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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-02093-TLN-DB

PROPOSED BRIEF OF AMICI CURIAE ADMINISTRATIVE LAW PROFESSORS JEFFREY S. LUBBERS; WILLIAM FUNK; JONATHAN H. ADLER; EMILY HAMMOND; MICHAEL HERZ; LINDA JELLUM; WILLIAM S. JORDAN, III; HAROLD J. KRENT; DON LEDUC; RONALD M. LEVIN; NATHAN A. SALES; AND LOUIS J. VIRELLI III

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INTEREST OF AMICI CURIAE

Amici are twelve law professors who regularly write and teach about federal administrative law and procedure. As longtime scholars in this area, amici 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.[1]

Although amici take no position on the merits of the enforcement action instituted by the Federal Energy Regulatory Commission ("FERC," the "Agency," or the "Commission") in this case, amici have grave concerns about the broader implications of the Agency's apparent position that the scope of a district court's "de novo review" of a civil penalty assessment under the Federal Power Act can be defined and circumscribed by the amount of "process" the agency unilaterally, and on an ad hoc basis, allows a defendant in assessing a civil penalty. The Agency's approach in this case runs counter to longstanding principles of federal administrative law, the text of the statute providing for "de novo review" by a court in this and other enforcement cases, and basic due process. Indeed, allowing the type of truncated, hearing-less proceeding advocated by the Agency in this case would set an unfortunate precedent that would undermine the court enforcement model used in other statutes for assessing and then imposing civil administrative penalties. Amici, therefore, submit this brief to express their view as scholars that a de novo, trial-type hearing governed by the Federal Rules of Civil Procedure is not only legally required but also sound policy.

Amicus Jeffrey S. Lubbers is Professor of Practice in Administrative Law at Washington College of Law, American University, where he has taught for 20 years. He has also taught at numerous other schools in the United States and overseas. Prior to joining American University, he served in various positions with the Administrative Conference of the United States ("ACUS"), the U.S. Government's advisory agency for promoting improvements "in the efficiency, adequacy, and fairness of the procedures by which federal agencies conduct regulatory

[1] No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief.

programs, administer grants and benefits, and perform related governmental functions." "Administrative Conference Act," Administrative Conference of the United States (Nov. 12, 2010), *available at* https://www.acus.gov/publication/administrative-conference-act. From 1982-1995, he was ACUS's Research Director—a position in the Senior Executive Service. He is now serving as an unpaid Special Counsel to ACUS. In 1993, Professor Lubbers served as Team Leader for Vice President Albert Gore's National Performance Review team on Improving Regulatory Systems. Professor Lubbers is the author of the American Bar Association's GUIDE TO FEDERAL AGENCY RULEMAKING (5th ed. 2012), has co-authored, with amicus Professor William Funk, the FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (5th ed. 2016), and served as the editor for the American Bar Association's annual DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE (16 volumes from 1998-2014). He has served as a consultant and trainer for numerous federal agencies, the American Bar Association, the World Bank, the U.S. Agency for International Development, and the Organisation for Economic Co-operation and Development and has made numerous trips to China to promote administrative law reforms on behalf of the Asia Foundation and the Yale University China Law Center. Professor Lubbers is a graduate of Cornell University and the University of Chicago Law School and is a member of the bars of the State of Maryland and the District of Columbia.

Amicus William Funk is the Lewis & Clark Distinguished Professor of Law at Lewis & Clark Law School, where he has taught for 33 years. Prior to teaching, Professor Funk served as an Assistant General Counsel in the U.S. Department of Energy, a Legislative Counsel for the House Permanent Select Committee on Intelligence, and an Attorney-Advisor in the Office of Legal Counsel of the U.S. Department of Justice. He is a former chair of the American Bar Association's Section of Administrative Law and Regulatory Practice, a former chair of the Administrative Law Section of the Association of American Law Schools, and a current member of the American Law Institute. In addition to numerous articles on administrative law in law journals, Professor Funk is co-author of ADMINISTRATIVE PROCEDURE AND PRACTICE (5th ed. 2014), co-author of ADMINISTRATIVE LAW, EXAMPLES AND EXPLANATIONS (5th ed. 2016), and co-author of the FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (5th ed. 2016). Professor

Funk has served as a consultant to ACUS and has taught Federal Judicial Center programs. Professor Funk is a graduate of Columbia Law School and Harvard College.

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ARGUMENT

Amici have grave concerns about the legal and policy implications of FERC's apparent view of what constitutes a district court's "de novo review" of an agency's civil penalty assessment. As explained below, amici believe that FERC's position runs counter to the traditional understanding of court enforcement actions for civil penalties and cannot be squared with the text, structure, or purpose of the Federal Power Act's civil penalty assessment mechanism, which gives a defendant the choice of challenging FERC's penalty assessment in a full trial-type proceeding before either an administrative law judge or a federal district court. What is more, FERC's position raises serious due process and policy concerns, and it is all the more puzzling in the context of this enforcement action, where FERC seeks to have the Court summarily affirm what FERC itself has described as "the largest civil penalty imposed since the

passage of the Energy Policy of Act of 2005." Tennille Tracy, "Barclays, Traders Hit for Manipulating Power Prices; British Bank Gets 30 Days to Distribute 'Unjust' Profits to Four U.S. States," WALL ST. J. ONLINE (July 17, 2013), *available at* http://on.wsj.com/2dwVAvZ.

I. The Historical Background Of Administrative Assessment Of Civil Money Penalties

Amici have long been active in the Administrative Conference of the United States ("ACUS"), which is an independent federal agency charged with studying administrative procedure and recommending improvements by "conducting research, formulating recommendations, spreading agency best practices, promoting information exchange, and sponsoring events and publications." *See* "Guide for Members," Administrative Conference of the United States (Mar. 29, 2011) at 2, *available at* https://www.acus.gov/sites/default/files/documents/Guide_5-9_0.pdf). Through their affiliation and work with ACUS, amici have been directly involved in the study and development of the modern regime for civil administrative penalties.

As Professor Funk explained in a 1993 report authored for ACUS, "[a]dministratively imposed civil penalties are not new to administrative law." William Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Administrative Penalties*, 1993 ACUS 43 (1993), 24 SETON HALL L. REV. 1, 5 (1993). Since the rise in administrative penalty assessments that began in the 1970s, the model for the administrative assessment of civil money penalties has developed two principal subsets: (1) an administrative penalty imposed through a formal adjudication under the Administrative Procedure Act ("APA"), 5 U.S.C. § 554 et seq., before an administrative law judge ("ALJ") and (2) an administrative penalty imposed by an agency through informal procedures (or no procedures at all) followed by an action instituted by the agency in district court whereby the assessment is subject to de novo review. Funk, 24 SETON HALL L. REV. at 1-2. In either scenario, Professor Funk explained, a defendant "has the opportunity for a full trial as to liability and penalty amount before a strictly neutral judge, at one before a court, at the other before an ALJ." *Id*. at 2-3.

