



Dated: March 23, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 23, 2017, 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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# **Exhibit A**

# ATTACHMENT A

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**Nos. 08-60730 and 08-60810 (Consolidated)**

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**ENERGY TRANSFER PARTNERS, L.P., *et al.*,  
PETITIONERS,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

---

**ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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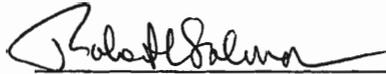
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**February 2, 2009**

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the Certificate of Interested Persons contained in the Brief of Petitioners Energy Transfer Partners LP, *et al.* lists the persons and entities as described in Fifth Circuit Rule 28.2.1 that have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.



Robert H. Solomon  
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February 2, 2009

**STATEMENT REGARDING ORAL ARGUMENT**

Oral argument in this case has been scheduled for March 2, 2009. In accordance with Fifth Circuit Rule 28.2.4 and Federal Rule of Appellate Procedure 34(a)(1), the Federal Energy Regulatory Commission submits that oral argument would assist the Court's resolution of this case.

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RESPONDENT.**

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**ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**STATEMENT REGARDING JURISDICTION**

This Court has already dismissed, for lack of finality, a previous challenge to the first two of the four agency orders now on review. *See Energy Transfer Partners, L.P. v. FERC*, 5th Cir. No. 07-61021 (Mar. 17, 2008) (“*ETP I*”). Because the later two orders merely set the agency case for hearing, Respondent Federal Energy Regulatory Commission (“Commission” or “FERC”) likewise moved to dismiss these consolidated appeals on the same grounds. By order dated

October 30, 2008, the Court carried the motion with the case. Accordingly, the Commission hereby renews its motion to dismiss.

As discussed more fully in Part I of the Argument, *infra*, none of the challenged FERC orders is final for purposes of judicial review. This appeal concerns orders that did no more than set forth the Commission's preliminary view that Petitioner Energy Transfer Partners, *et al.* ("ETP") had violated FERC's rules and regulations, provide notice of proposed civil penalties, and establish further procedures to permit ETP to respond to the allegations and to reach a final determination on the merits. For that reason, this Court granted the Commission's motion to dismiss the appeal of those nonfinal orders in *ETP I*. Nevertheless, ETP attempts to revive the same appeal by appending a challenge to additional orders that merely scheduled evidentiary hearings to consider the alleged violations. Therefore, the challenged agency action is no more final than in *ETP I*.

#### STATEMENT OF THE ISSUES

1. Assuming jurisdiction, whether the Commission reasonably construed its civil penalty authority under the Natural Gas Act ("NGA") and, in so doing, reasonably concluded that entities subject to civil penalties are not entitled to *de novo* review of FERC's civil penalty assessment order in a federal district court, and must instead obtain review in a circuit court of appeals.

2. Assuming jurisdiction, whether the Commission reasonably construed its civil penalty authority under the Natural Gas Policy Act (“NGPA”) and, in so doing, reasonably held that the statute allows the agency to conduct additional procedures, including a trial-type hearing before an administrative law judge, between the time it issues notice of a proposed civil penalty and the time it issues an order assessing a civil penalty.

### STATEMENT OF THE CASE

#### I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

In the ongoing FERC proceedings underlying this appeal, the Commission is investigating the natural gas trading and pipeline operation activities of ETP under the NGA and NGPA, respectively. These proceedings began when, after a nearly two-year non-public investigation by FERC Enforcement Staff, the Commission issued an order formally setting forth allegations that ETP’s activities violated FERC’s regulations under the NGA and NGPA. *See Energy Transfer Partners, L.P., et al.*, 120 FERC ¶ 61,086 (2007), RE 15 (“Show Cause Order”).<sup>1</sup> The Show

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<sup>1</sup> “R.” refers to a record item. “RE” refers to the page number in the Excerpts of Record that ETP filed in this case. “P” refers to the internal paragraph number within a FERC order.

All references to the Petitioners’ Opening Brief (“ETP Br.”) are to the “Corrected Copy” of that brief, which ETP filed on January 6, 2009.

Cause Order also provided notice of proposed civil penalties against ETP, and provided ETP with the opportunity to respond to the allegations made against it.

ETP filed an expedited request for rehearing and request for stay, objecting to the Commission's assertion that, for issues raised under either the NGA or NGPA, it could request briefs or set specified issues for trial-type hearing procedures before an administrative law judge ("ALJ"). ETP argued that, under both statutes, it is entitled to immediate *de novo* adjudication of its civil penalty liability in federal district court. The Commission denied ETP's request. *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 (2007), RE 217 ("2007 Rehearing Order," and together with Show Cause Order, the "Show Cause Orders"). The Commission concluded that NGA § 22, which provides FERC's civil penalty authority under the NGA, does not provide for *de novo* district court review of such penalties. Though the Commission did not dispute that the NGPA *does* provide for *de novo* district court review of penalties assessed under the NGPA, the Commission concluded that the statute does not prevent the Commission from conducting additional agency procedures, such as an ALJ hearing, before it actually assesses such penalties.

In 2008, ETP petitioned this Court for review of the Show Cause Orders. As noted above, the Court granted the Commission's motion to dismiss that appeal for lack of jurisdiction. *ETP I*, 5th Cir. No. 07-61021 (Mar. 17, 2008).

Two months later, in May 2008, after receiving written submissions from ETP and FERC Enforcement Staff, the Commission determined that genuine issues of material fact existed, and established an evidentiary hearing before an administrative law judge. *Energy Transfer Partners, L.P., et al.*, 123 FERC ¶ 61,168 (May 15, 2008), RE 264 (“Hearing Order”). The Commission subsequently denied rehearing or a stay of that order. *Energy Transfer Partners, L.P., et al.*, 124 FERC ¶ 61,149 (Aug. 7, 2008), RE 344 (“2008 Rehearing Order,” and collectively, the “Hearing Orders”).

On August 11, 2008, ETP filed a second appeal, this time seeking review of the Hearing Orders. On August 28, ETP amended its petition to add the same Show Cause Orders that the Court previously found unfit for immediate review.

Meanwhile, agency proceedings are continuing. The Commission has not, at this time, reached any final determinations regarding the allegations against ETP in the Show Cause Order, and has not yet imposed any civil penalty or other remedy. Indeed, ETP persuaded an ALJ to dismiss the bulk of the NGPA claims, leading to a settlement with FERC Enforcement Staff that, if approved by the Commission, would resolve the remaining NGPA claims.

## **II. STATEMENT OF FACTS**

### **A. Statutory And Regulatory Background**

The pertinent statutes and regulations are contained in the Addendum to this brief.

#### **1. Natural Gas Act**

Under the NGA, 15 U.S.C. § 717 *et seq.*, the Commission has jurisdiction to regulate the transportation and wholesale sale of natural gas in interstate commerce. The NGA requires that all rates and charges for transportation and wholesale sales of natural gas subject to the Commission's jurisdiction, and all "rules and regulations affecting or pertaining to such rates and charges," be just and reasonable, and declares rates and charges that are not just and reasonable to be unlawful. NGA § 4(a), 15 U.S.C. § 717c(a). Natural gas companies subject to the Commission's jurisdiction are prohibited from maintaining any rates, charges or practices that grant an undue preference or advantage. NGA § 4(b), 15 U.S.C. § 717c(b).

Additionally, NGA § 7, 15 U.S.C. § 717f, provides that no natural gas company may engage in transmission or sales of gas subject to FERC jurisdiction without first obtaining a certificate of public convenience and necessity. By regulation, the Commission has granted a blanket certificate, applicable to any entity that is not an interstate pipeline company, to make sales of gas for resale at

negotiated rates. *See* 18 C.F.R. § 284.402.

At the time of the events described in the Show Cause Order, FERC regulations prohibited sellers acting under that blanket authority from “engaging in actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for natural gas.” 18 C.F.R. § 284.403 (2005).<sup>2</sup>

EPAct 2005 added new NGA § 22, empowering the Commission to assess civil penalties of up to \$1 million per day for violations of the NGA “or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of” the NGA. 15 U.S.C. § 717t-1(a). NGA § 22 provides that such penalties shall be assessed “after notice and opportunity for public hearing.” *Id.* § 717t-1(b). *See infra* Argument, Part III.C.

## 2. Natural Gas Policy Act

NGPA § 311(a)(2) empowers the Commission to authorize an intrastate pipeline to transport natural gas on behalf of another intrastate pipeline or any local

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<sup>2</sup> This regulation was rescinded by the Commission in 2006 after Congress, in the Energy Policy Act of 2005, Pub. L. 109-58, 199 Stat. 691 (“EPAct 2005”), granted the Commission specific authority to prohibit manipulation of natural gas markets (codified at 15 U.S.C. § 717c-1). *See Colo. Office of Consumer Counsel v. FERC*, 490 F.3d 954, 955-56 (D.C. Cir. 2007) (explaining new market manipulation authority in EPAct 2005 and FERC’s decision to rescind certain regulations).

distribution company served by an interstate pipeline, subject only to maximum “fair and equitable rates” established by the Commission. 15 U.S.C. § 3371(a)(2). *See, e.g., La. Intrastate Gas Corp. v. FERC*, 962 F.2d 37, 39 (D.C. Cir. 1992). Regulations promulgated under this and other authorities require intrastate pipelines to provide non-discriminatory service, prohibit undue preference and undue discrimination, *see* 18 C.F.R. §§ 284.7(b), 284.9(b), and prohibit intrastate pipelines from charging rates in excess of the maximum fair and equitable rates approved by the Commission, *see* 18 C.F.R. §§ 284.122(b), 284.123.

As discussed more fully in Part III.A of the Argument, under NGPA § 504(b)(6)(A)(i), the Commission may assess civil penalties for violations of the NGPA or any rules or orders thereunder. 15 U.S.C. § 3414(b)(6)(A)(i). The statute requires that the Commission “shall provide notice” before assessing such a penalty; following that notice, “the Commission shall, by order, assess such penalty.” NGPA § 504(b)(6)(E), 15 U.S.C. § 3414(b)(6)(E). If a civil penalty has not been paid within 60 days of the order assessing it, “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.” NGPA § 504(b)(6)(F), 15 U.S.C. § 3414(b)(6)(F). That subsection also provides the district court with authority to “review de novo the law and facts involved.” *Id.*

In EPAAct 2005, Congress increased the amount the Commission may assess

in civil penalties from \$5,000 to \$1 million per violation. *See* EPA Act 2005, Pub. L. No. 109-58, 119 Stat. 691.

### 3. Federal Power Act

Though the instant case does not involve the Federal Power Act (“FPA”), the FPA is relevant to the statutory analysis because it likewise gives the Commission authority to impose civil penalties and because the FPA Part II civil penalty provision was amended at the same time as the NGA provision was enacted.

Part I of the FPA, concerning FERC’s regulation of hydropower development, includes civil penalty authority for non-compliance with the terms and conditions of FERC-issued licenses and permits. FPA § 31(c), 16 U.S.C. § 823b(c). FPA § 31(d) provides the subject of a proposed civil penalty with two procedural options: (i) assessment of the civil penalty by the Commission after a determination of the violation “made on the record after an opportunity for an agency hearing . . . before an administrative law judge,” 16 U.S.C. § 823b(d)(2)(A); or (ii) “prompt[]” assessment of the penalty by the Commission, 16 U.S.C. § 823b(d)(3)(A). Under the first option, review of the Commission’s orders will lie in an appropriate federal court of appeals. 16 U.S.C. § 823b(d)(2)(B). Under the second option, if the civil penalty has not been paid within 60 days, the Commission must institute an action in an appropriate federal

district court, which would have authority to “review de novo the law and the facts involved.” 16 U.S.C. § 823b(d)(3)(B).

