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

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

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INTRODUCTION

When the Federal Energy Regulatory Commission ("FERC" or the "Commission") decides to pursue civil penalties for alleged violations of the Federal Power Act ("FPA"), section 31(d) of the statute expressly gives the entity facing potential penalties the right to choose between two alternative and mutually exclusive sets of procedures. One option, set forth in FPA section 31(d)(2), provides for FERC's civil penalty claim to be adjudicated in an agency hearing pursuant to the Administrative Procedures Act ("APA"). The other option, set forth in FPA section 31(d)(3), requires FERC to pursue its claim in an "action" in federal district court. As we demonstrate, that action is governed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence, and includes the right to a jury trial if the case is not dismissed or resolved on summary judgment. The defendants here chose an adjudication in federal district court, not an administrative hearing.

In the decades since FPA section 31(d) was enacted in 1986,[1] FERC has repeatedly acknowledged that when a party elects district court procedures in lieu of an administrative hearing, that election triggers a trial de novo in federal district court. *See, e.g.*, *Procedures for the Assessment of Civil Penalties Under Section 31 of the Fed. Power Act*, Order No. 502, 53 Fed. Reg. 32,035, 32,038 (Aug. 23, 1988) (district court election "triggers the process leading to a *de novo* trial"); *infra* pp. 16-18. Roughly twenty years after FPA section 31 was enacted, Congress passed the Energy Policy Act of 2005 ("EPAct 2005") and increased the dollar amount

[1] Electric Consumers Protection Act, Pub L. No. 99-495, § 12, 100 Stat. 1243, 1255 (1986).

and scope of FERC's FPA civil penalty authority,[2] but did *not* change the FPA's detailed and mandatory procedures governing the process for assessing civil penalties.[3]

Since EPAct 2005 went into effect, FERC has conducted scores of investigations and settled civil penalty claims for hundreds of millions of dollars.[4] In several recent cases, including this one, the parties chose not to settle, and instead exercise the statutory right to require that FERC pursue its claim for civil penalties in federal district court. Here, and in several cases pending in other federal district courts, FERC is pressing a new and unfounded interpretation of FPA section 31(d)(3) that sharply contradicts its prior acknowledgement that the district court option is a trial de novo. Specifically, FERC now claims that because it held an "adversarial show cause proceeding" (Compl. ¶ 3) and created a so-called "administrative record" (*id.* ¶ 60), the court "can and should" simply review that record and affirm FERC's order assessing penalties (*id.* ¶ 107). Importantly, however, FERC acknowledges that FPA section 31(d)(3) authorizes the court to adjudicate this case under the Federal Rules of Civil Procedure and conduct a trial—and FERC has demanded a jury trial. *See* Compl. ¶¶ 107-08.[5] There thus is

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[2] Energy Policy Act of 2005, Pub. L. No. 109-58, § 1284, 119 Stat. 594, 980 (2005) (FPA civil and criminal penalty authority).

[3] *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 at P 23 (2007) ("EPAct 2005 increased the Commission's FPA section 316A civil penalty authority . . . and expanded coverage to any violation of Part II, but did not change the [FPA section 31(d) civil penalty assessment] procedures described above.").

[4] *See* Testimony of Norman C. Bay, Dir., Office of Enforcement, Fed. Energy Regulatory Comm'n, before the Committee on Banking, Financial Institutions and Consumer Protection Subcommittee, United States Senate at 2 (Jan. 15, 2014) (describing collection of approximately $873 million in civil penalties and disgorgement since EPAct 2005 was enacted) http://www.ferc.gov/CalendarFiles/20140115143216-Bay-testimony-01-15-2014.pdf.

[5] FERC states in the Complaint: "107. The Commission respectfully submits that this Court can and should affirm the penalty assessments without modification following a review of the Commission's Order and the materials presented to the Commission during the penalty assessment process. 108. *Should the Court determine, however, that its review of the Order requires a trial on any issues, the Commission, pursuant to Rule 38 of the Federal Rules of Civil* *(cont'd)*

no dispute that FPA section 31(d)(3) authorizes the court to conduct a plenary adjudication under the Federal Rules of Civil Procedure. The dispute instead is about whether the FPA gives the court discretion to go outside the Federal Rules, refuse to allow discovery, and conduct a summary review proceeding with no trial. We demonstrate in this memorandum of law that the FPA does not confer that unfettered discretion on the court. Instead, the FPA contemplates that this civil action be conducted under the Federal Rules of Civil Procedure, including the opportunity for discovery and a trial if the matter is not dismissed or resolved on summary judgment.

For context, we begin with a brief overview of (1) the two general statutory models for the imposition of civil penalties by agencies of the federal government—the judicial model and the administrative model; and (2) the text of FPA section 31(d). Then, we analyze the plain language of FPA section 31(d)(3) and demonstrate that it forecloses FERC's position that the district court has discretion to disregard the Federal Rules of Civil Procedure and conduct a summary review.

BACKGROUND

I. THE JUDICIAL AND ADMINISTRATIVE MODELS FOR CIVIL PENALTY ASSESSMENTS

There are two general statutory models for the imposition of civil penalties by agencies of the federal government—the judicial model and the administrative model.[6] Historically, the

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Procedure, demands a trial by jury on all issues triable as such." *Id.* ¶¶ 107-08 (emphasis added).