The rise since the 1970s of administratively assessed civil penalties can be traced, in large part, to the landmark study by Professor Harvey Goldschmid conducted for ACUS in 1972.[2] The ACUS study led to a sea change in the way civil penalty assessments are adjudicated, and Professor Funk's description of this study and its impact is definitive and deserves a lengthy quotation:

> [I]n 1972, when Professor Goldschmid made his report to the Administrative Conference on civil money penalties, he concluded that of the 104 civil penalty provisions he identified, only four involved "true administrative imposition" of penalties. The others required the agency to "be successful in a de novo adjudication in a district court (whether or not an administrative proceeding had previously occurred) before a civil money penalty could be imposed." In order to provide agencies more enforcement flexibility, particularly by avoiding the necessity of obtaining approval of the Department of Justice, and at the same time to enhance fairness, Professor Goldschmid recommended increased use of administratively imposed penalties that would not require de novo judicial proceedings to enforce. Rather, persons who wished to contest a penalty would have the opportunity for a hearing under Sections 554, 556, and 557 of the APA. Such adjudications, Professor Goldschmid wrote, should be "just, inexpensive, and speedy." The administrative decision would be final unless appealed within a limited period to a federal court, where the review would be limited to substantial evidence review under the APA.
>
> The Administrative Conference, thereafter, formally adopted a recommendation approving the increased use of civil money penalties as an alternative to criminal penalties and other draconian measures. [*See* ACUS Rec. 72-6, Civil Money Penalties as a Sanction, 38 Fed. Reg. 19,792, 19,792-93 (July 23, 1973).] It also recommended the administrative imposition of those penalties, at least where the penalty amount is small (less than $5000) and is imposed pursuant to a system affording parties an opportunity for a hearing on the record under Sections 554, 556, and 557 of the APA.
>
> By 1979, when the Administrative Conference next addressed the issue, the number of civil penalty provisions had mushroomed. Professor Diver's report to the Administrative Conference on administrative civil penalties [*see* Colin Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 1979 ACUS 203, *available at* http://hdl.handle.net/2027/uc1.b5156006?urlappend=%3Bseq=209; published in abridged form, 79 COLUM. L. REV. 1435 (1979)] identified 141 "agency-assessment" penalty provisions as well as 207 "court-assessment" provisions. Of these 141 "agency-assessment" provisions, however, Professor Diver believed that not all involved "true administrative imposition" of penalties. Because a "full-scale trial-type hearing must be provided before a civil penalty can be exacted," Professor Diver stated, true administrative imposition of penalties could only occur where those type of hearings were provided by the agency. Only 27 of the 141 "agency-assessment" provisions provided explicitly for a formal hearing

[2] Harvey J. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896 (1972), *available at* http://hdl.handle.net/2027/mdp.39015078601575?urlappend=%3Bseq=910.

> on the record under the Administrative Procedure Act, however, while only 27 more required an otherwise unspecified notice and a hearing. From this, Professor Diver concluded, most of the so-called administrative assessment provisions, those which did not in fact provide "full-scale trial-type hearings," still implicitly required a de novo judicial trial on the merits in order to enforce the administrative penalty determination. His recommendation was that agencies provide the opportunity for a "full-scale trial-type hearing" even when the governing statute did not require it, thereby forestalling the need for a de novo judicial trial.

Funk, 24 SETON HALL L. REV. at 9-10 (footnotes omitted).

As Professor Funk's account makes abundantly clear, the experts' understandings of civil money penalty assessment proceedings through 1993 assumed that, "if a defendant challenged the assessment of a penalty, either the agency had to provide a 'full-scale trial-type hearing,' as provided by Sections 554, 556, and 557 of the APA, or a court would have to hold a trial de novo on liability." Funk, 24 SETON HALL L. REV. at 11. Furthermore, the experts understood the terms "de novo review" and "de novo trial" to be interchangeable. As Professor Diver noted in his study: "One might conceivably draw a distinction between 'de novo review' and 'de novo trial' (or 'civil action'), and interpret the former to restrict the reviewing court to the record compiled by the agency. The courts have not generally acknowledged such a refinement, however." Diver, 1979 ACUS at 321 n.538 (citing *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1966)).

Professor Funk's 1993 report was primarily directed to the then-emerging trend in which Congress was allowing agencies to use non-ALJ adjudicators to hear civil penalty cases and to allow less formal hearings pursuant to some statutes providing for relatively small penalty assessments (generally below $25,000). These hybrid regimes—the first of which was authorized by Congress in 1986 (*see* Funk, 24 SETON HALL L. REV. at 3 & n.13)—existed somewhere between the traditional poles of an ALJ hearing on one side and an informal administrative assessment followed by de novo judicial review on the other. Instead, under these hybrid regimes, agencies would assess civil penalties without a formal APA-style hearing, *and* the only judicial review of the agency's assessment was deferential, being limited to substantial evidence or arbitrary and capricious standards. In other words, under these hybrid regimes, the defendant "does not receive a full trial anywhere." *Id*. at 3. This approach, as Professor Funk explained,

was contrary to the considered judgment of ACUS and had been roundly criticized. *See id*. at 4. Indeed, ACUS's subsequent recommendation based on Professor Funk's study decried the trend: "Congress should provide that the Administrative Procedure Act's formal adjudication provisions (5 U.S.C. §§ 554, 556-558) are available to parties whenever money penalties may be imposed by administrative agencies." ACUS Rec. 93-1, Use of APA Formal Procedures in Civil Money Penalty Proceedings, 58 Fed. Reg. 45,409, 45,410 (Aug. 30, 1993).

The strong endorsement from ACUS for the use of APA procedures when agencies impose civil penalties reflects the Supreme Court's longstanding view that the APA formal adjudication model guarantees sufficient due process. *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950) (the APA "represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest"). This, of course, does not mean that anything less than APA formality would always fall short of due process standards. Rather, under the three-part balancing test for determining what process is due adopted by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the procedures constitutionally required will depend on the circumstances. The maximum penalty available under the hybrid regimes studied by Professor Funk was $125,000. *See* Funk, 24 SETON HALL L. REV. at 47. As Professor Funk showed in his study, even where Congress had allowed a lesser formality for lower tier penalties, the agencies adopted procedures that nevertheless provided for adversary hearings with presiding officers. Thus, for example, as Professor Funk noted in evaluating the then-proposed procedures of the Environmental Protection Agency ("EPA") for its assessment of small penalties: "Compared to many 'informal' proceedings, EPA's proposed Part 28 procedures retain most of the trial-type procedures of a formal adjudication." *Id*. at 49. Thus, it should be noted that, in addition to involving relatively small penalty amounts, the few hybrid regimes in existence at the time of Professor Funk's study arguably provided for sufficient due process *under the circumstances of those regimes* given the relatively low penalty amounts at stake and the regulations governing the adversary hearings before agency-designated hearing officers. *See id*. at 33-35. Moreover, in each case, the hybrid regime was expressly created by statute.

