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

FEDERAL ENERGY REGULATORY COMMISSION, Petitioner, v. POWHATAN ENERGY FUND, LLC, HOULIAN "ALAN" CHEN, HEEP FUND, INC., and CU FUND, INC. Respondents.	)	Civil Action No. 3:15-cv-00452 (MHL)

MEMORANDUM OF LAW IN SUPPORT OF FERC'S OPPOSITION TO MOTION TO DISMISS OF DEFENDANTS HOULIAN CHEN, HEEP FUND, INC. AND CU FUND, INC.

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INTRODUCTION

In this case, the Commission asks this Court to affirm its order assessing civil penalties against Respondents Houlian Chen, HEEP Fund, Inc. and CU Fund, Inc. (collectively, "Chen"), and Chen's client Powhatan Energy Fund, LLC (together with Chen, "Respondents"), for wrongfully diverting approximately $10 million in credits from other wholesale energy market participants. Respondents achieved this unlawful goal through enormous volumes of manipulative trades in the summer of 2010. Their self-cancelling (A-to-B/B-to-A) trades, placed simply to create large trading volumes to qualify for credits, both violated a long-standing prohibition against wash trading and were also equivalent to Enron's infamous "Death Star" strategy during the Western Energy Crisis.

In their Memorandum of Law in support of their Motion to Dismiss ("Mem."), Chen advances four arguments for dismissing the Petition for an Order Affirming the Federal Energy Regulatory Commission's May 29, 2015, Order Assessing Civil Penalties Against Powhatan Energy Fund, LLC, HEEP Fund, Inc., Houlian "Alan" Chen, and CU Fund, Inc. ("Petition" or "Pet.") (ECF No. 1). Each argument is without merit, and the motion should be denied in full.

ARGUMENT

A motion to dismiss under Rule 12(b)(6) for failure to state a claim "tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Jones v. Equifax, Inc.*, No. 3:14CV678, 2015 WL 5092514, at *1 (E.D. Va. Aug. 27, 2015) (Lauck, J.) (denying motion to dismiss). Although merely conclusory statements are not presumed to be true, "a plaintiff's well-pleaded allegations are taken as true and the complaint is viewed in the light most favorable to the plaintiff." *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). All that is required is that the plaintiff (here, petitioner) assert facts showing a claim that is "plausible on its face." *Id.* (quoting *Iqbal*,

556 U.S. at 678–79 (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). And that simply means that the plaintiff (petitioner) has "pleaded factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556).

The Petition under review here seeks affirmance of an Order Assessing Civil Penalties ("Penalty Assessment") issued by the Federal Energy Regulatory Commission ("FERC" or "Commission"), following a lengthy, adversarial Order to Show Cause process in which FERC staff and Respondents each submitted hundreds of pages of briefing and attachments, based on an enormous administrative record. In the present proceeding, the Court has the authority to review that Penalty Assessment, *see* Federal Power Act ("FPA") §§ 316A and 31(d), 16 U.S.C. §§825o-1 and 823b (2012) (setting forth procedures for the assessment of civil penalties for violations), and determine whether to enforce, modify and enforce as modified, or set aside the Commissions' findings of fact, legal conclusions, penalties, and disgorgement. Powhatan's argument that this case should end at this stage—before the Court's statutorily-authorized review of the Penalty Assessment and the underlying administrative record — is in effect an invitation for the Court to abandon its proper role under the FPA.

I. THE PETITION WAS TIMELY FILED AND AFFIRMANCE OF THE PENALTY ASSESSMENT IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

A. The Civil Penalties Imposed By The Penalty Assessment Are Not Barred By The Statute Of Limitations.

Chen argues that "the statute of limitations bars FERC's claims for all but the last four days of the alleged manipulation period," because FERC filed its petition on July 31, 2015. Chen premises this argument principally on *Gabelli v. Securities and Exchange Commission*, 133 S. Ct. 1216 (2013), in which the Supreme Court held that a civil enforcement action brought by the SEC under the Investment Advisers Act, 15 U.S.C. § 80b – 9(e), was barred by 28 U.S.C. §

2462 because the SEC had failed to file the action in district court within five years of "when [the defendants'] allegedly fraudulent conduct occur[red]" (133 S. Ct. at 1221), which is when the SEC's claim accrued.

Because the instant case involves conduct occurring between June 1, 2010 and August 3, 2010, Respondents argue that "to timely capture all of the disputed trading FERC needed to file this action no later than June 1, 2015." Mem. at 8. Chen further argues (Mem. at 5, 10-14) that because the Commission's adversarial proceeding that followed the issuance of its Order to Show Cause, by which the Commission determined Respondents' liability and assessed a penalty and in which they fully participated, was not statutorily required by FPA § 31(d)(3), 16 U.S.C. § 823b(d)(3), the action is not timely. He argues this despite the line of cases, *e.g.*, *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987), holding that when "final assessment of an administrative penalty is a statutory prerequisite to the bringing of an action judicially to enforce such penalty, the statute of limitations prescribed by 28 U.S.C. § 2462 does not begin to run, so long as administrative proceedings have been seasonably initiated, until the same have been concluded and a final (administrative) decision has resulted." *Meyer*, 808 F.2d at 922.

Chen is incorrect. To begin with, he misunderstands the significance of the *Gabelli* decision by failing to take into account fundamental procedural differences between the Investment Advisers Act of 1940 (IAA) and the FPA with respect to the adjudication of liability and imposition of penalties, as well as the wholly different roles played by the judiciary under the respective statutes.[1] Chen also ignores the Supreme Court's emphasis on the purposes served

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[1] As discussed more fully below, the fact that under the IAA it is the district court that determines liability and "imposes" any penalty in the first instance, whereas under the FPA those decisions are made by the Commission, subject to district court *review*, necessarily changes the act that ultimately tolls the statute.

by a statute of limitations. When those factors are taken into account, the relevant event under *Gabelli's* statute of limitations analysis – that is, the event that tolls the statute of limitations in this case – is *not* the date FERC filed its petition to have this Court affirm the Penalty Assessment, but the date when FERC initiated the adversarial administrative proceeding for determining Respondents' liability.[2] And FERC initiated the administrative proceeding when it gave Respondents notice of the proposed penalty, as required by §§ 316A and 31(d)(1) of the FPA (16 U.S.C. §§ 825*o*-1, 823b(d)(1)). This occurred on December 17, 2014, when it served Respondents with an Order to Show Cause to which it appended an 84-page report ("Staff Report") prepared by FERC Enforcement staff. The Staff Report detailed the evidence gathered during Enforcement's five-year investigation; laid out the legal theory underlying staff's allegations that Respondents had violated § 222 of the FPA (16 U.S.C. § 824v and the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2 (2015), on a daily basis from June 1 through August 3, 2010; and provided the basis for the proposed penalties.[3]

Gabelli involved an enforcement action in which the SEC sought to have the district court impose a civil penalty under 15 U.S.C. § 80b-9(e), which provides:

> (e) Money Penalties in Civil Actions
>
> (1) Authority of Commission

[2] Applying *Gabelli* to FPA § 31(d)(3), the Eastern District of California found that it is the Order to Show Cause that must be issued within five years of the underlying violation. *FERC v. Barclays Bank PLC*, No. 2:13-CV-2093-TLN-DAD, 2015 WL 2448686, at *9 (E.D. Cal. May 20, 2015), *as amended* (May 22, 2015).