[6] *See generally Athlone Indus., Inc. v. Consumer Product Safety Comm'n*, 707 F.2d 1485 (D.C. Cir. 1983) (holding that agency lacked statutory authority to administratively assess civil penalties and was required to file an action in federal district court); *3M Co. v. Browner*, 17 F.3d 1453, 1459 (D.C. Cir. 1994) (distinguishing statutes that authorize an administrative assessment from ones where "the court first adjudicates liability and then sets the penalty or *(cont'd)*

primary method for assessing a civil penalty was the judicial model.[7] "From the earliest history of the government, the jurisdiction over actions to recover penalties and forfeitures has been placed in the district court." *Lees v. United States*, 150 U.S. 476, 478-79 (1893); *see also Athlone Industries*, 707 F.2d at 1492 ("Congress' decision to limit the [Consumer Product Safety Commission] to a prosecutorial role in civil penalty actions is not unique."). Under the judicial model, "the burden of proof is on the agency to prove the violation, and the determination of the violation is a jury question." Funk Report at 47.

Nevertheless, it is now well-established that Congress may statutorily authorize a federal agency to impose civil penalties through an administrative process. *See, e.g., Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977) ("the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible"); *Athlone Industries*, 707 F.2d at 1492 n.46 ("Congress can, if it wishes, authorize [a federal agency] to assess civil penalties;" citing statutes authorizing administrative assessment of civil penalties). The administrative model has a number of "subsets:"

> At one pole is the administrative penalty imposed through a formal adjudication under the [APA]. Here the administrative adjudication mirrors the trial in the judicially imposed civil penalty. . . .

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fine"); *United States v. Meyer*, 808 F.2d 912, 920-21 (1st Cir. 1987) (distinguishing between statutory civil penalty schemes where the agency makes a prosecutorial decision whereby the penalty claim is pursued in federal court, and statutes providing for mandatory administrative adjudication of liability and an administrative assessment).

[7] William Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Administrative Penalties*, 1993 ACUS 43, 47 (1993) ("Funk Report"). The Administrative Conference of the United States ("ACUS") is an independent agency of the federal government, empowered to study administrative procedure of federal administrative agencies and make formal recommendations to the agencies, the President, Congress, or the Judicial Conference of the United States. *See generally* 5 U.S.C. §§ 591 to 596.

* * * *

> At the other pole is an agency assessment of a penalty after informal or no procedures at all. Here the administrative assessment is more like an administrative complaint; it is what the agency thinks to be the case, what the agency alleges to be true, and what the agency thinks is appropriate as a penalty. . . . Traditionally, the understanding was that the agency could not collect this assessment, absent agreement, without a judicial proceeding in which the agency assessment would be subject to de novo review. What both these poles have in common is that the defendant has an opportunity for a full trial as to liability and penalty amount before a strictly neutral judge, at one before a court, at the other before an [administrative law judge].

Funk Report at 47-48.[8]

Even where an agency is authorized to administratively assess a penalty, a federal court generally must authorize collection of a penalty if it is not paid.

> All civil penalties authorized by Congress are, expressly or by implication, subject to ultimate collection in a United States District Court. In the absence of clear Congressional direction to the contrary, the application of the coercive power of government to compel payment requires the approval of a court. [Aside from certain maritime statutes] [a]ll other civil penalties are, by express provision or implication, enforceable in a civil action, including of course, an opportunity for jury trial of contested factual issues not foreclosed by a previous binding judgment.

Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 1979 Administrative Conference of the United States 203, 208-09 (1979) (footnotes omitted), https://bulk.resource.org/acus.gov/gov.acus.1979.rec.pdf.[9]

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[8] *See generally* ACUS Rec. 72-6, *Civil Money Penalties as a Sanction* (1972), 38 Fed. Reg. 19,792, 19,792-93 (July 23, 1973) (recommending authorization of administratively imposed civil penalties, with opportunity for formal agency adjudication under APA, substantial evidence review in federal appellate courts and collection action in federal district court); ACUS Rec. 93-1, *Use of APA Formal Procedures In Civil Money Penalty Proceedings* (1993), 58 Fed. Reg. 45,409, 45,410 (Aug. 30, 1993) (stating that "in hundreds of contexts" Congress has followed ACUS Recommendation 72-6).

[9] An abridged version of this report was reprinted in the Columbia Law Review. 79 Colum. L. Rev. 1435 (1979). *See also* Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction By Federal Administrative Agencies*, 2 Recommendations and Reports of the Administrative Conference of the United States 896, 906- *(cont'd)*

II. OVERVIEW OF FPA SECTION 31(D)

FPA section 31(d), 16 U.S.C. § 823b(d), mandates detailed procedures that apply when FERC seeks to impose civil penalties for alleged FPA violations. Section 31(d) provides two alternative procedural paths and expressly gives the potential subject of the proposed penalty the right to choose which procedural path will govern. One option provides for an evidentiary hearing before a FERC administrative law judge, after which FERC determines whether there has been a violation. FPA § 31(d)(2), 16 U.S.C. § 823b(d)(2). That is the option for administrative procedures. The other option does not provide for any hearing before FERC; it instead requires FERC to "promptly assess" the penalty and file an "action" in federal district court if the penalty is not paid within a set number of days. FPA § 31(d)(3), 16 U.S.C. § 823b(d)(3). That is the option for district court "procedures." *Id*. The election process, and those two mutually exclusive procedural paths, are summarized below.[10]

Before assessing a civil penalty, section 31(d) requires FERC to provide a person with "notice" of the proposed penalty and "inform such person of his opportunity to elect in writing . . . to have the [district court] procedures of paragraph (3) (in lieu of th[e] administrative procedures] of paragraph (2)) apply with respect to such assessment." 16 U.S.C. § 823b(d)(1).

