation. *See id*., and *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 305-306 (1973) (explaining application of primary jurisdiction in context of Commodity Futures Trading Commission).

The Commission's expertise is clearly implicated here. As noted above, courts have recognized the importance of that expertise in discharging the Commission's central responsibility under the FPA: ensuring abundant, reliable supplies of electric energy and ensuring that the rates at which that energy is sold at wholesale are just, reasonable, and not unduly preferential or discriminatory. That expertise is needed equally whether it involves the Commission's review and approval of cost-based rates and terms and conditions of service, or the setting of rates by market forces in Commission-approved regional wholesale energy markets. *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1292 (2016). The core

premise of such markets – which are uniquely complex[5] – is that if the markets are not impaired or obstructed, and prices are driven by market fundamentals of supply and demand, the rates those markets generate will be just and reasonable. The Commission's anti-manipulation authority, 16 U.S.C. § 824v, which is at issue in this case, is therefore an essential adjunct to its regulatory authority.

But the Commission's civil penalty authority goes far beyond the anti-manipulation authority at issue in this case – it extends to the entirety of Part II of the FPA, "Regulation of Electric Utility Companies Engaged in Interstate Commerce," 16 U.S.C. §§ 824-824w. The procedures of Section 31(d) therefore apply to any violation in the entire spectrum of the Commission's regulation of the interstate wholesale electric markets, not just to its anti-manipulation authority. *See* 16 U.S.C. § 825o-1.[6] Therefore, any construction by this Court of the meaning and scope of Section 31(d)(3) directly affects the ability of the Commission to regulate its markets under Section II of the FPA. It should be construed, as written, to maintain

[5] Their complexity stems from, among other things, the fact that electricity cannot be stored, and that it has traditionally been sold by "natural monopoly" utilities. *See generally*, FERC, Energy Primer: A Handbook of Energy Market Basics (Nov. 2015), available at https://www.ferc.gov/market-oversight/guide/energy-primer.pdf.

[6] Among the many other potential violations of the FPA subject to Section 31's civil penalty assessment provisions are: violations of Commission-approved electric utility tariffs, violations of Commission orders, and deviations from Commission-approved construction, maintenance, and reporting standards created to ensure the reliable operation of the electric grid. These types of violations would also be subject to whatever type of de novo review is ordered by the Court in this case. Adopting Respondents' position would require courts to conduct trials to determine these technical violations in the first instance – a proposition wholly at odds with the statutory framework established by Congress and recognized by courts. *See*, *e.g.*, *FPC v. Colo. Interstate Gas Co.*, 348 U.S. 492, 501 (1955) (finding that the Federal Power Commission's "technical knowledge and experience not usually possessed by judges" relating to "those difficult problems of policy, accounting, economics, and special knowledge that go into ratemaking" called for it to act first).

the Commission's primary role in enforcing and assessing any violations of the comprehensive regulatory scheme that Congress has charged the Commission with administering.

Far from ensuring uniformity, Amici's construction of Section 31(d) would, contrary to established legal principles, displace the Commission's expertise and (at the option of respondents) transfer enforcement of all matters within Part II of the FPA to district courts in 94 diverse districts across the country. Accepting Amici's suggestion that the Commission's Order and the accompanying Administrative Record be treated as nothing more than a "charging decision," would entail duplication (without the benefit of the Commission's expertise) of enormous amounts of agency-level fact finding about the interplay among, *e.g.,* issues of electricity infrastructure and financial market functioning, as well as variations in the application of those concepts in the various electrical markets across the country. The Commission's proposed procedure, by contrast, would allow courts to conduct a review of the Commission's detailed conclusions of fact and law on the basis of an extensive Administrative Record, and give courts a simple mechanism for identifying information outside that Record that would assist the court's review – namely, a motion to affirm.