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II. Section 31(d) Provides For A Full-Scale, Trial-Type Hearing Before Either An Administrative Law Judge Or A District Court

Against this historical backdrop, Congress adopted section 31(d) of the Federal Power Act in 1986. *See* Pub. L. No. 99-495, § 12, Oct. 16, 1986, 100 Stat. 1243, 1255-57 (codified at 16 U.S.C. § 823b(d)). As relevant here, section 31(d) sets forth two procedural methods for FERC to impose and collect an administrative civil penalty. The first procedure under section 31(d) involves an administrative penalty imposed through a formal adjudication before an ALJ under the APA, with FERC determining the penalty assessment based on the record of the hearing before the ALJ and deferential review of the assessment by the court of appeals pursuant to the APA. *See* 16 U.S.C. §§ 823b(d)(2)(A) & (B). The second procedure under section 31(d) involves a "prompt[]" assessment of a penalty by FERC and, if the penalty is not paid within 60 days, the subsequent filing of an action in district court, where "the court shall have the authority to review de novo the law and the facts involved" and to determine the appropriate assessment. *Id*. § 823b(d)(3). Section 31(d) allows the party subject to the civil penalty the option of choosing which of the two procedural methods will apply. *Id*. § 823b(d)(1).

Given the dual scheme set forth in section 31(d), Congress adopted a choice of procedures for the imposition of civil penalties under the Federal Power Act that was intended to, and actually does, mirror the two traditional subsets of the administrative assessment model discussed above: (i) the first option of an adjudicatory proceeding before an ALJ with subsequent deferential judicial review pursuant to the APA and (ii) the second option of a "prompt[]" and informal administrative assessment followed by de novo review in district court. As is the case with the two subsets generally, the two options for penalty assessment procedures under the Federal Power Act share an important common feature: Both provide the defendant with "an opportunity for a full trial as to liability and penalty before a strictly neutral judge, at one before a court, at the other before an ALJ." Funk, 24 SETON HALL L. REV. at 2-3.

That Congress would allow for a choice of assessment procedures in the Federal Power Act, and would give the subject of the penalty assessment that choice, is not unusual. Congress has allowed defendants to choose the procedure for imposing civil penalties in other contexts

1 besides the Federal Power Act.[3] In other statutes, Congress has left it to the agency to choose
2 between an administrative forum and a judicial forum. *See, e.g*., Securities Exchange Act of
3 1934, 15 U.S.C. §§ 78u(d), 78u-1, 78u-2, 78u-3.

4 What *is* unusual, and what concerns amici, is the apparent position of FERC that the
5 choice of the neutral forum—a choice Congress gave to the subjects of penalty assessments under
6 the Federal Power Act—can essentially be circumvented by the procedures the Agency deigns to
7 give subjects who elect a court proceeding under section 31(d)(3).

8 As amici understand FERC's position, FERC maintains that there is no need for this
9 Court's de novo review of the penalty assessment to include the trial-like proceedings typical in
10 court proceedings; it insists no further fact-finding is needed because "the administrative record
11 from the Assessment Order provides this Court with all the facts and legal arguments needed to
12 conduct its de novo review and affirm the Commission's assessed penalties in full." [ECF Dkt.
13 No. 125] at 2. Rather than affording the defendants in this matter "the opportunity for a full trial
14 as to liability and penalty before a strictly neutral judge" that is a hallmark of the court proceeding
15 model (Funk, 24 SETON HALL L. REV. at 2-3), it appears that FERC's position is that *the*
16 *Commission*'s decision to assess penalties after a bare-bones administrative process should
17 preclude the defendants from obtaining a full adjudicative process *in this Court*. FERC's
18 reasoning, it seems, is that the defendants "had a full opportunity, without limitation, to present
19 any arguments and evidence to the Commission." [ECF Dkt. No. 166] at 7. In other words, the
20 crux of FERC's position appears to be that "the process that occurred before the assessment
21 procedure" (*id*. at 5), which FERC labels "adversarial" (*id*. at 8), suffices to allow this Court to
22 conduct a review of the record rather than a trial de novo, as instructed in section 31(d) of the
23 Federal Power Act.[4]

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[3] For example, other similar civil money penalty statutes enforced by the Department of Energy include the Atomic Energy Act, 42 U.S.C. § 2282a(c) (involving penalties for violation of departmental safety regulations); the National Energy Conservation Policy Act of 1978, 42 U.S.C. § 6303(d); and the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8433(d).

[4] Amici note that FERC has argued for a similar approach in other civil money penalty cases under section 31(d)(3). *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

1 Amici see a number of legal and policy problems with FERC's position.

2 A. FERC's Position Cannot Be Squared With The Statute

3 FERC's position conflicts with the plain language of the Federal Power Act.
4 Section 31(d)(3)(B) provides that, if a defendant opts for a district court proceeding, the "court
5 shall have authority to review de novo *the law and the facts* involved." (Emphasis added.)
6 Section 31(d)'s presumption that, after receiving notice of a subject's election to use the process
7 in section 31(d)(3), the agency will "promptly assess such penalty" suggests that the agency need
8 not involve the subject in any proceedings at all prior to assessing a penalty that will be subject to
9 de novo review in the district court. The absence of a statutory requirement for any proceedings
10 before the Commission prior to FERC assessing a penalty strongly suggests that Congress
11 envisioned a full-scale, trial-type proceeding in court to adjudicate the underlying law *and facts*.
12 FERC's position also ignores the fact that Congress was not writing on a clean slate when
13 it adopted the scheme in section 31(d) that gives a defendant the option to choose one of two
14 procedures for administrative penalty assessments. In 1978, Congress adopted the very same dual
15 scheme for civil penalty assessments in two other statutes: the National Energy Conservation
16 Policy Act of 1978[5] and the Powerplant and Industrial Fuel Use Act of 1978.[6] Given their stark
17 similarities, these statutes undoubtedly served as models for the Federal Power Act provision at
18 the core of this case.
19 The legislative history shows that the dual scheme Congress adopted in the National
20 Energy Conservation Policy Act and the Powerplant and Industrial Fuel Use Act was the product
21 of a compromise between the House of Representatives and the Senate in conference. The House
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23 107770, at *14-21 (D. Mass. July 21, 2016) (same); Petitioner Federal Energy Regulatory Commission's Memorandum of Points and Authorities Regarding Review Procedures Mandated
24 by the Federal Power Act, *FERC v. Powhatan Energy Fund LLC*, Civ. A. No. 3:15-CV-452-MHL (E.D. Va. Dec. 31, 2015), ECF No. 39. The district courts in the *City Power* and *Maxim Power*
25 cases have rejected FERC's position. *See City Power*, 2016 U.S. Dist. LEXIS 105421, at *32; *Maxim Power*, 2016 U.S. Dist. LEXIS 107770, at *38-39.

26 [5] Pub. L. No. 95-619, title IV, § 423, Nov. 9, 1978, 92 Stat. 3206, 3262-63 (codified at 42
27 U.S.C. § 6303(d)).

[6] Pub. L. No. 95-620, title VII, § 723, Nov. 9, 1978, 92 Stat. 3289, 3333 (codified at 42
28 U.S.C. § 8433(d)).

members sought to adopt a formal APA-style administrative proceeding for civil penalty assessments, but the Senate members took the position that such assessments should be subject to the traditional full-scale, trial-type proceeding in court. Ultimately, the staff worked out a compromise that afforded the accused violator the choice between an APA-style administrative proceeding (which was favored by the House) or a de novo trial in district court (which was favored by the Senate).