[3] The Order to Show Cause and the accompanying Staff Report are Exhibit 2 to the Commission's Petition filed before this court. The Commission amended the Order to Show Cause on December 18, 2014 to formally notify Respondents that they potentially faced disgorgement along with civil penalties. The Order to Show Cause also informed Respondents of their "opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures [set out in § 823b(d)(3)] in lieu of those [set out in § 823b(d)(2)] apply with respect to [the assessment of the proposed penalty]." Page references in this Opposition to Pet. Ex. 2 are to the Staff Report.

> Whenever it shall appear to the Commission that any person has violated any provision of this subchapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission . . ., the Commission may bring an action in a United States district court to seek, and *the court shall have jurisdiction to impose, upon proper showing, a civil penalty* to be paid by the person who committed such violation.[4] (emphasis added).

In rejecting the SEC's argument that the limitations period began to run from the date on which the SEC discovered the defendants' allegedly fraudulent conduct, the Supreme Court identified "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liability." *Gabelli*, 133 S. Ct. at 1221 (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). Since the operative enforcement statute gave the district court "jurisdiction to impose, upon a proper showing a civil penalty," with no SEC-assessed penalty or administrative process as a prerequisite for filing its action in district court, the Court held that "[g]overnment enforcement actions for civil penalties" had to be initiated in district court within five years "of when the defendant's allegedly fraudulent conduct occurs," in order to vindicate these policies. *Id.* at 1220, 1222.

In enacting the enforcement provisions of the FPA, however, Congress did not give the district court "jurisdiction to impose . . . a civil penalty" in a FERC enforcement case. Rather, FPA § 316A (16 U.S.C. § 825o-1) provides that a civil penalty "shall be *assessed by the Commission* after notice and opportunity for a public hearing."[5] (emphasis added). Even when,

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[4] While this particular provision applies to the IAA, there are identical provisions for other statutes prosecuted by the SEC. *See* 15 U.S.C. § 77t(d) (Securities Act of 1933); 15 U.S.C. § 78u(d)(3)(A) and § 78u-1(a)(1) (Securities Exchange Act of 1934); 15 U.S.C. § 80a-41(e) (Investment Companies Act).

[5] It is clear that Congress used the word "assessed" in the sense of "(1) to fix the amount of (a tax, fine, etc.); *impose* a (specified tax, etc.) (up)on a person or community; (2) *impose a fine or*

as here, a person "elect[s] in writing within 30 days . . . to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment," Congress nonetheless provided that *it is the Commission* that "shall promptly assess such penalty." *Id.*; FPA § 31(d)(3)(A), 16 U.S.C. § 823b(d)(3)(A).

In cases involving the FPA's anti-manipulation provisions and the Commission's rule implementing those provisions, the district court has "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 [*sic*] [the Commission's penalty] assessment." FPA § 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B).[6] This authority to enforce or modify an existing penalty assessment is in contrast to the Court's role under the IAA, where Congress provided that "the court shall have jurisdiction to impose, upon proper showing, a civil penalty." *Id.*

Therefore, to vindicate the purposes served by a statute of limitations as identified by the Supreme Court in *Gabelli*, the relevant date for starting an administrative proceeding is the date the Commission serves a respondent with notice that the adversarial process for determining liability has begun by providing "notice of the proposed penalty" of "the opportunity for public hearing" and of "the opportunity to elect. . . to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to [the penalty] assessment." FPA § 31(d)(1), 16 U.S.C. § 823b(d)(1). It is *not* when the Commission seeks to have the district court affirm the

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tax on (a person or community)." The New Shorter Oxford English Dictionary, vol. 1 at 130 (1993) (emphasis added).

[6] In this regard, the role of the district court in proceedings under paragraph (d)(3) of FPA § 31 is analogous to the role of the Court of Appeals in proceedings under (d)(2). *Compare* 16 U.S.C. § 823b(d)(2)*, with* 16 U.S.C. § 823b(d)(3).

Penalty Assessment order – which occurs only after the administrative proceeding has already concluded.

The near-unanimous view of courts in similar circumstances is that so long as the agency has commenced an adversarial proceeding within five years, the statute of limitations clock for filing an action *in court* does not begin until the agency is in a position to file that action. This conclusion is consistent with and confirmed by the Supreme Court's precedent as to when a cause of action accrues. *See Wallace v. Kato*, 549 U.S. 384, 388 (2007) ("the standard rule is that accrual occurs when the plaintiff has a complete and present cause of action . . . that is, when the plaintiff can file suit and obtain relief.") (citations omitted) (internal alterations omitted). In *Gabelli*, for example, the Supreme Court held that the SEC's claim accrued on the date that '"the defendants' allegedly fraudulent conduct occurred" because, as of that date, the SEC had a complete and present cause of action because as of that date the SEC could have filed suit to obtain relief. *Gabelli*, 133 S. Ct. at 1221. Nothing further was required, other than actually filing a complaint with the court.

FERC's cause of action, however, did not accrue as of the dates when Respondents engaged in their manipulative conduct because FERC could not "file suit and obtain relief" as of those dates. On the contrary, the Commission was statutorily required to provide notice, wait 30 days for Respondents to make their election, assess a penalty under FPA § 31(d)(3) (if applicable), and then wait an additional 60 days to see whether Respondents would pay the penalty. Only then could it commence an action ("file suit and obtain relief") in this Court.