C. EPAct 2005 reflects Congress's desire to empower the Commission and draw upon its expertise.

The then-relatively new market-based system of wholesale rate regulation was shaken in 2000-2001 (a period now known as the "Western Energy Crisis") when California's market, plagued by systemic dysfunction and manipulation by Enron and others, experienced unprecedented price spikes and volatility ultimately leading to "blackouts, brownouts, and system emergencies" in addition to bankrupting at least one major utility. *Pub. Util. Comm'n. of*

State of Cal. v. FERC, 462 F.3d 1027, 1036-1042 (9th Cir. 2006) ("*CPUC*").[7] In the wake of the Western Energy Crisis, Congress directed the Commission to take a more aggressive role in ensuring the sound functioning of those markets. *See* ECF 52 at 2-3. Accordingly, Congress provided the Commission with additional tools to ensure that these highly-complex markets were free from the sort of manipulative gaming that had plagued the California markets during the crisis. Specifically, the Energy Policy Act of 2005 ("EPAct 2005")[8] gave the Commission the authority to investigate and penalize fraud and manipulation in the wholesale energy markets, pursuant to which the Commission promulgated its Anti-Manipulation Rule. 18 C.F.R. § 1c.2, *and see*, *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (2006); *see also*, ECF 28 at 9-18 (discussing the Commission's corrective measures pre-EPAct 2005) *and* ECF 52 at 2-3 (discussing EPAct 2005). EPAct 2005 also expanded the Commission's civil penalty authority to encompass violations of any part of Part II of the FPA, and substantially increased the magnitude of the civil penalties available – from $11,000 to $1,000,000 per violation per day. ECF 52 at 2-3.

D. The statutory text reflects Congress' decision to vest the Commission with the authority to make the initial penalty assessment.

FPA Section 31(d), both on its face and as construed by the Commission, reflects the Commission's primacy here. The plain language of Section 31(d) provides that under both

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[7] Prominent among the manipulative schemes at issue in the Western Energy Crisis was a strategy Enron called "Death Star." *CPUC*, 462 F.3d at 1040 ("Under the 'Death Star' strategy, Enron allegedly sought to be paid for moving energy to relieve congestion without actually moving any energy or relieving any congestion. All of the demand was created artificially and fraudulently, creating the appearance of congestion, and then satisfied artificially, without the company providing any energy."); *see also Calif. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1015 & n.8. The Commission found that Respondents' engaged in a variant of the Death Star strategy. *See* ECF 1-1 at P 96 ("[S]imilar to Death Star, Respondents' UTC trades involved offsetting pairs to capture revenues without providing the corresponding benefit to the market.").

[8] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

procedural paths, any penalty must be assessed by the Commission. *See* 16 U.S.C. § 823b(d)(2)(A) ("the *Commission* shall assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of title 5 before an administrative law judge") (emphasis added) *and* 16 U.S.C. § 823b(d)(3)(A) ("[i]n the case of any civil penalty with respect to which the procedures of this paragraph have been elected, *the Commission* shall promptly assess such penalty, by order") (emphases added). The plain language provides that under both procedural paths the courts are authorized to "review" the Commission's penalty assessment. Following that review, the district court, under Section 31(d)(3), is authorized to issue an order "affirming the assessment of the civil penalty" and "enforcing, modifying, and enforcing as modified, or setting aside in whole or in [p]art" the Commission's penalty assessment. 16 U.S.C. § 823b(d)(3)(B). This language is consistent with appellate-style review, not with the adjudication of complaints in ordinary civil actions. *See generally*, ECF 39 at 9-21. Therefore, consistent with the doctrine of primary jurisdiction, Section 31(d) entrusts the Commission – prior to any court review – with bringing its expertise to bear in the first instance on any of the often abstruse questions implicated by a potential violation, and with ensuring industry-wide uniformity of interpretation prior to any judicial review.[9] This is fundamentally different from enforcement statutes, such as the Securities Exchange Act, 15 USC § 78u(d)(3), which require that courts, rather than the agency,