The compromise, as described during conference proceedings on the National Energy Conservation Policy Act, makes clear that Congress conceived of the district court proceeding to be a full-fledged, de novo hearing subject to all the rules and procedures available to litigants in district court:

> The staff met last night and worked out a proposal with respect to procedures for the assessment of civil penalties. The conferees should recognize that the issue here is not whether the Administrator should be authorized to accept civil penalties or not. That is already part of existing law.
>
> So the staff proposal does not go to the question of whether the Administrator should be authorized to assess civil penalties. He already can. That is existing law. The staff proposal goes only to the question of what procedures should be followed, and it provides the following procedure that has three tracks to it:
>
> First, the Administrator would issue a notice of proposed penalty and this would be the way in which the proposed violator would find out that he has some problems. Second, then the alleged violator could elect one of the following courses of action within 30 days. And there are three courses of action.
>
> One, he could pay the proposed penalty, and that would be the end of that.
>
> Second, he could choose to go down the procedure which is outlined in the House language. And that is subsection (d) on page 21 of your comparative print. So he could choose to take essentially the route proposed by the House. This procedure includes, first, a hearing before an administrative law judge in the Department of Energy who would make the initial decision. Second, if the Administrator determines that a violation has occurred, assessment of the penalty by the Administrator on the hearing record would follow, and there would be an opportunity to review that assessment in the appropriate court based upon the record formulated by the administrative law judge where the test would be a test of substantial evidence.
>
> If he did not elect to go the House procedure—in other words, if the person who is charged with the violation did not elect to go by the House procedure, he would have the opportunity to go straight to court without going through the civil assessment. And under that track the Administrator would issue a penalty order on the basis of the evidence before him but without a hearing and file a petition in district court seeking a judgment assessing the civil penalty. The

> FEA would then consult with the Attorney General, only with the Attorney General concerning the suit and then take the alleged violator to court.
>
> The court will consider the violation and the amount of the assessment as a de novo proceeding applying all the normal Federal Rules of Procedure and Evidence. To recap it, we would have at the discretion of someone who was charged with a violation, he could choose one of three possible tacks. He could pay the violation, he could go down the procedure that the House has specified in the House bill, or he could go to court with a de novo proceeding against the Administrator of the Department of Energy.

Tr. of Proceedings, Joint Conference on Energy, 95th Cong. (Oct. 25, 1977) at 585-87 (*see* Attach. A). A similar proposal was made with respect to what would become the Powerplant and Industrial Fuel Use Act of 1978. *See* Tr. of Proceedings, Joint Conference on Energy, 95th Cong. (Nov. 10, 1977) at 2064-65, *available in* U.S. Dep't. of Energy, Office of General Counsel, LEGISLATIVE HISTORY: POWERPLANT AND INDUSTRIAL FUEL USE ACT (PL 95-620) (DOE/GC-0002/2, Vol. 2, June 1979) at 2-1018 to 2-1019 (*see* Attach. B).

The conference reports for the 1978 acts further confirm that Congress intended the scheme for assessing civil penalties to allow the accused violator to choose between (i) an adjudicatory proceeding before an ALJ and (ii) an informal administrative assessment followed by de novo review in district court. As the conference report for the National Energy Conservation Policy Act explained:

> The conference substitute modifies the House language on procedures. Under the provision, the Secretary of Energy (or Federal Trade Commission, as the case may be) shall issue notices of proposed assessments of civil penalties. The notice will inform the alleged violator that he can elect to have the assessment made after an administrative proceeding and judicial review thereof or after a *de novo* proceeding in a district court. The election may not be revoked. This procedure is the same as that adopted in the Powerplant and Industrial Fuel Use Act.
>
> It should be emphasized that although the language of section 333(d)(3)(B) 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.

Likewise, the conference report for the Powerplant and Industrial Fuel Use Act explained:

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> The Secretary shall issue notices of proposed assessments of civil penalties. The notice will inform the alleged violator that he can elect to have the assessment made after an administrative proceeding and judicial review thereof or after a *de novo* proceeding in a district court.

H.R. Rep. No. 95-1749, at 100 (1978), *reprinted in* 1978 U.S.C.C.A.N. 8760, 8793, *also available at* http://hdl.handle.net/2027/mdp.39015087614510?urlappend=%3Bseq=900.

Furthermore, FERC also enforces another civil money penalty provision in the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3414(b). If the penalty is not paid, the NGPA, albeit without the administrative hearing option, applies the exact same language found in section 31(d)(3)(B) of the Federal Power Act: "The court shall have authority to review de novo the law and the facts involved." The legislative history for the NGPA explains this language by stating that "violators may obtain review of [FERC's penalty] assessment through a trial de novo in federal district court." H.R. Rep. No. 95-1752, at 121 (1978), *reprinted in* 1978 U.S.C.C.A.N. 8983, 9038, *also available at* http://hdl.handle.net/2027/mdp.39015087614502?urlappend=%3Bseq=9. *See generally FERC v. Maxim Power Corp*., Civ. No. 15-30113-MGM, 2016 U.S. Dist. LEXIS 107770, at *23-24 & n.1 (D. Mass. July 21, 2016). Indeed FERC itself so interpreted that provision in an enforcement order under that provision of the NGPA. *See id.* at *23-24 (citing *Energy Transfer Partners, L.P*., 121 FERC ¶ 61,282 (2007) ("Congress created an affirmative right for the [penalized] person to receive review of the Commission's assessment in a trial de novo in district court.")).

In amici's view, the only construction of section 31(d) that comports with the plain language of section 31(d), with the 1977-1978 provenance of that provision, and with traditional understandings of administrative penalty assessments is to read the statute as providing for a full-fledged hearing in district court, albeit with an alternative option for an APA-style hearing before an ALJ. Thus, the proper procedure in district court would be a de novo trial, not a de novo review of a limited investigative record compiled by the agency—a record that, in many cases, could be compiled by the agency ex parte. The fact that Congress gave the subjects of civil money penalty assessments a choice under section 31(d) as to whether to defend themselves in an agency proceeding governed by the procedures of the APA or in a de novo court proceeding

should not serve to dilute the process used in court, if that is the avenue chosen by the subject. As the district court in *City Power* reasoned,

> [T]he [Federal Power Act's] instruction "to review de novo the law and the facts involved" likewise signals that the Court should make an independent determination of the issues. The logical procedures to govern that determination are those set forth in the Federal Rules [of Civil Procedure].
>
> Furthermore, the Court does not see why it should place special weight on the agency record or presume that City Power should not get discovery.

FERC v. City Power Mktg., LLC, Civ. A. No. 15-1428 (JDB), 2016 U.S. Dist. LEXIS 105421, at *29 (D.D.C. Aug. 10, 2016). In this regard, amici agree with the district court in *City Power* that the proceeding instituted pursuant to section 31(d)(3) should be governed by the Federal Rules of Civil Procedure, as would other civil actions.

