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

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

PETITIONER FEDERAL ENERGY REGULATORY COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES REGARDING REVIEW PROCEDURES MANDATED BY THE FEDERAL POWER ACT

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INTRODUCTION

Pursuant to the Court's Order of November 25, 2015, Petitioner Federal Energy Regulatory Commission ("FERC" or the "Commission") hereby submits this Memorandum of Points and Authorities regarding the Court's de novo review procedure under the Federal Power Act (the "FPA"), 16 U.S.C. § 823b(d)(3)(B) (2012).

Section 31(d) of the FPA provides two alternative procedural paths that may be followed after the Commission has notified a person that he faces a proposed civil penalty. One is the procedure under FPA § 31(d)(2), 16 U.S.C. § 823b(d)(2) ("Paragraph 2 Procedures"), which provides for an "on the record" adjudication before an Administrative Law Judge ("ALJ") pursuant to the procedures set out in sections 554 and 556-557 of the Administrative Procedure Act, Public L. No. 90-614 (1968), codified at 5 U.S.C. §§ 554, 556-557 ("APA"), 5 U.S.C. §§ 554, 556-557 (2012). A second path is that the notice recipient can elect to have his penalty assessed by the Commission in an adversarial proceeding under FPA § 31(d)(3), 16 U.S.C. § 823b(d)(3) ("Paragraph 3 Procedures"). Whichever procedural path is chosen, the statute requires that, should the Commission "assess" a "penalty" it must do so "by order." FPA §§ 31(d)(2)(A), 31(d)(3)(A), 16 U.S.C. §§ 823b(d)(2)(A), 823b(d)(3)(A).

The procedure mandated under Paragraph 3 is straightforward. This Court should "review," under the "de novo" standard, the extensive findings of fact and conclusions of law set forth in the Commission's May 29, 2015, Order Assessing Penalties (Petition Exhibit ("Pet. Ex.") 1, AR Tab 40), to determine whether the Commission correctly found that the evidence supporting that Order is credible and, if so, whether the Commission correctly found that Respondents failed to rebut it. *Barclays Bank, PLC et al.*, 144 FERC ¶ 61,041, at P 17 n.53 (2013), *citing, Dir. Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 275-76 (1994). The Court must make an "independent determination" that the

assessed penalty is appropriate, *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 368 (1967), and the Court has discretion to craft the procedure that will best facilitate its review. *See Quesinberry v. Life Ins. Co. of North America*, 987 F.2d 1017 (4th Cir. 1993) (en banc); *Doe v. United States*, 821 F.2d 694, 697-98, 698 n.10 (D.C. Cir. 1987) (en banc). Given the extensive factual development and legal argument that has occurred in this case over the past five years, the Commission believes that the most appropriate procedure would be a motion to affirm the Order Assessing Penalties followed by responsive briefing. Should the Court determine that additional information is necessary to complete its de novo review, it has the discretion to conduct such additional fact-finding.

Although the Court has discretion in this regard, that discretion does not extend to doing what Respondents seek – namely, to jettison years of investigation, fact-finding, and analysis by treating as a nullity the "order" that Congress directed the Commission to issue and the record on which that order is based.

BACKGROUND

Respondent Houlian Chen devised and implemented a wash trading scheme in the energy trading market operated by PJM Interconnection, L.L.C. ("PJM"), the Regional Transmission Organization responsible for operating the mid-Atlantic wholesale electrical market, including most of the Commonwealth of Virginia. *See* Petition, ECF 1 ("Pet.") ¶¶ 1-6, 10, 14-15, 47. Chen's scheme involved placing extraordinarily large[1] volumes of simultaneous trades back and forth between the same two points for the purpose of canceling out price exposure and capturing

[1] One trader analogized these volumes to "somebody moving a state somewhere." *See* Administrative Record ("AR") Tab 33 at 33 n.87 (Enforcement Reply to Respondents' Answer to Order to Show Cause), *quoting* Test. of Serge Picard Tr. 92:11-13.

excessive credit payments offered by PJM – the marginal loss surplus allocation.[2] *See* Pet. ¶¶ 1-6, 14-15, 60-90; Pet. Ex. 1 (Order Assessing Penalties) *passim*; Pet. Ex. 2 (Order to Show Cause).

Chen made these trades through two of his own companies (Respondents HEEP Fund, Inc., and CU Fund, Inc.) and through Respondent Powhatan Energy Fund, LLC, with which he had an advisory agreement. Pet. ¶¶ 1, 21, 233, 27-29, 61-79. Chen and Powhatan both understood the purpose and circular nature of the trades. Pet. ¶¶ 5, 84-87.

In August 2010, the Commission's Office of Enforcement ("Enforcement") learned of Respondents' trading and launched what would become a multi-year investigation. Consistent with Commission policy,[3] in August 2013, Enforcement sent Respondents lengthy letters detailing Enforcement's preliminary conclusion that Respondents had committed fraud in violation of the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2 (2015), and explaining the factual and legal bases for this conclusion. *See* AR Tabs 6-7 (Preliminary Findings Letters). Enforcement invited Respondents to provide argument or evidence suggesting the preliminary conclusion was incorrect, which they did in October 2013. *See* AR Tabs 8-9 (Responses to Preliminary Findings Letters).

Under the Commission's regulations, Respondents also had the right to provide, without limitation, any argument or evidence relevant to the investigation: "Any person may, at any time during the course of an investigation, submit documents, statements of facts or memoranda of law for the purpose of explaining said person's position or furnishing evidence which said person

[2] Because PJM prices line losses at marginal rather than average cost, more charges are collected for losses than are actually incurred. That marginal loss surplus is then returned to the market. *See* Pet. at ¶¶ 44-45.

[3] *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156, at P 32 (2008) (Paragraph numbers in Commission orders are designated with a capital "P").

considers relevant regarding the matters under investigation." 18 C.F.R. § 1b.18 (2015), *and see Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 at P 27 (permitting subjects of investigations to communicate directly with the Commission in writing). Respondents took full advantage of these opportunities.[4]

After considering Respondents' arguments, Enforcement notified Respondents pursuant to 18 C.F.R. § 1b.19 that it would be recommending that the Commission institute a public proceeding against Respondents to determine whether they violated Commission statutes or rules and, if so, whether to levy a civil penalty. *See* AR Tabs 10-11 (1b.19 Notices). Respondents responded to this notice on September 24, 2014. *See* AR Tabs 12-13 (1b.19 Responses).

Enforcement addressed these responses, along with all the other evidence and argument received from Respondents throughout the course of the investigation, in a report for the Commission ("Staff Report"). AR Tab 14 Appx. A. The Staff Report recommended that the Commission initiate adversarial proceedings under 18 C.F.R. § 385.209 by issuing Orders to Show Cause to each Respondent, and detailing its investigation and the legal and factual bases for its recommendations. As required by 18 C.F.R. § 1b.19, Enforcement submitted its Report to the Commission along with Respondents' § 1b.19 responses.

On December 17, 2014, the Commission initiated adversarial proceedings against Respondents by issuing an Order to Show Cause notifying Respondents of the proposed penalties and directing them to explain why the Commission should not conclude they had manipulated the market. *See* AR Tab 14 (Order to Show Cause). An order to show cause does

[4] *See* AR Tabs 2, 3, 4, and 5 (Respondents' Submissions). Respondents' written communications with Enforcement and FERC's Commissioners have been reproduced in the "Correspondence" section of the Administrative Record (electronic Folder AR 020A, subfolder "Correspondence") and on the Commission's "E-Library" website (FERC Docket No. IN15-3-000). Many of these communications have also been reproduced on a website created and maintained by Respondent Powhatan Energy Fund, LLC (www.ferclitigation.com).

not prejudge the merits; instead, it marks the beginning of the second distinct phase of proceedings before the Commission, whereby the parties enter into an adversarial proceeding. *Id*. at P 2 ("Issuance of this order does not indicate Commission adoption or endorsement of the [Enforcement] Staff Report."); *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156, P 37 ("The Commission emphasizes that, in issuing an Order to Show Cause, it does not make any finding as to whether there has been a violation of the law. Rather, an Order to Show Cause commences a Part 385 proceeding.").