Here, that is, the Commission's right to seek relief in a district court did not accrue *until after it had assessed a penalty against Respondents and the Respondents had declined to pay the assessed penalty.* Thus, the statute of limitations did not start to run until after the Commission

had completed its penalty assessment process and 60 days had passed during which Respondents had not paid the assessed penalty. FPA § 31(d)(3), 16 U.S.C. § 823b(d)(3). *See United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987).[7]

In *Meyer*—the leading case on this issue— the defendant had violated the Department of Commerce's (the "DOC") anti-boycott regulations. Within five years of the alleged violations, the DOC began an administrative proceeding, and Meyer was assessed a civil penalty. Sixteen months later, "more than five years after the infractions themselves occurred, but within five years of the assessment of his penalty," the DOC brought an enforcement suit in district court. *Id.* at 913. The court found that § 2462 requires that, where agency action is a prerequisite to the filing of an enforcement action in court, the agency must begin its *administrative proceeding* within five years of the violation. *Id.* at 914. The court then addressed "whether § 2462 affords an *additional* five-year period following final administrative assessment of a civil penalty during which the government may sue to enforce the sanction." *Id.*. The court found that § 2462 "is designed to operate in exactly that fashion." *Id.* [8]

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[7] Every Court of Appeals that has considered the issue, with the exception of the Fifth Circuit in *United States v. Core Labs*., *Inc*., 759 F.2d 480 (5th Cir. 1985), has either followed *Meyer's* reasoning or independently reached the same conclusion in applying § 2462. *Accord*, *e.g.*, *United States Department of Labor v. Old Ben Coal Co.*, 676 F.2d 259 (7th Cir. 1982); *SEC v. Mohn*, 465 F.3d 647 (6th Cir. 2006); *United States v. Godbout-Bandal*, 232 F.3d 637 (8th Cir. 2000) (following *Meyer*). *See also Fed. Election Comm'n v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15 (D.D.C. 1995) (following *Meyer* in dicta).

[8] Chen attempts to distinguish *Meyer* by arguing that the exact procedure the Commission adopted for assessing penalties under § 31(d)(3) is not statutorily-mandated. It is of no consequence that Congress did not specify precisely how the Commission was to go about assessing the penalty under this provision. The Commission had discretion in determining how it would proceed to satisfy the statutory mandate that it "promptly assess a penalty when a respondent has chosen to proceed under section 31(d)(3) of the FPA. Chen's reliance on *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59 (1953) and *Lance, Inc. v. United States*, 190 F.2d 204 (4th Cir. 1951) is misplaced, as in both of those cases the Government had the ability and the right to go to district court without going through an administrative proceeding

Finally, Chen's argument that the Commission does not satisfy § 2462 until the Commission asks the district court to affirm its penalty assessment order (FPA § 31(d)(3)(B)) fails to take account of the fact that there are two paths set out in FPA §§ 31(d)(2) and (d)(3) : one, where the Commission assesses a penalty following a hearing before an administrative law judge ("ALJ"); the other, where the ALJ hearing is waived in lieu of a more expedited penalty assessment by the Commission. Both paths involve judicial review of a penalty assessment by the Commission, but only one involves the district court. If a person who receives notice of a proposed penalty decides to have the Commission assess the penalty pursuant to the procedures in paragraph (d)(2), a penalty is assessed following an ALJ hearing, that person would obtain "judicial review of such order" by "instituting an action in [a] United States court of appeals" within 60 days of the Commission's penalty assessment FPA § 31(d)(2)(B). Moreover, if the order to show cause by which the Commission gives notice is *not* the event that tolls the statute of limitations, there is no subsequent common event that would toll the statute under both procedures. Stated another way, tolling of the statute under Chen's view would depend upon which procedural path a respondent chose – which is not a sensible way of reading the FPA or advancing the policies underlying statutes of limitation.

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first. Furthermore, while the Order to Show Cause process was not statutorily mandated, agencies are free to create their own processes, *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272 (4th Cir. 2004), and, once they have done so, are bound to follow them. *Morton v. Ruiz*, 415 U.S. 199 (1974). Moreover, Chen took full advantage of the procedure, including seeking (and receiving) first a 30-day extension of time and then requesting a 14-day extension of time (and receiving a seven-day extension) to respond to the Staff Report, submitting additional evidence (including an affidavit from Chen himself), and making a series of unauthorized submissions to the Commission. Pet. Ex. 2 at P 33. In any event, the statute requires no fewer than 90 days' worth of administrative proceeding, so the statute of limitations must be tolled for at least that period – thus rendering this action timely.

B. Equitable Remedies Such As Disgorgement Are Not Subject To The Statute Of Limitations.

As Chen notes, Mem. at 14, disgorgement is an equitable remedy.[9] Under settled law, equitable remedies are not subject to any statute of limitations. *See*, *e.g.*, *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 201 n.7 (4th Cir. 2013) ("*Lansdowne*") (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)).

Because government enforcement actions seek to vindicate the rights of the public, "[s]tatutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." *Badaracco v. C.I.R.*, 464 U.S. 386, 391 (1984) (quoting *E.I. Du Pont de Nemours & Co. v. Davis,* 264 U.S. 456, 462 (1924)). For that reason, "an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it." *E.I. Du Pont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924).

Chen does not identify any "congressional enactment clearly imposing" a time limitation on the equitable remedy of disgorgement, and there is none. Instead, based on, *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996), Chen urges this Court to hold that when a government agency seeks both equitable relief (such as disgorgement) and a "concurrent legal remedy" (such as a civil penalty), the statute of limitations applies equally to both. Mem. at 14. That approach is inconsistent with the Supreme Court precedents cited above (which the *Williams* court ignored), and has been correctly rejected by other courts.

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[9] *E.g.*, *CFTC v. Kimberlynn Creek Ranch, Inc*., 276 F.3d 187, 193 (4th Cir. 2002) ("it is well settled that equitable remedies such as disgorgement are available to remedy violations of the [Commodities Exchange Act]"); *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) ("disgorgement is an equitable obligation to return a sum equal to the amount wrongfully . . . [a]n order to disgorge is not a punitive measure.").

In *Williams*, the Ninth Circuit noted that in a case between private parties, *Cope v. Anderson*, 331 U.S. 461 (1947), the Supreme Court had held that "equity will withhold its relief in . . . a case where the applicable statute of limitations would bar the concurrent legal remedy." *Williams*, 104 F.3d at 240. With no mention of the special considerations applicable to government enforcement actions, the *Williams* court expanded the *Cope* principle to a case brought by a federal agency.

Since *Williams*, other courts have consistently rejected the Ninth Circuit's expansion of the "concurrent remedy" doctrine to government enforcement cases. In *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997), for example, the Eleventh Circuit held that "the concurrent remedy rule cannot properly be invoked against the government when it seeks equitable relief in its official enforcement capacity," *id.* at 919, noting that *Williams* failed to consider the principles set forth in cases such as *Du Pont* about government enforcement actions, *id.* at 919 n.6. A year later, the Tenth Circuit endorsed the reasoning of *Banks*, holding that "the concurrent remedy rule does not bar the Government's claims for equitable relief." *United States v. Telluride Co*., 146 F.3d 1241, 1249 (10th Cir. 1998).