Under Part II of the FPA, concerning FERC’s regulation of interstate transmission and wholesale power sales, the Commission has authority to assess civil penalties “in accordance with the same provisions as are applicable under” FPA § 31(d). FPA § 316A, 16 U.S.C. § 825o-1(b).

#### **4. FERC Civil Penalty Assessment Policy**

In 2006, following the legislative changes in EPAct 2005 that gave FERC civil penalty authority under the NGA, increased the scope of matters subject to civil penalties under Part II of the FPA, and increased the civil penalty amounts it could assess under all three of its primary statutes, the Commission issued a policy statement explaining the procedures the Commission will employ when assessing civil penalties under its governing statutes. Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties, *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006) (“*Policy Statement*”). The Commission noted that the NGA, NGPA, and FPA each require application of somewhat different civil penalty procedures. *Id.* at P 3.

## **B. The Commission Proceedings And Orders**

### **1. Show Cause Orders**

This appeal arises from an investigation by FERC Enforcement Staff into allegations that ETP and related entities manipulated wholesale natural gas markets or otherwise provided discriminatory services or charged excessive rates, in violation of the NGA, the NGPA, and the Commission's implementing regulations.

After two years of investigation, the Commission initiated formal litigation on July 26, 2007, issuing preliminary determinations that: (1) ETP had manipulated wholesale natural gas prices on specified dates between December 2003 and December 2005, in violation of the Commission's regulations under the NGA; and (2) ETP's pipeline companies had unduly discriminated against non-affiliated natural gas pipeline shippers, unduly preferred affiliated natural gas pipeline shippers, and charged rates for pipeline transportation service in excess of the maximum lawful rate, in violation of the Commission's regulations under the NGPA. Show Cause Order at PP 39-195, RE 31-89.

Based on this alleged conduct, the Commission proposed civil penalties and disgorgement of unjust profits. The Commission also directed that ETP respond to the specific allegations detailed in the Show Cause Order. *See* Show Cause Order at Ordering Paras. (A)-(D), RE 89-90.

ETP filed an expedited request for rehearing and for stay of the Show Cause Order, contending that adjudication of civil penalties under the NGA or NGPA should proceed in a *de novo* trial before a federal district court, rather than in administrative proceedings before the Commission. ETP also claimed that the Commission's statements in the Show Cause Order gave the appearance of pre-judgment, denying ETP due process of law.

In the 2007 Rehearing Order, the Commission rejected both of these contentions, and denied the request for stay. Nonetheless, to eliminate any perception of unfairness or prejudgment, the Commission instituted new investigative and enforcement procedures applicable to this case and all future cases proposing to impose civil penalties. *See* 2007 Rehearing Order at P 88, RE 260.

## **2. ETP's First Appeal (Dismissed)**

On December 27, 2007, ETP filed a petition for review of the Show Cause Orders in this Court, *Energy Transfer Partners, L.P. v. FERC*, 5th Cir. No. 07-61021. The Commission moved to dismiss the petition because the Show Cause Orders were not final orders, as the FERC proceedings initiated therein were still ongoing. The Commission had made no final determinations fixing ETP's legal rights or obligations, and had not directed ETP to pay any amounts. All the Commission had done, at that early stage in the proceedings, was to establish

formal investigation procedures and direct ETP to file a formal response to its Show Cause Order. *See* FERC Motion to Dismiss, 5th Cir. No. 07-61021 (filed Jan. 25, 2008).

By order dated March 17, 2008, this Court granted the Commission's motion and dismissed ETP's first appeal for lack of jurisdiction.

### **3. Hearing Orders And ETP's Second Appeal**

In response to the Show Cause Order, ETP filed its answer to the allegations on October 9, 2007. ETP argued that it had not violated the NGA or the NGPA, and requested summary disposition. FERC Enforcement Staff filed a brief responding to ETP's arguments on February 14, 2008, and ETP filed its reply on March 31, 2008.

On May 15, 2008, the Commission issued its Hearing Order. The Commission found "that there are genuine issues of fact material to the decision of this proceeding [that] require a hearing before an ALJ" and accordingly denied ETP's motion for summary disposition. Hearing Order at P 12, RE 269. The Commission specified that the ALJ should determine whether ETP violated FERC's market behavior rule that was in effect at the time (18 C.F.R. § 284.403(a) (2005)), whether ETP unjustly profited from its activities, and, if so, the level of unjust profits. *See id.* at P 13, RE 269. The Commission further identified certain allegations against ETP's pipeline affiliate that the ALJ should

determine. *See id.* at P 14, RE 269. The Commission reserved to itself the issues of whether civil penalties and/or other remedies should be imposed. *See id.* at P 15, RE 269 (“The Commission will make these determinations based on the record developed at the hearing established by this order.”). ETP again filed a request for rehearing and stay, on the same grounds as in its earlier request for rehearing of the Show Cause Order.

On August 7, 2008, the Commission denied ETP’s request for rehearing and stay. Because ETP itself stated that it raised no new issues that were not raised on rehearing of the Show Cause Order, the Commission did not revisit its prior holding, but adopted the findings in its 2007 Rehearing Order. Noting that “rehearing of the December 20, 2007 Rehearing Order does not lie, and ETP’s appeal of that order was dismissed,” the Commission briefly addressed two issues raised by ETP in response to the Commission’s earlier analysis. 2008 Rehearing Order at P 13, RE 347. First, the Commission stated that it was “assuming aggrievement only for the purpose of acting on ETP’s rehearing request,” but “makes no such assumption for purposes of judicial review . . . .” *Id.* at P 14, RE 347. Second, the Commission reaffirmed its interpretation of NGA § 24, 15 U.S.C. § 717u, as providing a method for the Commission or other parties “to bring an action in district court to enjoin violations of the [NGA], or to enforce liabilities or duties created under the [NGA] (such as civil penalty liability created

by a Commission order finding a violation),” but not requiring the Commission to bring such an action “each time it believes a person has violated the NGA . . . .” 2008 Rehearing Order at P 16, RE 348.

The Commission then considered and denied ETP’s request for stay because:

[t]he only difference in facts between ETP’s prior stay request [in 2007] and the current request is that the Commission has now ordered an administrative hearing to address the allegations against ETP. The Commission finds that no irreparable harm will occur to ETP if it is required to adjudicate its civil penalty liability in an administrative hearing before the Commission. The courts have determined that litigating a case before an administrative agency does not constitute irreparable harm.

*Id.* at P 18, RE 350 (citing *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980)).

ETP filed a second petition for review (No. 08-60730) on August 11, 2008, this time challenging the Hearing Orders, and an amended petition (No. 08-60810) on August 28, 2008, adding the Show Cause Orders to the instant appeal. This Court denied ETP’s motion for a stay of ongoing FERC proceedings on December 9, 2008.

#### **4. Ongoing FERC Proceeding**

The evidentiary hearings established in the Hearing Order are proceeding on two tracks: the NGA claims are scheduled for a hearing to begin on April 29, 2009, and a hearing on the NGPA claims was to have begun on December 10, 2008. But in a ruling issued on November 18, 2008, the ALJ presiding over the

NGPA hearing dismissed the primary undue discrimination claim pending against ETP. Partial Initial Decision Granting Summary Disposition, *Oasis Pipeline, L.P., et al.*, 125 FERC ¶ 63,019 (Nov. 18, 2008), RE 352. In the wake of that ruling, the parties agreed to a settlement in principle regarding the NGPA claims. The hearing was suspended pending the Commission's consideration of that settlement. Order Suspending Trial Schedule, *Oasis Pipeline, L.P.*, Docket No. IN06-3-004 (Dec. 11, 2008), RE 363.

Meanwhile, pre-hearing litigation of the NGA claims continues. *See, e.g., Energy Transfer Partners, L.P.*, 123 FERC ¶ 61,136 (2008), *order on reh'g*, 124 FERC ¶ 61,224 (2008), *reh'g denied*, 125 FERC ¶ 61,387 (2008) (ordering McGraw-Hill to produce certain trading data and other information regarding gas pricing indices sought by ETP to support its defense of the NGA claims).

## SUMMARY OF ARGUMENT

The Commission's orders, initiating a show cause proceeding and later establishing a hearing to determine whether to assess civil penalties, are not final and therefore are not ripe for judicial review. Furthermore, even if review were appropriate, the Commission's reasonable interpretation of its civil penalty authority under the Natural Gas Act and the Natural Gas Policy Act should be upheld.

First, this case is no more final on the merits than when this Court dismissed ETP's previous appeal of the Show Cause Orders for lack of jurisdiction. The challenged FERC orders mark the early steps of an administrative process to determine whether ETP violated the NGA or NGPA or FERC's regulations thereunder, and if so, what (if any) legal consequences should follow. Though ETP objects to that process, the burden of litigation is not enough to support judicial review. Moreover, this is not an extraordinary case requiring interlocutory judicial intervention to halt an obvious statutory violation.

Assuming jurisdiction, the Commission's interpretation of the NGA and NGPA in the challenged FERC orders is entitled to *Chevron* deference because the Commission was construing its own authority under its primary statutes, rather than defining the scope of judicial powers. In construing its civil penalty authority, the Commission appropriately considered both the similarities and the differences

among the civil penalty provisions of the NGA, NGPA, and FPA. Based on the different procedures for assessing civil penalties and for obtaining judicial review, the Commission reasonably concluded that NGA § 22 does not provide for *de novo* review in district court of FERC's civil penalty assessments.

The Commission also reasonably rejected ETP's interpretation of NGA § 24 and determined that § 24 does not require the Commission to pursue civil penalty assessments for NGA violations in district court. The Commission reasonably held that, unlike the civil penalty provisions of the NGPA and FPA, NGA § 22 does not set forth specific procedures for assessing penalties or explicitly supplant the exclusive appellate review provisions of NGA § 19(b).

Finally, the Commission reasonably concluded that it could hold an agency hearing before assessing civil penalties under the NGPA, as that statute does not dictate the agency's process for such assessments, or otherwise limit the agency's general discretion in fashioning its own procedures.

## ARGUMENT

### I. ETP'S APPEAL SHOULD AGAIN BE DISMISSED FOR LACK OF JURISDICTION

None of the challenged FERC orders is final for purposes of judicial review. Indeed, the 2008 Hearing Orders that gave rise to ETP's latest appeal are manifestly nonfinal, as they decided nothing and merely established evidentiary hearings to consider alleged violations of the NGA and NGPA. And the 2007 Show Cause Orders, which ETP has tacked onto its new appeal despite this Court's previous dismissal for lack of jurisdiction, marked the beginning of that litigation before the Commission.

As a general matter, judicial review of administrative orders is only available once agency action becomes final. *See, e.g., Bell v. New Jersey*, 461 U.S. 773, 778 (1983) ("The strong presumption is that judicial review will be available only when agency action becomes final . . .") (citing *FPC v. Metro. Edison Co.*, 304 U.S. 375, 383-85 (1938)); *Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 112-113 (1948); *see also* Administrative Procedure Act, 5 U.S.C. § 704. While the statutes providing for judicial review of Commission orders do not impose a specific requirement of finality or "ripeness," this Court has long held that it lacks jurisdiction to review FERC orders that are not "final orders" and are not ripe for immediate review. *See, e.g., Tenneco, Inc. v.*

*FERC*, 688 F.2d 1018, 1021-22 (5th Cir. 1982) (citing cases); *Pennzoil Co. v.*

*FERC*, 645 F.2d 394, 397-99 (5th Cir. 1981) (citing cases).