[9] The Fourth Circuit Court of Appeals has found that primary jurisdiction does *not* apply where, in clear contrast to Section 31, "there is nothing in the section which contemplates that the Commission must *first* determine administratively whether the grounds of revocation exist." *Pennsylvania Water & Power Co. v. Consol. Gas Elec. Light & Power Co.*, 184 F.2d 552, 563 (4th Cir. 1950) (emphasis added); *cf.*, 16 U.S.C. §§ 823b(d)(3)(A) ("*the Commission* shall promptly assess such penalty by order"), 823(b)(d)(3)(B) ("If the civil penalty has not been paid . . . [t]he court shall have authority to review de novo the law and the facts involved") and 825o-1(b) ("Such penalty *shall be assessed by the Commission*, after notice and opportunity for public hearing") (emphases added).

impose any penalty. *See also* 42 U.S.C. § 300j-23(d) (Environmental Protection Agency); 52 USC § 30109(a)(6)(C) (Federal Election Commission).

This investment of responsibility in the Commission is consistent with the historical origins of EPAct 2005, from which the Commission derives both the formal authority to prohibit market manipulation and the civil penalty authority at issue in this proceeding. Congress's express desire for the Commission to police its markets more actively, and with more serious sanctions, is consistent with the Commission's responsibility for ensuring just and reasonable rates in a market-based context, and its necessary adjunct, enforcement of the Anti-Manipulation Rule.

E. Amici's construction of the statute as a choice-of-venue provision is untenable.

Under Amici's construction, Section 31(d)(3) is only a choice-of-venue statute. In effect, Amici's construction would allow any person alleged to have violated Part II of the FPA or any rule thereunder – including tariff violation and reliability cases involving no alleged manipulation or issue of scienter – to simply "opt out" from the Commission's primary jurisdiction.

This construction would divest the Commission of "the primary responsibility for deciding matters concerning enforcement," *Towns of Norwood*, 955 F.2d at 76, and impinge upon its "exclusive jurisdiction over the regulation of interstate wholesale energy rates." *Snohomish*, 384 F.3d at 760. The Ninth Circuit, in a slightly different context, articulated the absurdity of just such a position:

> The Commission having power to conduct the proceeding, and adequate opportunity to be heard having been given, the Company could not, by deliberately refraining from participation, deprive the proceeding of its vitality. The entire controversy could not, by option of the Company, be forced into a court for de novo determination. To do so would violate fundamental tenets of primary jurisdiction,

> exhaustion of administrative remedies, and orderly administrative procedures derived therefrom.

Fed. Power Comm'n v. Arizona Edison Co., 194 F.2d 679, 684 (9th Cir. 1952).[10] Amici's reading of Section 31 would likewise violate those fundamental principles, and there is nothing in the history, context, or structure of the FPA that supports such a reading.

III. Amici's Due Process Concerns are Ill-Founded.

For the reasons discussed herein, Amici's ostensibly "serious due process concerns" (Amici Br. at 18) are ill-founded, because the Comission's interpretation adheres to the principles of due process and basic fairness.

A. The availability of APA procedures under Section (d)(2) satisfies due process.

An APA trial-type hearing was not only available to Respondents, but, as the default procedure under the statute, Respondents would have received one had they not turned down the opportunity. 16 U.S.C. § 823b(d)(2)(A). Nonetheless, Amici argue that due process requires this Court to conduct a plenary civil trial. Amici Br. at 21-22. This is so despite the fact that Amici admit that "due process would be satisfied if defendants were provided a trial-type hearing before a neutral hearing officer – *either* an ALJ under section 31(d)(2) *or* a federal district court judge under section 31(d)(3)." Amici Br. at 21 (emphasis added); *and see id. at* 7 (conceding that if Respondents had proceeded under Section 31(d)(2), due process would have been satisfied, noting "the Supreme Court's longstanding view that the APA formal adjudication model guarantees sufficient due process" (citing *Wong Yang Sung. v. McGrath*, 339 U.S. 33, 40 (1950))).