District Courts in other Circuits have likewise followed *Banks* and rejected *Williams. See, e.g.*, *United States ex rel. Zissler v. Regents of the Univ. of Minnesota*, 992 F. Supp. 1097, 1110 (D. Minn. 1998) ("the 'concurrent remedy rule' should not apply to the government's disgorgement claim because the government is seeking equitable relief in its enforcement capacity"); *Fed. Election Comm'n v. The Christian Coalition.*, 965 F. Supp. 66, 71-72 (D.D.C. 1997) (rejecting application of concurrent remedy rule to equitable relief sought by agency). And, in a case predating *Williams* and *Banks*, a court in this District held that when an agency seeks "both civil penalties . . . and injunctive relief," the statute of limitations "does not govern

this court's actions with respect to the equitable relief" sought by the agency. *United States v. Hobbs*, 736 F. Supp. 1406, 1410 (E.D. Va. 1990).

Accordingly, even if the Commission's claims for penalties were time-barred for certain days – and they are not – there would be no statute of limitations bar to the Commission's claim for disgorgement from Respondents.[10]

II. THE COMMISSION'S PETITION STATES A CLEAR AND SUFFICIENT CLAIM FOR MARKET MANIPULATION.

Chen engaged in a scheme to execute large volumes of offsetting trades for the sole purpose of capturing MLSA payments. Pet. ¶¶ 66-90. After voluminous briefing below, the Commission issued an 89-page Penalty Assessment order, concluding that this activity constituted market manipulation. Pet. Ex. 1. Yet Chen now argues that the Court should, in effect, ignore the Commission's Penalty Assessment – and the rest of the Petition – and focus solely on four paragraphs of the Petition. On that basis, Chen asserts that the Commission has failed to state a claim for market manipulation with sufficient particularity. Mem. at 18.

This approach is based on a fundamental misunderstanding of both this proceeding and the proceeding below. Relying primarily on *DiLeo v. Ernst & Young*, 901 F.2d 624 (7th Cir. 1990) (*DiLeo*), Chen contends that the Petition has failed to identify the "what, when, where, and how" of the conduct that is at issue in this proceeding. In fact, as shown in detail below, the

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[10] Respondents also cite (Mem. at 14-15) two cases from other jurisdictions in which courts held that certain equitable remedies were in effect legal relief subject to statutes of limitations. Neither of those cases supports application of a statute of limitations to the Commission's claim for disgorgement. The Third Circuit's decision in *United States v. EME Homer City Generation, L.P.*, is about injunctions, not disgorgement, and holds only that one specific type of injunction may be functionally equivalent to a penalty or forfeiture. 727 F.3d 274, 295-96 (3d Cir. 2013). And the decision by a district court in *SEC v. Graham*, 21 F. Supp. 3d 1300 (S.D. Fla. 2014) (now on appeal to the Eleventh Circuit), which purports to apply statutes of limitations to all forms of equitable relief, is contrary to the decades of settled precedents cited above, including the Fourth Circuit's decision in *Lansdowne*, 713 F.3d at 201 (4th Cir. 2013).

Petition and the Penalty Assessment it seeks to enforce more than adequately establish the "what, when, where, and how" Chen suggests are missing. There is no reasonable argument that Chen does not have sufficient notice of the Commission's claims.

A. FERC's Findings Should Be Read In The Context Of Both The Commission's Penalty Assessment And The Entire Petition.

Chen's approach of isolating four paragraphs of the Commission's petition and interpreting them devoid of context is fundamentally incorrect. Mem. at 18-25. The Petition should be read as a whole, and specific paragraphs that reference specific findings should be read in the context of the entire Petition. *McBurney v. Cuccinelli*, 616 F.3d 393, 404 n.8 (4th Cir. 2010) ("Because we read the complaint as a whole."); *Green v. Maroules*, 211 F. App'x 159, 162 (4th Cir. 2006) (reading allegations "in the context of the entire complaint"); *Chisolm v. Transouth Fin. Corp.*, 164 F.3d 623 (4th Cir. 1998) (same), *and see* Fed. R. Civ. P. 10(c) (an exhibit to a pleading "is a part of the pleading for all purposes").

Chen's argument that the context of the Petition should be ignored shows a fundamental misunderstanding of both this action and the proceeding below.[11] The Petition does not contain mere allegations. Instead, it summarizes the Commission's extensive findings detailed in a lengthy Penalty Assessment based on a massive administrative record. Pursuant to the

[11] That Chen has received sufficient notice of FERC's claims and the underlying evidence supporting the Commission's determination of liability is further proven by the fact that Chen has already briefed and made many of these same arguments below. Indeed, Chen's only new substantive argument is the statute of limitations; his other contentions were fully litigated before the Commission. *See, e.g.*, Pet. Ex. 1 at PP 30-34 (describing the Commission's show cause procedures in this case and listing several of Chen's submissions), 52-57 (summarizing show cause responses), 94-97 (rejecting argument that conduct was not fraudulent), 98-99 (rejecting contention that trades did not result in harm), 100 (summarizing claim that the trades were not wash trades), 108-110 (rejecting claims that respondents lacked fair notice), and 177-179 (rejecting arguments against imposing penalties on Chen personally).

procedures set forth in the FPA, Petitioner has requested this Court affirm the Commission's Penalty Assessment.[12]

Therefore, this action is not a complaint alleging fraud that is subject to the heightened pleading requirements of Fed. R. Civ. P. 9. It is a petition seeking affirmance and enforcement of the Commission's Penalty Assessment. In contrast with, for example, the SEC's statutory authority—which empowers the SEC to bring an action to establish liability in district court—the Commission's statutory authority is to establish liability by order, and then to seek affirmance of that order in district court. *See* discussion above and *compare* 15 U.S.C. § 77t, *with* 16 U.S.C. § 823b(d)(3). Stated simply, it is the Penalty Assessment itself (supported by the underlying record) that sets forth the claim; it is not the Petition, which is merely the procedural vehicle required by the FPA for filing the Penalty Assessment in district court and asking the court to review, affirm, and enforce it.

In any event, if Rule 9(b) were applicable, it would be difficult to imagine a pleading that more fully "state[s] with particularity the circumstances constituting fraud." In this case, the Commission has filed a detailed, 29-page Petition, summarizing and attaching the 89-page Order, with 420 footnotes, describing in extraordinary detail what Respondents did and why it was unlawful (and which in turn is supported by an 84-page Staff Report).