This Court has defined a “final agency action” for which judicial review is available based on “two conditions”:

First, the action must mark the consummation of the agency’s decision-making process — it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

*Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287-88 (5th Cir. 1999) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and additional citations omitted)). Conversely, “a nonfinal agency order [is] one that ‘does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.’” *Am. Airlines*, 176 F.3d at 288 (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939)); see also *Exxon Chems. Am. v. Chao*, 298 F.3d 464, 466-67 (5th Cir. 2002).

None of the orders at issue here satisfies either of the conditions for finality. No order “mark[s] the consummation” of the Commission’s decision-making process, *Bennett*, 520 U.S. at 178; in fact, these are only the first steps of formal administrative litigation in which (absent settlement) the Commission ultimately will make a final determination whether the actions taken by ETP were lawful or unlawful. At this early stage, ETP has responded to the Commission’s direction to

show cause, and the Commission has set specified issues for a trial-type hearing before an ALJ.

Moreover, the orders do not determine any of ETP's "rights or obligations," and no "legal consequences will flow" from any of the Show Cause or Hearing Orders. *Bennett*, 520 U.S. at 178. ETP will only face the adverse consequences of civil penalties, disgorgement of profits, and/or revocation of regulatory approvals if the Commission ultimately rules against it.

The Show Cause Order was in essence an administrative complaint, setting forth charges against ETP and initiating further administrative procedures to allow ETP to respond to those charges and, ultimately, reach a final determination on the merits. The Supreme Court has found that such complaints are not final agency actions. *FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980); *id.* at 241-43 (concluding that "the issuance of the complaint averring reason to believe" statutory violations had occurred were not final agency actions, as they were "not a definitive statement of position," and "had no legal force or practical effect . . . other than the disruptions that accompany any major litigation."); *see also Metro. Edison*, 304 U.S. at 384-86 (holding that orders by FERC's predecessor initiating investigation and setting hearing were unreviewable). This Court has similarly held (following *Standard Oil*) that "[a]n agency's initiation of an investigation does not constitute final agency action." *Veldhoen v. United States Coast Guard*,

35 F.3d 222, 225 (5th Cir. 1994) (citing *Standard Oil*). Cf. *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 245-47 (D.C. Cir. 1980) (noting that NGA does not permit immediate review of FERC orders that merely announce intention to hold hearing; reaffirming “traditionally limited approach to reviewability of nonfinal agency orders”).

ETP claims that it is injured by being compelled to participate in an agency hearing process rather than proceeding directly to court. See ETP Br. 3-4. But that claim has no more merit now than when this Court dismissed ETP’s first appeal. The Hearing Order, by denying ETP’s motion for summary disposition and establishing fact-finding hearings, merely continued the agency process that the Show Cause Orders had started.

Moreover, “the burden of responding to the charges, . . . [though] substantial, . . . is different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action.” *Standard Oil*, 449 U.S. at 242; see also *id.* at 244 (“[T]he expense and annoyance of litigation is part of the social burden of living under government” and does not constitute irreparable harm); *Am. Airlines*, 176 F.3d at 291 (rejecting claim that forcing petitioner to wait to litigate “seminal issues” would result in “huge waste of agency and judicial resources”; “the expense and annoyance of litigation does not constitute irreparable injury that would justify an exception to the finality rule”). As this Court has put it

(again following *Standard Oil*), “[t]he obligation to defend oneself before an agency is not the type of obligation that creates final agency action.” *Veldhoen*, 35 F.3d at 226.

Furthermore, even “[a]n attack on the authority of an agency to conduct an investigation does not obviate the final agency action requirement.” *Veldhoen*, 35 F.3d at 225 (citing *Aluminum Co. of Am. v. United States*, 790 F.2d 938, 942 (D.C. Cir. 1986)). In arguing the establishment of hearing procedures in this case is in itself an immediate, cognizable injury (ETP Br. 3), ETP relies on cases that do not support its argument. First, in *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), the “final agency action” was not in dispute, as the petitioner sought review of a completed, formal notice-and-comment rulemaking. 497 F.3d at 499. The challenged regulations were promulgated by the Secretary of the Interior to circumvent a Supreme Court decision upholding states’ sovereign immunity under the Eleventh Amendment in the context of regulating tribal gaming. *See id.* at 494. A state that chose not to waive its immunity from suit was “forced to choose one of two undesirable options”: either participate in a federal mediation process, or risk federal approval of a tribal gaming proposal without the state’s input. *Id.* at 499. That forced choice was the requisite harm that made the regulations ripe for review. *See id.* Thus, *Texas* did not speak to a party’s ability to shortcut an

ongoing agency adjudication and seek piecemeal review of interlocutory procedural rulings.

Nor does *Mississippi Valley Gas Co. v. FERC*, 659 F.2d 488 (5th Cir. 1981), further ETP's argument. See ETP Br. 4-5. ETP contends that the Commission, by proceeding with administrative litigation, is depriving ETP of a statutory right (to *de novo* adjudication of its potential civil penalty liability in federal district court). ETP Br. 4. But *Mississippi Valley* concerned a narrow category of rate cases in which FERC's decision rejecting a contractual claim is "effectively final" and (unlike ETP's claim) cannot later be vindicated before the agency in subsequent administrative litigation or on subsequent judicial review. *Id.* at 498-99; see also *Papago*, 628 F.2d at 245. Indeed, the Court in *Papago* (whose reasoning this Court endorsed in *Mississippi Valley*) distinguished the "effectively . . . final" contract issue from — as here — the "interlocutory . . . right to *proper procedures*, which *can* be vindicated on appeal from the final order." 628 F.2d at 245 (emphases added and footnote omitted).

ETP's claimed right depends on a question of statutory interpretation, as to which "courts generally grant deference to agencies" and do not allow interlocutory appellate review. *Veldhoen*, 35 F.3d at 226 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). Only in extraordinary cases, in the "very narrow situation in which there is a 'plain' violation of an

unambiguous and mandatory provision of the statute,” will this Court permit an exception to the finality and ripeness requirements. *Am. Airlines*, 176 F.3d at 293; *see also Kirby Corp. v. United States*, 109 F.3d 258, 269 (5th Cir. 1997) (agency action must violate statute “on its face”). *See generally United States v. Feaster*, 410 F.2d 1354, 1368 (5th Cir. 1969) (exception is “narrow and rarely successfully invoked”).

This is not such an extraordinary case. Addressing ETP’s statutory claims in the 2007 Rehearing Order, and to a very limited extent in the 2008 Rehearing Order, the Commission thoroughly reviewed the relevant statutory language of the NGPA and the NGA, and the intent of Congress in drafting that language, and did no more than conclude that neither statute (either on its face or in its intent) prevents the FERC from conducting and completing its own administrative procedures before judicial review commences. 2007 Rehearing Order at PP 30-34, 53-66, RE 229-31, 239-49; 2008 Rehearing Order at P 16, RE 348. Under these circumstances, the Commission cannot be found to have acted “so contrary to the terms of the relevant statute” as to permit judicial review now. *Kirby*, 109 F.3d at 269 (to invoke exception, case must not simply “involve a dispute over statutory interpretation”) (quoting *Dart v. United States*, 848 F.2d 217, 231 (D.C. Cir. 1988)); *Lundeen v. Mineta*, 291 F.3d 300, 312 (5th Cir. 2002) (review under this exception is permissible only if alleged agency violation is “plain” and

“unambiguous,” and of a “*summa* or *magna* quality,” as opposed to “*cum*” error). See also *Hunter v. FERC*, 527 F. Supp. 2d 9, 17 n.6 (D.D.C. 2007) (denying motion for preliminary injunction of another FERC show cause proceeding; interlocutory review is only appropriate where “an agency patently misconstrues a statute, disregards a specific and unambiguous statutory directive, or violates a specific command of a statute” in “brazen defiance” of agency’s statutory authority) (citing cases); accord *Hunter v. FERC*, 569 F. Supp. 2d 12, 17 (D.D.C. 2008) (reaffirming that conclusion in dismissing case for lack of jurisdiction, holding that “FERC’s actions are neither sufficiently final nor ripe to warrant review at this juncture”), *appeal pending*, D.C. Cir. No. 08-5380. The same is true for ETP.

This Court’s own dismissal, on March 17, 2008, of ETP’s first appeal indicated that this Court agreed: this is not the truly exceptional type of case warranting a departure from conventional finality principles. There is no reason to upset the Court’s earlier judgment, as the 2008 Hearing Orders now presented to the Court decided nothing new. See 2008 Rehearing Order at PP 13, 16, RE 347, 348 (reaffirming and adopting findings made in 2007 Rehearing Order). Accordingly, the Court should reject ETP’s latest effort to resuscitate the same arguments at each step in the administrative proceeding.

## II. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g., Brazos Elec. Power Coop., Inc. v. FERC*, 205 F.3d 235, 240 (5th Cir. 2000). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The two-step standard of review set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), applies to the Commission's interpretation of the NGA and NGPA in the challenged orders. *See, e.g., La. Envtl. Action Network v. EPA*, 382 F.3d 575, 581-82 (5th Cir. 2004); *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 320 (5th Cir. 2001).

Under the first step, if Congress "has spoken directly on the precise question at issue," the Court "must 'give effect to [Congress'] unambiguously expressed intent.'" *Tex. Office*, 265 F.3d at 320 (quoting *Chevron*, 467 U.S. at 843). In this situation, "[r]eversal is warranted only where an agency interpretation is contrary to 'clear [C]ongressional intent.'" *La. Envtl.*, 382 F.3d at 581 (quoting *Chevron*, 467 U.S. at 843 n.9).

If Congress has not spoken directly, however, the court moves to the second step of *Chevron* and assesses “whether the agency interpretation is a ‘permissible construction of the statute.’” *Id.* at 581-82 (quoting *Chevron*, 467 U.S. at 843). If the agency’s interpretation is permissible, “[d]eference is warranted,” and reversal is appropriate only where the agency’s construction is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* at 582; *see also Tex. Office*, 265 F.3d at 320. “The question is not whether [the Court] might have preferred another way to interpret the statute, but whether the agency’s decision was a reasonable one.” *Id.*; *accord Am. Forest & Paper Ass’n v. FERC*, No. 07-1328, 2008 U.S. App. LEXIS 25853, at \*9 (D.C. Cir. Dec. 23, 2008) (affirming FERC’s statutory interpretation of another section of EPA Act 2005) (“Step two of *Chevron* does not require the best interpretation, only a reasonable one.”).

ETP argues that *Chevron* deference does not apply here because the Commission’s orders construe “the scope of the judicial power vested by the statute.” ETP Br. 23 (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)). But this case concerns the Commission’s construction of its *own* statutory authority under statutes that it administers, a circumstance where *Chevron* deference has typically been applied. *See, e.g., Pac. Gas & Elec. Co. v. FERC*, 106 F.3d 1190, 1196 (5th Cir. 1997) (applying *Chevron* deference to determine whether “FERC imposed a reasonable construction on the description of its

statutory powers” in the NGA); *El Paso Elec. Co. v. FERC*, 201 F.3d 667, 669-70 (5th Cir. 2000) (applying *Chevron* deference to FERC’s determination of its statutory authority); *Tex. E. Transmission Corp. v. FERC*, 769 F.2d 1053, 1069 (5th Cir. 1985) (“[T]his Court generally accords ‘great deference’ to the Commission in its interpretation of the NGPA”); *see also Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277, 1279 (D.C. Cir. 2007), and *Okla. Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (FERC’s interpretations of its own jurisdiction under the FPA and NGA, respectively, receive *Chevron* deference).

Specifically, the Commission here construed its own civil penalty authority under two statutes that are directed solely to FERC: NGA § 22 (granting FERC the power to impose civil penalties for violations) and NGPA § 504(b)(6)(E) (same). While the Commission also considered other provisions of the NGA and NGPA that are directed to the powers of the judiciary (such as NGA § 24 and NGPA § 504(b)(6)(F)), it did so only in the course of construing its own civil penalty authority under provisions that define FERC’s powers.