[10] The context is different because *Ariz. Edison* was decided before Section 31 was enacted in 1986. *See* Section IV, *infra*. In that case, the Ninth Circuit rejected the argument that only federal courts could determine whether a company was a "public utility" and therefore subject to the jurisdiction of the Federal Power Commission, the Commission's predecessor.

Yet elsewhere, Amici argue that due process requires this Court to conduct a full trial despite the availability of an ALJ hearing under Section 31(d)(2). Amici Br. at 18. Due process, however, does not require two avenues for adjudication of a civil penalty, let alone two avenues that both lead to the same process: a trial. It makes no sense to suggest, as Amici do, that the mere availability of a second, more streamlined, and less procedurally intensive option – exercisable at the sole discretion of a respondent – somehow denies a respondent due process. To the extent Amici believe that the procedures provided under Section 31(d)(3) inadequately protect Respondents here, their objection is to Respondents' litigation strategy, not to the Constitutional adequacy of the available process.[11]

B. The Administrative Record is not a mere "investigative record."

Amici distort the Petitioner's position as "entitl[ing] defendants to no more than a summary proceeding in district court *on the basis of the investigative record compiled by the Agency*." Amici Br. at 18 (emphasis added).[12] The Administrative Record before the Court is no mere "investigative record." The Administrative Record on which the Commission's Order is based is the record of an informal adversarial adjudication conducted on the record and in accordance with the Commission's Rules of Practice and Procedure.[13] To be sure, the Administrative Record includes relevant investigative material, but it also contains numerous other materials, including evidence and arguments provided by Respondents in the adversarial

[11] Nor can there be any suggestion that Respondents' election of procedures under Section 31(d)(3) was uninformed as to the procedures the Commission would employ or the position it would take in court. *See* ECF 52 at 5 & n.10 (quoting Respondents' Notice of Election).

[12] Amici so characterize the Administrative Record throughout their brief. Amici Br. at 15-20.

[13] Portions of the Commission's Rules of Practice and Procedure applicable to this proceeding, Docket No. IN15-3-000, include 18 C.F.R. Part 385 Subparts A (385.101 *et seq.*), B (385.201 *et seq.*), T (385.2001 *et seq.*), U (385.2101 *et seq.*), and V (385.2201 *et seq.*).

show cause proceeding. Contrary to Amici's suggestion, the Administrative Record is the culmination of a docketed proceeding in which Respondents not only had the *opportunity* to be heard, but were affirmatively *required* to provide all arguments and evidence in their defense.[14] *See* ECF 1-2 at 6-7 *and* 18 C.F.R. § 385.213. The Administrative Record was emphatically *not* "compiled by the agency ex parte." *Compare* Amici Br. at 15 *with* ECF 37 at 3 and AR Nos. 1-42 (filings made by both parties and orders issued in the show cause proceeding). Accordingly, to the extent Amici's due process concerns stem from their misunderstanding that the Administrative Record is an ex parte investigative record, they are ill-founded.

C. A review of the Administrative Record satisfies basic fairness.

The review procedures that the Petitioner has endorsed for this proceeding also satisfy the basic fairness requirement espoused in *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976), which, as Amici have acknowledged, "does not inexorably lead to a requirement for a full APA-hearing for all civil penalty actions." Amici Br. at 19. In *Mathews*, the Court endorsed a "flexible" approach, finding that due process fundamentally requires only "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (internal quotations, citations omitted). This Constitutional standard makes clear that "[t]he essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it." *Mathews*, 424 U.S. at 348-349 (internal quotation, citation omitted).