B. FERC's Petition More Than Adequately Pleads Facts Sufficient To Establish Respondents' Market Manipulation.

Even if the Court were to accept Chen's invitation to ignore the proceedings it is charged with reviewing, it should still find that the Petition more than adequately states the "what, when,

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[12] The FPA establishes that the Court has authority to "review" the Order Assessing Civil Penalties "*de novo.*" FPA § 31(d)(3), 16 U.S.C. § 823(b)(d)(3). While the Commission and Chen disagree on what the Court's *de novo* review should entail, Mem. at 6, this issue need not be resolved as part of the instant motions. *See also* section V, *infra*.

where, and how" Chen suggests are missing. Mem. at 18-25. Contrary to Chen's assertions, the Commission was not required to painstakingly recount each of the thousands of fraudulent transactions Chen executed. Mem. at 16 n.10. Instead, under Fed. R. Civ. P. 8(a)(2), FERC was required to present a plain and concise statement sufficient to give Respondents fair notice of the Commission's findings and the grounds upon which they rest. *See Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007). There can be no argument that after years of investigation, numerous pleadings below, a lengthy Penalty Assessment, and the detailed recitation in the Petition that Chen somehow lacks fair notice of the basis of the findings that this Court is asked to review. And even if Rule 9(b) were applicable here (and it is not), "a court should hesitate to dismiss a complaint under Rule 9(b)" when the defendant (here, respondent) "has been made aware of the particular circumstances for which she will have to prepare a defense at trial" and, when the case is filed, already has "substantial . . . evidence of those facts." *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 432 (4th Cir. 2015) (holding that complaint satisfied Rule 9(b)) (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)).

Relying primarily on *DiLeo*, Chen contends that the Petition fails to identify the "what, when, where, and how" of the conduct is at issue. The following paragraphs (among others) in the petition show that Chen's assertion is incorrect:

- *What*: Chen engaged in actions that "constitute fraud" and "engaged in wash trading, which the Commission has long recognized as fraudulent conduct" in violation of FPA section 222 and Part 1c of the Commission's Regulations. Pet. ¶ 15 (quoting Pet. Ex. 1 at P 51). Chen's A-to-B/B-to-A trades were also functionally similar to Enron's notorious "Death Star" (circular scheduling) scheme. Penalty Assessment at P 96.

- *When*: During the "Manipulation Period," defined as June 1, 2010 – August 3, 2010. Chen acknowledges this in his Motion. Mem. at 1, 8 (citing Pet. ¶ 1).
- *Where*: "in PJM Interconnection L.L.C.'s (PJM) energy markets." Pet. ¶ 10 (quoting Pet. Ex. 1 at P 6).
- *How*: By implementing a scheme involving the execution of large volumes of offsetting, A-to-B/B-to-A trades for the purpose of capturing '"excessive amounts of certain credit payments,'" namely, the Marginal Loss Surplus Allocation (MLSA). Pet. ¶ 10 (quoting Pet. Ex. 1 at P 1), and *see id*. ¶¶ 14-15, 43-45, 60-90.

This case is the polar opposite of *DiLeo*, in which the plaintiff pled fraud without any citation to what the fraud was, who committed it, or when or how it was committed. *DiLeo*, 901 F.2d at 629-630. Here, as described above, the Commission's Penalty Assessment and the Petition describe in detail how and when Chen committed fraud.

Between the Petition, the Penalty Assessment (Pet. Ex. 1), and the Order to Show Cause and Staff Report (Pet. Ex. 2), FERC has far exceeded its obligation to identify the activity at issue and why it constituted market manipulation in violation of the FPA and the Anti-Manipulation Rule.

III. ENFORCEMENT OF THE ORDER ASSESSING PENALTIES DOES NOT VIOLATE THE REQUIREMENT OF FAIR NOTICE.

Chen advances another argument that has been fully litigated before the Commission (*see* Pet. Ex. 1 at 108-110; Pet. Ex. 2 at 35-36, 48, 50), namely, that the Commission supposedly violated his constitutional rights by failing to provide him with fair notice (as of June 2010) that his trading was prohibited. Mem. at 26. Chen's arguments to this effect are full of errors and omissions: he misstates the Commission's broad flexible powers to regulate the energy industry, he fails to acknowledge the deference due to the Commission's interpretation of its statutory

anti-manipulation authority, and he relies on authorities that are readily distinguishable. And his claim that the Commission authorized the conduct it now claims is manipulative, *see* Mem. at 27, is contradicted by Commission orders and has been rejected by the Commission itself in the Penalty Assessment.

At bottom, Chen cannot claim that he lacked notice that his conduct would expose him to liability because his conduct fits neatly into not just one but two categories of manipulation that the Commission has already identified and condemned: wash trading and Enron's circular scheduling scheme (a/k/a "Death Star"). The Commission found that Chen's actions constituted wash trades, (i.e., prearranged offsetting trades with no change of net position) which have been prohibited for over a decade. Pet. ¶¶ 2, 83. The Commission also found that Chen's trading was a variant of the infamous "Death Star" scheme, in which Enron traders submitted offsetting schedules in order to capture market credits. Pet. Ex. 1 at P 96 ("similar to Death Star, Respondents' UTC trades involved offsetting pairs to capture revenues without providing the corresponding benefit to the market"). In light of the Commission's broad authority (discussed below) and the notoriety of the schemes to which Chen's trading was equivalent, his contention that he lacked notice is untenable.

A. The Commission Has Interpreted its Anti-Manipulation Authority to Be Flexible, Fact-Specific, and Not Confined to Any Specific List of Prohibited Activities.

Chen's Motion advocates for an exceedingly narrow reading and interpretation of the Commission's anti-manipulation authority. Mem. at 26-28. But FERC's powers to prohibit fraud and other forms of impropriety in the energy trading markets are significantly broader.

In the wake of Enron's schemes in the California wholesale energy market, the Energy Policy Act of 2005 ("EPAct 2005") both gave the Commission express anti-manipulation

authority and directed the agency to issue rules implementing that authority.[13] Reflecting the seriousness of its concern about harm to the public from abusive conduct in energy markets, Congress also increased the agency's penalty authority 100-fold, from $10,000 to $1,000,000 per violation, per day.[14]

The Commission complied with Congress' directive and, in 2006 issued a rulemaking, *Prohibition of Energy Market Manipulation,* Order No. 670, 114 FERC ¶ 61,047, *reh'g denied*, 114 FERC ¶ 61,300 (2006) ("Order No. 670"), implementing EPAct 2005 after a notice and comment process. In Order No. 670, the Commission both promulgated the agency's Anti-Manipulation Rule, 18 C.F.R. § 1c, and explained how the Commission would interpret that rule. That interpretation was in line with the Commission's pre-EPAct anti-manipulation orders.[15]

The Commission's broad construction of its anti-manipulation authority was not only consistent with prior Commission pronouncements, but was also in accord with the consistent holdings of courts enforcing the securities laws and other prohibitions against fraud and market manipulation. *See, e.g.*, *SEC v. Zandford*, 535 U.S. 813, 819-21 (2002) (section 10(b) of the Securities Exchange Act "should be construed '*not technically and restrictively, but flexibly to effectuate its remedial purposes.*'"); *Superintendent of Ins. of State of N. Y. v. Bankers Life &*

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[13] Section 222 of the Federal Power Act, added in EPAct 2005, makes it unlawful to employ "any manipulative or deceptive device or contrivance" in jurisdictional energy markets, "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers." 16 U.S.C. § 824v (2012).