B. FERC's Position Strays Far From The Traditional Civil Penalty Assessment Models

Although FERC characterizes the process it is advocating here as "assessment by informal adjudication and de novo review in district court" ([ECF Dkt. No. 166] at 3), the substance of FERC's position does not resemble the traditional understanding of court proceedings involving civil penalty assessments, where the penalty is assessed by the agency after informal proceedings and is followed by a full-scale, trial-type proceeding in an action brought by the agency in district court. *See* Funk, 24 SETON HALL L. REV. at 11. Although FERC suggests that it has already provided a sufficient "hearing" before the Commission, that proceeding was merely an *investigative* process punctuated by a show cause order (which, itself, is not part of the statutory scheme adopted by Congress). *See* [ECF Dkt. No. 125] at 2-3 (describing FERC's show cause order).

Whatever proceeding FERC may have conducted in this case did not amount to the type of adversarial process before a neutral decisionmaker that is the hallmark of the APA and court proceeding models. Nor does the procedure employed by FERC here resemble the informal hearings that have occasionally been expressly authorized by Congress in certain low-dollar civil money penalty cases. *Compare* Funk, 24 SETON HALL L. REV. at 20-46 (describing the hybrid procedures applicable to the EPA and Coast Guard). Rather, FERC's proceeding was an

investigative proceeding that did not produce the kind of administrative record that would be appropriate for judicial review, much less de novo review, since the defendants did not have the opportunity to participate as a party with the full panoply of discovery rights afforded defendants in APA proceedings or under the Federal Rules of Civil Procedure in court. The defendants participated only as targets of FERC's investigation.

Additionally, FERC cannot circumvent the defendants' election of a court proceeding under section 31(d)(3) by providing the defendants with an opportunity to respond during the assessment investigation. FERC argues that its "Assessment Order was based on an extensive administrative process that provided [the defendants] with numerous procedural mechanisms to offer and support whatever defenses they could muster." [ECF Dkt. No. 125] at 2. But whether *FERC* provided the defendants an opportunity to respond to the Agency's allegations is irrelevant to the question of what procedures the Federal Power Act requires in an action brought in district court under section 31(d)(3). Congress adopted a statutory scheme that allows *defendants* to choose whether the full-scale, trial-type hearing takes place before an ALJ pursuant to section 31(d)(2) or before a district court judge pursuant to section 31(d)(3), and Congress clearly contemplated that defendants might reasonably choose either forum for that full-fledged hearing. It would be bizarre, to say the least, for Congress to have bestowed that choice on defendants only to have a defendant's choice of a full-fledged hearing in district court under section 31(d)(3) be trumped by procedures FERC voluntarily provides to a defendant *before* issuing the Agency's penalty assessment. The defendants in this case chose the district court option available under section 31(d)(3), not the option for a hearing before the Agency. Therefore, any hearing before FERC cannot suffice because that type of hearing is not what section 31(d)(3) guarantees. Section 31(d)(3) guarantees a full-scale hearing in court.

At bottom, what FERC seems to be advocating here is an altogether different assessment regime than the two regimes clearly contemplated by section 31(d), where Congress gave *subjects* the choice between a full-scale, trial-type hearing before an ALJ or a de novo determination by a district court after a full-scale, trial-type hearing. FERC instead appears to seek this Court's imprimatur on a regime where agencies (in this instance, FERC) can unilaterally define the scope

1 of the hearing afforded to subjects if they choose de novo review in court. In other words, FERC
2 seeks to arrogate to itself the decision on the amount of process that subjects receive if they
3 initially opt for a court proceeding under section 31(d)(3) rather than a trial before an ALJ under
4 section 31(d)(2). As section 31(d)(1) makes clear, however, Congress left the decision as to
5 which process to use to defendants, not to FERC.

6 C. FERC's Position Raises Serious Due Process Concerns

7 Amici also have grave due process concerns with FERC's position that section 31(d)(3)
8 entitles defendants to no more than a summary proceeding in district court on the basis of the
9 investigative record compiled by the Agency. A summary proceeding where a court is asked to
10 determine whether a penalty assessment "shall be affirmed, vacated, or modified," without any
11 additional discovery or evidentiary proceedings, conflicts with fundamental due process
12 considerations. For this reason, amici agree with the United States District Court for the District
13 of Massachusetts that "[t]here must be due process rights and factfinding at some level, but by
14 directing FERC to promptly assess a penalty and institute an action in district court if the penalty
15 is not paid, the statute indicates that due process and factfinding take place at the district court
16 [when the option offered in section d(3) is chosen]." *Maxim Power*, 2016 U.S. Dist. LEXIS
17 107770, at *38.

18 Under the Due Process Clause of the Fifth Amendment, the federal government may not
19 deprive a person of property without due process of law. A civil money penalty of a relatively
20 substantial amount—and FERC's penalty assessment of nearly half a billion dollars in this case
21 unquestionably is substantial—is a deprivation of property subject to the *Mathews* balancing test
22 for determining what process is constitutionally required. That test balances three factors:
23 "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous
24 deprivation of such interest through the procedures used, and probable value, if any, of additional
25 procedural safeguards; and (3) the Government's interest, including the fiscal and administrative
26 burdens that the additional or substitute procedures would entail." *Mathews*, 424 U.S. at 321.

27 In applying that test to federal civil penalty proceedings adjudicated by agencies
28 generally, amicus Professor Funk has noted that the *Mathews* test does not inexorably lead to a

1 requirement for a full APA-hearing for all civil penalty actions and that some statutory provisions
2 for assessing relatively small civil penalties using non-ALJ adjudicators and restricted
3 cross-examination procedures might pass the *Mathews* test. *See* Funk, 24 SETON HALL L. REV. at
4 16-19. But Professor Funk has also stressed that, in this context, the size of the prospective
5 penalty matters: "[A]gencies are probably best advised to be sensitive to the *Mathews* factors in
6 light of the size of the penalties involved and the nature of the likely type of violations and
7 penalty considerations involved." *Id*. at 19. Certainly, the interests at stake in this proceeding are
8 a far cry from "the equivalent of traffic tickets for pleasure boats" (*id*. at 41 n.279) where more
9 summary procedures may, perhaps, satisfy constitutional requirements.

10 Regardless, the due process concerns here do not really turn on *FERC*'s process. Courts
11 apply *Mathews* not only as a tool to evaluate administrative agency proceedings but also "as a
12 tool for deciding due process questions in nonadministrative contexts, such as prejudgment
13 attachment, seizure of real property through civil forfeiture, and the right to appointed counsel in
14 civil contempt proceedings to enforce child support orders." Ronald M. Levin, *Administrative*
15 *Procedure and Judicial Restraint*, 129 HARV. L. REV. F. 338, 345 (2016) (footnotes omitted).
16 Under section 31(d), the statute contemplates an administratively *proposed* assessment of a civil
17 penalty; the actual imposition of that penalty must be by the district court. *See* 41 U.S.C.
18 § 823b(d)(5) (providing that FERC can institute an action in district court to recover any unpaid
19 assessment of a civil penalty that "has become a final and unappealable order under
20 paragraph (2)" or "after the appropriate district court has entered final judgment in favor of the
21 Commission under paragraph (3)"); *see also* Diver, 79 COLUM. L. REV. at 1478-79, 1486-87
22 (differentiating between the agency's "initial assessment" or "charging decision" and, when the
23 initial assessment is then contested, the subsequent "enforcement action" that involves a trial).
24 For this reason, the key due process question is whether a summary proceeding where the Court
25 examines the investigative record compiled by FERC, rather than affording the defendants a true
26 adversarial proceeding before a neutral decisionmaker, would run afoul of the *Mathews* test.