Once Respondents received notice of the alleged violation and proposed penalties, the FPA gave them a month to choose between two different types of adversarial proceedings; the implications of that choice are addressed in this memorandum. FPA § 31(d)(1), 16 U.S.C. § 823b(d)(1). Rather than taking the path of a formal adjudication before an ALJ, Respondents affirmatively chose the adversarial procedures available under Paragraph 3. AR Tab 21 (Notice of Election). The Paragraph 3 Procedures require the Commission to determine if a civil penalty is appropriate and, if so, to assess one via a Commission order. FPA § 31(d)(3)(A), 16 U.S.C. § 823b(d)(3)(A). In this proceeding, Respondents and Enforcement stood adverse to one another, and the Commission served as an impartial adjudicator,[5] similar to the Court in this proceeding. Rule 2202, 18 C.F.R. § 385.2202 (2015); AR Tab 15 (Notice of Designation of Commission Staff as Non-Decisional).

The Order to Show Cause directed Respondents to "file an answer that provides a clear and concise statement regarding any disputed factual issues and any law upon which he relies

[5] "It would take considerably more than the unsupported allegation in a brief to show that the Commission or any one of its members failed to act impartially. Under the well-settled presumption of administrative regularity, courts assume administrative officials 'to be men [and women] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1119 (D.C. Cir. 1992) (citation omitted).

. . . and set forth every defense relied upon." AR Tab 14, n.8. The Commission also ordered Respondents to "address any matter, legal, factual or procedural, that they would urge in the Commission's consideration of this matter. To the extent that Respondents cite any material not cited in the Staff Report, Respondents are directed to file [the material] . . . and to serve a copy of same on [Enforcement] staff." *Id*. at P (C).

Respondents briefed their arguments extensively, making many of the same arguments they have made in their motions to dismiss before this Court. *See, e.g.*, AR Tabs 28-29, 31 (Answers to Order to Show Cause). In these briefs, Respondents had a full and fair opportunity to – and did – present evidence and argument in their defense, including as many statements, affidavits, documents, data, information, or other submissions as they wished. *Id*. In fact, Respondents submitted many materials in their defense – including twelve separate "expert" reports. AR Tab 2, Appx. A; AR Tab 3, Ex. A; AR Tab 12 (referencing position papers); AR Tab 29, Exs. A-M. Enforcement filed a brief with the Commission as well, explaining why Respondents' evidence and arguments did not rebut Enforcement's evidence. *See* AR Tab 33 (Enforcement Reply to Answers). Because the Commission places no page limits on a party's briefs, and submissions are not subject to any evidentiary rules, Respondents had unfettered flexibility and discretion in choosing how to present argument and evidence to the Commission.

The Commission fully addressed all of the arguments and evidence presented in the parties' submissions and, on May 29, 2015, announced its conclusion that Respondents had committed fraud in violation of § 1c.2 of the Commission's regulations and § 222 of the FPA. The Commission's reasoning is laid out and explained in detail in its Order Assessing Penalties. Pet. Ex. 1, AR Tab 40.

In sum, Respondents had numerous opportunities to make their case during the proceeding below. Contrary to Respondents' assertions, the Paragraph 3 Procedures do not require this Court to ignore the proceedings before the Commission, and Respondents can point to no irregularity to justify devoting judicial resources to a protracted "do-over."

ARGUMENT

I. Proposed Procedures: The Court Should Conduct a Review of the Commission's Penalty Assessment

The only procedure *mandated* by 16 U.S.C. § 823b(d)(3)(B) is a "review" of the Commission's Order Assessing Penalties under the "de novo" standard. While the FPA makes clear that the Court "shall have authority" to review the Commission's Order, it places no restrictions or limitations on how the Court may exercise that authority. Thus, the Court "shall have authority" to craft the procedure that would best facilitate its review. *See, e.g., Pac. Lighting Serv. Co. v. FPC*, 518 F.2d 718, 720 (9th Cir. 1975) (holding that "shall have authority" language in the Natural Gas Act makes holding of hearing discretionary, not mandatory); *Tex. Mun. Power Agency v. EPA*, 836 F.2d 1482, 1486 n.16 (5th Cir. 1988) (The Clean Water Act "provides that the EPA shall have authority to issue NPDES permits which 'can be terminated or modified for cause,' but . . . nowhere requires that the permits be modified.") (citation omitted). In other words, the Court may make an independent determination of the facts and legal conclusions set forth in the Commission's order and has broad discretion in how it makes that determination. The Court is not faced with a binary choice between rigid adherence to one procedure or another. For example, should the Court decide that additional fact finding is required on a discrete issue, the Court is free to permit limited discovery, testimony, argument, etc., on that discrete issue.

In this case, no additional fact finding is needed; consequently, the best procedure would be to have briefing on a motion to enforce the Commission's Order Assessing Penalties.[6] In analyzing the Commission's motion, the Court would have the opportunity to review the extensive factual and legal findings in the Commission's Order and the substantial documentary and testimonial evidence contained in the Administrative Record, which was filed on December 10, 2015. Pet'r's Notice of Filing Admin R., ECF 37. The Court should then analyze de novo whether the Commission was correct in finding that Respondents violated FPA section 222, 16 U.S.C. § 824v (2012), and the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2. If the Court believes that further fact finding is necessary to making its determination, it can engage in such supplementary fact finding (though the Commission believes the Court will not find this necessary). Finally, the Court should issue an order enforcing, denying, or modifying and enforcing as modified the Commission's Order. As described in more detail below, this procedure – which has been adopted in the only case, in the market manipulation context, to address the question of procedures under FPA § 31(d)(3)[7] – is supported by statutory analysis, precedent, and the specific circumstances of this case.

[6] The Commission proposes to file a Motion for Affirmance 45 days following the later of the filing of Respondents' Answers to the Petition or an order denying Respondents' Motions to Dismiss. Respondents would then be given an opportunity to file a brief in response, and the Commission an opportunity to file a brief in reply, consistent with E.D. Va. Loc. Adm. R. CV-7.

[7] *See* Scheduling Order, *FERC v. Barclays Bank PLC*, No. 2:13-cv-02093 (E.D. Cal. Oct. 2, 2015) (Dkt. 106) (Ex. 1-A). In that case, the judge has denied requests to permit discovery prior to consideration of the administrative record and briefs supporting and opposing the motion for affirmance. *See* Order Denying Discovery, *FERC v. Barclays Bank PLC*, No. 2:13-cv-02093 (E.D. Cal. Dec. 18, 2015) (Dkt. 133) (Ex. 1-B). Barclays has appealed these orders. *FERC v. MacDonald*, 862 F.Supp. 667 (D.N.H. 1994), was resolved prior to *Barclays*, but that was a hydropower license case and did not squarely address the question of proper procedures.

II. The Text of the FPA Does Not Require a Trial De Novo

A. The Plain Meaning of FPA § 31(d)(3) Only Mandates a Review

The plain language of the statute mandates a review rather than a trial in this case. *Crespo v. Holder*, 631 F.3d 130, 133 (4th Cir. 2011) ("When interpreting statutes we start with the plain language.") (citations omitted). Here, the relevant words of the statute are "shall have authority to review de novo." FPA § 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B). Those words make clear that the Court is to conduct a review, and is given substantial latitude in doing so.

