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

DEFENDANTS' REBUTTAL TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL MATERIAL

Defendants respectfully submit this rebuttal to the Federal Energy Regulatory Commission's ("FERC") opposition (ECF No. 59) to defendants' motion for leave to file supplemental material (ECF No. 54). FERC makes three points in response to defendants' motion, each unavailing:

First, FERC's opening argument—that two of the lawyers for Dr. Chen were counsel to Energy Transfer Partners ("ETP") in the Fifth Circuit case, and thus "ha[ve] been aware of the material they seek leave to file for over seven years," FERC's Opp. to Resp'ts Mot. For Leave to File Suppl. Material ("Opp."), ECF No. 59 at 1—misses the mark. Dr. Chen's counsel did not remember what FERC said to the Fifth Circuit seven years ago in a different case on an issue that became moot before oral argument. It was only in preparation for oral argument before this Court that there was any thought to look to see whether FERC said anything relevant to the Fifth Circuit years ago.

As it turned out, FERC's Fifth Circuit brief is directly responsive to the Court's direction that the parties "specifically address . . . [w]hether any FERC statements or records . . . shed light on the interpretation of § 823b(d)[.]" Order Denying Motions to Dismiss and Setting Procedures, ECF No. 44 at 3. That brief also bears on the Court's direction that the parties address the meaning of the words "promptly 'assess'" in the statute. *Id.* Having reviewed FERC's Fifth Circuit brief after filing the additional memorandum directed by the Court, defendants moved to supplement—giving FERC prior notice, before oral argument, of the defendants' view that FERC's Fifth Circuit brief contradicts its current position.

Strikingly absent from FERC's opposition is any explanation of why it did not bring its own prior statements to the Fifth Circuit to the attention of this Court, as the Court directed it to do. FERC apparently suggests that the lawyers who represented ETP should have had perfect recall of the filings in that proceeding. But two of the FERC lawyers in this action, Ms. Watson and Mr. Backfield, were on the FERC Enforcement litigation team before the agency in the *ETP* case. They would have read FERC's Fifth Circuit brief in 2009. And a litigation party is inherently better positioned to recall its own prior statements in court than to recall the statements of others. FERC thus was equally, if not better, positioned to bring its own prior brief to the Court's attention as a "FERC statement[]" that "shed[s] light" on the interpretation of the statute. In any case, imperfect recollection is no basis for denying the motion to supplement briefing with material that is directly responsive to the Court's questions.[1]

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[1] FERC cites *Campbell v. Verizon Virginia, Inc.*, 812 F. Supp. 2d 748, 750 (E.D. Va. 2011), for the proposition that the defendants must show "excusable neglect" to amend their prior briefing. Opp. at 2. There a plaintiff answered a motion for summary judgment and then later sought to "supplement the record with belatedly discovered payroll records," without explaining "*why* he neglected to timely search for and submit the records." 812 F. Supp. 2d at 750 (emphasis in original). Putting aside FERC's interesting reliance on a case applying the Federal Rules of Civil Procedure, given FERC's (mistaken) contention that those rules do not *(cont'd)*

Second, FERC's next argument—that its Fifth Circuit brief "accords with its position in this litigation," Opp., ECF No. 59 at 3—does not survive even the barest scrutiny. Attempting to highlight a similarity between the two positions it has advocated, FERC points to a sentence in the *ETP* brief stating that both the NGPA and the FPA provisions at issue "go[] to the *review* of the Commission's final decision, not to the adjudication leading to that final decision." *Id*. at 4 (quoting Brief for Respondent at 54, *Energy Transfer Partners, L.P. v. FERC*, Nos. 08-60730 & 08-60810 (5th Cir. 2009) ("ETP Resp'ts Br.") (emphasis in original)). This statement is ambiguous—but it is manifest in the plain language of the relevant statutory provisions of both the NGPA and the FPA that they speak to the district court's role in reviewing the law and the facts involved.

