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

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| **FEDERAL ENERGY REGULATORY COMMISSION,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Case No. 3:15-CV-00452-MHL** |
| | ) | |
| **POWHATAN ENERGY FUND, LLC, et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |
| | ) | |

**MOTION OF ADMINISTRATIVE LAW PROFESSORS**
**FOR LEAVE TO FILE BRIEF AS AMICI CURIAE**

Pursuant to Rule 7(A) of the Local Rules of the Eastern District of Virginia, administrative law professors Jeffrey S. Lubbers, William Funk, Jonathan H. Adler, Michael Herz, Linda Jellum, William S. Jordan, III, Harold J. Krent, Don LeDuc, Ronald M. Levin, and Louis J. Virelli III, by and through undersigned counsel, file this motion for leave to file a brief as amici curiae in the above-captioned case concerning the procedure mandated by 16 U.S.C. § 823b(d)(3)(B) of the Federal Power Act for de novo review of civil penalty assessment orders issued by the Federal Energy Regulatory Commission ("FERC"). The grounds for this motion are stated with particularity below. If permitted to appear, amici respectfully request that this Court consider the amici curiae brief submitted contemporaneously with this motion.

Counsel for amici have contacted all parties to seek consent to file this motion. Plaintiff opposes the motion. Defendants consent to the filing of the motion.

1. This Court has "broad discretion in deciding whether to allow a non-party to participate as an amicus curiae." *Tafus v. Dudas*, 511 F. Supp. 2d 652, 659-60 (E.D. Va. 2007);

*accord Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 728 (D. Md. 1996). Although there is no Federal Rule of Civil Procedure addressing the filing of amicus briefs, district courts "often look for guidance to Rule 29 of the Federal Rules of Appellate Procedure, which applies to amicus briefs at the federal appeals level." *Wash. Gas Light Co. v. Prince George's Cty. Council*, Civ. A. No. DKC 08-0967, 2012 U.S. Dist. LEXIS 31798, at *9 (D. Md. Mar. 9, 2012). "Rule 29 indicates that amici should state 'the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.'" *Id.* (quoting Fed. R. App. P. 29(b)(2)).[1]

2. The Court may grant leave when (i) the proposed amicus curiae has a "special interest in the subject matter of the suit" or can "provide helpful analysis of the law" and (ii) the proposed brief is timely filed. *Tafas*, 511 F. Supp. 2d at 659 (internal citations omitted); *see also NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (noting that amicus briefs are "frequently welcome" from nonparties "concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide" (quotation marks and citation omitted)). "'Generally, courts have exercised *great* liberality in permitting an amicus curiae to file a brief in a pending case," and "[t]here are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to or otherwise desirable to the court.'" *In re Roxford Foods Litig.*, 790 F. Supp. 987, 997 (E.D. Cal.

[1] In this regard, amici note that no party's counsel authored the proposed amici curiae brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of the proposed amici curiae brief. *Cf.* Fed. R. App. P. 29(c)(5).

1991) (emphasis added) (quoting *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990)). Amici's proposed brief readily meets these standards.

3. As explained in their proposed brief, amici are law professors who regularly write and teach about federal administrative law and procedure. They therefore have a keen interest in the proper development of federal administrative law and policy and are well positioned to provide the Court with an institutional perspective on the broader implications of the statutory and due process rights at stake in this civil penalty proceeding. *See Wash. Gas*, 2012 U.S. Dist. LEXIS 31798, at *10.[2]

4. Amici have grave concerns about the broader implications of FERC's apparent position that the scope of a district court's "de novo review" of a civil penalty assessment under 16 U.S.C. § 823b(d) can be defined and circumscribed by the amount of "process" the agency unilaterally, and on an ad hoc basis, allows a defendant in assessing the civil penalty. Amici note, too, that FERC has made similar arguments about the scope of the "de novo review" mandated by the Federal Power Act in other cases. *See FERC v. City Power Mktg., LLC*, Civ. A. No. 15-1428 (JDB), 2016 U.S. Dist. LEXIS 105421, at *24-32 (D.D.C. Aug. 10, 2016) (describing FERC's arguments); *FERC v. Maxim Power Corp.*, Civ. No. 15-30113-MGM, 2016 U.S. Dist. LEXIS 107770, at *14-21 (D. Mass. July 21, 2016) (same); Plaintiff's Notice of Motion to Affirm Civil Penalties Assessed by the Federal Energy Regulatory Commission and Memorandum of Points and Authorities in Support, *FERC v. Barclays Bank PLC*, No. 2:13-cv-2093-TLN-DB (E.D. Cal.

[2] Amici sought leave to file a substantially similar brief as amici curiae in the *Barclays Bank* case. *See* Notice of Motion and Motion for Leave to File Brief of Amici Curiae, *FERC v. Barclays Bank PLC*, No. 2:13-cv-2093-TLN-DB (E.D. Cal. Nov. 7, 2016), ECF Dkt. No. 180. The district court, however, denied amici's motion, explaining that the parties "have already provided the Court with sophisticated and thorough briefing on the pertinent issues." Order, *FERC v. Barclays Bank PLC*, No. 2:13-cv-2093-TLN-DB (E.D. Cal. Nov. 17, 2016), ECF Dkt. No. 185, at 1.