Under the procedure provided for in Paragraph 3, and elected by Respondents in this matter, the Commission was required to "promptly assess" any penalty "by order." Paragraph 3 further provided that:

> 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.

FPA § 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B). The plain meaning of this statutory language is that the Court is to conduct a review, not a trial.

1. "Review" Means Review, Not Trial

Paragraph 3 calls for a review of the Commission's order, not a trial de novo. The language of Paragraphs 2 and 3 parallel one another: Paragraph 2 provides for a "review" of the Commission's order by a federal circuit court of appeals, with the authority to issue an order "affirming, modifying, or setting aside in whole or in [p]art, the order of the Commission"; Paragraph 3 provides for a "review" of the Commission's order by a federal district court, with the authority to issue an order "enforcing, modifying, and enforcing as so modified, or setting aside in whole or in [p]art" the Commission's order assessing penalties. FPA §§ 31(d)(2)(B) and

31(d)(3)(B), 16 U.S.C. §§ 823b(d)(2)(B) and 823b(d)(3)(B), *and see* FPA § 313(b), 16 U.S.C. § 825*l*(b) (granting courts of appeal the exclusive jurisdiction "to affirm, modify, or set aside [an appealed Commission order] in whole or in part").

There are three key differences between the two types of review in Paragraphs 2 and 3: The first difference is that, under the general FPA appeals provision, which applies to Paragraph 2, if the court of appeals is satisfied that "additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the [appeals] court may order such additional evidence to be taken before the Commission," whereas the district court under Paragraph 3 can take such evidence itself.[8] FPA § 313(b), 16 U.S.C. § 825*l*(b) (FPA section governing judicial review of Commission orders). The second difference is that, under Paragraph 2, the Court of Appeals reviews under the deferential "substantial evidence" standard, whereas the district court reviews under the less deferential "de novo" standard. *Id*. The third difference is that the district court can "enforce" the order itself, with any modifications it deems necessary.

These parallels suggest that Congress intended the district court's "review" in Paragraph 3 to be similar to the court of appeals' "review" in Paragraph 2. There is no language in the FPA evincing a Congressional intent for the term "review" to mean one thing in Paragraph 3 and something entirely different a mere paragraph earlier. *In re Total Realty Mgmt., LLC*, 706 F.3d 245, 251 (4th Cir. 2013) (identical terms should be read as having a consistent meaning). It is untenable to suggest, as Respondents do, that Congress did *not* mean one thing it *did* say ("review"), but *did* mean one thing it did *not* say ("trial").

[8] As discussed below, this Court only should take additional evidence under "exceptional circumstances," which are not present here. *See* sections III and IV below.

The concept of a review is incompatible with the plenary trial proceeding Respondents contend is mandated by the FPA. Section 31 of the FPA became law in 1986, at which point Black's Law Dictionary defined "review" to mean "To re-examine judicially or administratively; a reconsideration; second view or examination; revision; consideration for purposes of correction. Used especially of the examination of a cause by an appellate court or an appellate administrative body (*e.g.* Appeals Council in social security cases)." Black's Law Dictionary 1186 (5th ed. 1979).[9] What occurs in district court is therefore intended to be secondary or to be predicated and focused on what came previously. Furthermore, the definition is entirely consistent with the FPA's two "review" provisions under § 31(d)(2) and (3), providing complementary – rather than redundant – procedures.

A law calling for de novo *review* is not the same as one calling for de novo *trial*. Had Congress intended to require a trial, it could have done so simply by saying in § 31 that the court shall conduct a "trial." Indeed, it has done exactly that in providing for *trial* de novo under other statutes. For example, the Food Stamp Act, Pub. L. No. 88-525 (1964), codified at 7 U.S.C. 2011, et seq., states that a district court's review of the Department of Agriculture's food stamp eligibility determinations must take the form of a de novo *trial*. 7 U.S.C. § 2023(a)(15) (2012) ("The suit in the United States district court or State court shall be a trial de novo by the court in

[9] This definition also is consistent with definitions found in contemporary, non-legal dictionaries, such as the most current version of the Am. Heritage Dictionary: "1. To look over, study, or examine again: *reviewed last week's lesson* . . . . 5. *Law* To evaluate (a decision made 2013); *see also* Merriam-Webster Collegiate Dictionary 1067 (11th ed. 2005) ("to examine or study again; *esp*: to reexamine judicially") (italics original). It is also consistent with an early FPA § 31(d)(3) case antedating that provision's application to market manipulation. *MacDonald*, 862 F.Supp. at 672 (court would "make a 'fresh, independent determination of the matter at stake.'") (quoting *Doe v. United States*, 821 F.2d 694, 697 (D.C. Cir. 1987) (en banc)). The question of whether the statute mandated a trial or merely a review was not litigated in *MacDonald*.

which the court shall determine the validity of the questioned administrative action in issue . . . ."). Other examples are plentiful.[10]

Here, Congress mandated a "review," not a "trial," and there is no support in the text of the FPA for redefining "review" to *require* a "trial." Indeed, as then-Judge Ginsburg wrote for D.C. Circuit, "de novo review, in diverse contexts, does not necessarily require any trial-type hearing. . ." *Doe*, 821 F.2d at 697-98, 698 n.10. Although a district court conducting a de novo review should take a "fresh" look at what an agency did by "put[ting] itself in the agency's place," doing so does *not* require a new trial. *Id.*

Respondents cite *United States. v. First City Nat'l Bank of Houston*, 386 U.S. 361 (1967) to support the proposition that "review de novo" necessarily means "plenary adjudication." Chen Reply Br. at 7, ECF 34. Respondents are incorrect. In that case, the issue before the court was whether, by providing for a "review," rather than "trial," Congress had necessarily intended to limit the scope of the reviewing court's authority. The Supreme Court found that by requiring a de novo review, Congress intended for the court to "make an independent determination of the issues." *First City Nat'l Bank of Houston*, 386 U.S. at 368. The use of the term "review" as opposed to "trial" did not alter the need for such an "independent" determination. *Id*. In fact, far

[10] *See* 42 U.S.C. § 300e-9(d)(3) (2012) ("In any civil action brought to review the assessment of a civil penalty assessed under this subsection, the court shall, at the request of any party to such action, *hold a trial de novo* on the assessment of such civil penalty and in any civil action to collect such a civil penalty, the court shall, at the request of any party to such action, *hold a trial de novo* on the assessment of such civil penalty unless in a prior civil action to review the assessment of such penalty the court held a trial de novo on such assessment.") (emphasis added); 5 U.S.C. § 7703(c)(3) (2012) (Merit Systems Protection Board) ("facts subject to trial de novo by the reviewing court"); 28 U.S.C. § 657 (2012) (review of arbitration awards) ("trial de novo in the district court"); 42 U.S.C. § 300e-9 (2012) (health benefits plans) ("trial de novo" on assessment of civil penalty"); 47 U.S.C. § 504(a) (2012) (FTC) (forfeiture proceeding "shall be a trial de novo"); *see also* 8 U.S.C. § 1421(c) (2012) (review of immigration decision "shall be de novo, and the court shall make its own findings of fact and conclusions of law and *shall, at the request of the petitioner, conduct a hearing de novo* on the application") (emphasis added).

from directing the Courts to ignore the agency's decision, the Court held that "[t]he courts may find the Comptroller's reasons persuasive or well nigh conclusive." *Id.* at 369. *First City Nat'l Bank of Houston* is thus perfectly consonant with the procedures Petitioner urges here.

2. An "Action" Does Not Mean a Trial

While the FPA uses the word "action" to describe cases in which the Commission asks a federal court to affirm Commission penalty assessments, an "action" does not necessarily mean a full trial. For one thing, "action" also is the word that Congress used to refer to an appeal under the Paragraph 2 Procedures. FPA § 31(d)(2)(B), 16 U.S.C. 823b(d) (2)(B). "Action" in that paragraph certainly does not mean a "trial."

