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

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

REPLY IN SUPPORT OF MOTION OF ADMINISTRATIVE LAW PROFESSORS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Proposed amici curiae 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, respectfully submit this reply brief in support of their motion for leave to file a brief as amici curiae. *See* [ECF Dkt. No. 70]. In their motion, amici established that their proposed brief met all of the requisites for an amicus brief and, in particular, that it provided this Court with useful information concerning the procedure mandated by Congress in section 31(d)(3) of the Federal Power Act, 16 U.S.C. § 823b(d), for de novo review in federal district courts of a civil penalty assessment order issued by the Federal Energy Regulatory Commission ("FERC").

In opposing amici's motion, FERC does not dispute that the decision to allow an amicus brief is committed to this Court's discretion. *See* [ECF Dkt. No. 76] at 2 (quoting *Tafus v. Dudas*, 511 F. Supp. 2d 652, 659 (E.D. Va. 2007)). Rather, FERC raises a number of unavailing objections seeking to preclude this Court from considering the highly pertinent and helpful

legislative history brought to this case by amici. As explained in their motion (*see* [ECF Dkt. No. 70] at 5) and as detailed in their proposed brief (*see* [ECF Dkt. No. 70-1] at 11-14), amici bring to the Court information regarding the history, meaning, and purpose of the dual scheme adopted by Congress in section 31(d) of the Federal Power Act. Because amici's proposed brief is both timely and useful, they respectfully request that the Court grant their motion and accept their proposed brief for filing.

FERC's timeliness objection lacks merit. FERC principally objects to amici's proposed brief as being "untimely," citing a few instances where district courts, exercising their discretion, did not accept proposed amicus briefs on timeliness and other grounds. *See* [ECF Dkt. No. 76] at 3. These decisions, however, merely illustrate that the timeliness of a proposed amicus brief is but one factor to be considered and that, in any event, timeliness is a relative concept: The timeliness of a given brief depends on the circumstances of a particular case. Thus, district courts have also exercised their discretion to allow amicus briefs (over timeliness objections) where the proposed briefs were filed after the parties had completed briefing. *See, e.g.*, *Andersen v. Leavitt*, No. 03-cv-6115 (DRH) (ARL), 2007 U.S. Dist. LEXIS 59108, at *13-14 (E.D.N.Y. Aug. 13, 2007) (accepting amicus brief filed five months after summary judgment briefing was completed); *Waste Mgmt., Inc. v. City of York*, 162 F.R.D. 34, 35-37 (M.D. Pa. 1995) (accepting amicus brief filed months after briefing was completed). Indeed, courts accept amicus briefs filed even after the issues have been decided. *See Acra Turf Club, LLC v. Zanzuccki*, Civ. A. No. 12-2775 (MAS) (DEA), 2014 U.S. Dist. LEXIS 152167, at *15-16 (D.N.J. Oct. 28, 2014) (allowing amicus brief over objection after the issues had already been decided "in order to preclude the possibility that a resource that could have been of assistance is absent from the record").

The salient question, as illustrated by all of these examples, is whether accepting the proposed amicus brief, on balance, will *unnecessarily* delay the proceedings. *See, e.g.*, *Andersen*, 2007 U.S. Dist. LEXIS 59108, at *7 (observing that parties "should have their dispute resolved without any unnecessary delay" and accepting amicus brief where it would not delay the proceedings (quotation marks and citation omitted)); *Bryant v. New Jersey DOT*, 987 F. Supp. 343, 346 n.3 (D.N.J. 1998) (accepting amicus brief over objection where its consideration did not delay the case and the brief provided "considerable assistance" to the court), *vacated in part on other grounds*, 998 F. Supp. 438 (D.N.J. 1998); *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 286 (1996) (concluding that, where the acceptance of an amicus brief that "would not unreasonably delay the litigation," that factor weighs in favor of allowing the brief).