Moreover, ETP overstates the holding of *Adams Fruit*. In that case, the Supreme Court refused to defer to an agency interpretation of a statute that granted migrant workers a private right of action to seek statutory damages for violations of motor vehicle safety requirements. The Court held that it need not defer to the

agency interpretation because the statute in question was part of an enforcement scheme that was *not* administered by the interpreting agency, but instead provided “direct recourse to federal court,” completely “independent of the [agency].” *Adams Fruit*, 494 U.S. at 649-50. In that circumstance, deferring to the agency’s interpretation would allow the agency to “bootstrap itself into an area in which it has no jurisdiction.” *Id.* at 650.

Here, by contrast, as discussed in considerable detail below, the enforcement schemes established by the NGA and NGPA are not “independent of the [agency,]” *id.*, but rather explicitly depend on FERC to conclude that violations have occurred and to assess civil penalties. Unlike in *Adams Fruit*, where the Court did nothing more than apply the well-settled rule that *Chevron* deference does not apply where the agency does not administer the statute in question, here, the NGA and NGPA and the enforcement mechanisms under those statutes are without question administered by FERC.

### **III. THE COMMISSION’S GOVERNING STATUTES SET FORTH DIFFERENT PROCEDURES FOR ASSESSMENT AND SCHEMES FOR JUDICIAL REVIEW OF CIVIL PENALTIES**

Although only the NGA and NGPA are at issue in this case, the Commission’s analysis necessarily considers the three primary statutes administered by the Commission — the NGA, NGPA and FPA — which spell out different procedures for the assessment of civil penalties, and different modes for

judicial review of such assessments. *See, e.g., Policy Statement*, 117 FERC ¶ 61,317 at P 3 (explaining that differences among statutes require different procedures for assessing civil penalties). The different civil penalty schemes established by each of these statutes, as described below in chronological order of their enactment by Congress, together belie ETP's argument that the NGA, NGPA, and FPA should be read *in pari materia* to provide the form of *de novo* federal district court adjudication that ETP seeks here. *See* ETP Br. 32-39.

In the challenged orders, the Commission construed the provisions of the NGA and NGPA, both according to their actual language and in comparison to provisions of the FPA, to ensure that its procedures for assessing civil penalties comport with the intent of Congress. *See* 2007 Rehearing Order at P 55, RE 241. Though ETP and the Interstate Natural Gas Association of America ("INGAA," filing as *amicus curiae*) may suggest otherwise, the Commission is not opposed to *de novo* district court review of its civil penalty assessments across the board — it only seeks to ensure that such review is provided where Congress intended. As both the orders here and the earlier *Policy Statement* make clear, where Congress dictates that judicial review of civil penalty assessments is to occur *de novo* in federal district court or expressly permits such *de novo* review — as in the NGPA and FPA — the Commission structures its procedures to effectuate that intent.

Where Congress has not dictated *de novo* review in district court — as in the NGA — the Commission’s procedures do not provide for such review.

**A. Natural Gas Policy Act**

Congress first granted civil penalty authority to the Commission in the NGPA, enacted in 1978. NGPA § 504(b)(6) allows the Commission to assess a civil penalty of up to \$1 million for any violation of the Act or any rule or order issued under the Act. 15 U.S.C. § 3414(b)(6). Before assessing such a civil penalty, “the Commission shall provide to such person notice of the proposed penalty. Following receipt of notice of the proposed penalty by such person, the Commission shall, by order, assess such penalty.” *Id.* at § 3414(b)(6)(E).

With regard to judicial review of civil penalty assessments, the NGPA includes a specific provision that grants jurisdiction to federal district courts for *de novo* review of the law and facts concerning any assessment made by the Commission:

If the civil penalty has not been paid within 60 calendar days after the assessment order has been made . . . 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, such assessment.

*Id.* at § 3414(b)(6)(F). *See also Policy Statement*, 117 FERC ¶ 61,317 at PP 11-12 (explaining NGPA civil penalty procedures).

## **B. Federal Power Act**

### **1. Part I**

Congress next (in 1986) gave the Commission civil penalty authority to punish non-compliance with rules, regulations, licenses, or permits issued under Part I of the FPA, concerning the development and regulation of hydropower facilities. *See* FPA § 31(c), 16 U.S.C. § 823b(c). This statute contains detailed provisions regarding the assessment of civil penalties, and the mode of judicial review of such assessments.

An entity receiving notice from the Commission of a proposed civil penalty against it has the choice of two *specific* procedural options to adjudicate its liability. FPA § 31(d), 16 U.S.C. § 823b(d). First, the entity may choose to have its liability determined “on the record after an opportunity for an agency hearing” before an ALJ, pursuant to the Administrative Procedure Act, 5 U.S.C. § 554. *See* FPA § 31(d)(2)(A), 16 U.S.C. § 823b(d)(2)(A). (This option also applies by default if the entity makes no choice of procedures). Under this option, the statute explicitly provides that judicial review of the Commission’s order assessing a civil penalty lies in an appropriate circuit court of appeals. FPA § 31(d)(2)(B), 16 U.S.C. § 823b(d)(2)(B).

Alternatively, the entity may choose to have the Commission “*promptly* assess” a civil penalty. FPA § 31(d)(3)(A), 16 U.S.C. § 823b(d)(3)(A) (emphasis

added). In this case, the statute explicitly provides for *de novo* federal district court proceedings identical to those described in the NGPA — that is, if the civil penalty is not paid within 60 days, the Commission must institute an action in federal district court for an order affirming the civil penalty, with exclusive jurisdiction lying with the district court to affirm, modify, or set aside the civil penalty. FPA § 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B); *compare* NGPA § 4(b)(6)(F), 15 U.S.C. § 3414(b)(6)(F). *See also Policy Statement*, 117 FERC ¶ 61,317 at PP 9-10 (describing FPA Part I civil penalty assessment procedures).

## 2. Part II

In 1992, Congress granted the Commission civil penalty authority under certain sections of Part II of the FPA (regulating wholesale sales and transmission of electricity in interstate commerce), for a limited number of violations of the FPA or any rules, regulations, or orders issued thereunder. With regard to the Commission's procedures for assessing civil penalties, and for judicial review of any such assessments, the statute explicitly directs that the provisions of FPA § 31(d) (including the two procedural options and attendant modes of judicial review) be applied. FPA § 316A(b), 16 U.S.C. § 825o-1(b). *See also Policy Statement*, 117 FERC ¶ 61,317 at P 5 (describing FPA Part II civil penalty assessment procedures). In 2005, Congress expanded FPA civil penalty authority to cover all violations of Part II of the FPA and left in place the two procedural

options for assessing penalties.

### C. Natural Gas Act

In 2005, when Congress passed the last of the relevant civil penalty authority provisions, it not only expanded the scope of matters subject to civil penalties under Part II of the FPA but also, for the first time, gave the Commission civil penalty authority under the NGA. *See* NGA § 22, 15 U.S.C. § 717t-1. In stark contrast to the NGPA and the FPA provisions, the NGA provision neither specifies that judicial review of civil penalty assessments be conducted *de novo* in federal district court, nor cross-references any of the earlier statutory language specifying such a mode of judicial review. *See* 2007 Rehearing Order at P 53-55, RE 239-41. NGA § 22 states only that a civil penalty “shall be assessed by the Commission after notice and opportunity for public hearing,” NGA § 22(b), 15 U.S.C. § 717t-1(b), and includes no language specifying the mode of judicial review of such an assessment. *See also Policy Statement*, 117 FERC ¶ 61,317 at PP 6-7 (describing NGA civil penalty assessment procedures, and noting that the statute does not provide for *de novo* district court review). Since Congress was reevaluating the scope of the preexisting FPA civil penalty provision (which provided for an optional *de novo* review procedure) at the same time it was adding a provision to the NGA, presumably it would have explicitly included a *de novo* provision in the NGA had it intended one.

#### **IV. THE COMMISSION REASONABLY CONSTRUED ITS NGA CIVIL PENALTY AUTHORITY**

In the 2007 Rehearing Order, the Commission rejected ETP's claims that newly-enacted NGA § 22(b), 15 U.S.C. 717t-1(b), contemplates *de novo* district court review of Commission orders assessing civil penalties. Analyzing the actual language of the statute, as well as other provisions of the NGA and the language of the other primary statutes administered by FERC, the Commission held that judicial review of orders assessing civil penalties should proceed in a circuit court of appeals, as do other orders issued under the NGA. *See* 2007 Rehearing Order at PP 53-66, RE 239-49. This Court should affirm the Commission's reasonable construction of its NGA civil penalty authority.

##### **A. NGA § 22 Does Not Provide For *De Novo* District Court Review Of FERC's Assessment Of Civil Penalties**

While both ETP and INGAA begin their arguments with the language of a different provision of the NGA (*see* ETP Br. 25 and INGAA Br. 8, discussing NGA § 24), the Commission appropriately construed its civil penalty authority by first analyzing the language of NGA § 22, which grants FERC its civil penalty authority. *See* 2007 Rehearing Order at P 53, RE 239-40; *cf. United States v. Rabham*, 540 F.3d 344, 348 (5th Cir. 2008) ("our canons of statutory construction instruct us to examine the language of the statute first"); *ECEE, Inc. v. FERC*, 611 F.2d 554, 561 (5th Cir. 1980) ("We must grapple with the precise wording of the

statute, since the starting point in every case involving construction of a statute is the language itself.”) (internal quotations omitted).

As noted above, and as the Commission correctly emphasizes in its order, NGA § 22 includes no language providing for *de novo* proceedings in federal district court to review civil penalties assessed by the Commission. 2007 Rehearing Order at P 53, RE 239-40. NGA § 22(b) states only that “[t]he penalty shall be assessed by the Commission after notice and opportunity for public hearing.” 15 U.S.C. § 717t-1(b). In sharp contrast to the other, earlier statutes that the Commission administers, Congress chose not to include specific language requiring *de novo* district court review when it recently gave FERC civil penalty authority for NGA violations. 2007 Rehearing Order at P 53, RE 239-40.

The Commission’s construction of NGA § 22 in this case is not new. In its *Policy Statement* issued in 2006 to provide notice to the industry of the procedures the Commission would employ when exercising its various civil penalty authorities, the Commission explained that “[t]he NGA civil penalty process does not include the possibility for the person to receive a *de novo* review in district court, because there is no statutory provision permitting *de novo* review.” *Policy Statement*, 117 FERC ¶ 61,317 at P 7 (2006).

**B. The Commission Properly Construed Its Civil Penalty Authority To Harmonize NGA §§ 19(b), 22, And 24**

Apparently recognizing that the actual language used by Congress in NGA § 22 does not provide for *de novo* district court review, ETP and INGAA focus instead on NGA § 24, 15 U.S.C. § 717u. *See* ETP Br. 25-30; INGAA Br. 16. They claim this provision gives federal district courts exclusive jurisdiction to adjudicate, *de novo*, violations of the NGA and any resulting civil penalty liability. Construing the language of NGA § 24 on its face, however, and considering it with other provisions of the NGA, the Commission reasonably rejected ETP's interpretation. 2007 Rehearing Order at PP 56-58, 61-64, RE 241-44, 245-47.