27 Applying the *Mathews* test to this case, the proposed penalty of nearly $500 million
28 clearly would affect a substantial private interest. There is certainly a risk of error should the

Court simply review the Agency's investigative file rather than allow the defendants to rebut the factual assertions against them in an evidentiary proceeding. As for the burden on the government, that is the cost of holding the very type of evidentiary proceeding in the district court that is common in other civil penalty statutes—even in cases where less significant penalties are at stake—and that would have been available to the defendants in an APA hearing under section 31(d)(2).

In summary, FERC's apparent suggestion is that a trial-type hearing in this case, or any case brought under section 31(d), is unnecessary under due process. That position cannot be squared with the text of the statute or traditional notions of due process. Although due process would be satisfied if defendants were provided a trial-type hearing before a neutral hearing officer—*either* an ALJ under section 31(d)(2) or a federal district court judge under section 31(d)(3)—the summary assessment of a penalty that FERC seeks in this case falls short of due process requirements.

As with any case in district court, such a proceeding should be governed by the Federal Rules of Civil Procedure, which gives the court ample authority to structure the discovery process, to tailor the introduction of additional evidence, and to entertain motions for summary judgment as would be appropriate under the Civil Rules, informed by considerations of fairness and efficiency. A full trial may not be appropriate or necessary in every proceeding commenced pursuant to section 31(d)(3). Rather, the fact-finding procedures employed in those cases should be substantially equivalent to procedures that apply generally to other district court proceedings. In this regard, amici agree with the district court's analysis in *City Power*:

> In sum, the Court will treat this case like a normal civil action governed by the Federal Rules. That does not, however, stop FERC from seeking affirmance of the Penalty Assessment Order right away. If FERC is convinced that the agency record contains all of the relevant evidence and shows conclusively that City Power is liable, FERC can move for summary judgment promptly. *See* Fed. R. Civ. P. 56(b). But City Power will be free to argue that without discovery "it cannot present facts essential to justify its opposition," at which point the Court might defer consideration of the motion until City Power has had the opportunity to gather those facts. *See* Fed. R. Civ. P. 56(d). And the Court will apply the usual summary judgment standard in resolving any such motion.

2016 U.S. Dist. LEXIS 105421, at *31.

1 Moreover, despite FERC's characterizations of the process afforded to the defendants in
2 this case, the fact remains that the defendants have not yet been offered the sort of evidentiary
3 hearing (either before the Agency or in this Court) that is guaranteed by the Constitution before a
4 significant money penalty can be assessed. This basic principle goes back to *Londoner v. Denver*,
5 210 U.S. 373 (1908), which held that the Due Process Clause guaranteed taxpayers a right to a
6 hearing to challenge tax assessments. Thus, to the extent there are disputed issues of material fact
7 that require resolution in this case (a question on which amici express no views), the question of
8 what process is due should not be a difficult question. *Londoner* long ago established that some
9 type of hearing is required, and *Mathews* makes clear that, given all that is at stake when an
10 agency seeks to impose a penalty of nearly half a billion dollars, the type of summary proceeding
11 contemplated by FERC is constitutionally inadequate.
12 Lastly, given the serious constitutional issues raised by FERC's position, the
13 well-established canon of constitutional avoidance counsels that section 31(d)(3) be interpreted to
14 require a district court to hold an evidentiary hearing when a subject elects that option. *See*
15 *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575
16 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious
17 constitutional problems, the Court will construe the statute to avoid such problems unless such
18 construction is plainly contrary to the intent of Congress."); *cf*. ACUS Rec. 93-1, 58 Fed. Reg. at
19 45,410 (recommending that, "in all cases involving administratively imposed civil money
20 penalties, the opportunity for a formal adjudication pursuant to the APA's provisions . . . be
21 available to parties" in order to "alleviate[]" constitutional "uncertainty" surrounding an agency's
22 adjudicative process). Treating the two options under section 31(d) as involving the traditional
23 subsets of administratively imposed civil money penalties—i.e., either (i) a formal trial-type
24 proceeding before an ALJ or (ii) an informal administrative assessment followed by a trial-type
25 proceeding in district court—avoids the due process concerns raised by FERC's approach. Under
26 the traditional model, a subject "has the opportunity for a full trial as to liability and penalty
27 amount before a strictly neutral judge, at one before a court, at the other before an ALJ." Funk,
28 24 SETON HALL L. REV. at 2-3. FERC's position negates that constitutional guarantee.

D. FERC's Position Diverges From Accepted Best Practices For Civil Administrative Penalty Assessment

Finally, amici are concerned that, considering best practices in civil penalty enforcement, the approval of a truncated proceeding without discovery and development of the record would set a harmful precedent and could undermine the court proceeding model used for civil penalties in other statutes. Although ACUS has long recommended that Congress use the administrative imposition model as a standard model for collecting civil money penalties, ACUS has also recognized that, in particular statutes, Congress may want to retain the court proceeding model. *See* ACUS Rec. 72-6, 38 Fed. Reg. at 19,793 & n.2 (noting the "limited applicability" of administrative assessment of penalties administered by the Internal Revenue Service). Moreover, ACUS in its recommendation has suggested that the potential for assessing large penalties would be a legitimate factor for Congress to consider in that regard. *See id*. at 19,793. In the Federal Power Act, Congress clearly listened to the recommendations of ACUS and adopted both models, giving a defendant the right to elect one process or the other.

In this case, FERC has assessed a combined penalty of nearly $500 million against the defendants. As a matter of both sound policy and common sense, the scale of that assessment alone strongly militates against affording defendants *less* process than they would be afforded under the APA had they selected to proceed under section 31(d)(2). *See* ACUS Rec. 93-1, 58 Fed. Reg. at 45,410 ("[A]nyone facing a civil money penalty imposed by a federal administrative agency with judicial review on the record of the administrative proceedings should have available the opportunity to have his or her case heard by an ALJ in a formal APA hearing. Where penalties would be small, it is of course less likely that such an opportunity would be taken; where they are large, such an opportunity becomes that much more important.").

CONCLUSION

For these reasons, amici curiae respectfully encourage the Court to reject FERC's proposed reading of section 31(d) and, instead, to treat this statute like any other assessment statute requiring a de novo, trial-type hearing in district court governed by the Federal Rules of Civil Procedure.

Dated: November 7, 2016

Respectfully submitted,

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& JACOBSON LLP

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Transcript of Proceedings

UNITED STATES SENATE

JOINT CONFERENCE ON ENERGY

October 25, 1977

United States Senate
Committee on Energy &
Natural Resources

United States House of
Representatives
Committee on Interior &
Insular Affairs

Washington, D.C.

PAGES 584 thru 706

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1 Chairman Staggers. So we will proceed.

2 On last evening when we adjourned we had one problem that
3 we would take up first thing today and that had to do with
4 plant proficiency. There was one or two questions left on
5 that. And one of them was the citizens' suits and civil
6 assessment.