Here, and as explained in their motion (*see* [ECF Dkt. No. 70] at 5), amici respectfully submit that allowing their proposed brief need not materially delay this case, if at all. Although the Court has taken the issues under advisement, the Court has not ruled on the pending question of the appropriate procedures for this Court's de novo review under section 31(d). Amici's proposed brief has already been lodged with the Court (*see* [ECF Dkt. No. 70-1]) and therefore can be considered by the Court without delay. And, although FERC chose not to avail itself of the opportunity to address the substance of amici's proposed brief in its opposition, the Court could set a relatively short briefing schedule for such a response if the Court accepts FERC's proposal (*see* [ECF Dkt. No. 76] at 7) to allow a "responsive brief of no more than 20 pages." FERC has not suggested that it would suffer any undue prejudice if the Court were to allow such a response.

In short, amici's proposed brief is timely, and its consideration by the Court need not unnecessarily delay this case.

FERC ignores the useful information in the proposed brief. FERC also objects to the proposed brief as being "unhelpful" on a number of grounds. Of course, FERC's view that the proposed brief may not be helpful to its position in this litigation does not render the proposed brief unhelpful *to the Court*. On this score, amici respectfully submit that their proposed brief provides highly useful information not previously presented to the Court in these proceedings.

"The primary reason to allow *amicus curiae* briefing is that the *amicus curiae* 'offer insights not available from the parties,' thereby aiding the Court." *Andersen*, 2007 U.S. Dist. LEXIS 59108, at *6 (quoting *Citizens Against Casino Gambling in Erie Cty. v. Kempthorne*, 471 F. Supp. 2d 295, 311 (W.D.N.Y. 2007)). This Court previously asked the parties to address, inter alia, "[w]hether legislative history of § 823b(d) exists, and whether such information sheds light on the interpretation of the statute." [ECF Dkt. No. 44] at 3. In response to that request, the parties submitted briefs canvassing the legislative history of the Federal Power Act and other statutes. *See* [ECF Dkt. No. 52] at 1-11; [ECF Dkt. No. 53] at 4-5. Amici's proposed brief does not duplicate that effort; rather, amici supplement it by pointing the Court to the text and legislative history of the National Energy Conservation Policy Act of 1978 and the Powerplant and Industrial Fuel Use Act of 1978 -- two statutes in which Congress used the very same "de novo review" formulation as later found in section 31(d) of the Federal Power Act. *See* [ECF Dkt. No. 70-1] at 11-14; *see also* 42 U.S.C. § 6303(d)(3)(B) ("[T]he Secretary 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."); 42 U.S.C. § 8433(d)(3)(B) (same).

FERC attempts to dismiss the proposed brief's discussion of these two statutes as involving "statutes not at issue in the current proceeding" ([ECF Dkt. No. 76] at 4), but the histories of these statutes and the import of the similar language used by Congress in the National Energy Conservation Policy Act of 1978, the Powerplant and Industrial Fuel Use Act of 1978, and the Federal Power Act cannot be so easily dismissed. Indeed, the similarity of the language in these three statutes is, at the very least, highly probative that the language shares a common meaning. *See, e.g., Northcross v. Bd. of Educ. of the Memphis City Schs.*, 412 U.S. 427, 428 (1973) (per curiam) ("The similarity of language in § 718 [of the Emergency School Aid Act of 1972, 86 Stat. 369, 20 U.S.C. § 1617] and § 204(b) [the Civil Rights Act of 1964, 78 Stat. 244, 42 U.S.C. § 2000a-3(b)] is, of course, a strong indication that the two statutes should be interpreted *pari passu*."); *Welsh v. United States*, 398 U.S. 333, 351 (1970) (Harlan, J., concurring) ("In the realm of statutory construction it is appropriate to search for meaning in the congressional vocabulary in a lexicon most probably consulted by Congress.").

In response to this Court's inquiry regarding the legislative history of section 31(d) of the Federal Power Act, none of the parties pointed this Court to the National Energy Conservation Policy Act of 1978 or the Powerplant and Industrial Fuel Use Act of 1978. For its part, FERC pointed this Court to a number of different statutes, including the Employee Retirement Income Security Act of 1974, the Immigration and Nationality Act, the Bank Merger Act of 1966, and the Sarbanes-Oxley Act of 2002). *See* [ECF Dkt. No. 52] at 7-11; *see also* [ECF Dkt. No. 39] at 27 n.29 (discussing the Individuals with Disabilities Education Act and the Gun Control Act.). As FERC has framed its discussion of these other statutes, "[n]umerous statutes could be

analogized in some way to the FPA, but few directing a 'review de novo' and even fewer that have given rise to case law that would allow inferences to be drawn about the meaning of FPA § 823b(d)(3)." [ECF Dkt. No. 52] at 6.