As noted above, there is no dispute that the formal APA procedures that were available to Respondents under Section 31(d)(2), and that they would have received had they not

[14] Respondents' submissions were unconstrained by any page limits or rigid rules of evidence.

affirmatively waived them, satisfy all due process requirements.[15] Amici Br. at 7 ("the APA formal adjudication model guarantees due process") (citation omitted). Beyond this, the procedures the Commission provided under Section 31(d)(3) were fundamentally fair and consistent with the principles set forth in *Mathews*.

Throughout the investigation, Respondents had the right to be, and were, represented by counsel and to submit evidence and arguments at any time, without limitation as to form, length, or content. 18 C.F.R. §§ 1b.16, 1b.18. Respondents had the right to challenge Enforcement staff's recommendation that the Commission initiate an adversary proceeding by issuing an order to show cause. 18 C.F.R. § 1b.19. Respondents exercised these rights.[16] *See* AR Nos. 2-13. Respondents also had the right to a formal adjudication under the APA, which they would have received if they had not affirmatively declined it. *See* AR No. 14 (explaining that the matter will be set for hearing under FPA § 31(d)(2) unless Respondents decline those procedures in writing) and AR No. 21 (notice declining opportunity for APA hearing procedures).

With commencement of the show cause proceeding itself, Respondents once again received detailed notice of the case against them in the form of an 84-page report attached to the Order to Show Cause. AR No. 14. Respondents had ample opportunity to address those allegations during the show cause proceeding and exercised that right. AR Nos. 17-39 (filings and orders in show cause proceeding). This process ultimately culminated in an 89-page Order

[15] Amici have pointed to the size of penalties in this case to illustrate the failure of due process. Petitioner does not dispute that the private interest involved in this case is significant. However, the size of the penalty was known to Respondents when they made their election, and it is they who are best suited to determine if its size alone demands trial-type proceedings. Allowing companies to make that determination, as does the FPA, removes any subjective agency determination of whether a penalty is sufficiently "large" to justify trial-type procedures.

[16] That Respondents chose to disparage the opportunities afforded them does not mean the opportunities were not offered. *See* AR No. 9 ("Your preliminary findings make no sense.").

Assessing Civil Penalties based on the Administrative Record that was created in that proceeding, and addressing in considerable detail the evidence and arguments raised therein. ECF 1-1.

This Court's review provides yet another layer of protection to Respondents' right to notice and opportunity to respond. Section 31(d)(3) confers upon this Court the authority to apply a de novo standard of review to the entire Administrative Record and the Commission's findings and conclusions. Pursuant to this authority, this Court has wide latitude in how it ultimately disposes of the matter, being authorized to "enforc[e], modify[], and enforc[e] as so modified, or set[] aside in whole or in [p]art" the Commission's penalty assessment. 16 U.S.C. § 823b(d)(3)(B).[17]

In sum – and especially in light of Respondents' decision to voluntarily forego a more procedurally-robust alternative – there can be no serious question that these procedures are fair and have provided Respondents with multiple opportunities in fact to be heard at "a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (citation omitted).

IV. The Court Should Not Adopt the Legislative History of Different Statutes Passed Years Before the FPA.

There is very little in the legislative history of FPA Section 31 explaining clearly why Congress adopted these procedures. Amici attempt to fill that vacuum by providing the Court with the legislative history of two different statutes, enacted eight years before the relevant FPA provisions. But there is no indication that the Congress that enacted Section 31 through the Electric Consumers Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986) (the "1986

[17] This authority includes the ability to order targeted discovery if the Court determines that additional factual development would assist its review. The Petitioner, however, believes such discovery to be unnecessary in light of the ample administrative record here.