Dec. 2, 2015), ECF No. 125, at 19 (arguing that "expanding the record is unnecessary in this case due to the voluminous administrative record and the Commission's careful analysis of the various arguments and evidence").

5. The district courts in the *City Power* and *Maxim Power* cases have rejected FERC's arguments, yet amici recognize that the law in this area remains unsettled. *Compare City Power*, 2016 U.S. Dist. LEXIS 105421, at *25 (concluding that, "[n]otwithstanding the significant proceedings that occurred at the agency level, the Court will treat this as a standard civil action, governed by the Federal Rules of Civil Procedure."), *and Maxim Power*, 2016 U.S. Dist. LEXIS 107770, at *39 (concluding that section 31(d)(3)'s "*de novo* review means treating this case as an ordinary civil action governed by the Federal Rules of Civil Procedure that culminates, if necessary, in a jury trial"), *with FERC v. Silkman*, Civ. A. No. 13-13054-DPW, 2016 U.S. Dist. LEXIS 48409, at *26 n.5 (D. Mass. Apr. 11, 2016) (noting that de novo review "may or may not require other trial-like proceedings"). *See also* [ECF Dkt. No. 44] (Jan. 8, 2016) at 2-3 (ordering that the parties to this action file additional memoranda regarding the procedure mandated by the Federal Power Act). As these cases illustrate, the resolution of the legal issues presented in this case regarding the nature of the "de novo review" by district courts required by the Federal Power Act undoubtedly will have ramifications for parties other than those directly involved in this case.

6. Leave to file the proposed amici curiae brief should be granted because the undersigned administrative law professors have significant expertise in the administrative law and policy issues implicated by civil money penalty proceedings. As experts in this area, the undersigned are well positioned to fulfill the traditional role of amici "to act as a friend of the court, providing guidance on questions of law," *Bryant*, 923 F. Supp. at 727, by assisting the Court in placing the core administrative law and due process issues raised in the instant suit in a broader

context. In the view of amici, FERC's approach in this case runs counter to longstanding principles of federal administrative law, the text and history of the statute providing for "de novo review" by a court in this and other civil penalty assessment cases, and basic due process. Indeed, allowing the type of truncated, hearing-less proceeding advocated by FERC in this case would set an unfortunate precedent that would undermine the court enforcement model used in other statutes for civil administrative penalties.

7. In particular, amici bring to the Court information regarding the historical underpinnings of administrative civil penalty assessments and the "de novo review" contemplated by Congress in enacting section 31(d). As amici explain in their proposed brief, that history—which this Court can consider as a matter of law, *see, e.g.*, *Terr. of Alaska v. Am. Can Co.*, 358 U.S. 224, 227 (1959) (taking judicial notice of legislative history)—belies the reading of section 31(d) that FERC has advocated in this case and in other cases. Although the Court has taken this issue under advisement, the Court's consideration of the proposed brief—and particularly the historical underpinnings of section 31(d)—need not delay these proceedings since the Court is free to consider such information as a matter of law.

8. Amici submit that the proposed brief does not enlarge the issues presented by the parties. Rather, they respectfully submit that the brief will be useful in resolving the issues presented by the parties, particularly with respect to the legislative history behind Congress adopting the scheme in 16 U.S.C. § 823b(d) that allows subjects of civil penalty assessments to elect either a trial-type hearing before an administrative law judge or "de novo review" before a federal district court. *Cf. Bryant*, 923 F. Supp. at 728, *citing Harris v. Pernsley*, 820 F.2d 592, 603 (3d. Cir. 1987) ("Permitting persons to appear . . . as friends of the court . . . may be advisable where third parties can contribute to the court's understanding.").

9. For these reasons, amici respectfully submit that the Court may find additional briefing from the ten undersigned professors helpful in grappling with the significant statutory interpretation and due process issues presented in this case. *See, e.g.*, *Garcia v. Google, Inc.*, 786 F.3d 733, 739 n.3 (9th Cir. 2015) (en banc) (acknowledging assistance of amicus briefs, including from "copyright and Internet law scholars," as being "helpful to our understanding of the implications of this case from various points of view"); *In re Price*, 562 F.3d 618, 629 (4th Cir. 2009) (considering arguments from amici curiae bankruptcy law professors).

## CONCLUSION

For the reasons set forth above, the Court should grant the ten undersigned administrative law professors leave to file a brief as amici curiae in this case. A proposed order is attached.

Dated: December 7, 2016

Respectfully submitted,

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(The amici's institutional affiliations are provided for identification purposes only.)

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 7th day of December 2016, I electronically filed with the Clerk the foregoing using the Court's Electronic CM/ECF System and that service was thereby accomplished upon:

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