As explained in more detail in their proposed brief (*see* [ECF Dkt. No. 70-1] at 14), amici believe that, as just one example, the conference report for the National Energy Conservation Policy Act provides far more relevant information that "would allow for inferences to be drawn about the meaning of" section 31(d) of the Federal Power Act, where it is specifically explained in that conference report that, although the statutory language adopted by Congress "says that 'the court shall have authority to review de novo the law and facts involved, . . .' the conferees fully intend that the party electing the de novo review procedure is entitled to such review, and the scope of review used by the district court under this provision shall be no other than a de novo review of the facts and issues pleaded." H.R. Rep. No. 95-1751, at 117 (1978), *reprinted in* 1978 U.S.C.C.A.N. 8134, 8161, *also available at* http://hdl.handle.net/2027/mdp.39015087614510?urlappend=%3Bseq=1153. Thus, amici respectfully submit that the legislative histories of the National Energy Conservation Policy Act of 1978 and the Powerplant and Industrial Fuel Use Act of 1978 -- where Congress employed the very same de novo review procedure as found in the Federal Power Act -- provide far more relevant context than any of the other histories previously cited to this Court.

FERC also insists that the proposed brief from amici is not helpful because the defendants in this case are well represented. *See* [ECF Dkt. No. 76] at 4. This argument is a non sequitur. Even when the parties are well represented, "an amicus may provide important assistance to the court." *Jamul Action Comm. v. Stevens*, No. 2:13-cv-01920-KJM-KJN, 2014 U.S. Dist. LEXIS 107582, at *13-15 (E.D. Cal. Aug. 5, 2014) (quotation omitted); *see also*

Neonatology Assocs., P.A. v. Comm'r of Internal Revenue, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (explaining that, "[e]ven when a party is very well represented, an amicus may provide important assistance to the court"); *Canamar v. McMillin Tex. Mgmt. Servs., LLC*, Civ. A. No. SA-08-CV-0516 FB, 2009 U.S. Dist. LEXIS 108986, at *3 (W.D. Tex. Nov. 20, 1999) (accepting amicus brief over opposition where "the information supplied is potentially useful to the Court and beyond that which the parties themselves have provided in their extensive briefing"). As then-Circuit Judge Alito observed in *Neonatology Associates*, "denying motions for leave to file an amicus brief whenever the party supported is adequately represented would in some instances deprive the court of valuable assistance." 293 F.3d at 132 (endorsing the view that "[s]ome amicus briefs collect background or factual references that merit judicial notice" and "[s]ome friends of the court are entities with particular expertise not possessed by any party to the case." (quotation marks and citation omitted)). Here, amici, as experts in administrative law, bring to this Court a useful perspective and highly relevant background information not previously addressed by the parties. This information merits this Court's attention, regardless of whether the parties in this case are well represented.

FERC also complains that the proposed brief "does not provide useful legal analysis materially different from that contained in Respondents' own briefing." [ECF Dkt. No. 76] at 4 (citing the discussion in the proposed brief of amicus Professor William Funk's research). This complaint is plainly wrong. The one example of purported "duplication" cited by FERC is the discussion of Professor Funk's research that had previously been discussed by the defendants in this case (*see* [ECF Dkt. No. 76] at 4), but the discussion in the proposed brief was plainly part of a broader discussion of the historical background of the administrative assessment of civil money penalties, as indicated by the heading title for that section of the brief. *See* [Dkt. No. 70-1] at 4

("The Historical Background Of Administrative Assessment Of Civil Money Penalties"). In contrast, FERC has not pointed to any discussion of the National Energy Conservation Policy Act of 1978 or the Powerplant and Industrial Fuel Use Act of 1978 in any of the prior submissions of the parties in this case, so FERC's objection rings hollow. (In any event, to the extent FERC is correct that the proposed brief is in any way duplicative, FERC could not be prejudiced by such alleged duplication.)