7 And I thought we had an agreement, and I believe we do
8 have. The staff has worked on this very closely during the
9 evening, and I would call on Dr. Cooper to give an explanation
10 of the agreement they worked out. I think it is very close to
11 the agreement we had when we quit, and I would call on him to
12 give an explanation.

13 Dr. Cooper. OK. The staff met last night and worked out
14 a proposal with respect to procedures for the assessment of
15 civil penalties. The conferees should recognize that the
16 issue here is not whether the Administrator should be
17 authorized to accept civil penalties or not. That is already
18 part of existing law.

19 So the staff proposal does not go to the question of
20 whether the Administrator should be authorized to assess civil
21 penalties. He already can. That is in existing law. The
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23 should be followed, and it provides the following procedure
24 that has three tracks to it.

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2 violator would find out that he has some problems. Second,
3 then the alleged violator could elect one of the following
4 courses of action within 30 days. And there are three courses
5 of action.
6 One, he could pay the proposed penalty, and that would be
7 the end of that.
8 Second, he could choose to go down the procedure which is
9 outlined in the House language. And that is subsection (d) on
10 page 21 of your comparative print. So he could choose to take
11 essentially the route proposed by the House. This procedure
12 includes, first, a hearing before an administrative law judge
13 in the Department of Energy who would make the initial decision.
14 Second, if the Administrator determines that a violation has
15 occurred, assessment of the penalty by the Administrator on
16 the hearing record would follow, and there would be an oppor-
17 tunity to review that assessment in the appropriate court based
18 upon the record formulated by the administrative law judge
19 where the test would be a test of substantial evidence.
20 If he did not elect to go the House procedure -- in other
21 words, if the person who is charged with the violation did not
22 elect to go by the House procedure, he would have the oppor-
23 tunity to go straight to court without going through the civil
24 assessment. And under that track the Administrator would issue
25 a penalty order on the basis of the evidence before him but

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1 without a hearing and file a petition in district court seeking
2 a judgment assessing the civil penalty. The FEA would then
3 consult with the Attorney General, only with the Attorney
4 General concerning the suit and then take the alleged violator
5 to court.
6 The court will consider the violation and the amount of
7 the assessment as a de novo proceeding applying all the normal
8 Federal Rules of Procedure and Evidence. To recap it, we would
9 have at the discretion of someone who was charged with a
10 violation, he could choose one of three possible tacks. He
11 could pay the violation, he could go down the procedure that
12 the House has specified in the House bill, or he could go to
13 court with a de novo proceeding against the Administrator of
14 the Department of Energy.
15 Chairman Staggers. Is there a motion to receive --
16 ____________________. Has it been tendered, Mr. Chairman?
17 Chairman Staggers. Well, they haven't tendered it but --
18 ____________________. Mr. Chairman, I think this is pre-
19 cisely what we had offered yesterday with one exception. That
20 the Administrator can go to court under track 3 or track 2
21 rather than just the Attorney General. But nevertheless it is
22 precisely what we have offered, and if there is no objection --
23 ____________________. Will the Senator yield for a question--
24 ____________________. Yes. Yes.
25 ____________________. Yesterday you talked about a package

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1 deal. Is it still a package deal?

2 ______________. It is still a package deal.

3 ______________. With regard to citizen suits?

4 ______________. Yes. Still a package for citizens

5 suits.

6 ______________. Is there objection on our side?

7 Without objection.

8 ______________. Mr. Chairman, I would move that we

9 concur in the Senate's offer of the package deal with citizens'

10 suits and the civil penalty assessment matter.

11 And I think a word of commendation to the staff for help-

12 ing work this thing out is in order.

13 Chairman Staggers. The gentlemen from Illinois.

14 ______________. Mr. Chairman, I am just curious as to

15 why there is a specific provision here that the Attorney General

16 will only have a consultative role. Normally it is the

17 Department of Justice and the Attorney General that represent

18 the government in a suit. These, we heard yesterday, there are

19 going to be suits involving very substantial sums in sizable

20 amounts.

21 It would seem to me that to put the FEA or DOE, as the case

22 may be, directly in court without the Attorney General repre-

23 senting the government is not a very good precedent to estab-

24 lish. Now I wonder whether this exists in other provisions of

25 law or what the reason for reducing the Attorney General to

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1 merely a consultative role.

2 ____________________. I might just briefly -- but the
3 reasoning in back of it was that we wanted the cases to be
4 settled as quickly as possible and referring them to the
5 Justice Department, they only have so many lawyers and they
6 are tied up -- they don't have the expertise. That is the
7 first thing.

8 We have done this in several other cases out of our
9 committee with the Securities and Exchange Commission and the
10 Federal Trade Commission and others -- and the ICC. So it is
11 just following a precedent we have had before.

12 And they have many more lawyers, let me say, in this
13 agency than they do to handle these cases in the Justice
14 Department.

15 ____________________. Mr. Chairman, if I may briefly respond,
16 the instances that you cited, the examples that you mentioned
17 are all examples involving independent regulatory agencies. I
18 see some difference between them and the FEA and the DOE. But
19 I would also like to make one additional point. I would hope
20 that we are not somehow establishing a precedent with this
21 suggested compromise for other sections of the bill where the
22 question of civil penalties are involved. Because we heard
23 yesterday when we deferred action on this that similar pro-
24 visions are intertwined in other parts of the bill. And I would
25 hope that there was no understanding on the part of the House

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1 in accepting this compromise offered by the Senate that we
2 were somehow establishing a precedent as to how we would deal
3 with those other sections of the statute -- coal conversion and
4 so on.
5 ____________. I can assure the gentleman this is
6 not the case and that there is no intermingling of the two
7 conditions whatsoever.
8 ____________. Mr. Chairman, in response to the
9 comments made by my good friend Mr. Anderson, I would like to
10 observe several things. First of all, at least this member of
11 the conference regards having the Department of Energy to be
12 able to go to court to sue to collect as being a matter of
13 great importance. And the reason is that they have assessed
14 a civil penalty, we have conceded much, and I for one do not
15 trust the Department of Justice to carry this thing forward.
16 And I can cite an enormous number of cases and kinds of cases
17 where the Department of Justice has been, in my view at least,
18 highly derelict in carrying forward matters of this kind and of
19 this importance.
20 And I would point out that this is in connection with
21 assessment of civil penalties which are important. Now more
22 importantly I think that we are establishing a precedent. We
23 have been groping towards a way of accommodating the Senate and
24 arriving at a compromise which would be bearable for all parties
25 in connection with the matters related to the assessment of

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1 civil penalties which appeared not once in the bill, but I
2 believe three or four times. And for that reason I think it is
3 important that we understand what we are doing.
4 There is one other point that I think bears consideration,
5 and that is that the Department of Justice has precisely 11
6 attorneys assigned to this kind of case. I am not sure that
7 11 attorneys assigned to this kind of case is going to make the
8 kind of impact on the kind of problems that we might very well
9 meet in this area. And for that reason I believe that it is
10 quite urgent that the Department of Energy be able to take the
11 matter directly to court on its own.
12 ______________. Question.
13 Chairman Staggers. The question occurs upon the motion of
14 the gentleman from Michigan. All in favor of the motion will
15 let it be known by saying aye.
16 (Chorus of ayes.)
17 Chairman Staggers. Opposed no.
18 (Chorus of noes.)
19 Chairman Staggers. I don't know whether the -- The
20 question was, and I will put it again, as to whether we go along
21 with the offer made by the Senate and the compromise worked out
22 by our staffs last night, which is practically what we agreed
23 upon before we left yesterday afternoon.
24 So I put the question again. All in favor of that motion
25 of the gentleman from Michigan will let it be known by saying

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1 aye.