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08 (1972) ("The vast majority of federal administrative agencies must be successful in a de novo adjudication in a district court (whether or not an administrative proceeding has previously occurred) before a civil money penalty may be imposed.").

[10] The text of FPA section 31(d), 16 U.S.C. 823b(d), is set forth, for convenience, in Attachment A. In addition, FERC has depicted the process required under FPA section 31(d) in a flow chart. *See Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 at App., Process for FPA Part II Penalty Assessment (2006) ("*Penalty Assessment Policy*"). That flow chart shows the two mutually exclusive procedural paths for a penalty assessment and highlights that the FPA does not provide for any administrative hearing when, as here, a defendant elects district court procedures. For convenience, it is attached as well, at Attachment B.

A party has thirty days to make the election in writing. *Id.* If no election is made, the administrative procedures apply.

If a person elects to have district court procedures apply, "the Commission shall promptly assess" the penalty "after the date of the receipt of the [election] notice." *Id.* § 823b(d)(3)(A). If the penalty is not paid within sixty days, "the Commission shall institute an action" in the appropriate federal district court "for an order affirming the assessment." *Id.* § 823b(d)(3)(B). In that action, the court "shall have 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 [p]art, such assessment." *Id.*

If a party does not elect district court procedures, then the administrative procedures of "paragraph 2" apply. *Id.* § 823b(d)(1). Under those administrative procedures, before FERC is authorized to assess a penalty, it first must make a "determination of violation . . . on the record after an opportunity for an agency hearing pursuant to section 554 of title 5 before an administrative law judge." 16 U.S.C. § 823b(d)(2). FERC's order is subject to judicial review in a federal appellate court, pursuant to 16 U.S.C. § 825*l*.

After there is a "judgment" following a district court action, or a "final assessment order" under the option for an administrative hearing, FERC can file "an action to recover" a civil penalty if it remains unpaid. *Id.* § 823b(d)(5). In that recovery action, "the validity and appropriateness of such final assessment order or judgment shall not be subject to review." *Id.*

ARGUMENT

I. FPA SECTION 31(D)(3) REQUIRES A PLENARY DISTRICT COURT ADJUDICATION UNDER THE FEDERAL RULES

A. FERC's Proposed Summary Procedure Contradicts FPA Section 31(d)'s Plain Language

The plain language of FPA section 31(d) dictates that this district court action must involve a full adjudication of disputed facts material to liability and penalties. As FERC has recognized, section 31(d) "must govern any assessment of penalties under the FPA." *Consumers Power Co.*, 68 FERC ¶ 61,077 at 61,380 (1994). Where statutory language is clear—as it is here—courts must apply it according to its terms. *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.").

1. The Term "Action" In FPA Section 31(d)(3) and That Provision's Structure Require the Court To Conduct a Plenary Adjudication Under the Federal Rules

By requiring that section 31's judicial procedure option involve an "action" in district court, Congress plainly required a plenary adjudication of disputed facts pursuant to the Federal Rules, not a summary review proceeding. The statute similarly refers to the district court action as "civil litigation." 16 U.S.C. § 823b(d)(6). As the Ninth Circuit explained in *SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003), the term "action" has a well-established meaning:

> [A]n "action" is the formal and ordinary means by which parties seek legal and/or equitable relief before a court of law through the filing of a formal complaint, triggering the full array of legal, procedural, and evidentiary rules governing the process by which a court adjudicates the merits of a dispute. Absent express statutory authorization stating otherwise, there is no question that the Federal Rules govern all "actions" before the district courts of the United States.

Id. at 656-57 (statute providing for enforcement of U.S. Securities Exchange Commission orders upon "application" contemplated a summary proceeding because "application" signifies something other than an "action").

The Federal Rules of Civil Procedure, by their own terms, "govern the procedure in all civil actions and proceedings in the United States district courts" unless Congress expressly directs otherwise. Fed. R. Civ. P. 1. Those rules apply in the absence of a "direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose." *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) (failing to find, in the class action context, "the necessary clear expression of congressional intent to exempt actions brought [pursuant to the Social Security Act] from the operation of the Federal Rules of Civil Procedure"); *see* Fed. R. Civ. P. 2 (providing that there is only "one form of action"). And the FPA does not express any intent that an action for civil penalties for alleged FPA violations be exempt from the rules that govern other civil actions.

The Supreme Court reached an analogous conclusion in *Chandler v. Roudebush*, 425 U.S. 840 (1976). That case involved a discrimination claim brought under a statute that permitted an employee to "'file a civil action'" following a final adverse employment action by the employing agency. *Id.* at 844 (citation omitted). The district court where the action was filed prohibited discovery, concluding that a "'trial *de novo* is not required [under the statute] in all cases,'" and that "review of the administrative record" was sufficient unless the court made certain findings. *Id.* at 842-43 (citation omitted). The Supreme Court rejected that interpretation, finding no support for reading the statute's contemplated "civil action" to have such a

> chameleon-like character, providing fragmentary de novo consideration of discrimination claims where "appropriate," and otherwise providing record review. On the contrary, the options which Congress considered were entirely straightforward. It faced

> a choice between record review of agency action based on traditional appellate standards and trial de novo of [the statutory] claims. The Senate committee selected trial de novo [and that bill was ratified by Congress].

Id. at 861 (citation omitted). This "action" similarly requires a plenary adjudication under the plain language of the FPA.