Amendments"), referred back to the deliberations of an earlier Congress, with different members, enacting distinct statutes for different purposes, that it duplicated the specific compromises negotiated by Congressional members in passing those statutes, or that it was subject to the same or similar pressures in doing so. Therefore, the legislative history cited simply provides no basis for explaining the meaning of the FPA's penalty-assessment provisions.[18]

Amici do not dispute that the legislative history of the 1986 Amendments to the FPA has no explanation of the language at issue in this case; namely, what constitutes a "review de novo" for purposes of Section 31(d)(3). And while Amici state that the civil penalty assessment schemes in the National Energy Conservation Policy Act ("NECPA"), Pub. L. No. 95-619, 92 Stat. 3206 (1978), and the Powerplant and Industrial Fuel Use Act ("PIFUA"), Pub. L. No. 95-620, 92 Stat. 3289 (1979), "undoubtedly served as models for the Federal Power Act provision at the core of this case," they offer no support for this claim. Amici Br. at 12. And there is none. The legislative history of the 1986 Amendments makes no mention of such a connection.[19]

Numerous courts have recognized that "because words used in one statute have a particular meaning they do not necessarily denote an identical meaning when used in another and different statute." *United States v. Diallo*, 476 F. Supp. 2d 497, 504 (W.D. Pa. 2007) (citing

[18] Amici also argue that the FPA must be structured like the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3414(b), which provides for a trial de novo in district court. Amici Br. at 15. But Amici discount or ignore crucial differences between the statutes: the NGPA does not give respondents the option to have their case heard before an ALJ, nor does the NGPA require the Commission to apply statutory factors to its penalty assessment.

[19] This lack of attribution is particularly telling because the legislative history of NECPA makes clear reference to the portions of the PIFUA it was modeled on. *See* Amici Br. at 14 ("This procedure is the same as that adopted in the [PIFUA]."). As discussed above, however, the legislative history of EPAct 2005 does clearly reflect an intent to enhance the Commission's oversight and enforcement authority.

United States ex rel. Chicago, New York & Boston Refrigerator Co. v. Interstate Commerce Comm'n, 265 U.S. 292, 295 (1924)). Indeed, "[t]wo statutory provisions containing similar or identical language are not necessarily subject to the same interpretation, as there are other interpretative factors such as the purpose and context of the legislation, and legislative history." *Galvin v. EMC Mortg. Corp.*, 50 F. Supp. 3d 70, 83 n.11 (D.N.H. 2014) (citing 2A N.J. Singer & J.D. Singer, Sutherland Statutory Construction § 46:5 at 224 (7th ed. 2007)). Those factors are present here.

First, the statutes cited by Amici serve very different purposes than the FPA. The NECPA was a program designed to encourage energy conservation among residential, industrial, and governmental entities. *See generally* Pub. L. No. 95-619, title IV, § 423, Nov. 9, 1978, 92 Stat. 3206. The PIFUA was passed in response to the oil crisis of the mid-1970s and sought to encourage more efficient fossil fuel use. *See generally* Pub. L. No. 95-620, title VII, § 723, Nov. 9, 1978, 92 Stat. 3289. Both granted the Department of Energy, in consultation with the Attorney General, the right to pursue civil penalties for violations of the statute. *See* 42 U.S.C. § 6303(d) *and* 42 U.S.C. § 8433(d). Neither establishes a comprehensive regulatory scheme administered by an independent commission. *See* Section II, *supra*. As recognized by the very legislative history cited by Amici, the fact that the FPA vests discretion to assess penalties in an independent commission is a critical distinction. *See* Amici Br. Attach. A at 589:15-18 (noting in the context of civil penalty enforcement schemes, there is a difference between the Department of Energy and "independent regulatory agencies").

The timing of the statutes likewise counsels caution. The 1986 Amendments were passed eight years and four Congresses after both the NECPA and PIFUA. Without any supporting evidence, Amici ascribe the same understanding of the term "review de novo" from one

Congress to a different Congress eight years later. Absent other evidence of intention, courts often shy away from ascribing the same meaning to similar words used by different Congresses. *See*, *e.g.*, *Lyes v. City of Riviera Beach, Fla.*, 166 F.3d 1332, 1353 n.5 (11th Cir. 1999) ("words can mean different things to different Congresses").