First, the Commission reviewed NGA § 24 itself, noting that this provision gives federal district courts exclusive jurisdiction over "violations" of the NGA (or the rules, regulations, and orders issued thereunder), and over actions "to enforce any liability or duty created by, or to enjoin any violation" of the NGA and any rules, regulations and orders issued thereunder. 15 U.S.C. § 717u. To trigger exclusive jurisdiction over "violations" of the NGA, the Commission must first find that a violation has occurred. 2007 Rehearing Order at P 58, RE 243. Where the Commission seeks to assess a civil penalty under NGA § 22, the Commission must conduct a process "providing notice and the opportunity for public hearing, followed by the Commission assessing a penalty." *Id.* Once that process is complete, NGA § 24 allows the Commission to bring an action in federal district

court to enforce the civil penalty liability it has determined in its final order. *Id.* The language of NGA § 24, contrary to the suggestions of ETP, states no intention to apply a *de novo* standard of review to any particular types of cases and, in fact, contains no reference at all to *de novo* review.

In sum, the Commission reasonably concluded that NGA § 24 does not require the Commission to file an action in federal district court each time it believes a person has violated the NGA. Rather, NGA § 24 provides a vehicle for the Commission or other parties to bring an action in district court to enjoin violations of the NGA, or to enforce liabilities or duties created under the NGA — such as civil penalty liability created by a Commission order finding a violation. 2007 Rehearing Order at PP 58, 62, RE 243-44, 245-46.

The Commission's conclusion that NGA § 24 does not provide an independent basis to seek judicial review of an order assessing a civil penalty is consistent with precedent construing both NGA § 24 and its identical counterpart, FPA § 317, 16 U.S.C. § 825p. *See* 2008 Rehearing Order at P 17, RE 348-49. For example, in *Panhandle E. Pipe Line Co. v. Trunkline Gas Co.*, 928 F. Supp. 466 (D. Del. 1996), the court concluded that it would have jurisdiction to entertain a suit under NGA § 24 only if the FERC orders in question had first created a liability for it to enforce. *Id.* at 471, 473. The court also noted, importantly, that “[a]ny alleged infirmity with the FERC’s ruling involving the merits or its

authority to so rule needs to be passed upon” by the court of appeals. *Id.* at 473. Similarly, this Court, construing identical FPA § 317, held that this provision gives district courts “exclusive jurisdiction to enforce or enjoin . . . definitive orders, establishing rights and duties, such as may be reviewed before the Circuit Court of Appeals.” *Miss. Power & Light Co. v. FPC*, 131 F.2d 148, 150 (5th Cir. 1942). District courts in this and other circuits have reached the same conclusion. *See, e.g., La. Power & Light Co. v. Ackel*, 616 F. Supp. 445, 447 (M.D. La. 1985) (district court lacked jurisdiction under FPA § 317 where defendants had not violated FERC’s order); *Allegheny Elec. Coop., Inc. v. Power Auth. of N.Y.*, 630 F. Supp. 1271, 1276 (S.D.N.Y. 1986) (FPA § 317 “is an enforcement section designed to address the violation of specific orders delineating rights and duties”); 2008 Rehearing Order at P 17 & n.10, RE 349.

The Commission also took into account NGA § 19(b), 15 U.S.C. § 717r(b), the overarching provision of the statute that governs judicial review of FERC decisions under the NGA. 2007 Rehearing Order at PP 57, 62, RE 242-43, 245-46. That provision “vests *exclusive* jurisdiction to review all decisions of the Commission in the circuit court of appeals.” *Id.* at P 63, RE 246 (quoting *Consol. Natural Gas Corp. v. FERC*, 611 F.2d 951 (4th Cir. 1979)) (emphasis in original). *See also, e.g., City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (interpreting identical FPA § 313(b), 16 U.S.C. § 825l, and holding that all

objections on judicial review to FERC orders “must be made in the Courts of Appeals or not at all”; Courts of Appeals “shall have exclusive jurisdiction”). If ETP were correct that NGA § 24 mandates that the Commission seek enforcement of civil penalties in a *de novo* federal district court action, the exclusive review mandate of NGA § 19(b) would be inappropriately rendered superfluous as to FERC orders finding an NGA violation and assessing a civil penalty under NGA § 22. 2007 Rehearing Order at P 62, RE 245.

ETP argues that this conclusion is undercut by FPA § 313(b), 16 U.S.C. § 825l(b), which is identical to NGA § 19(b). ETP Br. 30-31. According to ETP, since the Commission concedes that the FPA gives a person subject to a civil penalty the option of a *de novo* proceeding in federal district court, then NGA § 19(b), given that it is identical to FPA § 313(b), must not be a bar to *de novo* district court adjudication of civil penalties under the NGA. ETP Br. 30-31. Unlike the FPA, however, which explicitly establishes a procedure that includes *de novo* district court proceedings at the option of the entity subject to civil penalty liability – and therefore indicates Congress’ intent to supplant the more general judicial review provisions of FPA § 313(b) – nothing in the text of the three sections of the NGA suggests that different judicial review procedures should apply to civil penalty assessments. Moreover, the Commission did not, as ETP contends (Br. 31), read NGA § 19(b) as a prohibition on *de novo* federal district

court proceedings; rather, it found that § 19(b) would be rendered meaningless in the civil penalty context under ETP's preferred interpretation, as — in contrast to the text of the FPA — there is no indication in the statutory text that Congress intended to supplant that provision. 2007 Rehearing Order at P 62, RE 245.

As a whole, the Commission's well-reasoned construction of these provisions of the NGA ensures that they harmoniously fit together, and that no provision is made superfluous or rendered inapplicable without a clear indication that Congress intended such a result. 2007 Rehearing Order at P 62, RE 245-46 (setting forth in detail the statutory scheme established for the assessment of civil penalties under the NGA); *see, e.g., Med. Ctr. Pharm. v. Mukasey*, 536 F.3d 383, 406 (5th Cir. 2008) ("It is a cardinal principle of statutory construction that a statute be construed such that no clause, sentence, or word shall be superfluous, void, or insignificant."); *Waggoner v. Gonzales*, 488 F.3d 632, 636 (5th Cir. 2007) ("When interpreting statutes . . . each part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole."). ETP's preferred interpretation, relying solely on NGA § 24 without taking NGA § 19(b) into account, would not achieve such harmony. Instead, ETP simply presumes that when Congress gave FERC civil penalty authority in NGA § 22, it intended that NGA § 24 would provide targets of that authority with a right to *de novo* federal district court adjudication, and that NGA § 19(b) would not

apply. *See* ETP Br. 30.

Not only does ETP's presumption ignore the exclusive review provisions of NGA § 19(b), it also ignores the fact that NGA § 24 was enacted long before FERC even had the power to impose civil penalties under the NGA. *See, e.g., Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986) (prior to the enactment of NGA § 22 in 2005, it was "well settled that the [NGA] does not give the Commission the authority to impose civil penalties"). Given that sequence, and the longstanding status of NGA § 19(b) as the exclusive mode for judicial review of FERC orders under the NGA, it would be unreasonable to presume, without more, that Congress intended the existing NGA § 24 to require district court *de novo* adjudication of civil penalties under later-enacted authority, entirely supplanting the broad judicial review provisions of NGA § 19(b). *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *United States v. Seale*, 542 F.3d 1033, 1039 (5th Cir. 2008) (same).

**C. The Civil Penalty Provisions Of The NGPA And FPA Do Not Support ETP's Reading Of NGA § 22**

ETP and INGAA attempt to bolster their arguments by pointing to the civil penalty sections of the NGPA and FPA. *See* ETP Br. 32-39; INGAA Br. 10-11. ETP, in particular, claims that NGA § 22(b) utilizes "terms of art" included in the

other statutes, and therefore dictate that the same *de novo* federal district court review procedures should apply. ETP Br. 33-34.

Unlike the NGA, however, the other statutes explicitly set forth different procedures for the Commission's assessment of civil penalties, and for judicial review of such assessments. In fact, the language used by Congress in NGA § 22 bears little similarity to the more detailed language used in the NGPA and FPA. *See, e.g.*, 2007 Rehearing Order at P 54 & n.96, RE 240 (noting that NGA § 22(b) is identical to just one phrase of FPA § 316A, and that the statutes use only a few of the same words).

As it did before the Commission, however, ETP asks this Court to read words into NGA § 22(b) that Congress explicitly included in the NGPA and FPA, but not in the NGA. 2007 Rehearing Order at P 53, RE 239-40. Seeking to have NGA § 22 read *in pari materia* with the NGPA and FPA, ETP focuses (Br. 33) on what it calls the “operative language” of NGA § 22(b), which states that “[t]he [civil] penalty shall be assessed by the Commission after notice and opportunity for public hearing.” 15 U.S.C. § 717t-1(b). Since this single phrase was also used in earlier-enacted FPA §§ 31(c) and 316A, and because the single word “assess” was also used in earlier-enacted NGPA § 504(b)(6)(E), ETP leaps to the conclusion (Br. 33-34) that Congress must have intended for the same *de novo* federal district court procedures set forth in those statutes to apply under the NGA.

As the Commission explained, however, this comparability principle only applies where the statutory provisions in question are “in all material aspects substantially identical.” 2007 Rehearing Order at P 54, RE 240 (quoting *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)); see also *Smith v. City of Jackson*, 351 F.3d 183, 190 & n.9 (5th Cir. 2003) (noting that the canon of *in pari materia* is “largely inapplicable” when there are “salient textual differences” between the statutes in question). The recently-enacted NGA § 22(b) is not “in all material aspects” similar to FPA §§ 31(d) and 316A, or to NGPA § 504(b)(6)(E) — all of which were enacted earlier.

First, FPA § 31(d), unlike the single sentence of NGA § 22(b), sets forth specific procedures that provide an entity subject to possible civil penalty liability a choice between an agency hearing followed by judicial review in a court of appeals, or the “prompt” assessment of a civil penalty followed by *de novo* review in a federal district court. Compare 16 U.S.C. § 823b(d); see *supra* pp. 33-34 (describing FPA § 31(d)). Second, while FPA § 316A includes one phrase (“[s]uch penalty shall be assessed by the Commission, after notice and opportunity for public hearing”) identical to the single sentence in NGA § 22(b), it also expressly references and applies the procedures laid out in FPA § 31(d); NGA § 22(b) includes no similar cross-reference to *de novo* procedures that are described elsewhere. Compare 16 U.S.C. § 825o-1(b); see *supra* p. 34 (describing

FPA § 316A); *see also* 2007 Rehearing Order at P 54, RE 240-41. Finally, while NGA § 22(b) and NGPA § 504(b)(6)(E) share a single word in common — “assess” — the NGPA provision, unlike the NGA, goes on to specify, in an entire subsection entitled “Judicial review,” the *de novo* federal district court review procedures that are to be applied. *See* NGPA § 504(b)(6)(F), 15 U.S.C. § 3414(b)(6)(4); *see supra* p. 32 (describing NGPA §§ 504(b)(6)(E)-(F)).

In short, while Congress included explicit language providing for *de novo* federal district court procedures in each of the earlier statutory provisions giving FERC civil penalty authority, it did not do so in NGA § 22(b). Additionally, because Congress made amendments to the scope of the FPA penalty provision at the very same time it was amending the NGA to add a penalty provision, presumably it was well aware of the differences of those two provisions. From this, the Commission reasonably concluded that Congress understood the existing law and made a deliberate and conscious choice not to include specific *de novo* review language in the NGA. 2007 Rehearing Order at P 55, RE 241. Thus, the Commission’s determination that NGA § 22(b) does not provide for *de novo* district court review of civil penalty assessments appropriately recognizes both the similarities and the differences between the statutes it administers. *See id.* (explaining that FERC must give meaning to different language in the three statutes it administers); *see also, e.g., City of Chicago v. Envtl. Def. Fund*, 511 U.S.

328, 338 (1994) (“It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.”) (internal quotation marks omitted); *Tex. Coal. of Cities for Util. Issues v. FCC*, 324 F.3d 804, 809 n.4 (5th Cir. 2003) (same); *Sierra Club v. U.S. EPA*, 314 F.3d 735, 741 (5th Cir. 2002) (same).