But that was not the point in FERC's brief that defendants highlighted. Defendants focused on a different passage in which FERC contrasted similar sections of the NGPA and the FPA, which differ only because the FPA includes the word "promptly." *See* Br. in Supp. of Mot. for Leave to File Suppl. Material, ECF No. 55 at 2-3. FERC argued to the Fifth Circuit that the difference between the two provisions was dispositive: because the FPA includes the word "promptly," it "requires the immediate assessment of a civil penalty without additional agency procedures," while the NGPA, lacking the word "promptly," escapes such limitations. *Id*. When that assertion is read in the context of the full block quote set forth in defendants' brief in

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apply here, that case is dispositively different. Seeking to supplement an answer to an opposition to a motion for summary judgment with factual material that could have been found before, without explanation of why it was not found before, is dramatically different from the posture here, where we seek to supplement our prior memoranda with a brief FERC previously filed in another court that contradicts its current position—a brief that is directly responsive to a question posed by the Court, and that FERC had at least an equal, if not greater, obligation to provide to the Court.

support of the motion, there is no avoiding the conclusion that FERC was interpreting FPA § 823b(d) to preclude the agency from inserting "'additional agency procedures'" between (1) issuance of notice and (2) issuance of a penalty assessment order. Driving that point home, the Fifth Circuit brief cites one of FERC's prior statements that the assessment must "immediately" follow the notice. *Id.* FERC's prior Fifth Circuit brief therefore directly addresses whether FERC has authority to inject "additional agency procedures" between issuance of a notice and issuance of an order assessing civil penalties. As FERC correctly told the Fifth Circuit, the answer is no.

Third, FERC chides defendants for allegedly seeking to "reargue [their] astonishing proposition . . . that the Commission should, indeed is required to, simply find violations and assess penalties without hearing from the subject first." Opp., ECF No. 59 at 5. That mischaracterizes defendants' position. Defendants have never advocated that FERC cannot ask the potential defendant for its views—in a *prompt* fashion, *without* purporting to preclude plenary district court adjudication.

But FERC does not seek merely to hear from potential defendants to better inform the penalty assessment process. Instead, it seeks to use its extra-statutory show cause process as a basis for curtailing defendants' statutory right to de novo district court review under the Federal Power Act ("FPA") § 823b(d)(3). And that FERC cannot do. There is nothing "astonishing" about the defendants arguing that FERC cannot arrogate unto itself the adjudicative function Congress authorized the federal district courts to execute.

One of the Administrative Conference of the United States ("ACUS") reports cited in defendants' initial brief on procedures under FPA section 31(d)(3) actually foresaw and squarely rejected, agency efforts to forestall de novo review much like what FERC attempts here. That

report—prepared in 1979, before the 1986 amendments to the FPA that added § 823b(d)—stated as follows:

> Even when the statute does not require an administrative trial, there may be instances in which it would be desirable for the agency to conduct one. . . . [The] elements [of adjudication] consume resources likely to be in short supply to the agency. What countervailing benefit might the agency realize to justify this cost?
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> One can think of at least three. The first is the possibility of forestalling de novo review at the judicial level by conducting a trial at the agency level. Can an agency, by conducting a trial-type hearing not required by statute, induce a court to accord a form of limited judicial review rather than conducting a plenary trial? The question does not lend itself to any simple answer: one must examine the structure of the statutory scheme. If the organic statute expressly provides for "de novo review" or "de novo trial," the answer clearly is in the negative.

1979 Administrative Conference of the United States 203, 324-25 (citing *Chandler v. Roudebush*, 425 U.S. 840 (1976)); *see* Defs.' Mem. of Law on Procedures, ECF No. 38 at 5. So too here. While FERC seeks to inject what it calls "adjudicative" and "adversarial" agency procedures falling short of an agency trial, that makes the case for forestalling de novo review even weaker. There is nothing "astonishing" about the defendants echoing a position that the 1979 ACUS Report set forth almost 40 years ago, that is founded on the plain meaning of the statute, that is reflected in various FERC orders, and that is set forth in the Fifth Circuit brief that FERC now seeks to keep out of this case.

For these reasons, and those previously given, the Court should grant the motion.

Respectfully submitted,

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