Construing section 31(d)'s judicial procedures option to require a plenary adjudication under the Federal Rules also comports with the statute's structure. Section 31(d)'s detailed election mechanism signifies the importance Congress placed on giving the party facing the risk of a civil penalty the right to elect either judicial or administrative procedures for adjudicating disputed issues. For the statutory choice between administrative and judicial procedures to be meaningful, both paths must provide the potential subject of an FPA civil penalty a plenary adjudication of all issues. The administrative option does so through a formal trial-type "hearing" before an administrative law judge, followed by a "determination of violation" by FERC "on the record." 16 U.S.C. § 823b(d)(2)(A). The judicial option does so by requiring the parties to adjudicate all disputed issues in court under the Federal Rules.

FERC's proposal defies this statutory structure by asserting that the FPA implicitly gives the district court unfettered discretion to curtail adjudication and procedure, to waive the Federal Rules, and to limit the proceeding to a summary review of a record that was not developed through adjudication. What FERC is asking for here would lead to a patently absurd result: the defendants would have less robust procedures in district court than would be required under the administrative path. Moreover, the choice of procedures that is expressly and carefully provided for in the statute would not be meaningful because a party would not be able to know in advance what the district court option might mean. It would make no sense for a defendant to choose the judicial path under these circumstances. Nor is it plausible that, in otherwise carefully prescribed

procedures for assessing a penalty, Congress implied—without any express statement—that a civil action by FERC can diverge from the Federal Rules that ordinarily govern civil actions.

Therefore, the plain language and structure of section 31(d)(3) mandate a plenary adjudication under the Federal Rules and preclude the limited review proceeding urged by FERC.

2. The Federal District Court Action Is Not a Review of an Administrative Record Because No Such Record Is Contemplated by the Statute

FERC's effort to limit this action to a summary review of what it terms the administrative record is also foreclosed because, under the plain language of section 31(d)(3), FERC is not authorized to adjudicate civil penalty liability or create an administrative record if a party elects an action in federal district court.

When a statute contemplates the creation of an administrative record, it clearly says so. *See Chandler*, 425 U.S. at 862 n.37 ("[W]here Congress intends review to be confined to the administrative record, it so indicates, either expressly or by use of a term like 'substantial evidence,' which has 'become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court.'") (citation omitted).

FPA section 31(d)(2), the provision addressing the option for administrative procedures (which is not applicable here), is an excellent example. That statutory option expressly provides for FERC to create an administrative record by requiring the FERC "hearing" to be conducted under the APA:

> [U]nless an election is made . . . to have paragraph (3) apply with respect to such penalty, 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 . . . . Such assessment order shall include the administrative law judge's findings and the basis for such assessment.

16 U.S.C. § 823b(d)(2)(A). By expressly incorporating 5 U.S.C. § 554, Congress dictated that the "hearing and decision" be "in accordance with sections 556 and 557," 5 U.S.C. § 554(c)(2). Among other things, that means the agency orders must be based upon a "record," and a party "is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Id.* § 556(d). The APA also provides that "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title." *Id.* § 556(e).

By contrast, the language creating judicial procedures under section 31(d)(3) never refers to, or authorizes FERC to create, an administrative record. Nor does section 31(d)(3) authorize FERC to make the "determination of violation" that section 31(d)(2) expressly authorizes FERC to make. Nor does it refer to a hearing or an "adversarial Order to Show Cause process."[11] If Congress wanted the district court option to be limited to an appellate-style review of an administrative record, it would have said so. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (internal quotation marks and citation omitted). And it *did* say so under the alternative in section 31(d)(2) for an administrative hearing followed by judicial review of the formal administrative record. This contrast between sections 31(d)(2) and (d)(3) underscores the error of FERC's position. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[W]e do nothing more . . . than follow the cardinal rule that a statute is to be read as a whole, . . . since the meaning of statutory language, plain or not, depends on context.") (citations omitted). FERC's reading of section

[11] FERC'S Opposition to Motion to Dismiss of Defendants Houlian Chen, HEEP Fund, Inc. and CU Fund, Inc. at 2 (Oct. 30, 2015) ("Opp'n to Chen Mot. to Dismiss").

31(d)(3) would impose essentially the same limitations on review in district court that are present in reviewing an administrative action, even though the defendants here declined the opportunity to develop a record at the administrative level by electing to require FERC to pursue its case in a district court action.

Furthermore, section 31(d)(3) forecloses FERC's purported interpretation by commanding that FERC "promptly" assess the penalty after "the date of the receipt of the [notice of election]." 16 U.S.C. § 823b(d)(3)(A). FERC has described this mandate as requiring an "immediate" assessment. *Penalty Assessment Policy*, 117 FERC ¶ 61,317; *see also Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1263-64 (D.C. Cir. 1996) (FERC "promptly assesses a penalty without a hearing" under FPA section 31(d)(3)(A)). In this context, that assessment is merely FERC's view of the appropriate penalty based on unproven allegations. And the express statutory requirement for a prompt assessment is fundamentally at odds with FERC's claim of authority to conduct an adversarial proceeding and create a record for the court to review. While there might be debate about exactly how promptly FERC is required to act under this statutory directive, it is not reasonable to contend that the statute gives FERC an opportunity to conduct an "adversarial Order to Show Cause process" and create an administrative record before assessing the penalty.