Furthermore, the Commission did not, as ETP argues, base its construction of the NGA on the “faulty premise” that Congress must expressly state that *de novo* federal district court adjudication of civil penalties is required. ETP Br. 32. Rather, as discussed herein, the Commission reviewed all three of the primary statutes it administers, and reasonably concluded from the specific *de novo* federal district court procedures provided in the NGPA and FPA that if Congress intended for the same procedures to apply under the NGA, it knew how to incorporate them. 2007 Rehearing Order at P 54, RE 240. Whatever the validity of a “premise” that Congress must specifically provide for *de novo* federal district court adjudication, the Commission expressed no such premise here. *Am. Forest*, 2008 U.S. App. LEXIS 25853 (recent decision of the D.C. Circuit holding that the Commission reasonably interpreted another section of EPA Act 2005, promulgated at the same time as NGA § 22, that omitted a single word (“competitive”) found in other sections, and that the Commission reasonably gave effect to the difference in statutory phrasing).

ETP's claims regarding whether or not Congress must explicitly state an intention for *de novo* district court review also suffer from their own contradictions. While ETP faults the Commission for concluding that *de novo* review is not available under NGA § 22 because the statute does not specifically provide for it (unlike the FPA and NGPA), at the same time it asserts that Congress expressed the intent to provide for *de novo* adjudication by “not expressly stating that the *agency* will adjudicate potential civil penalty, followed by substantial evidence judicial review.” ETP Br. 38-39.<sup>3</sup> ETP cannot have it both ways.

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<sup>3</sup> ETP attempts to support this argument with new comments by Senator Domenici made in September 2008 — three years after Congress enacted NGA § 22, one year after FERC initiated formal litigation against ETP, and over one month after the last of the FERC orders challenged here. *See* ETP Br. 39. Those comments — which, of course, were never presented to the Commission in this proceeding — are of questionable significance:

The retroactive wisdom provided by the subsequent speech of a member of Congress stating that yesterday we meant something that we did not say is an ephemeral guide to history. Though even God cannot alter the past, historians can, . . . and other mortals are not free from the temptation to endow yesterday with the wisdom found today. What happened after a statute was enacted may be history and it may come from members of the Congress, but it is not part of the legislative history of the original enactment.

*Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980); *accord Guilzon v. Comm'r*, 985 F.2d 819, 823 n.11 (5th Cir. 1993). *Cf. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (“[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”).

**D. The Remaining Arguments of ETP and INGAA Lack Merit**

The additional assertions raised here by ETP and INGAA are wholly unpersuasive, and should be rejected.

First, ETP asserts that where a statute is silent as to the standard of review, federal courts will look to various “indicia” to determine the appropriate forum and standard of review. ETP Br. 41-45. INGAA similarly suggests a judicial preference for *de novo* review in the civil penalty context. INGAA Br. 22. These arguments fail principally because the NGA is *not* silent as to the judicial forum and standard of review to be applied to FERC orders. Rather, as described above, NGA § 19(b) sets forth a comprehensive scheme of judicial review of Commission orders, and provides that a party aggrieved by such an order may seek review of such orders in the court of appeals, and that the factual findings of the Commission, “if supported by substantial evidence,” shall be conclusive. 15 U.S.C. § 717r(b).

While FPA § 313(b), 16 U.S.C. § 825l(b), is identical to NGA § 19(b), Congress included in the FPA specific language providing for *de novo* district court review of civil penalties (as discussed above) that supplants the more general comprehensive judicial review scheme. No similar language is included in the NGA that would trump the general judicial review provisions of NGA § 19(b). *See Ehlmann v. Kaiser Found. Health Plan*, 198 F.3d 552, 555 (5th Cir. 2000) (noting

that, where it is clear Congress is capable of specifying requirements, the absence of such requirements “was probably intentional”); *see also Furco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 228-29 (1957) (“However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . . Specific terms prevail over the general in the same” statute.) (alterations in original; internal quotation marks omitted); *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003) (“As a fundamental rule of statutory interpretation, specific provisions trump general provisions.”).

The case that ETP finds “particularly instructive,” for its broad assertion that, where a statute giving an agency prosecutorial functions is silent as to the standard of review, it is presumed that any prosecution must be initiated in a *de novo* federal district court proceeding, is readily distinguishable. ETP Br. 43-44; *see* 2007 Rehearing Order at P 64, RE 246-47. In *NRC v. Radiation Technology, Inc.*, 519 F. Supp. 1266 (D.N.J. 1981), the court considered the civil penalty provision of the Atomic Energy Act, 42 U.S.C. § 2282(c), which, while explicitly providing for district court jurisdiction to review such penalties, was silent as to the standard of review to be employed. While the court noted “general principles” that might favor a right to a *de novo* trial, it expressly declined to base its determination on those principles. *Radiation Tech.*, 519 F. Supp. at 1279. Rather, the court

“[r]esort[ed] to the statute itself,” *id.* at 1279, and concluded, on the basis of the legislative history, that it should conduct a *de novo* trial pursuant to this statute. *Id.* at 1278-86.

As the Commission explained, the kind of definitive legislative history that was central to the court’s decision in *Radiation Tech.* does not exist with regard to NGA § 22. 2007 Rehearing Order at P 64, RE 246-47. Moreover, while in that case Congress expressly chose to retain *de novo* review procedures when it later amended the statute at issue, *see* 519 F. Supp. at 1286, here Congress chose not to expressly specify *de novo* review procedures in the NGA, as it had previously done in both the NGPA and FPA. 2007 Rehearing Order at P 64, RE 246-47. Finally, as the *Radiation Tech.* court expressly declined to rely on any general principle favoring *de novo* procedures, ETP cannot rely on that case for those principles here.

Likewise, the other cases cited by ETP are unpersuasive. None of these opinions sets forth the detailed analytical framework ETP posits in its brief. *See* ETP Br. 42-44. Rather, in each of these cases (to the extent they are relevant at all) the court reviewed the actual language of the statute in question, as well as any available legislative history, to determine the mode of judicial review and standard of review that should apply. *See* 2007 Rehearing Order at P 65 & n.120, RE 247-48. In fact, those cases suggest that in the absence of specific statutory language,

*de novo* review is not presumed. See *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619 n.17 (1966) (citing *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963)); see also *Chandler v. Roudebush*, 425 U.S. 840, 862 (1976) (noting that while *de novo* review is not to be presumed, specific statutory authorization in the statute at issue required such review); *Policy Statement*, 117 FERC ¶ 61,317 at P 7 & n.25. The Commission here did exactly what the court instructed in each of those cases: it reviewed the actual text of the NGA § 22 to determine the proper forum and standard of review for civil penalty assessments.

ETP and INGAA also contend that the Commission's interpretation creates an illogical outcome by potentially subjecting ETP to two separate modes of judicial review under the same Show Cause Order. ETP Br. 40; INGAA Br. 18-19. To be sure, the single Show Cause Order sets forth allegations that ETP took separate actions that violated both the NGA and the NGPA. But the fact that the Commission opted to issue one Show Cause Order, instead of two separate orders (which it also could have done), does not undermine its construction of the NGA. As the NGA and NGPA allegations concern separate actions by ETP and its affiliates, it is not illogical for any subsequent judicial review to proceed in two different courts, as the two separate statutes require. ETP would not be required to litigate the same issues in two courts, since the court of appeals would consider the set of law and facts surrounding the civil penalty issued under the NGA, while the

federal district court would consider the separate set of law and facts surrounding the civil penalty issued under the NGPA.

ETP also takes issue with the language used in the Show Cause Order to describe the allegedly unlawful conduct, arguing that the Commission appears to have prejudged the merits of the case. *See* ETP Br. 46-49. ETP does not, however, ask the Court to determine whether the Commission has in fact denied it due process by prejudging its case, but instead simply posits that the Commission's choice of words casts doubt on its construction of NGA § 22. ETP Br. 49. In any event, the Commission fully addressed the due process claims raised on rehearing, concluding that the procedures followed to that point were consistent with governing law and applicable precedent and fully provided ETP due process of law. 2007 Rehearing Order at PP 76-87, RE 252-60. The Commission emphasized on rehearing that, regardless of the language employed in the Show Cause Order, it had not made any final conclusions and was only setting forth preliminary allegations, to which ETP would have the opportunity to respond. *Id.* at P 87 & n.168, RE 260. In addition, to ensure that no perception of unfairness or prejudgment remained, the Commission instituted additional procedural safeguards beyond what is required by law. *Id.* at P 88, RE 260-61.

Finally, to the extent that ETP suggests that the Commission may not hold its own agency procedures before assessing civil penalties under NGA § 22, and

must stop its process now and bring an action to adjudicate civil penalties in federal district court, its argument lacks merit, both on the face of the relevant statutes and in light of the discretion afforded to administrative agencies to formulate their own procedures. Even assuming *arguendo* that NGA § 22 provides for a *de novo* proceeding in federal district similar to that provided in the NGPA and FPA, the language of NGA § 22(b) explicitly states that the Commission shall assess any civil penalty “after notice and opportunity for public hearing.” This language undoubtedly permits the hearing procedures adopted here.

Moreover, even if the *de novo* procedures of NGPA § 504(b)(6)(F) and FPA § 31(d)(3)(B) did apply, as ETP contends, neither statute contemplates an original *de novo* adjudication. Rather, the language used in both provisions — stating that the district court will “have authority to *review de novo* the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying . . . or setting aside” a civil penalty — goes to the *review* of the Commission’s final decision, not to the adjudication leading to that final decision. *See* 15 U.S.C. § 3414(b)(6)(F) and 16 U.S.C. § 823b(d)(3)(B) (emphasis added).

In any event, “the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress [has] confided the responsibility of substantive judgments.” *W. Coal Traffic League v. United States*, 719 F.2d 772, 780 (5th Cir. 1984) (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res.*

*Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978)). NGA § 22 confides in the Commission the responsibility to assess civil penalties “after notice and opportunity for hearing,” giving the agency discretion to formulate appropriate notice and hearing procedures to satisfy the directives of Congress.

**V. THE COMMISSION REASONABLY CONCLUDED THAT IT COULD HOLD AN AGENCY HEARING BEFORE ASSESSING CIVIL PENALTIES UNDER THE NGPA**

ETP and FERC agree that the NGPA explicitly provides for *de novo* review in a federal district court of any civil penalties assessed by the Commission. *See* 2007 Rehearing Order at P 30, RE 229 (acknowledging NGPA § 504(b)(6)(F), 15 U.S.C. § 3414(b)(6)(F)). ETP objects, however, to the Commission’s unremarkable conclusion in the challenged orders that it has discretion to formulate and conduct its own agency procedures to guide it in determining whether to assess a civil penalty and in arriving at a civil penalty amount. *See* ETP Br. 50-55. That conclusion comports with the language of the NGPA and the general discretion of agencies to fashion their own procedures, and should be upheld.

ETP’s arguments regarding the NGPA proceed almost entirely from the flawed premise that Congress defined the specific process by which FERC must proceed in determining whether to exercise its civil penalty authority. *See* ETP Br. 51. But the NGPA does not contain any specific language dictating the procedure that the agency may use to arrive at a civil penalty assessment. 2007

Rehearing Order at P 30, RE 229. NGPA § 504(b)(6)(E), addressing the assessment of civil penalties by the Commission, states only that FERC must provide notice of its proposed penalty and, following receipt of that notice, “shall, by order, assess such penalty.” 15 U.S.C. § 3414(b)(6)(E). Nothing in this language precludes the Commission from conducting additional procedures, such as holding a trial-type hearing before an administrative law judge, between the time it issues notice of a proposed civil penalty and its order assessing such penalty. 2007 Rehearing Order at P 31, RE 229.