The very legislative history Amici cite illustrates the potential unreliability of much legislative history as a guide to statutory meaning. The NECPA conference report cited by Amici states that "the [procedural] election may not be revoked;" however, the NECPA, like the FPA, allows for revocation. Amici Br. at 14.[20] Such anomalies illustrate why courts have noted that "legislative history is notoriously unreliable." *Matter of Lifschultz Fast Freight Corp.*, 63 F.3d 621, 627 (7th Cir. 1995); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("legislative history is itself often murky, ambiguous, and contradictory").

These issues notwithstanding, no court has endorsed the interpretation of the NECPA and PIFUA advanced by Amici. Amici Br. at 13-14. Nonetheless, Amici insist that this Court must adopt the NECPA conference report's understanding of the term "de novo review" as requiring not de novo review but de novo trial – not only for the NECPA, but for the FPA. Amici ignore other language in the FPA ("affirm," etc.) that implies review rather than trial.[21] *See* ECF 39 at 9-21. Amici base their interpretation of Section 31(d)(3) not on a reading of the statute as a whole, or even on the basis of its own legislative history, but on the basis of the flawed and unreliable legislative history of different acts passed by different Congresses as part of different

[20] The House of Representatives Report contains the same error. *See* H.R. Rep. No. 95-1749, at 100 (1978), reprinted in 1978 U.S.C.C.A.N. 8760, 8793.

[21] Congress knows how to use the word "trial" when it means there should be a trial. *See* ECF 39 at 11-12 & n.10 (collecting examples). By contrast, "[w]hen a court reviews a decision *de novo*, it simply decides whether or not it agrees with the decision under review." *Perry v. Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990).

regulatory schemes administered by different entities and which have never been interpreted by any court. This is a reckless basis for disregarding the plain language of the statute and the Commission's role in administering the FPA's regulatory regime.

V. Amici Misconstrue the Question Before the Court as Whether the FRCP "Should Apply."

Amici emphasize that the plenary trial they believe is required by the FPA "should be governed by the Federal Rules of Civil Procedure." Amici Br. at 16. Certain district courts to have addressed the question of what "review de novo" means under Section 31(d) have similarly framed the issue as one of applicability of the FRCP. That, however, is not the question pending before this Court.

Petitioner's position has been and remains that the FRCP give this Court broad authority when determining how best to review the Commission's Order consistent with Congress' authorization to conduct a de novo review. As Amici themselves acknowledge, "the Federal Rules of Civil Procedure [] give[] the court ample authority to structure the discovery process, to tailor the introduction of additional evidence . . . informed by considerations of fairness and efficiency." Amici Br. at 21.

As all parties agree that the FRCP are available to this Court in conducting its review de novo of the Commission's Order, Petitioner urges the Court to focus on the real question, which is how the Court should perform the "review" that it is authorized by the statute to conduct.[22] Petitioner submits, for the reasons stated here, in its other briefs, and at oral argument, that the

[22] *See*, *e.g.*, Pet.'s Memo Re. Review Procedures, *FERC v. Powhatan, et al.*, No. 3:15-cv-00452, at 13-15 (Dec. 31, 2015) (ECF 39) (explaining that the administrative review model advanced by the Commission is consistent with the FRCP); *see also*, Pet.'s Resp. Re. Scope of Review, *FERC v. ETRACOM*, No. 2:16-cv-01945, at 1-3 (Feb. 2, 2017) (ECF 23) (explaining that the administrative review model advanced by the Commission is consistent with FRCP 52).

FPA authorizes this Court to conduct a review that begins with the Administrative Record – not a trial from scratch – and that such a procedure is consistent with both the text and the context of the FPA.

CONCLUSION

For the reasons stated herein, and as previously briefed by Petitioners, the Court should interpret the FPA as authorizing this Court to conduct a "review de novo" of the Commission's Order.

Dated: March 24, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, I filed the foregoing Reply with the Clerk's Office, using the CM/ECF system, which will send a notification of such filing to counsel of record in this matter.

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