3. FPA Section 31(d)(3)'s "Review De Novo" Language Is Fully Consistent With a Plenary District Court Adjudication

The statutory requirement that district courts undertake a "review de novo" dictates that *Chevron* deference does not apply in FPA penalty actions like this one. FERC gets no deference regarding the interpretation of section 31(d)(3)'s authorization of judicial "review de novo [of] the law and the facts involved."[12] Thus, discussion of *Chevron* deference is relevant at this point simply because it is the reason why the statute refers to "review de novo" in the first place.

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), an agency's reasonable interpretation of an ambiguous statute is given deference where the agency acts with the force of law. *See generally United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). But where Congress expressly incorporates a de novo standard of review, as it did in FPA section 31(d)(3)—that general assumption does not apply. *See, e.g., 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). By specifying a "review de novo" in section 31(d)(3), Congress foreclosed *Chevron* deference. *See FERC v. MacDonald*, 862 F. Supp. 667, 672 (D.N.H. 1994) (stating, without direct reference to *Chevron*, that the de novo standard in 31(d)(3) means "no deference to FERC's decision").

FERC probably will claim, in contrast, that the statute's "review de novo" language instead limits the scope of this adjudication because it is (allegedly) at odds with the concept of a "trial de novo." As a threshold matter, the APA makes clear that a "trial de novo" is one form (among others) of "review" of agency action by a court: "The reviewing court shall . . . hold

[12] It is firmly established that courts do not defer to agencies regarding the role of a court in a given statutory scheme. *See, e.g., Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990) (Congress did not delegate interpretive authority to agency regarding statute's judicial enforcement provisions).

unlawful and set aside agency action, findings, and conclusions found to be . . . unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2)(F).[13]

FERC's argument also contradicts the Supreme Court's construction of similar "review de novo" language in *United States v. First City National Bank of Houston*, 386 U.S. 361 (1967). That case involved bank mergers approved by the Comptroller of the Currency. The Bank Merger Act of 1966 permitted the government to file an action in federal district court to challenge the mergers, and provided that "'the court shall review de novo the issues presented.'" *Id.* at 365 (citation omitted). The Supreme Court rejected the claim that the phrase "review de novo" precluded a trial.

> It is argued that the use of the word 'review' rather than 'trial' indicates a more limited scope to judicial action. The words 'review' and 'trial' might conceivably be used interchangeably. The critical words seem to us to be 'de novo' and 'issues presented.' They mean to us that the court should make an independent determination of the issues.

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[13] Where other statutes include identical "review de novo" language in civil penalty assessment schemes, Congress intended to provide for a "trial de novo." For example, the Atomic Energy Act replicates the same two-path approach as FPA section 31(d). *See* 42 U.S.C. § 2282a(c). Its legislative history demonstrates that Congress intended the district court assessment option to provide for a trial de novo. *See* S. Rep. No. 100-70, at 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1425, 1436 (person subject to penalty "may elect administrative assessment of the penalty . . . or a *trial de novo* in the appropriate district court of the United States") (emphasis added). The Natural Gas Policy Act of 1978 ("NGPA") provides another example. Like the FPA, the NGPA provides for "review de novo" in a federal district court civil penalty action. 15 U.S.C. § 3414(b)(6)(F) ("[t]he court shall have authority to review de novo the law and the facts involved"); *see also Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 at P 55 ("Congress specifically provided for *de novo* review in district court under the FPA and NGPA civil penalty provisions."). The NGPA's legislative history states: "The Commission is given authority to assess civil penalties. V[i]olators may obta[i]n review of the Commission's assessment through a *trial de novo in Federal district court.*" H.R. Rep. No. 95-1752, at 120-21 (1978), *reprinted in* 1978 U.S.C.C.A.N. 8983, 9037-38 (emphasis added). Although the NGPA does not provide the option for an administrative assessment, that does not suggest the "review de novo" language signals something different.

Id. at 368. As the Supreme Court explained, to accept an interpretation of "review de novo" as precluding a trial would require the Court "to assume that Congress made a revolutionary innovation by making administrative action well nigh conclusive, even though no hearing had been held and no record in the customary sense created." *Id.* The same analysis and conclusions apply here, where FPA section 31(d)(3) requires the court to review "the law and the facts involved," not a so-called record or an order. *See* 16 U.S.C. § 823b(d)(3)(B) (providing for "review de novo [of] the law and the facts involved," not review of a FERC order or record). That requires plenary adjudication of all issues. As the Fourth Circuit explained when it construed the phrase "de novo review" in a different statute, "'[b]y definition, *de novo* review entails consideration of an issue as if it had not been decided previously.'" *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 246 (4th Cir. 2009) (quoting *United States v. George*, 971 F.2d 1113, 1118 (4th Cir. 1992)); *see Betty B Coal Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 194 F.3d 491, 499 (4th Cir. 1999) ("The sum of a de novo review and a de novo process is a new adjudication.").[14]

[14] A recent Supreme Court case interpreting a different statute also is instructive. In *Kappos v. Hyatt*, 132 S. Ct. 1690 (2012), the Court considered a statute that provided two options for judicial review if a patent applicant's patent is denied by the Patent and Trade Office ("PTO"): (1) appeal to the U.S. Court of Appeals for the Federal Circuit, pursuant to 35 U.S.C. § 141; or (2) file a civil action against the PTO Director in the U.S. District Court for the District of Columbia, pursuant to 35 U.S.C. § 145. *See id.* at 1694. Because a § 141 proceeding is governed by the APA, the Federal Circuit can only set aside the PTO's findings "if they are 'unsupported by substantial evidence.'" *Id.* (quoting *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999)). By contrast, under § 145, applicants can "introduce new evidence . . . subject only to the rules applicable to all civil actions, the Federal Rules of Evidence and the Federal Rules of Civil Procedure, even if the applicant had no justification for failing to present the evidence to the PTO." *Id.* at 1695 (internal quotation marks and citation omitted). The Court held that "when new, conflicting evidence is introduced in a § 145 proceeding, the district court must make *de novo* findings to take such evidence into account." *Id.* (citation omitted); *id.* at 1696 (because § 145 proceedings are not limited to an administrative record, "the district court may consider new evidence," and when it does so, "it must act as a factfinder").