Many federal laws authorize agencies to bring actions that are not trials. For example, agencies can bring "actions" to enforce administrative subpoenas,[11] even though agency subpoena enforcement cases are almost always summary proceedings."[12] These have been treated as summary proceedings for years even though, at the time, Rule 81 did not specifically

[11] 12 U.S.C. § 4588(c) ("The Director [of the Federal Housing Financing Agency] may bring *an action* or may request the Attorney General of the United States to bring *an action* in . . .United States district court for enforcement of any subpoena or subpoena duces tecum issued pursuant to this section.") (emphasis added); 15 U.S.C. § 7304(f) ("If a person disobeys a subpoena issued by the Director [of the National Construction Safety Team] under this chapter, the Attorney General, acting on behalf of the Director, may bring *a civil action* in a district court of the United States to enforce the subpoena. *An action* under this subsection may be brought in the judicial district in which the person against whom the action is brought resides, is found, or does business.") (emphasis added); 16 U.S.C. § 4307(d) ("The Secretary [of the Interior] may issue subpoenas in connection with proceedings under this subsection compelling the attendance and testimony of witnesses and subpoenas duces tecum, and may request the Attorney General to bring *an action* to enforce any subpoena under this section.") (emphasis added); 49 U.S.C. § 32307(c) ("*Civil actions* to enforce.–A *civil action* to enforce a subpoena or order of the Secretary [of Transportation] under subsection (a) of this section may be brought in . . .United States district court . . . ." (emphasis added).

[12] *E.g., United States v. Am. Target Advert., Inc.*, 257 F.3d 348, 351 (4th Cir. 2001) (subpoena enforcement cases are designed to be summary proceedings and the district court's role is "sharply limited").

carve them out. *In re FTC Corporate Patterns Report Litig*., 432 F.Supp. 274, 282 (D.D.C. 1977).

Actions for affirmance of a penalty order under FPA § 31(d)(3) are not specifically enumerated in Rule 81's exceptions to Rule 1. But Rule 81 is not an exhaustive list of carve-outs from Rule 1. Indeed, the Advisory Committee Notes to Rule 1 expressly recognize this: "The former reference to 'suits of a civil nature' is changed to the more modern 'civil actions and proceedings.' This change does not affect such questions as whether the Civil Rules apply to summary proceedings created by statute." 2007 Advisory Comm. Note to Fed. R. Civ. P. 1 (citing *SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003) and *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960)).[13] Summary proceedings created by statute are exactly what the Court is presented with here, as the statute explicitly provides that the Court "shall have the authority to review" the Commission's penalty assessment order. FPA § 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B).[14]

Even under the narrowest reading of Fed. R. Civ. P. 1, it is well accepted that district courts have the authority to adapt "actions" to the circumstances of each case "to secure the just, speedy, and inexpensive determination of every action and proceeding."[15] The most obvious

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[13] Respondents attempt to distinguish *McCarthy* on the grounds that in that case the statute required the agency to file an "application" rather than an "action". Chen Reply Br. at 3 n.1, ECF 34. Respondents are wrong. *See United States v. First City Nat'l Bank*, 568 F.2d 853, 855-56 (2d Cir. 1977) (allowing summary proceeding to enforce IRS levy despite statute (26 U.S.C. §7402(a)) referring expressly to "civil action").

[14] At the time Congress enacted section 31 of the FPA, Black's Law Dictionary defined "authority" to mean "Permission. Right to exercise powers . . . [or] to judge . . . Often synonymous with power." Black's Law Dictionary 121 (5th ed. 1979). Other sources are in accord. *See, e.g.*, Am. Heritage Dictionary (5th ed. 2013) ("The power to enforce laws, exact obedience, command, determine, or judge.").

[15] *See Appeal of FTC Line of Bus. Report Litig*., 595 F.2d 685, 705 (D.C. Cir. 1978) (holding that "unyielding adherence to the Federal Rules of Civil Procedure" is inappropriate and that "summary mandamus enforcement proceedings" are appropriate in certain cases).

example is that the Federal Rules permit district courts to issue Local Rules exempting categories of cases from Rule 16 scheduling procedures (Fed. R. Civ. P. 16(b)(1)), just as this Court has done for administrative review cases in its Local Rule 16. Other portions of the Federal Rules similarly grant the courts broad discretion in fashioning an appropriate proceeding for each individual action before it:

- Rule 16 allows individual judges to postpone issuance of a scheduling order for good cause (Fed. R. Civ. P. 16(b)(2)), and to "modify the extent of discovery" when they do issue such orders (Fed. R. Civ. P. 16(b)(3)).
- Judges can exempt actions entirely from Rule 26(a)(1)'s initial disclosure requirements (Fed. R. Civ. P. 26(a)(1)(A)).
- Rule 26 expressly authorizes judges to "limit [discovery] by court order" (Fed. R. Civ. P. 26(b)(1)), to decline to permit discovery that is unnecessary or otherwise inappropriate, Fed. R. Civ. P. 26(b)(2)(C), and to control the sequence and timing of any discovery that does occur (Fed. R. Civ. P. 26(d)). *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) ("Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly . . . .").
- Courts may stay all discovery pending resolution of important motions.[16]
- Courts sometimes resolve actions without any discovery whatsoever.[17]
- In certain types of actions, courts permit no (or minimal) discovery, even when the governing statute is silent on that topic.[18]
- Courts can sometimes resolve the central issue in an action (for either side) based on factual materials readily available at the start of the action, without formal discovery.[19]

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[16] *See, e.g., Virginia-Pilot Media Companies, LLC v. Dep't of Justice*, No. 2:14CV577, 2015 WL 7575916, at *2 (E.D. Va. Nov. 25, 2015) (discovery had been stayed pending resolution of motions); *see also* Ex. 1-B (Order Denying Discovery).

[17] *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 961 (4th Cir. 1996) (summary judgment can be granted without discovery).

[18] *Heily v. U.S. Dep't of Commerce*, 69 F.App'x 171, 174 (4th Cir. 2003) ("It is well established that discovery may be greatly restricted in FOIA cases."). But, the FOIA itself does not contain any prohibition on, or limitation of, discovery. 5 U.S.C. § 552(a)(4)(B)-(C).

[19] *Produce All. v. Let-Us Produce*, 776 F.Supp.2d 197, 214 n.9 (E.D. Va. 2011) (resolving several issues without formal discovery); *see also Prunte v. Universal Music Grp., Inc*., 699 F.Supp.2d 15, 20 (D.D.C. 2010) ("The Court reasoned that, in all likelihood, the only evidence necessary to a decision on substantial similarity would be (1) recordings of all the songs at issue, and (2) transcriptions of the songs' lyrics. . . . The parties could easily exchange that evidence

In short, there can be no argument that the FPA's use of the term "action" necessitates a de novo trial. A new trial would not be "just," "speedy," or "inexpensive," (Fed. R. Civ. P. 1) because it would require the duplication of significant amounts of effort, expended over significant amounts of time and would, in effect, reward and encourage sandbagging.

The express purpose of the Commission's "action" under FPA § 31 is to seek an order "affirming" the Commission's Order Assessing Penalties. The result of a trial is a verdict not an affirmance. When a court "affirms" it "confirm[s], ratif[ies], or approve[s] (a lower court's judgment) on appeal." Black's Law Dictionary (10th ed. 2014). Thus, an affirmance is the result of a review, not a trial.