To be sure, the statute explicitly dictates the mode of judicial review of civil penalty assessments, providing for *de novo* federal district court review. NGPA § 504(b)(6)(F), 15 U.S.C. § 3414(b)(6)(F). That subsection does not, however, contain any language limiting the Commission’s ability to conduct additional procedures before assessing civil penalties.

As the governing statute does not dictate the specific procedures the Commission must use when assessing civil penalties, the Commission retains the usual discretion afforded to administrative agencies to fashion their own procedures. *See* 2007 Rehearing Order at P 31 & nn.55-58, RE 229-30 (citing *Vt. Yankee*, 435 U.S. at 524-25); *see also W. Coal Traffic League*, 719 F.2d at 780 (“[T]he formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress [has] confided the responsibility of substantive

judgments””) (quoting *Vt. Yankee*). Additional procedures before the Commission would not “erect[] a roadblock” to the *de novo* review procedures provided under the statute (ETP Br. 54), but rather would help ensure that any decision to assess a civil penalty has a “sound factual and legal basis,” thus satisfying the responsibilities given to FERC by Congress. 2007 Rehearing Order at P 31, RE 229-30.

Moreover, comparing NGPA § 504(b)(6)(E) to its counterpart in the FPA suggests that Congress did not intend to limit the Commission’s discretion to conduct additional procedures, if it finds them necessary, between issuance of notice and assessment of civil penalties. As discussed above, FPA § 31(d)(3)(A) provides, at the option of the entity subject to possible penalty, for *de novo* district court review of Commission penalty assessments. 16 U.S.C. § 823b(d)(3)(A); *see supra* pp. 33-34. Unlike NGPA § 504(b)(6)(E), however, this FPA provision directs the Commission “*promptly*” to assess the civil penalty after notice. FPA § 31(d)(3)(A), 16 U.S.C. § 823b(d)(3)(A) (emphasis added). This language requires the immediate assessment of a civil penalty without additional agency procedures — but Congress did not include the same (or even similar) language in the NGPA. *See Policy Statement*, 117 FERC ¶ 61,317 at PP 5, 10 (noting that where a person elects procedures of FPA § 31(d)(3), FERC will immediately assess civil penalty).

ETP also contends that the legislative history of the NGPA supports its view that the agency may not conduct its own procedures before assessing a civil penalty. ETP Br. 52. The Commission reasonably concluded, however, that the competing draft versions of the NGPA civil penalty provision — one that would have required the Commission to make civil penalty determinations on the record after agency hearing, and one that would have required the Commission to bring an action in federal district court — represented only a “debate over whether a person should be allowed, as a matter of right, to receive a hearing on the record.” 2007 Rehearing Order at P 34, RE 231. Congress in the end chose not to mandate an on-the-record agency hearing, as a matter of right, and provided entities subject to civil penalties the right to receive *de novo* review in federal district court. *Id.* This legislative history, fairly interpreted, does not provide evidence that Congress intended to prohibit FERC from holding trial-type hearings or other procedures if necessary to reach a final civil penalty determination. *Id.*; *see also* RE 155 (House Conference Report (attached to ETP’s request for rehearing) stating only that “[t]he Commission is given authority to assess civil penalties”).

ETP further claims (Br. 50-51) that the Commission’s holding here conflicts with its earlier position, expressed in the *Policy Statement*, that “[t]he NGPA does not provide for an on-the-record hearing before an ALJ.” 117 FERC ¶ 61,317 at P 12. To the contrary, this statement conveys exactly the same position that the

Commission has taken here: “that the NGPA does not provide a person who receives notice of a proposed penalty with an ALJ hearing *as a matter of right.*” 2007 Rehearing Order at P 33, RE 231 (emphasis added). The *Policy Statement* did not state, as ETP seems to suggest, that the Commission viewed the NGPA at that time as *prohibiting* the use of an agency hearing or other procedures before arriving at a final civil penalty assessment. See 2007 Rehearing Order at P 33, RE 231 (noting that *Policy Statement* recognized some additional process might be necessary before assessing civil penalty) (citing 117 FERC ¶ 61,317 at P 12).

### CONCLUSION

For the reasons stated herein, and in Respondent FERC's Motion to Dismiss and Reply to Response to Motion to Dismiss, carried with the case, the petitions for review should be dismissed for lack of jurisdiction. In the alternative, the petitions for review should be denied and the Commission's orders should be upheld in all respects.

Respectfully submitted,

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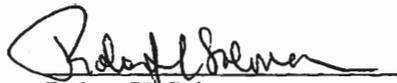
**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

In accordance with Fed. R. App. P. 32(a)(7)(c)(i) and Fifth Circuit Rule

32.3, I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because it contains 13,749 words, excluding the cover page, statement regarding oral argument, table of contents and authorities, certificates of counsel, and the addendum.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Office Word, Version 2003 in 14 point, Times New Roman style.



Robert H. Solomon  
Attorney of Record for Respondent  
Federal Energy Regulatory Commission

February 2, 2009

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**ADDENDUM  
STATUTES & REGULATIONS**



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The Administrative Procedure Act, 5 U.S.C. § 704, provides as follows:

**Sec. 704: Actions Reviewable**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Sections 31 of the Federal Power Act, 16 U.S.C. §§ 823b, provides as follows:

**Sec. 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 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, 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.

Section 313 of the Federal Power Act, 16 U.S.C. § 825l, provides as follows:

**Sec. 825l: Review of orders**

**(a) Application for rehearing; time periods; modification of order**

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

**(b) Judicial review**

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before

the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

**(c) Stay of Commission's order**

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Section 316A of the Federal Power Act, 16 U.S.C. § 825o-1, provides as follows:

**Sec. 825o-1: Enforcement of certain provisions**

**(a) Violations**

It shall be unlawful for any person to violate any provision of subchapter II of this chapter or any rule or order issued under any such provision.

**(b) Civil penalties**

Any person who violates any provision of subchapter II of this chapter or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than \$1,000,000 for each day that such violation continues. Such penalty shall be assessed by the Commission, after notice and opportunity for public hearing, in accordance with the same provisions as are applicable under section 823b (d) of this title in the case of civil penalties assessed under section 823b of this title. In determining the amount of a proposed penalty, the Commission shall take into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner.

Section 317 of the Federal Power Act, 16 U.S.C. § 825p, provides as follows:

**Sec. 825p: Jurisdiction of offenses; enforcement liabilities and duties**

The District Courts of the United States, and the United States Courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability of duty created by, or to enjoin any violation of this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

Sections 4(a)-4(b) of the Natural Gas Act, 15 U.S.C. §§ 717c(a)-717c(b), provide as follows:

**Sec. 717c: Rates and charges**

**(a) Just and reasonable rates and charges**

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

**(b) Undue preferences and unreasonable rates and charges prohibited**

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Section 19 of the Natural Gas Act, 15 U.S.C. § 717r, provides as follows:

**Sec. 717r: Rehearing and review**

**(a) Application for rehearing; time**

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

**(b) Review of Commission order**

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the

Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

**(c) Stay of Commission order**

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

**(d) Judicial review**

**(1) In general**

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

**(2) Agency delay**

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or

State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

**(3) Court action**

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

**(4) Commission action**

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

**(5) Expedited review**

The Court shall set any action brought under this subsection for expedited consideration.

Sections 22 of the Natural Gas Act, 15 U.S.C. §§ 717t-1, provides as follows:

**Sec. 717t-1: Civil penalty authority**

**(a) In general**

Any person that violates this chapter, or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall be subject to a civil penalty of not more than \$1,000,000 per day per violation for as long as the violation continues.

**(b) Notice**

The penalty shall be assessed by the Commission after notice and opportunity for public hearing.

**(c) Amount**

In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation.

Section 24 of the Natural Gas Act, 15 U.S.C. § 717u, provides as follows:

**Sec. 717u: Jurisdiction of offenses; enforcement liabilities and duties**

The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

Section 311(a)(1)-(2) of the Natural Gas Policy Act, 15 U.S.C. § 3371(a)(1)-(2), provides as follows:

**Sec. 3371: Authorization of certain sales and transportation**

**(a) Commission approval of transportation**

**(1) Interstate pipelines**

**(A) In general**

The Commission may, by rule or order, authorize any interstate pipeline to transport natural gas on behalf of –

- (i) any intrastate pipeline; and
- (ii) any local distribution company.

**(B) Just and reasonable rates**

The rates and charges of any interstate pipeline with respect to any transportation authorized under subparagraph (A) shall be just and reasonable (within the meaning of the Natural Gas Act [15 U.S.C. 717 et seq.]).

**(2) Intrastate pipelines**

**(A) In general**

The Commission may, by rule or order, authorize any intrastate pipeline to transport natural gas on behalf of -

- (i) any interstate pipeline; and
- (ii) any local distribution company served by any interstate pipeline.

**(B) Rates and charges**

**(i) Maximum fair and equitable price**

The rates and charges of any intrastate pipeline with respect to any transportation authorized under subparagraph(A), including any amount computed in accordance with the rule prescribed under clause (ii), shall be fair and equitable and may not exceed an amount which is reasonably comparable to the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service.

**(ii) Commission rule**

The Commission shall, by rule, establish the method for calculating an amount necessary to –

(I) reasonably compensate any intrastate pipeline for expenses incurred by the pipeline and associated with the providing of any gathering, treatment, processing, transportation, delivery, or similar service provided by such pipeline in connection with any transportation of natural gas authorized under subparagraph (A); and (II) provide an opportunity for such pipeline to earn a reasonable profit on such services.

Section 504(b) of the Natural Gas Policy Act, 15 U.S.C. § 3414(b), provides as follows:

**Sec. 3414: Enforcement**

\* \* \*

**(b) Civil enforcement**

**(1) In general**

Except as provided in paragraph (2), whenever it appears to the Commission that any person is engaged or about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter, or of any rule or order thereunder, the Commission may bring an action in the District Court of the United States for the District of Columbia or any other appropriate district court of the United States to enjoin such act or practice and to enforce compliance with this chapter, or any rule or order thereunder.

**(2) Enforcement of emergency orders**

Whenever it appears to the President that any person has engaged, is engaged, or is about to engage in acts or practices constituting a violation of any order under section 3362 of this title or any order or supplemental order issued under section 3363 of this title, the President may bring a civil action in any appropriate district court of the United States to enjoin such acts or practices.

**(3) Repealed. Pub. L. 101-60, § 3(a)(4)(B), July 26, 1989, 103 Stat. 158**

**(4) Relief available**

In any action under paragraph (1) or (2), the court shall, upon a proper showing, issue a temporary restraining order or preliminary or permanent injunction without bond. In any such action, the court may also issue a mandatory injunction commanding any person to comply with any applicable provision of law, rule, or order, or ordering such other legal or equitable relief as the court determines appropriate, including refund or restitution.

**(5) Criminal referral**

The Commission may transmit such evidence as may be available concerning any acts or practices constituting any possible violations of the

Federal antitrust laws to the Attorney General who may institute appropriate criminal proceedings.

**(6) Civil penalties**

**(A) In general**

Any person who knowingly violates any provision of this chapter, or any provision of any rule or order under this chapter, shall be subject to—

(i) except as provided in clause (ii) a civil penalty, which the Commission may assess, of not more than \$1,000,000 for any one violation; and

(ii) a civil penalty, which the President may assess, of not more than \$1,000,000, in the case of any violation of an order under section 3362 of this title or an order or supplemental order under section 3363 of this title.

**(B) “Knowing” defined**

For purposes of subparagraph (A) the term “knowing” means the having of—

(i) actual knowledge; or

(ii) the constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.