Contrary to its litigation position here, FERC has repeatedly stated, in agency orders, that FPA section 31(d)(3)'s "review de novo" language contemplates a full adjudication in federal district court. In the context of civil penalty assessments under both the FPA and the NGPA, numerous FERC orders state that "review de novo" means a trial in federal district court. For example, when promulgating regulations to implement FPA section 31(d) in 1988, FERC stated that when a party elects federal district court procedures to apply to a civil penalty case, the ensuing assessment order "merely triggers the process leading to a *de novo* trial." *Procedures for the Assessment of Civil Penalties Under Section 31 of the Fed. Power Act*, Order No. 502, 53 Fed. Reg. 32,035, 32,038 (Aug. 23, 1988). One year later, in 1989, FERC described the FPA's procedural options as a choice of resolution through either "the Commission's administrative procedures" or "judicial adjudicative procedures." *Burt Dam Power Co.*, 49 FERC ¶ 61,007 at 61,025 (1989). Subsequently, in 1994, when considering whether a settlement proposal conflicted with civil penalty assessment procedures in FPA section 31(d), FERC stated that "[FPA section 31(d)] requires . . . the opportunity for a hearing on the record before an Administrative Law Judge or a *trial de novo* in federal court." *Consumers Power Co.*, 68 FERC ¶ 61,077 at 61,380 (emphasis added). In 2007, in an order comparing and contrasting the civil penalty assessment procedures in the different statutes that FERC administers, FERC described the NGPA's "review de novo" standard as creating "an affirmative right for the person to receive review of [FERC]'s assessment in a *trial de novo* in district court." *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 at P 34.[15] And in 2008, FERC amended its regulations to require FERC enforcement staff to provide notice to the subject of an investigation, and the opportunity to respond in writing, when staff decides to recommend that the Commission pursue a claim of

[15] FERC recognized in the same order that the FPA and NGPA use the same "review *de novo*" language. *Id.* at P 55.

violations by making the subject of an investigation either "the subject of a proceeding governed by part 385 of this chapter [the procedural rules governing agency hearings]" or "*a defendant in a civil action to be brought by the Commission*." 18 C.F.R. § 1b.19 (emphasis added); *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), FERC Stats. & Regs. ¶ 31,270 (2008).

The statutory phrase "review de novo" therefore is fully consistent with a plenary adjudication in district court, and FERC itself acknowledged this for at least two decades before espousing its current litigation position.[16]

B. Even If The Plain Language Were Not Clear, Avoiding Constitutional Error Would Require Rejection of FERC's Proposed Summary Procedure

Even if the plain language of FPA section 31(d)(3) did not provide for a plenary district court adjudication under the Federal Rules—which it does—any ambiguity in the statute would still have to be resolved in favor of plenary adjudication. Doing so avoids the significant constitutional harm created by FERC's alternative construction, which would deny defendants their constitutional right to a jury trial and to due process—as discussed in more detail in part III.

II. FERC HAS NO AUTHORITY TO CIRCUMSCRIBE THE DEFENDANTS' STATUTORY RIGHT TO A DISTRICT COURT ADJUDICATION

Although FERC points to what it deems to be "extensive findings" and "a massive administrative record" to justify its proposed summary procedure, Opp'n to Chen Mot. to Dismiss at 13, FERC's position is unmoored from statutory text. Section 31(d)(3) "sets forth detailed procedures the Commission must follow" when seeking to impose civil penalties. *Consumers Power Co.*, 68 FERC ¶ 61,077 at 61,379; *id.* at 61,380 (section 31(d) "must govern

[16] *See also FERC v. MacDonald*, 862 F. Supp. 667 (D.N.H. 1994) (FPA civil penalty assessment action filed in federal district court in New Hampshire; parties filed cross motions for summary judgment and court set a bench trial on the matters not disposed of on summary judgment).

any assessment of penalties under the FPA"). Section 31(d) authorizes none of FERC's supposedly "extensive" administrative process.

In addition, much of the "process" to which FERC apparently refers was part of the enforcement staff's investigation. An investigation is distinct from, and does not provide the same procedural protections as, an adjudication. For instance, the defendants had no right during FERC's investigation to take discovery on any aspect of the case against them or to test that case before an impartial fact-finder. The materials in the so-called administrative record were never tested under any evidentiary standard—and may not be admissible under the Federal Rules of Evidence. And the only alleged "process" that occurred after defendants elected a district court adjudication was briefing in response to FERC's show cause order—which FERC acknowledges is not part of the statutory scheme.[17] And in that extra-statutory show cause process, FERC placed the burden of establishing there was no violation on the defendants by ordering them to show cause why the Commission should not find that they violated the FPA.