3. "Shall Have Authority" Grants the Court Broad Discretion

As discussed above, the FPA does not mandate a specific procedure. It instead gives the Court the "authority" to conduct a "review de novo." To the extent Respondents argue that the Court *must* conduct a full plenary proceeding, their argument is irreconcilable with its statutory "authority" to conduct a "review de novo." The use of the words "shall have authority" is important because it makes clear Congress's intent to grant the Court discretion. *Reynolds v. United States*, 132 S.Ct. 975, 986 (2012) (Scalia, J. dissenting). At most, the Court would have the prerogative but not the obligation to do so. Every word in a statute is meant to be given meaning whenever possible, so these discretion-granting words must not be read out of the statute. *PSINet, Inc. v. Chapman*, 362 F.3d 227, 232 (4th Cir. 2004) ("General principles of statutory construction require a court to construe all parts to have meaning and to reject constructions that render a term redundant."). Thus, any argument the Court must do anything beyond a "review de novo" improperly ignores the words "shall have authority."

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among themselves and provide it to the Court, thus avoiding the expense of formal discovery at least temporarily."), *aff'd*, 425 F.App'x 1 (D.C. Cir. 2011).

4. "Review De Novo" Means Only That the Court Will Re-examine with Fresh Eyes

"De novo" modifies "review." It describes what kind of review should occur, i.e., the standard of review. The version of Black's in effect at the time the FPA became law defines "de novo" as "Anew; afresh; a second time." Black's Law Dictionary 392 (5th ed. 1979).[20] The plain meaning of § 31(d)(3) of the FPA, therefore, is that the Court has discretion in determining how it will give a fresh second look at the Commission's Order.

B. A Full Reading of § 31 of the FPA Makes Clear that Only a Review is Required

"[I]n interpreting a statute," a court "must look to the provisions of the whole law, ascertain legislative intent, and give effect to that intent . . . . A statute must be interpreted to give it the single most harmonious, comprehensive meaning possible in light of legislative policy and purpose." *Food Town Stores, Inc. v. EEOC*, 708 F.2d 920, 924 (4th Cir. 1983) (internal quotation omitted). A review of § 31 in the context of the FPA's legislative policy and purpose makes clear that the FPA only requires this Court to conduct a "review" of the Commission's Order, not a full trial.

Congress enacted § 31 of the FPA as part of the Electric Consumer Protection Act of 1986 to address the "increasing criticism" of the Commission's enforcement program. Congressional hearings focused on "two fundamental concerns . . . about the Commission's enforcement program," namely, the continued operation of unlicensed and potentially unsafe hydroelectric projects, and the Commission's alleged failure to "aggressively monitor" the licensees. John D. Echeverria, *The Electric Consumers Protection Act of 1986*, 8 Energy L.J. 61, 81 (1987) (providing a section-by-section review of the FPA amendments).

[20] Again, contemporary non-legal dictionaries again are in accord. *See* Am. Heritage Dictionary (5th ed. 2013) ("Over again, anew"); Merriam-Webster Collegiate Dictionary 333 (11th ed. 2005) ("over again: ANEW").

The new provision directed the Commission to "monitor and investigate compliance with each license and permit issued under this subchapter [i.e. Part I of the FPA]," and granted it authority to revoke licenses or exemptions "[a]fter notice and opportunity for an evidentiary hearing." FPA § 31, 16 U.S.C. § 823b. This new authority is reflected in subsection (d) of FPA § 31, which addresses the "Assessment" of the penalty. *Id*. Subsection (d)(1), addresses the issue of "notice," directing the Commission to "provide to [a person against whom the Commission proposes a civil penalty] notice of the proposed penalty." *Id*. In this case that was accomplished on December 17, 2014 when the Commission issued its Order to Show Cause to the Respondents. AR Tab 14 at P 4 n.9. The Order to Show Cause "inform[ed] 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." 16 U.S.C. § 823b(d)(1). Under both paragraphs, it is the *Commission* that shall assess the penalty.[21]

Following the Western Energy Crisis, Congress passed the Energy Policy Act, Pub. L. No. 90-618 (2005), codified in part at 16 U.S.C. §§ 824v, 825*o*-1 ("EPAct 2005"), amending the FPA to enhance the Commission's enforcement capabilities in multiple ways. It added FPA § 222, which explicitly prohibited market manipulation, and § 316A, which raised the maximum daily penalty for a violation from $11,000 to $1 million per violation. New FPA § 316A also specified that the provisions of FPA § 31(d), originally designed to apply only to Part I of the

[21] Respondents' contention that "as used in FPA § 31(d)(3)(A), the word 'assess' does not – as FERC argues – imply that FERC is authorized to 'impose' a civil penalty" (Chen Reply Br. at 5, ECF 34) is without merit. FPA § 31(d) applies to this matter by dint of FPA § 316A (16 U.S.C. § 825*o*-1). Courts have found that the power to "assess" a penalty under FPA § 316A "confer[s] . . . power to *impose* monetary penalties for violations." *Southwest Power Admin. v. FERC*, 763 F.3d 27, 30 (D.C. Cir. 2014) (emphasis added). Congress has also used "assess" and "impose" interchangeably in other statutes, *see* 15 U.S.C. § 2615, and doing so here makes much more sense of the FPA as a whole than Respondents' reading.

FPA, would apply to violations of Part II of the FPA. 16 U.S.C. §§ 824v, 825*o*-1 (2012). Both the Electronic Consumer Protection Act of 1986 (which created FPA § 31) and EPAct 2005 (which made it applicable to violations of Part II of the FPA, including market manipulations) evince clear Congressional intent to expand and enhance FERC's enforcement powers.[22]

Under the Paragraph 2 Procedures, the Commission assesses a penalty by order following receipt of an initial decision by the presiding ALJ in a hearing subject to APA § 554. 5 U.S.C. § 554. Hearings subject to APA § 554, which establishes the rules for "adjudications" that are "required by statute to be determined on the record after opportunity for agency hearing," must be conducted in accordance with the provisions of APA §§ 556 and 557. 5 U.S.C. § 554(a)(2). Thus, a party electing the procedures afforded by Paragraph 2 is subject to the procedures for "on the record" hearings, which include: having the proceeding conducted by "one or more Administrative Law judges" who have the authority to administer oaths and affirmations; issue subpoenas; rule on operative proof and receive evidence; take or have depositions taken; hold settlement conferences; dispose of procedural requests or similar matters; and take other action authorized by agency rule. 5 U.S.C. § 556.

A party aggrieved by a penalty order issued under the Paragraph 2 Procedures must seek rehearing of that order, and then "institute an action" for review in the Court of Appeals. FPA §§

[22] Respondents cite to dicta in a Commission order antedating EPAct 2005 by 17 years to suggest that the Commission has committed itself to the position that the Paragraph 3 procedures require trial de novo. ECF 23 at 6, quoting *Procedures for the Assessment of Civil Penalties Under Section 31 of the Fed. Power Act*, Order No. 502, FERC Stats. & Regs. ¶ 30,828 at 32,038 (1988). Aside from the fact that this order also contains language suggesting a contrary position *id*. at 32,039 (referring to the cause of action as a combination of "a petition affirming a civil penalty assessment and a petition ordering recovery of the civil penalty assessment"), the Commission was clear in implementing its post-EPAct 2005 authority that review was what was intended. *See Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006) (referring repeatedly to review de novo but never to trial de novo).

31(d)(2)(B), 16 U.S.C. § 823b(d)(2)(B) and 313(a) ("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.") 16 U.S.C. § 825*l*(a). The standard for such a review is the "substantial evidence" standard. *Id*. ("The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."); *see also*, 5 U.S.C. § 706(2)(E) (all matters "in a case subject to sections 556 and 557" are reviewed under the substantial evidence standard). The Supreme Court has described this as the "conventional standard" of judicial review and observed that under that scope of review, the decision of an agency is "well nigh conclusive." *First City Nat'l Bank of Houston*, 386 U.S. at 368.