As established in the motion, amici's proposed brief is useful and provides this Court with highly relevant information on the meaning of section 31(d) that had not previously been brought to this Court's attention. This Court should reject FERC's attempts at keeping this information from the Court's consideration.

FERC's improperly narrow conception of the role of amicus curiae should be rejected. FERC does not question the expertise of amici, nor does it question their interest, as scholars of administrative law, in the proper development of the law. Rather, FERC argues that amici have "no special interest in this case to justify their input" ([ECF Dkt. No. 76] at 5), as if this is a specific threshold requirement for accepting the proposed brief from amici. The circumstances where an amicus curiae may be appropriate are much broader, however, and amici have "'been allowed at the trial level where they provide helpful analysis of the law, they have a special interest in the subject matter of the suit, *or* existing counsel is in need of assistance.'" *Tafus*, 511 F. Supp. 2d at 659 (emphasis added) (quoting *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 728 (D. Md. 1996)).

Law professors like amici here routinely appear as amici curiae in federal courts. *See, e.g., Garcia v. Google, Inc.*, 786 F.3d 733, 739 n.3 (9th Cir. 2015) (en banc) (amicus brief filed by copyright and Internet law scholars); *Enron Corp. v. Springfield Assocs., L.L.C. (In re Enron*

Corp.), 379 B.R. 425, 431 (S.D.N.Y. 2007) (bankruptcy professor); *321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085, 1106-07 (N.D. Cal. 2004) (copyright law professors). FERC discounts the input of such experts, quoting in its opposition the majority decision in *American College of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644 (3d Cir. 1983), where a sharply divided panel rejected a proposed amicus curiae brief filed by law professors. *See* [ECF Dkt. No. 76] at 5-6. The analysis of the panel majority in that case is dubious. *See Neonatology Assocs.*, 293 F.3d at 130 (questioning the correctness of the majority's analysis); *see also Am. Coll.*, 699 F.2d at 645 (Higginbotham, J., dissenting) ("H.G. Wells once wrote 'That civilization is a race between education and catastrophe.' I submit that, even in a court as learned as ours, we might be able to avoid some unnecessary catastrophes if we have the will and the patience to listen to legal educators."). In any event, that analysis is not binding on this Court and, in light of the sheer number of amicus briefs filed by law professors that are routinely accepted by federal courts, obviously does not represent a consensus view. *Cf. Neonatology Assocs.*, 293 F.3d at 130 (noting that "the appellants cite a small body of judicial opinions that look with disfavor on motions for leave to file amicus briefs" and ultimately rejecting that view).

FERC also hints that the proposed brief is improper, citing then-Chief Judge Posner's observation that some types of amicus briefs should not be allowed. [ECF Dkt. No. 76] at 6 (quoting *Ryan v. Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir 1997) (Posner, C.J., in chambers)). But the proposed brief from amici in this case falls squarely within even Judge Posner's conception of an appropriate amicus brief -- i.e., a brief that points judges to "considerations germane to our decision . . . that the parties for one reason or another have not brought to our attention." *Ryan*, 125 F.3d at 1064. FERC's objections, therefore, should be rejected.

* * *

In the end, the appropriate "touchstone is whether the amicus is 'helpful,'" *Cal. v. U.S. Dep't of Labor*, No. 2:13-CV-02069-KJM-DAD, 2014 U.S. Dist. LEXIS 5439, at *3 (E.D. Cal. Jan. 14, 2014) (citation omitted), and when the proposed brief meets these standards, the amicus brief "should normally be allowed," *Cmty. Ass'n for Restoration of the Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999). Because amici's proposed brief is timely and provides useful information not previously brought to this Court's attention, amici respectfully submit that this Court should grant their motion, accept the proposed brief for filing, and decide the question of what procedures are required under Section 31(d) with all relevant resources available to the Court.

Dated: December 27, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 27th 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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