[14] Energy Policy Act of 2005, Pub. L. No. 109-58 §§ 1284(e), 314 (b)(1)(B), and 314(b)(2), 119 Stat. 594 at 950 and 691 (2005).

[15] *See, e.g.*, *Order Revising Market-Based Rate Tariffs and Authorizations*, 114 FERC ¶ 61,165, at P 21 (2006) (adopting "*an intentionally broad proscription* against all kinds of deception, manipulation, deceit and fraud"), and Pet. Ex. 1 at 51-54.

Cas. Co., 404 U.S. 6, 10 n.7 (1971) ("We believe that s 10(b) and Rule 10b–5 prohibit all fraudulent schemes in connection with the purchase or sale of securities, *whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws*."); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972) ("These proscriptions [in the securities laws], by statute and rule, *are broad* and, by repeated use of the word 'any,' are *obviously meant to be inclusive*. . . . . "); *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971) ("The *methods and techniques of manipulation are limited only by the ingenuity of man*.") (citations omitted and emphasis added in all cases). Chen, like all traders in the energy market, has at all times been on notice of these points.

Not just in connection with fraud and manipulation, but across the legal spectrum, development of legal principles on a case-by-case basis is routine and long-accepted. Indeed, it is a bedrock principle of our common law system. Penalties for insider trading under the securities laws, for example, are now commonplace, though there was a time when that legal theory was brand new. When the SEC (and later courts) first determined that insider trading was a form of securities fraud, they did *not* do so based on a specific statutory or administrative prohibition of that conduct. Instead, they did so based on the SEC's broad, flexible anti-fraud authority under Section 10(b) of the Securities Exchange Act of 1934, as implemented in Rule 10b-5's general prohibition of "any device, scheme, or artifice to defraud."[16]

[16] The SEC first determined that insider trading violates Rule 10b-5 in *Cady, Roberts & Co.*, Exchange Act Release No. 6668, 40 SEC 907 (Nov. 8, 1961). In "a case of first impression," the SEC found that a business owner "willfully violated Sections 17(a) and 10(b) and Rule 10b–5" by engaging in insider trading. *See Chiarella v. United States*, 445 U.S. 222, 226-27 (1980) ("[In *Cady, Roberts & Co.*,] [t]he SEC took an important step in the development of § 10(b) when it held that a broker-dealer and his firm violated that section by selling securities on the basis of

The Commission's authority is similarly broad and flexible, though of course it must be adapted to the particulars of its unique statutory mission and the massively complex and important industry it regulates.[17] Though FERC's Rule 1c is patterned on SEC Rule 10b-5, the Commission "adapt[s] analogous securities precedents as appropriate to specific facts, circumstances, and situations that arise in the energy industry." Order No. 670 at P 30. While precedent is instructive—whether it arises under the FPA, the Securities Exchange Act, or elsewhere—the fact that a specific manipulative scheme has not previously arisen (and been specially condemned) in all its particulars is no obstacle to lawfully taking enforcement action against the perpetrators of such a scheme.

This is especially so in the current context: wholesale energy markets are both relatively new compared to securities and commodities markets, and highly complex. They thus furnish opportunities for the unscrupulous to fashion new devices to fraudulent ends. The confluence of unique, energy market-specific elements here (*see* Pet. at ¶¶ 33-46 and Penalty Assessment at PP 10-25), which are not present in securities markets, provided Respondents with just such an opportunity. That this *precise* scheme has not previously arisen is neither surprising nor problematic. Similar schemes have, and they have been condemned.[18] As the First Circuit has explained in the more stringent criminal context, "[f]air warning . . . does not mean that the first bite is free, nor does the doctrine demand an explicit or personalized warning." *United States v. Arcadipane*, 41 F.3d 1, 5 (1st Cir. 1994).

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undisclosed information obtained from a director of the issuer corporation who was also a registered representative of the brokerage firm."). Federal courts soon endorsed the SEC's conclusion that, although Rule 10b-5 says nothing specifically about insider trading, the Rule prohibits that conduct. *See SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1968).

[17] *See Barclays Bank PLC et al.*, 144 FERC ¶ 61,041, at P 58 (2013).

[18] *See* Pet. Ex. 1 at PP 118-121; Pet. Ex. 2 at 47-57.

Consistent with these principles, as the Commission observed in a 2006 Order, "no list of prohibited activities could be all-inclusive."[19] To ensure that the public is protected against novel schemes, the Commission "defines fraud generally, that is, to include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market."[20] Similarly, the Commission has made clear that "fraud is a question of fact that is to be determined by all the circumstances of a case,"[21] not by a mechanical rule limiting manipulation to tariff violations (which would render § 222 of the FPA meaningless, since FERC had authority to enforce the terms of tariffs prior to enactment of that provision). Again, Respondents at all times have been on notice of these points.

In short, FERC was not required to preemptively envision the precise manner of fraudulent trading Chen would choose to employ in order to prohibit the conduct. Holding

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[19] *Order Revising Market-Based Rate Tariffs and Authorizations*, 114 FERC ¶ 61,165, P 24 (2006) ("Furthermore, we recognize that fraud is a very fact-specific violation, the permutations of which are limited only by the imagination of the perpetrator. Therefore, no list of prohibited activities could be all-inclusive. The absence of a list of specific prohibited activities does not lessen the reach of the new anti-manipulation rule, nor are we foreclosing the possibility that we may need to amplify section 1c.2 as we gain experience with the new rule, just as the SEC has done.").

The Commission has made the same point in other Orders for more than a decade. *E.g.*, *Am. Elec. Power Serv. Corp., et al.*, 106 FERC ¶ 61,020, at P 45 (2004) (FERC cannot be required to "have the prescience to include in a rate schedule *all* specific misconduct in which a particular market participant could conceivably engage. That standard is unrealistic and would render regulatory agencies impotent to address newly conceived misconduct and allow them only to pursue, to phrase it simply, last year's misconduct – essentially, to continually fight the *last* war and deny the capability to fight the present or next one.") (emphasis in original); *Amendments to Blanket Sales Certificate*, Order No. 644, 105 FERC ¶ 61,217, at P 33 (2003) ("The courts have recognized, in this regard, that specific regulations cannot begin to cover all of the infinite variety of cases to which they may apply and that '[b]y requiring regulations to be too specific, [courts] would be opening up large loopholes allowing conduct which should be regulated to escape regulation.'") (citation omitted).

[20] Order No. 670 at P 50.

[21] *Id.*

otherwise would denude FERC's power to regulate the energy markets—which Congress intended to strengthen in the wake of Enron.