The procedures described above, often referred to as "formal adjudication," would have provided Respondents with the type of proceeding (a trial) they now incorrectly assert they are entitled to in this Court.[23] Chen Mot. To Dismiss ("MTD") at 6, ECF 23.

To opt out of the default Paragraph 2 Procedures in favor of the summary Paragraph 3 Procedures, the person receiving the notice of the proposed penalty must do so affirmatively and in writing. FPA § 31(d)(1), 16 U.S.C. § 823b(d)(1). Under the Paragraph 3 Procedures, Congress required that "the Commission shall promptly assess [a] penalty, by order," and allowed the penalized person 60 calendar days to pay the assessed penalty. FPA § 31(d)(3), 16 U.S.C. § 823b(d)(3). If the person does not pay the penalty in that 60 day period, then "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." FPA § 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B). The Court, in turn, "shall have authority to review de novo the law and the facts

[23] *See* 18 C.F.R. §§ 385.401 – 385.510 (Commission's rules for discovery and hearings applicable to formal adjudications before ALJs).

involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in [p]art, such assessment." *Id.*

When read together, it is clear that Congress envisioned complementary but not redundant procedures: formal adjudication under Paragraph 2 and informal adjudication under Paragraph 3.[24] While a party electing for the procedure outlined in Paragraph 2 gains the benefit of a full formal adjudication such as that sought by Respondents, it faces a longer path to judicial review and a highly deferential standard of review when it gets there. A party electing the Paragraph 3 Procedures waives the benefits of formal adjudication, but gains the benefit of a shorter path to judicial review and a less deferential standard of review when it gets there.

C. The Commission Correctly Interpreted the FPA as Authorizing it to Engage in Informal Adjudication

Respondents suggest that the Commission has completely misinterpreted the proper procedure under Paragraph 3 and that the Commission was not even "statutorily *authorized* to adjudicate [Respondents'] liability." Chen MTD at 13, ECF 23 (emphasis added). Respondents are wrong. By specifying that the Commission is to assess the penalty "by order," Congress did, in fact, *expressly* authorize the Commission to "adjudicate liability." Under the APA's "Definitions," section, "'order' means the whole or part of a final disposition whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter," and "'adjudication' means an agency process for the formulation of an order." 5 U.S.C. § 551(6)-(7). Thus, by specifying that the Commission must assess a penalty "by order," Congress expressly gave the Commission authority to adjudicate liability. Not only would Respondents' interpretation be at odds with the plain meaning of the statute, but it would also run counter to Congress's intent for the procedure under Paragraph 3.

[24] Both procedures are adjudications. The APA defines an "adjudication" as an "agency process for the formulation of an *order*." 5 U.S.C. § 551(7) (emphasis added).

Respondents' argument would deprive the words of the statute of any meaning. FPA § 316A, which grants the Commission civil penalty authority under Part II of FPA and specifies that the FPA § 31 procedures should be used, provides that, "[i]n 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." 16 U.S.C. § 825*o*-1 (b). Moreover, Paragraph 3 states that, when its procedures have been elected, "the Commission shall promptly assess such penalty, by order." Respondents cannot explain how the Commission could take into consideration the statutory factors of FPA § 316A and assess a penalty based on those factors "by order" without finding facts and adjudicating Respondents' liability – or why, in the context of the extremely complex and dynamic wholesale energy markets, Congress would want it to.

The Commission's penalty assessment has indeed been prompt. The FPA does not specify what time period constitutes a "prompt" penalty assessment, but given the magnitude and number of submissions in this case, four months is clearly within that time period. In fact, the Order was issued less than a month after Chen's last submission. AR Tab 39 (Notice of Supplemental Authority).[25] By way of comparison, if this case had proceeded under the Paragraph 2 Procedures, the Commission might not even have begun its deliberations yet.[26]

[25] Respondents claim, inaccurately, that "FERC took *no* action for more than four months after the [Respondents] filed their election notices." Chen MTD at 7 ECF 23 (emphasis added). As the Administrative Record shows, Respondents made a series of filings to the Commission after the Order to Show Cause was issued, including multiple requests for extensions of time (AR Tabs 17 and 22) as well as other pleadings (AR Tabs 25, 31, 32, 36, 38, and 39). The Commission addressed each of these filings in due course, including by granting multiple extensions in whole or in part. AR Tabs 19 and 26.

[26] *See* FPA § 31(d)(1), 16 U.S.C. § 823b(d)(1) (30 days for election of procedures prior to designation of ALJ); Summary of Procedural Time Standards for Hearing Cases, available at http://www.ferc.gov/legal/admin-lit/time-sum.asp (29 - 63 weeks to initial decision after

As for Respondents' contention that the Commission is not authorized to create an "administrative record" (Chen MTD at 5-6, ECF 23), FPA § 308 states that "[h]earings under this chapter may be held before the Commission . . . *and appropriate records thereof shall be kept*." 16 U.S.C. § 825g(a) (2012) (emphasis added). That provision further states that "[n]o informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter." 16 U.S.C. § 825g(b). Moreover, FPA § 309 grants the Commission "power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders and regulations as it may find necessary or appropriate to carry out the provisions of this Act." FPA § 309, 16 U.S.C. § 825h. *See Chippewa and Flambeau Imp. Co. v. FERC*, 325 F.3d 353, 358 (D.C. Cir. 2003) (creation of "necessary or appropriate" powers signals Congressional intent to rely on '"the Commission's expert judgment'") (*quoting Towns of Concord, Norwood and Wellesey v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992).

Respondents' view that there is no administrative record of that proceeding because FERC did not actually adjudicate anything (Chen MTD at 5-6, ECF 23), is also wrong because it would render the adversarial process before the Commission, which was essential to establish "the law and the facts involved" for "review de novo" by this Court, nothing more than a nullity – as never having happened. In effect, Respondents ask the Court to assume that Congress intended to *prohibit* the Commission from engaging in thoughtful fact-finding prior to assessing penalties under FPA § 31(d)(3). *See* Chen Reply Brf. at 5, ECF 34 (asserting that "FERC is *not* authorized to make any comparable determination" of whether a violation occurred prior to assessing a penalty under Paragraph 3). It is unfathomable that Congress intended to deprive the

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designation of ALJ); 18 C.F.R. § 385.711 (allowing 50 days for briefs on and opposing exceptions).

Commission of the power to test the legal and factual predicates of a penalty prior to assessing it, especially given the FPA's language that the Court should review the "facts" involved in the penalty assessment order.

While the Commission's analysis of the facts and law in its Order Assessing Penalties is subject to de novo review, the Commission's interpretation of Paragraph 3 as requiring the Commission to adjudicate liability is not. The Commission's interpretation of this authority as requiring the adversarial procedure before the Commission described above is accorded significant deference. *Hogge v. Wilson*, No. 3:14CV314, 2015 WL 5799720, at *5 (E.D. Va. Oct. 5, 2015) ("If the statute is silent or ambiguous in expressing Congress's intent, the court must defer to the agency's reasonable construction of the statute."); *see Knott v. F.E.R.C.*, 386 F.3d 368, 372 (1st Cir. 2004) ('"Questions involving an interpretation of the FPA involve a de novo determination by the court of congressional intent; if that intent is ambiguous, FERC's conclusion will only be rejected if it is unreasonable.'") (citation omitted). Thus, Respondents' argument that the Commission was not permitted to adjudicate their liability (and the related argument that there is, as a result, no administrative record) is entirely without merit.