FERC cannot invent procedures that the FPA does not authorize and then assert that those procedures supplant the fundamental rights the statute and the Constitution confer upon the defendants.[18] The FPA gave the defendants the right to require FERC to pursue its case for civil penalties in a federal district court action, giving FERC the burden of proving its case as required

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[17] FERC's *2006 Penalty Assessment Policy* confirms that the "show cause" process FERC followed here (and typically follows in other cases) is not contemplated by the FPA: "*Though not required by the statute*, the Commission will allow the person to file with the Commission within 30 days of the notice any legal or factual arguments that could justify not issuing the assessment or a reduction or modification of the proposed penalty." *Penalty Assessment Policy*, 117 FERC ¶ 61,317 at P 5(1) (emphasis added).

[18] Indeed, in the context of the NGPA, FERC itself has acknowledged that "the provision of any additional process at the Commission in no way impedes the ability of a person to obtain *de novo* review by a district court as expressly permitted by the NGPA." *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 at P 33.

under the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Under this statutory scheme, the matters in dispute are adjudicated in the district court. The court is not expected to simply "take the word of the [agency] as to the outcome of a secret investigation, and let it go at that." *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 304 (1937) (Cardozo, J.). Because the defendants exercised their statutory right to a federal district court action, FERC's role is limited to prosecuting its claims. It had no statutory authority to adjudicate them.

III. DEFENDANTS HAVE A CONSTITUTIONAL RIGHT TO A JURY TRIAL

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." The Supreme Court "has construed this language to require a jury trial on the merits in those actions that are analogous to 'Suits at common law.'" *Tull v. United States*, 481 U.S. 412, 417 (1987) (footnote omitted). In *Tull*, the Supreme Court held that because an action for civil penalties under the Clean Water Act was "clearly analogous to . . . [an] action in debt," the Seventh Amendment required a jury trial on the issue of liability. *Id.* at 420. Here, as in *Tull*, this action by FERC for civil penalties triggers defendants' right to a jury trial. FERC has elected a jury trial here.

The defendants have not yet made that election. But FERC's proposed summary proceeding would deprive the defendants of their constitutional right to a jury trial.

CONCLUSION

For all of the reasons set forth herein, this case should be conducted like any other civil action, under the Federal Rules of Civil Procedure.

In the event that the court is considering deviating from the Federal Rules of Civil Procedure and conducting only a summary review proceeding, the defendants request oral argument on this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2015, 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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ATTACHMENT A

Statutory Appendix

tion shall be treated as a violation of a rule or order of the Commission under this chapter.

(e) Fees for studies

The Commission, in addition to the requirements of section 803(e) of this title, shall establish fees which shall be paid by an applicant for a license or exemption for a project that is required to meet terms and conditions set by fish and wildlife agencies under subsection (c) of this section. Such fees shall be adequate to reimburse the fish and wildlife agencies referred to in subsection (c) of this section for any reasonable costs incurred in connection with any studies or other reviews carried out by such agencies for purposes of compliance with this section. The fees shall, subject to annual appropriations Acts, be transferred to such agencies by the Commission for use solely for purposes of carrying out such studies and shall remain available until expended.

(June 10, 1920, ch. 285, pt. I, §30, as added Pub. L. 95–617, title II, §213, Nov. 9, 1978, 92 Stat. 3148; amended Pub. L. 99–495, §7, Oct. 16, 1986, 100 Stat. 1248; Pub. L. 113–23, §4(a), Aug. 9, 2013, 127 Stat. 494.)

REFERENCES IN TEXT

The Fish and Wildlife Coordination Act, referred to in subsec. (c), is act Mar. 10, 1934, ch. 55, 48 Stat. 401, as amended, which is classified generally to sections 661 to 666c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

PRIOR PROVISIONS

A prior section 30 of act June 10, 1920, was classified to section 791 of this title, prior to repeal by act Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847.

AMENDMENTS

2013—Subsecs. (a), (b). Pub. L. 113–23, §4(a)(1), added subsecs. (a) and (b) and struck out former subsecs. (a) and (b) which authorized the Commission to grant exemptions from the requirements of this subchapter for certain hydroelectric facilities and prohibited the granting of exemptions to facilities with certain capacities.

Subsec. (c). Pub. L. 113–23, §4(a)(2), substituted ''subsection (b)'' for ''subsection (a)'' in introductory provisions.

Subsec. (d). Pub. L. 113–23, §4(a)(3), substituted ''subsection (b)'' for ''subsection (a)''.

1986—Subsec. (b). Pub. L. 99–495, §7(a), inserted provision setting the maximum installation capacity for exemptions under subsec. (a) at 40 megawatts in the case of a facility constructed, operated, and maintained by an agency or instrumentality of a State or local government solely for water supply for municipal purposes.

Subsec. (c). Pub. L. 99–495, §7(b), which directed the insertion of ''National Marine Fisheries Service'' after ''the Fish and Wildlife Service'' in both places such term appears, was executed by inserting ''National Marine Fisheries Service'' after ''the United States Fish and Wildlife Service'' and ''the Fish and Wildlife Service'', as the probable intent of Congress.

Subsec. (e). Pub. L. 99–495, §7(c), added subsec. (e).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

APPLICATION OF SUBSECTION (c)

Pub. L. 99–495, §8(c), Oct. 16, 1986, 100 Stat. 1251, provided that: ''Nothing in this Act [see Short Title of 1986 Amendment note set out under section 791a of this title] shall affect the application of section 30(c) of the Federal Power Act [16 U.S.C. 823a(c)] to any exemption issued after the enactment of this Act [Oct. 16, 1986].''