2 (Chorus of ayes.)

3 Chairman Staggers. Opposed no.

4 (Chorus of noes.)

5 Chairman Staggers. I heard that one. The motion is so
6 agreed and we pass on to the next issue which is the automobile
7 fuel standards. And there are four major questions in this
8 section.

9 This is a Senate proposal, so I would call on the Senate
10 to discuss or their Senate staff as they see fit.

11 ____________________. Mr. Chairman, I would recognize
12 Senator Metzenbaum who is the author of this statement.

13 Senator Metzenbaum. Mr. Chairman, members of the House,
14 I would like to make some preparatory comments about this
15 particular amendment. First of all, let me put it in its
16 proper context with respect to the gas guzzlers tax. I do not
17 support the gas guzzlers tax but there are many who do. And I
18 don't believe it is a question of this or that nor need it be.
19 In fact, the administration takes the position that they would
20 like to see both the gas guzzlers tax as well as this part of
21 the law enacted. Therefore, it seems to me, and we will not
22 in this committee, at least while I am on it, will not be
23 getting into the issue of the gas guzzlers tax, that being an
24 issue for another part of the Senate to deal with.

25 The UAW supports this provision. The auto manufacturers

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14 Attachment B
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DOE/GC-0002/2
Vol. 2 of 11

LEGISLATIVE HISTORY

POWERPLANT AND INDUSTRIAL FUEL USE ACT

PL 95-620

1978

VOLUME 2

UNITED STATES DEPARTMENT OF ENERGY

Legislative History

Powerplant and Industrial Fuel Use Act
PL 95—620

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1 JOINT CONFERENCE ON ENERGY

2 - - -

3 Thursday, November 10, 1977

4 - - -

5 United States Senate
Committee on Energy and
6 Natural Resources

7 United States House of
Representatives
8 Committee on Interior and
Insular Affairs

9 Washington, D. C.

10 The Conference met, pursuant to recess, at 10:00
11 o'clock a.m. in Room 2123, Sam Rayburn Building, the Honorable
12 Harley Staggers, Acting Chairman of the Conference, presiding.
13 Present: Senators Haskell, Johnston, Ford, Bennett,
14
15 Representatives Staggers, Dingell, Moffett, Foley,
16 Brown (Ohio), Collins, Rogers,
17 Chairman Staggers. The Committee will come to order.
18 Yesterday when we stopped we agreed to come back to the
19 impact assistance program, and there have been some changes
20 that have been suggested by the staff. I think that they
21 are very good suggestions, and I would like to yield to the
22 gentleman from Colorado for any comment he might have. Mr.
23 Haskell.
24 Senator Haskell. Mr. Chairman, I would concur that
25

1 order.

2 The Chairman. The gentleman from Michigan will give his

3 counterproposal.

4 Mr. Dingell. Mr. Chairman, I am not quite sure what is

5 the order of events now. Are we passing over --

6 Senator Ford. No. I wanted to let the Senator from New

7 Hampshire win and the Senate proposes that you bring your

8 pocket proposal out.

9 Mr. Dingell. I am delighted to and the staff will pass it

10 out. Mr. Chairman, I seek recognition for purposes of making

11 a motion.

12 The Chairman. The gentleman from Michigna.

13 Mr. Dingell. Mr. Chairman, I move that the House offer the

14 Senate the following proposal:

15 Mr. Chairman, my colleagues should know that this is

16 practically the same proposal agreed to by the Conferees once

17 before.

18 The FEA Administrator issues a notice of proposed penalty.

19 Then, the Alleged violator elects one of the following

20 courses of action within 30 days.

21 A. Pays the proposed penalty or

22 B. Follows the House procedure (section e(4) on page 103)

23 i. hearing with an administrative law judge who makes

24 an initial decision

25 ii. assessment of penalty by the Administrator on the

1 hearing record.

2 iii. review of the assessment by a court of appeals

3 based on the record formulated by the administrative law judge

4 or

5 C. Administrator issues a penalty order on the

6 basis of the evidence before him without a hearing and files

7 a petition in district court seeking a judgment which affirms

8 his assessment of the civil penalty. The FEA shall only con-

9 sult with the Attorney General concerning the civil suit.

10 The court will consider the violation and the amount of the

11 assessment as a de novo proceeding, applying all normal federal

12 rules of procedure and evidence.

13 D. Can compromise at any time.

14 III. Agreed to citizen suit provisions.

15 Mr. Brown (Michigan). Since this is the House's court,

16 I presume, it seems to me that the first part might have merit

17 but I don't see how you can apply the same kind of legal

18 thinking to a citizen suit with the -- as a civil -- as a

19 utility gypping or something, to a situation in the coal

20 conversion. You are comparing apples and oranges. It seems

21 to me the only citizen suit that should be pemitted is the

22 citizen suit that the gentleman from Louisiana mentioned and

23 that is the citizen suit to require the Administrator to

24 perform his duty. That makes eminent good sense whereas

25 citizen suits directly do not at all it seems to me. All this

COAL CONVERSION--Part X

ADMINISTRATIVE PROCEDURES

ISSUES FOR WHICH THERE ARE NO STAFF RECOMMENDATIONS

Citizen Suits

The House provides that any aggrieved person may commence a civil action for mandatory or prohibitive injunction relief against--

(a) a person who is allegedly violating provisions of this legislation, or

(b) any Federal agency which has responsibility under this legislation if there is an alleged failure of such agency to perform any nondiscretionary act or duty.

The civil suit must be brought in the United States district court. Notice must be provided at least 60 days prior to the filing of the suit. If the FEA begins and diligently prosecutes the civil action to provide for compliance, the citizen suit may not begin but the person may intervene as a matter of right in the FEA's action. Provision is made for awarding cost of litigation to any party whenever the court determines the award is appropriate. (Item 11.e., p. 19)

The Senate has no comparable provision.

Civil Penalties

The House provides that FEA shall assess civil penalties and provides procedures for assessing civil penalties.

The Senate provides for civil penalties, but does not state who assesses them and does not provide

procedures. The effect is to have the court assess the penalties through the Justice Department. (Item 11.f.II., p. 19).

Coal Reserves Disclosure

The Senate directs the FEA to require disclosure of all coal reserves except small reserves.

The House does not have a comparable provision. (Item 17, p. 23)

Coal Price Monitoring

The Senate provision directs the FEA to monitor coal prices and report annually to Congress on trends in coal prices. (Item 18, p. 23)

The House does not have a comparable provision.

Studies

The Senate provides a 2-year Presidential study of coal industry performance and competition.

The House has no comparable provision. (Item 22, p. 24)

Energy Information

The Senate provision directs that any energy information acquired, collected, or held by the Department of Energy be subject to section 11(d) of ESECA.

The House has no comparable provision. (Item 25, p. 24)