**(C) Each day separate violation**

For purposes of this paragraph, in the case of a continuing violation, each day of violation shall constitute a separate violation.

**(D) Statute of limitations**

No person shall be subject to any civil penalty under this paragraph with respect to any violation occurring more than 3 years before the date on which such person is provided notice of the proposed penalty under subparagraph (E). The preceding sentence shall not apply in any case in which an untrue statement of material fact was made to the Commission or a State or Federal agency by, or acquiesced to by, the violator with respect to the acts or omissions constituting such violation, or if there was omitted a material fact necessary in order to make any statement made by, or acquiesced to by, the violator with respect to such acts or

omissions not misleading in light of circumstances under such statement was made.

**(E) Assessed by Commission**

Before assessing any civil penalty under this paragraph, the Commission shall provide to such person notice of the proposed penalty. Following receipt of notice of the proposed penalty by such person, the Commission shall, by order, assess such penalty.

**(F) Judicial review**

If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (E), 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, such assessment.

18 C.F.R. § 284.7(b) provides as follows:

**Sec. 284.7 Firm transportation service.**

\* \* \*

**(b) Non-discriminatory access.**

- (1) An interstate pipeline or intrastate pipeline that offers transportation service on a firm basis under subpart B, C or G must provide such service without undue discrimination, or preference, including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or volumes of natural gas to be transported, customer classification, or undue discrimination or preference of any kind.
- (2) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part must provide each service on a basis that is equal in quality for all gas supplies transported under that service, whether purchased from the pipeline or another seller.
- (3) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part may not include in its tariff any provision that inhibits the development of market centers.

18 C.F.R. § 284.9 provides as follows:

**Sec. 284.9 Interruptible transportation service.**

**(a) Interruptible transportation availability.**

- (1) An interstate pipeline that provides firm transportation service under subpart B or G of this part must also offer transportation service on an interruptible basis under that subpart or subparts and separately from any sales service.
- (2) An intrastate pipeline that provides transportation service under Subpart C may offer such transportation service on an interruptible basis.
- (3) Service on an interruptible basis means that the capacity used to provide the service is subject to a prior claim by another customer or another class of service and receives a lower priority than such other classes of service.

**(b)** The provisions regarding non-discriminatory access, reasonable operational conditions, and limitations contained in Sec. 284.7 (b), (c), and (f) apply to pipelines providing interruptible service under this section.

**(c) Reservation fee.** No reservation fee may be imposed for interruptible service. A pipeline's rate for any transportation service provided under this section may not include any minimum bill provision, minimum take provision, or any other provision that has the effect of guaranteeing revenue.

18 C.F.R. § 284.122 provides as follows:

**Sec. 284.122 Transportation by intrastate pipelines.**

(a) Subject to paragraphs (d) and (e) of this section, other provisions of this subpart, and the applicable conditions of Subpart A of this part, any intrastate pipeline may, without prior Commission approval, transport natural gas on behalf of:

(1) Any interstate pipeline; or

(2) Any local distribution company served by an interstate pipeline.

(b) No rate charged for transportation authorized under this subpart may exceed a fair and equitable rate under Sec. 284.123.

(c) Any intrastate pipeline engaged in transportation arrangements authorized under this section must file reports as required by Sec. 284.126.

(d) Transportation of natural gas is not on behalf of an interstate pipeline or local distribution company served by an interstate pipeline or authorized under this section unless:

(1) The interstate pipeline or local distribution company has physical custody of and transports the natural gas at some point; or

(2) The interstate pipeline or local distribution company holds title to the natural gas at some point, which may occur prior to, during, or after the time that the gas is being transported by the intrastate pipeline, for a purpose related to its status and functions as an interstate pipeline or its status and functions as a local distribution company.

18C.F.R. § 284.123 provides as follows:

**Sec. 284.123 Rates and charges.**

**(a) General rule.** Rates and charges for transportation of natural gas authorized under §284.122(a) shall be fair and equitable as determined in accordance with paragraph (b) of this section.

**(b) Election of rates.**

**(1)** Subject to the conditions in §§284.7 and 284.9 of this chapter, an intrastate pipeline may elect to:

**(i)** Base its rates upon the methodology used:

**(A)** In designing rates to recover the cost of gathering, treatment, processing, transportation, delivery or similar service (including storage service) included in one of its then effective firm sales rate schedules for city-gate service on file with the appropriate state regulatory agency; or

**(B)** In determining the allowance permitted by the appropriate state regulatory agency to be included in a natural gas distributor's rates for city-gate natural gas service; or

**(ii)** To use the rates contained in one of its then effective transportation rate schedules for intrastate service on file with the appropriate state regulatory agency which the intrastate pipeline determines covers service comparable to service under this subpart.

**(2)(i)** If an intrastate pipeline does not choose to make any election under paragraph (b)(1) of this section, it shall apply for Commission approval, by order, of the proposed rates and charges by filing with the Commission the proposed rates and charges, and information showing the proposed rates and charges are fair and equitable. Each petition for approval filed under this paragraph must be accompanied by the fee set forth in §381.403 or by a petition for waiver pursuant to §384.106 of this chapter. Upon filing the petition for approval, the intrastate pipeline may commence the transportation service and charge and collect the proposed rate, subject to refund.

**(ii)** 150 days after the date on which the Commission received an application filed pursuant to paragraph (b)(2)(i) of this section, the rate

proposed in the application will be deemed to be fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for providing similar transportation service, unless within the 150 day period, the Commission either extends the time for action, or institutes a proceeding in which all interested parties will be afforded an opportunity for written comments and for the oral presentation of views, data and arguments. In such proceeding, the Commission either will approve the rate or disapprove the rate and order refund, with interest, of any amount which has been determined to be in excess of those shown to be fair and equitable or in excess of the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service.

(iii) A Commission order approving or disapproving a transportation rate under this paragraph supersedes a rate determined in accordance with paragraph (b)(1) of this section.

**(c) Treatment of revenues.** The Commission presumes that all revenues received by an intrastate pipeline in connection with transportation authorized under §284.122(a) and computed in accordance with paragraph (b)(1) of this section have been or will be taken into account by the appropriate state regulatory agency for purposes of establishing transportation charges by the intrastate pipeline for service to intrastate customers.

**(d) Presumptions.** If the intrastate pipeline is charging a rate computed pursuant to §284.123(b)(1), the rate charged is presumed to be:

- (1) Fair and equitable; and
- (2) Not in excess of the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service.

**(e) Filing requirements.** Within 30 days of commencement of new service, any intrastate pipeline that engages in transportation arrangements under this subpart must file with the Commission a statement that includes the pipeline's interstate rates, the rate election made pursuant to paragraph (b) of this section, and a description of how the pipeline will engage in these transportation arrangements, including operating conditions, such as quality standards and financial viability of the shipper. If the pipeline changes its operations, rates, or rate election under this subpart, it must amend the statement and file such amendments not later than 30 days after commencement of the change in operations or the change in rate election.

18 C.F.R. § 284.402 provides as follows:

**Sec. 284.402 Blanket marketing certificates.**

**(a) Authorization.** Any person who is not an interstate pipeline is granted a blanket certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act authorizing the certificate holder to make sales for resale at negotiated rates in interstate commerce of any category of gas that is subject to the Commission's Natural Gas Act jurisdiction. A blanket certificate issued under Subpart L is a certificate of limited jurisdiction which will not subject the certificate holder to any other regulation under the Natural Gas Act jurisdiction of the Commission, other than that set forth in this Subpart L, by virtue of the transactions under this certificate.

**(b)** The authorization granted in paragraph (a) of this section will become effective on January 7, 1993 except as otherwise provided in paragraph (c) of this section.

**(c)(1)** The authorization granted in paragraph (a) of this section will become effective for an affiliated marketer with respect to transactions involving affiliated pipelines when an affiliated pipeline receives its blanket certificate pursuant to §284.284.

**(2)** Should a marketer be affiliated with more than one pipeline, the authorization granted in paragraph (a) of this section will not be effective for transactions involving other affiliated interstate pipelines until such other pipelines' meet the criterion set forth in paragraph (c)(1) of this section. The authorization granted in paragraph (a) of this section is not extended to affiliates of persons who transport gas in interstate commerce and who do not have a tariff on file with the Commission under part 284 of this subchapter with respect to transactions involving that person.

**(d)** Abandonment of the sales service authorized in paragraph (a) of this section is authorized pursuant to section 7(b) of the Natural Gas Act upon the expiration of the contractual term or upon termination of each individual sales arrangement.

18 C.F.R. § 284.403 (2005) provides as follows:

**Sec. 284.403: Code of conduct for persons holding blanket marketing certificates.**

(a) Any person making natural gas sales for resale in interstate commerce pursuant to Sec. 284.402 is prohibited from engaging in actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for natural gas. Prohibited actions and transactions include but are not limited to:

- (1) Pre-arranged offsetting trades of the same product among the same parties, which involve no economic risk and no net change in beneficial ownership (sometimes called “wash trades”); and
- (2) Collusion with another party for the purpose of manipulating market prices, market conditions, or market rules for natural gas.

(b) To the extent Seller engages in reporting of transactions to publishers of electricity or natural gas indices, Seller shall provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the Policy Statement on Natural Gas and Electric Price Indices, issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. Seller shall notify the Commission within 15 days of the effective date of this regulation of whether it engages in such reporting of its transactions and update the Commission within 15 days of any subsequent change to its transaction reporting status. In addition, Seller shall adhere to such other standards and requirements for price reporting as the Commission may order.

(c) A blanket marketing certificate holder shall retain, for a period of three years, all data and information upon which it billed the prices it charged for the natural gas sold pursuant to its market based sales certificate or the prices it reported for use in price indices.

(d) Any violation of the preceding paragraphs may subject Seller to disgorgement of unjust profits from the date when the violation occurred. Seller may also be subject to suspension or revocation of its blanket certificate under Sec. 284.284 or other appropriate non-monetary remedies.

(e) Any person filing a complaint against a blanket marketing certificate holder for violation of paragraphs (a) through (c) must do so no later than 90 days after the end of the calendar quarter in which the alleged violation occurred unless that person could not have known of the alleged violation, in which case the 90-day time limit will run from the discovery of the alleged violation. The Commission will act within 90 days from the date it knew of an alleged violation of these code of conduct regulations or knew of the potentially manipulative character of an action or transaction. Commission action in this context means a Commission order or the initiation of a preliminary investigation by Commission Staff pursuant to 18 CFR Section 1b. If the Commission does not act within this time period, the seller will not be exposed to potential liability regarding the subject action or transaction. Knowledge on the part of the Commission will take the form of a call to our Hotline alleging inappropriate behavior or communication with our enforcement Staff.

***Energy Transfer Partners, LP v. FERC***  
**5<sup>th</sup> Cir. Nos. 08-60730 & 08-60810 (Consolidated)**

**Docket No. IN06-3**

**CERTIFICATE OF SERVICE**

I hereby certify that I have, this 2<sup>nd</sup> day of February 2009, served the foregoing by causing copies of it to be sent via email and overnight delivery to the counsel listed below.

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ENERGY TRANSFER COMPANY  
ETC MARKETING LTD  
HOUSTON PIPE LINE CO, LP  
OASIS PIPELINE LP  
OASIS PIPELINE COMPANY  
TEXAS LP  
ETC TEXAS PIPELINE LTD,  
OASIS DIVISION**

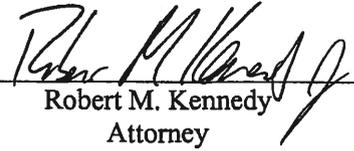
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*CERTIFICATE OF SERVICE*

I hereby certify that on March 23, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to counsel receiving notices in this matter, including the following counsel of record:

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