§ 823b. Enforcement

(a) Monitoring and investigation

The Commission shall monitor and investigate compliance with each license and permit issued under this subchapter and with each exemption granted from any requirement of this subchapter. The Commission shall conduct such investigations as may be necessary and proper in accordance with this chapter. After notice and opportunity for public hearing, the Commission may issue such orders as necessary to require compliance with the terms and conditions of licenses and permits issued under this subchapter and with the terms and conditions of exemptions granted from any requirement of this subchapter.

(b) Revocation orders

After notice and opportunity for an evidentiary hearing, the Commission may also issue an order revoking any license issued under this subchapter or any exemption granted from any requirement of this subchapter where any licensee or exemptee is found by the Commission:

(1) to have knowingly violated a final order issued under subsection (a) of this section after completion of judicial review (or the opportunity for judicial review); and

(2) to have been given reasonable time to comply fully with such order prior to commencing any revocation proceeding.

In any such proceeding, the order issued under subsection (a) of this section shall be subject to de novo review by the Commission. No order shall be issued under this subsection until after the Commission has taken into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation.

(c) Civil penalty

Any licensee, permittee, or exemptee who violates or fails or refuses to comply with any rule or regulation under this subchapter, any term, or condition of a license, permit, or exemption under this subchapter, or any order issued under subsection (a) of this section shall be subject to a civil penalty in an amount not to exceed $10,000 for each day that such violation or failure or refusal continues. Such penalty shall be assessed by the Commission after notice and opportunity for public hearing. In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation, failure, or refusal and the efforts of the licensee to remedy the violation, failure, or refusal in a timely manner. No civil penalty shall be assessed where revocation is ordered.

(d) Assessment

(1) Before issuing an order assessing a civil penalty against any person under this section, the Commission shall provide to such person notice of the proposed penalty. Such notice shall,

except in the case of a violation of a final order issued under subsection (a) of this section, inform such person of his opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment.

(2)(A) In the case of the violation of a final order issued under subsection (a) of this section, or unless an election is made within 30 calendar days after receipt of notice under paragraph (1) to have paragraph (3) apply with respect to such penalty, 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 appointed under section 3105 of such title 5. Such assessment order shall include the administrative law judge's findings and the basis for such assessment.

(B) Any person against whom a penalty is assessed under this paragraph may, within 60 calendar days after the date of the order of the Commission assessing such penalty, institute an action in the United States court of appeals for the appropriate judicial circuit for judicial review of such order in accordance with chapter 7 of title 5. The court shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in Part,[1] the order of the Commission, or the court may remand the proceeding to the Commission for such further action as the court may direct.

(3)(A) In 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, after the date of the receipt of the notice under paragraph (1) of the proposed penalty.

(B) If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (A), 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 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,[1] such assessment.

(C) Any election to have this paragraph apply may not be revoked except with the consent of the Commission.

(4) The Commission may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation in a timely manner at any time prior to a final decision by the court of appeals under paragraph (2) or by the district court under paragraph (3).

(5) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order under paragraph (2), or after the appropriate district court has entered final judgment in favor of the Commission under paragraph (3), the Commission shall institute an action to recover the amount of such penalty in any appropriate district court of the United States. In such action, the validity and appropriateness of such final assessment order or judgment shall not be subject to review.

(6)(A) Notwithstanding the provisions of title 28 or of this chapter, the Commission may be represented by the general counsel of the Commission (or any attorney or attorneys within the Commission designated by the Chairman) who shall supervise, conduct, and argue any civil litigation to which paragraph (3) of this subsection applies (including any related collection action under paragraph (5)) in a court of the United States or in any other court, except the Supreme Court. However, the Commission or the general counsel shall consult with the Attorney General concerning such litigation, and the Attorney General shall provide, on request, such assistance in the conduct of such litigation as may be appropriate.

(B) The Commission shall be represented by the Attorney General, or the Solicitor General, as appropriate, in actions under this subsection, except to the extent provided in subparagraph (A) of this paragraph.

(June 10, 1920, ch. 285, pt. I, § 31, as added Pub. L. 99–495, § 12, Oct. 16, 1986, 100 Stat. 1255.)

EFFECTIVE DATE

Section applicable to licenses, permits, and exemptions without regard to when issued, see section 18 of Pub. L. 99–495, set out as an Effective Date of 1986 Amendment note under section 797 of this title.

§ 823c. Alaska State jurisdiction over small hydroelectric projects

(a) Discontinuance of regulation by the Commission

Notwithstanding sections 797(e) and 817 of this title, the Commission shall discontinue exercising licensing and regulatory authority under this subchapter over qualifying project works in the State of Alaska, effective on the date on which the Commission certifies that the State of Alaska has in place a regulatory program for water-power development that—

(1) protects the public interest, the purposes listed in paragraph (2), and the environment to the same extent provided by licensing and regulation by the Commission under this subchapter and other applicable Federal laws, including the Endangered Species Act (16 U.S.C. 1531 et seq.) and the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.);

(2) gives equal consideration to the purposes of—

(A) energy conservation;

(B) the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat);

(C) the protection of recreational opportunities;

(D) the preservation of other aspects of environmental quality;

(E) the interests of Alaska Natives; and

(F) other beneficial public uses, including irrigation, flood control, water supply, and navigation; and

[1] So in original. Probably should not be capitalized.

ATTACHMENT B

Penalty Assessment Policy
(117 FERC ¶ 61,317), Appendix A

PROCESS FOR FPA PART II PENALTY ASSESSMENT