III. Review De Novo Does Not Mean Trial De Novo in Other Circumstances

Cases involving de novo reviews under other statutes make clear that the term "review" means only review and not trial. For example, the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-260 (1974), codified in part at 29 U.S.C. § 1132, allows a person to file a "civil action" in District Court for review of a plan administrator's denial of benefits, 29 U.S.C. § 1132(a)(1). In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), "the Supreme Court decided that a district court should review *de novo* a plan administrator's denials of benefits under § 1132(a)(1)(B) of ERISA, unless the benefit plan 'gives the administrator or fiduciary discretionary authority to determine eligibility for benefits

or to construe the terms of the plan.'" *Quesinberry*, 987 F.2d at 1021 (4th. 1993), quoting *Firestone*, 489 U.S. at 115, 109 S.Ct. at 956. In *Quesinberry*, the Fourth Circuit addressed "the scope of the district court's *de novo* review" and concluded that, "courts conducting *de novo* review of ERISA benefits claims should review only the evidentiary record that was presented to the plan administrator or trustee except where the district court finds that additional evidence is *necessary for resolution* of the benefit claim." *Id*. at 1019, 1026-27 (emphasis added). After adumbrating some possible "exceptional circumstances," the court added that, "[w]e do not intimate, however, that the introduction of new evidence is required in such cases. A district court may well conclude that the case can be properly resolved on the administrative record without the need to put the parties to additional delay and expense." *Id*. at 1027.

Quesinberry traces its roots to a decision of the D.C. Circuit written by then-judge Ginsburg – *Doe v. United States*, 821 F.2d 694 (D.C. Cir. 1987).[27] In *Doe*, the court examined a civil remedies provision under the Privacy Act, specifically a job applicant's attempt to amend the records related to her job application. *Id*. at 695. The Privacy Act allowed the agency at issue to grant or deny an applicant's request to amend records related to a job application. *Id*. at 697. If unsatisfied with the agency's decision, the applicant could bring a civil action in federal district court challenging the agency's determination, and the district court was granted the authority to review de novo the agency's decision. *Id*.

The D.C. Circuit explained "how" this de novo review was to occur: "the district court's charge was to put itself in the agency's place, to make anew the same judgment earlier made by the agency." *Id*. at 698. The district court did not consider new evidence or conduct trial-type

[27] *Quesinberry* relies, in part, upon the Third Circuit's decision in *Luby v. Teamsters Health, Welfare, And Pension Trust Funds*, 944 F.2 1176 (3d Cir. 1991), which in turn relies, in part, upon *Doe*.

proceedings when conducting its de novo review. *Id*. at 699. Nor did the agency conduct a trial-like proceeding when making its initial determination. *Id*. at 700. The D.C. Circuit affirmed this procedure and explained that a review de novo did not require a rigid adjudicatory structure. *Id*. Again, this approach is consistent with the procedures the Commission proposes here.

The weight of this precedent expounding on the limited, flexible authority of a court when reviewing a matter de novo, must be contrasted against those statutory schemes where Congress has made clear that it intends for a court to consider an agency's decision via a de novo trial. *See* n.10, above and accompanying text. As these cases show, "de novo review" and "de novo trial" are different terms that must be afforded different meanings. Even if those terms "might conceivably be used interchangeably," *First City Nat'l Bank of Houston*, 386 U.S. at 368, reading them as equivalent in the context of § 31 makes no sense in terms of the statute's structure or purpose and, under the particular circumstances of this case would be wasteful and unnecessary.

IV. The Circumstances of This Case Support a Review Not a Trial

The particular circumstances of this case support following the review procedure described above instead of a full trial de novo, because further fact-finding is neither necessary nor appropriate.

Respondents were ordered to provide all evidence and arguments supporting their defenses to the Commission, and had ample opportunity to do so. *See* Pet. Ex. 2 at PP (B) & (C), ECF 1; *see also* 18 C.F.R. § 385.213(c) (requiring detailed and specific answers setting forth "every defense relied on.").[28] The evidence does not support Respondents' defenses, but to the

[28] *See also, United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its

extent they believe it does, they had an obligation to produce, or at the very least make the Commission aware of, that evidence. All such evidence has been placed into the Administrative Record, and Respondents have never – either before the Commission or before this Court – identified any specific need for further fact-finding.

Even if Respondents had not been obligated to present all potentially exculpatory arguments and evidence in the proceeding below, the Court should still not engage in the type of broad discovery and fact-finding that Respondents will argue are necessary.[29] In the Penalty Assessment Order, the Commission reviewed the material in the Administrative Record and, relying principally on Respondents' own trades, Respondents' own documents, Respondents' own testimony, Respondents' own data responses, and Respondents' own communications, concluded that the record supported the imposition of penalties and disgorgement of unjust profits in the amounts set forth in the Order. There is no need to engage in further fact-finding.

In *Quesinberry*, the Fourth Circuit held that in a review de novo, a party (or the court) must specify a particularized reason for going "outside the record." *Quesinberry*, 987 F.2d 1017.

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practice."). The key factor in whether a party must raise matters with the agency is whether the proceeding was adversarial. *See Sims v. Apfel*, 530 U.S. 103, 107-11 (2000) (Social Security Administration proceeding was non-adversarial, so party could raise new matters in court). Here, the proceeding was adversarial, and Respondents had the opportunity – and were specifically instructed – to submit any evidence or arguments of their choice.

[29] Even in certain statutory schemes that explicitly allow for the submission of additional evidence, such as the Individuals with Disabilities Education Act ("IDEA"), Publ. L. No. 108-446 (2004) and the Gun Control Act, Pub. L. No. 90-618 (1968), the administrative record remains the touchstone for future de novo proceedings. *See Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 103 (4th Cir.1991) ("Generally, in reviewing state administrative decisions in IDEA cases, courts are required to make an independent decision based on a preponderance of the evidence, while giving due weight to state administrative proceedings."); *Prino v. Simon*, 606 F.2d 449, 451 (4th Cir. 1979) (de novo review under the Gun Control Act does not require full discovery, evidentiary hearings, or cross-examination); *Best Loan Co. v. Herbert*, 601 F.Supp.2d 749, 753 (E.D. Va. 2009) (a party must provide "good reason" for holding an evidentiary hearing, or the court will grant summary judgment based on its de novo review of the administrative record).

The court explained that while the District Court "in its discretion [may] allow evidence that was not before [the agency], the district court should exercise its discretion however *only when circumstances clearly establish that additional evidence is necessary to conduct an adequate de novo review of the [agency's] decision*." *Id.* at 1025 (emphasis added). Moreover, the Court stated that "[i]n most cases, where additional evidence is not necessary for adequate review of the [agency's] decision, the district court should only look at the evidence that was before the plan administrator or trustee at the time of the determination." *Id*.

The only basis for further discovery would be if Respondents identified particularized areas of inquiry and explained (1) why they were not able to present or seek such evidence below and (2) the benefit of such discovery to the Court's review. To date, Respondents have not addressed either issue. In all of the submissions Respondents made during the investigation and in all of the filings Respondents made in the Show Cause Proceeding, Respondents never identified any discovery that they needed to address any element of the violation or the magnitude of their liability.[30] The Court should not hesitate to deny Respondents' generalized demands for broad discovery, and the Court should not go "outside the record" created by the Commission.[31]

Finally, despite the voluminous nature of Respondents' submissions and filings with the Commission, the only material fact even arguably in dispute is Respondents' intent in executing

[30] Respondents complained that Enforcement Staff had not identified the manipulative trades with "granular specificity" (presumably, by listing them), but it is evident that Respondents understood what trades were at issue because they made very specific representations about them. *Compare* AR Tab 29 (Chen Answer to Order to Show Cause) at n.6 (AR_001251) *with id.* at n.41 and accompanying text (AR_001264). This discussion reflects a substantive disagreement over the merits of the case, rather than a need for discovery.