B. The Commission is Entitled to Deference For Order No. 670 and Other Orders Interpreting its Statutory Anti-Manipulation Authority and Rule 1c.

Chen's Motion is silent regarding the significant deference the Commission's interpretation of its anti-manipulation authority is entitled to receive. As has long been settled, "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 980 (2005). The Commission is a unitary agency entrusted by Congress with implementing the FPA. *See Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Comp. Programs*, *Dep't of Labor*, 519 U.S. 248, 267 (1997). Moreover, under the FPA's anti-manipulation provision, FPA § 222, 16 U.S.C. § 824v the Commission's authority to prescribe "rules and regulations" is explicit and hence plainly subject to *Chevron*.[22] *See, e.g.*, *Brand X Internet Serv.*, 545 U.S. at 980.

It is equally well-settled that an agency's interpretation of its own regulations is subject to deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("Because the [test] is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'") (citations omitted). And the fact that this Court has the authority to conduct a *de novo* review does not alter the deference to which the Commission is entitled. *United States v. Haggar Apparel Co.*, 526 U.S. 380, 391 (1999)

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[22] In addition to section 222's specific authorization to the Commission to issue anti-manipulation regulations, the Commission also has general authority under the FPA for the sections at issue to "prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of [the Act]." 16 U.S.C. § 825h.

(*Chevron* deference applies to court's de novo review of agency regulations); *Hui Zheng v. Holder*, 562 F.3d 647, 651 (4th Cir. 2009) ("the [agency's] legal conclusions are reviewed de novo, although the [agency's] interpretation of the [statute] is entitled to deference and must be accepted if reasonable.") (citations omitted).

Thus, FERC's interpretations of its broad and flexible anti-manipulation authority are entitled to significant deference.

C. The Authorities Relied Upon By Chen Are Distinguishable.

The fair notice cases cited by Chen are readily distinguishable. Mem. at 26-28. These cases typically involve either: 1) an agency that contemplated imposing a specific requirement on the regulated community, declined to do so, but subsequently sought to enforce the substance of that requirement anyway,[23] 2) regulated entities diligently attempting to ascertain the import of the regulations and comply with them,[24] or 3) "sensitive areas of basic First Amendment freedoms."[25]

None of those circumstances is present in this case. The Commission's bar on manipulative gaming, wash trading, and Death Star-like circular trading schemes was well-established for years before the conduct at issue occurred. The commercial conduct at issue implicates no sensitive First Amendment issues. Chen makes no claim that he made any attempt to validate the legality of its trading, nor is there any evidence he did so. *See* Pet. Ex. 2 at 70-71 & n.363. This case does not involve retroactive application of a new regulation, a novel and

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[23] *FCC v Fox Television Stations, Inc*., 132 S. Ct. 2307 (2012).

[24] *Hoechst Celanese Corp*., 128 F.3d 216 (4th Cir. 1997); *First Am. Bank of Virginia v. Dole*, 763 F.2d 644 (4th Cir. 1985); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995) (company's interpretation of the regulation was reasonable and produced environmental benefits).

[25] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *FCC v. Fox Television*, 132 S. Ct.at 2318.

expansive application of limited authority, or a change in agency position. The Commission's actions are, instead, deeply rooted in its fundamental power to prevent fraud and gaming in the energy markets. *See* Pet. ¶¶ 30-32, Ex. 1 at PP 49-51, Ex. 2 at 47-57.

Chen claims that the Commission understood that the MLSA distribution methodology that it approved would create incentives for traders to do precisely what Chen did and yet chose to do nothing to prohibit the conduct. Mem. at 26-27. Powhatan makes the same claim in its pending motion to dismiss, at much greater length, and we refer the Court to our Opposition in that case for a more detailed refutation of that claim.

In summary, Chen's (and Powhatan's) contention is based on a gravely incomplete and misleading description of what the Commission did. What happened is that the Commission *initially* (between December 2007 and October 2008) considered a proposal for PJM to allocate a certain type of credit not only to purchases and sales of physical energy (such as by generators and utilities), but to financially-settled "virtual" trades (see Pet. ¶¶ 37-39, Ex. 2 PP 8-12, 59-66) — and to the firms that participate in energy markets on a purely financial basis (which the Commission calls "arbitrageurs"). The proposal initially before the Commission proposed allocating these credits to *all* virtual transactions. The Commission rejected that broad proposal, both in March 2008 and in October 2008 (after the virtual traders pressed for it again). In both instances, a key reason the Commission rejected the proposal was that *it believed this broad proposal could create incentives for abusive trading not for the purpose of arbitrage but to collect these credits. Black Oak Energy LLC, et al. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,208, at PP 44, 48, 51 (2008), and *Black Oak Energy, LLC, et al. v. PJM Interconnection, L.L.C.*, 125 FERC ¶ 61,042 (2008) ("October 2008 Order"). In its October 2008 Order, the Commission contrasted the broad distribution proposal (which it rejected because it could lead to

abusive trading) with a much narrower approach, in which PJM would pay the credits only for transactions in which the market participant paid for transmission:

> Indeed, *payment of the surplus to arbitrageurs that is unrelated to the transmission costs* could distort arbitrage decisions and reduce the value of arbitrage by *creating an incentive for arbitrageurs to engage in purchase decisions, not because of price divergence, but simply to increase marginal line loss payments*.
>
> *Black Oak*, 125 FERC ¶ 61,042 at P 43 (2008) (emphasis added).

PJM subsequently presented a narrower proposal—to pay the credits only for trades with paid transmission (basically, physical trades and a subset of a subset of virtual trades). As the passage just quoted shows, the Commission believed that this narrower proposal would avoid the "perverse incentive" problem with the broad proposal.

Since some commenters represented that arbitrageurs would not, in fact, have any incentive to trade simply for credits under this narrower proposal (and no commenters contended otherwise), the Commission was not presented with any reason to suspect that the narrower provision would be subject to the same abuses to which the broader proposal had appeared vulnerable. Consequently, the Commission approved it in September 2009.

As it turned out, in 2010 Respondents (and a small number of other traders)discovered that even with the narrow distribution method, they could find a way to conduct sham trades not to arbitrage price differences—which is the purpose of virtual trading in PJM—but simply to collect credits, diverting them from other market participants. When PJM realized what Respondents and others were doing, they immediately referred the matter to FERC for enforcement and simultaneously proposed new rules on an expedited basis, to block this strategy. [26]

[26] *See* PJM Interconnection, LLC Proposed Revisions to Schedule 1 of the Amended and Restated Operating Agreement, Docket No. ER10-2280-000 (filed August 18, 2010).

In short, Chen argues that by rejecting one distribution proposal because it could lead to abusive trading and adopting a different proposal that nonetheless turned out to be vulnerable to the same sort of abuse, this means that the Commission must have changed its mind and approved of the abusive trading. That contention is illogical and wrong. The Commission has at all times been against the abusive trading Respondents engaged in and Respondents cannot point to any Commission statement in the *Black Oak* orders or anywhere else that suggests it changed its position on such a fundamental issue.