[31] This Court has previously refused to go outside the record even in circumstances in which it found that a *trial* de novo was appropriate. *Neumann v. Prudential Ins. Co. of America*, 387 F.Supp.2d 969, 979 (E.D. Va. 2005) (finding, in an ERISA case, that "a bench trial on the paper record . . . is appropriate").

the trades. But the Commission based its finding of intent on party admissions and contemporaneous documents. *See* Pet. Ex. 1 at PP 128 – 140, AR Tab 40. This Court will have the opportunity to review those findings, along with evidence adduced by both sides, and make its own determination. The principles of administrative efficiency and judicial economy, as well as the goal of "secur[ing] the just, speedy, and inexpensive resolution" (Fed. R. Civ. P. 1) of this matter counsel against the use of trial procedures which in this case would be unjust, duplicative, and expensive.

V. Respondents' Reading of FPA § 31 as Requiring a Plenary Trial is Untenable

It is worth summarizing the implications of Respondents' reading of the statute:

- "*Review*" in Paragraph 3 does not mean review. It means "trial," even though it means "review" in Paragraph 2.
- "*Review de novo*" necessarily means "trial de novo" because of dictum from a case that speculated that the terms "might conceivably be used interchangeably," despite the fact that plenty of other statutes employ the term "trial de novo" to refer to trials de novo and "review" to refer to reviews.
- "*Shall have authority*" imposes a mandate on the Court, rather than giving it discretion.
- "*Action*" necessarily means "trial" in Paragraph 3, even though it does not mean "trial" in Paragraph 2, and many "actions" are not trials.
- "*Order*" has multiple meanings in § 31 – one of which does not mean what the APA says it means.
- "*Assess*" in multiple meanings, depending on whether the procedures of Paragraphs (d)(2) or (d)(3) are selected.
- "*Affirming*" a penalty assessment actually means disregarding the penalty assessment and reaching a verdict instead.

For Respondents' reading to be correct, it would also have to be the case that Congress intended the Commission to impose penalties without engaging in any fact-finding and without creating a record of the basis for its penalty assessment, and intended to create two totally redundant paths (for the convenience of Respondents) to plenary adjudication. In creating these

redundant paths, Congress valued the Commission's expertise so highly under Paragraph 2 that it required the courts of appeal to accord it substantial deference, while at the same time providing a mechanism under Paragraph 3 for that expertise to be evaded completely. Respondents' reading of the FPA is untenable and the Court should reject it.

CONCLUSION

For these reasons, the Court should rule that de novo review means a review of the Commission's Order Assessing Penalties based on the administrative record rather than a trial, and should then order the Commission to file a motion to affirm the Order Assessing Penalties within 45 days of the latter of Respondents' answers or the Court's resolution of Respondents' motions to dismiss.

Dated: December 31, 2015

FEDERAL ENERGY REGULATORY COMMISSION

Larry R. Parkinson
Director
Office of Enforcement

Lee Ann Watson
Deputy Director
Office of Enforcement

David A. Applebaum
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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2015, I filed the foregoing Memorandum of Points and Authorities Regarding Review Procedures Mandated by the Federal Power Act, with the Clerk's Office, using the CM/ECF system, which will send a notification of such filing to the following:

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Exhibit 1-A

***FERC v. Barclays Bank PLC*, No. 2:13-cv-02093**
(E.D. Cal. Oct. 2, 2015) (Dkt. 106)
(Scheduling Order)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FEDERAL ENERGY REGULATORY COMMISSION,

Plaintiff,

v.

BARCLAYS BANK PLC, DANIEL BRIN, SCOTT CONNELLY, KAREN LEVINE, and RYAN SMITH,

Defendants.

No. 2:13-cv-2093-TLN-DAD

SCHEDULING ORDER

The parties have briefed the nature of the subsequent proceedings in a joint status report and in supplemental briefing.[1] (ECF Nos. 97, 101, 103.) In consideration of those arguments the Court issues the following Scheduling Order:

- Within 30 days after issuance of this Order, FERC shall file with the Court the administrative record used by FERC in assessing civil penalties.
- Within 30 days of the filing of the record, FERC shall file a motion for an order affirming the civil penalties assessed by FERC.
- Within 60 days of the filing of FERC's motion, Defendants shall file an opposition.

[1] Defendants' motion for leave to file a memorandum on the scope of de novo review under the Federal Power Act (ECF No. 102) is denied.

- Within 21 days of the filing of Defendants' opposition, FERC may file a reply.

The Court will review FERC's assessment to determine whether penalties shall be affirmed, vacated, or modified. 16 U.S.C. § 823b(d)(3)(B). The Court will also consider whether a determination as to this assessment requires supplementation of the record submitted by FERC and/or alternative means of fact-finding.

The Court hereby bifurcates its determination of disgorgement from its review of liability and the assessed civil penalties. The Court finds bifurcation facilities a just and expeditious resolution of this litigation. *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 575 (9th Cir. 1995). Accordingly, the parties may address issues relevant to disgorgement only to the extent they are relevant to the Court's review of liability and civil penalties. If necessary at a later date the Court will set forth a schedule for a determination of disgorgement.

Dated: October 1, 2015

Exhibit 1-B

FERC v. Barclays Bank PLC, No. 2:13-cv-02093 (E.D. Cal. Dec. 18, 2015) (Dkt. 133) (Order Denying Discovery)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FEDERAL ENERGY REGULATORY COMMISSION,

Plaintiff,

v.

BARCLAYS BANK PLC, DANIEL BRIN, SCOTT CONNELLY, KAREN LEVINE, and RYAN SMITH,

Defendants.

No. 2:13-cv-2093-TLN-DAD

ORDER

On November 9, 2015, Defendants filed a motion for leave to serve limited discovery. (ECF No. 118.) On November 25, 2015, FERC filed an opposition. (ECF No. 122.) On December 3, 2015, Defendants filed a reply.[1] (ECF No. 126.)

Defendants seek discovery from FERC including: 1) FERC's investigative file; 2) all documents and communications concerning the relevant trading activity; 3) FERC's penalty assessment and disgorgement calculations; 4) documents and communications concerning FERC's jurisdiction over the relevant trading activity; and 5) documents and communications concerning FERC's contentions that Defendants delivered electricity. (*See* ECF No. 118-1,

[1] Per the October 2, 2015, scheduling order, FERC filed its administrative record on November 2, 2015, and the motion to affirm penalties on December 2, 2015. Defendants' opposition is due by February 1, 2016. (ECF Nos. 106, 115 & 125.)

Nolan Decl., Ex. 2.)

Defendants seek discovery from Intercontinental Exchange, Inc. ("ICE") including documents and communications that concern: 1) particular trading activity on ICE ECM by Defendants and non-parties, during the relevant time period; 2) ICE investigations into Defendants' trading activity; 3) information provided by ICE to FERC, the Commodity Futures Trading Commission ("CFTC") or other agencies, relative to Defendants' trading; 4) the purpose, use and function of Reserve Quantity Orders; 5) the methodology that ICE used to calculate the ICE Day-Ahead Index; 6) whether and/or how it was possible for Defendants to schedule the delivery of electricity; and 7) information provided by ICE to the CFTC pursuant to CFTC Rule 36.3. (*See* ECF No. 118-1, Nolan Decl., Ex. 1.)

The Court has reviewed and considered Defendants' stated reasons for conducting discovery and does not find discovery is warranted at this juncture. The Court has not yet considered whether the record already submitted, which FERC represents totals nearly 8,500 pages and includes Defendants' trades, communications, testimony, and data analyses, is sufficient for this Court's de novo review. (ECF No. 122 at 3.) The Court will make that determination relative to the briefs due per the scheduling order filed on October 2, 2015. Defendants may reiterate their argument in their to-be-filed opposition that the submitted record is insufficient. If the Court determines additions to the record and/or discovery are required after briefing has been completed per the October 2, 2015 scheduling order, an order from this Court will issue in due course. For those reasons, Defendants' motion to serve limited discovery (ECF No. 118) is DENIED.

Dated: December 18, 2015