Chen also describes the Commission's position that he received fair notice as "unsupported, new, and radical," yet fails to acknowledge (must less distinguish) the legal authority cited by the Commission in support of that view. Mem. at 28 (citing Pet. Ex. 1 at P 122 and see *id*. n.296). It is well-established that "economic regulation is subject to a less strict vagueness test . . . because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982). When someone "'deliberately goes perilously close to an area of proscribed conduct [it] shall take the risk' of crossing the line, as '[o]nly a reasonable degree of certainty is necessary." *United States v. Midwest Fireworks Mfg. Co., Inc*., 248 F.3d 563, 568 (6th Cir. 2001) (quoting *United States v. Sun and Sand Imports, Ltd., Inc*., 725 F.2d 184 (2d. Cir. 1984)).

IV. FERC HAS STATUTORY AUTHORITY TO ASSERT A CLAIM AGAINST CHEN FOR VIOLATION OF SECTION 222(A) OF THE FPA

Chen contends that when Congress amended the FPA in the wake of Enron to give the Commission express anti-manipulation authority, it intended to insulate individuals from

liability. Mem. at 29. As the Commission concluded in Order No. 670, and as the U.S. District Court for the Eastern District of California recently confirmed,[27] that contention is incorrect.

FPA § 222 bars "any entity" from engaging in "manipulative behavior . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers." Based on the plain meaning of the word "entity," the logical reading of the text in the context of Congress' goals, and the deference due the agency under *Chevron*, FPA § 222 authorizes the Commission to impose liability on individuals for market manipulation.

Chen claims that "in common parlance," the term "entity" does not include an individual. Mem. at 29. In fact, numerous sources interpret the broad term "entity" to include individuals. *See, e.g.*, *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) (entity "may include a natural person, a corporation, a partnership, a limited liability company, a limited liability partnership."); Black's Law Dictionary (6th ed. 1990) ("an organization or being that possesses separate existence for tax purposes"); West's Encyclopedia of American Law (2nd ed. 2008) ("Entity" is "[a] real being; existence. . . . Entity includes person, estate, trust, governmental unit.").

Reading "entity" in FPA § 222 to include natural persons is logical given Congress' goal of providing the Commission with strong tools to combat market manipulation in the wake of the Enron scandal. As one court recently explained, "[o]verall, a meaning of 'entity' that includes natural persons appears more consistent with the goals of FPA § 222 and the surrounding statutory scheme. *See Roberts v. Sea–Land Services, Inc.*, 132 S. Ct. 1350, 1357 (2012) ('[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"). *FERC v. Barclays Bank*, 2015 WL 2448686, at *20. The *Barclays* court

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[27] *Barclays Bank*, 2015 WL 2448686, at *20-21, as amended (May 22, 2015).

further noted that concurrently-enacted provisions of the FPA encompass "person" within "entity". *Id*. (comparing FPA § 221, 16 U.S.C. § 824u with FPA § 222, and noting that "FPA § 316, 16 U.S.C. § 825o(a) provides for criminal liability by '[a]ny person' who knowingly violates any provision of the FPA, which would include FPA § 222")[28]

The Commission's interpretation of "any entity" to include individuals rests on the common-sense proposition that while they may act on behalf of corporations, it is *individuals* who plan and execute unlawful schemes. Reading FPA § 222 to exempt the individuals who actually engage in wrongful conduct would be inconsistent with Congress' intent to provide strong and effective remedies against manipulation of wholesale electricity markets.

Chen argues that differences in the language of the Securities Exchange Act and of the FPA mean that Congress must have intended to exclude individuals under FPA § 222. Mem. at 29. But as the *Barclays* court explained, the relevant point is the opposite:

> FPA § 222 makes unlawful the use of "any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of title 15)," i.e. Section 10(b) of the Securities Exchange Act ("SEA") and its corresponding Rule 10b–5. Actions under Section 10(b) and Rule 10b–5 are routinely brought against individuals. . . . *Defendants do not provide adequate reason to conclude that Congress would enact an anti-manipulation statute modeled after the SEA, but preclude enforcement against persons who engaged in manipulative trading*.

FERC v. Barclays Bank PLC, 2015 WL 2448686, at *20-21 (emphasis added).

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[28] In addition, section 18 of Energy Policy Act of 2005, 15 U.S.C. § 717s (2012), prohibits trading by "individuals" who have violated the Natural Gas Act's ("NGA's") anti-manipulation provision (15 U.S.C. § 717c-1), which, like FPA § 222, applies to "any entity." Because the NGA's anti-manipulation provision treats individuals as "entities," the FPA anti-manipulation provision (enacted the same day) must be read identically. *See Fed Power Comm'n. v. Sierra Pac. Power Co*., 350 U.S. 348, 353 (1956). (substantively identical provisions of the FPA and NGA should be construed *in pari materia*). In addition, it would be strange indeed for Congress to impose criminal (16 U.S.C. § 825o(a)), but not civil, penalties on individual market manipulators.

Even if the term "entity" were ambiguous, the Commission's reasonable interpretation, consistent with its long experience and expertise administering the FPA, is entitled to deference. *See Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 843 (1984); *Rolland v. Romney*, 318 F.3d 42, 48 (1st Cir. 2003) ("'[a]n inquiring court – even a court empowered to conduct *de novo* review – must examine the [agency's] interpretation of the statute, as expressed in the regulation, through a deferential glass.'") (citations omitted). Such *Chevron* deference applies to all ambiguities in a statute, even those that an enforcement subject might try to characterize as "jurisdictional" (like the meaning of "any entity" in FPA § 222). *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874-75 (2013).

The Court should therefore conclude that the Federal Power Act authorizes the Commission to assess a penalty against Chen for market manipulation.

V. CHEN'S ARGUMENTS REGARDING DE NOVO REVIEW ARE PREMATURE.

Under the guise of providing "procedural background," Chen briefs an issue that is not properly before this Court in a 12(b)(6) motion, namely, the nature of the proceedings that this Court should follow once the present motion is resolved. Mem. at 4-7. Chen's arguments are incorrect, but in any event they are not properly before the Court. A 12(b)(6) motion asserts that a cause of action should be dismissed for failure to state a claim upon which relief can be granted. The question of how this Court should exercise its authority to "review de novo" the Penalty Assessment, once the present motion is resolved, is a separate legal issue that should be addressed through separate briefing at a later time of the Court's choosing.

CONCLUSION

For the foregoing reasons, Chen's motion to dismiss should be denied.

Dated: October 30, 2015

FEDERAL ENERGY REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2015, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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