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ADMINISTRATIVE LAW PROFESSORS
JEFFREY S. LUBBERS, WILLIAM FUNK ET AL.
9

10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA
12

13 FEDERAL ENERGY REGULATORY
14 COMMISSION,

15 Plaintiff,

16 v.

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

19 Defendants.
20
21
22
23

No. 2:13-cv-02093-TLN-DB

**NOTICE OF MOTION AND MOTION
FOR LEAVE TO FILE 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; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: December 8, 2016
Time: 2:00 p.m.
Judge: Hon. Troy L. Nunley

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that, on December 8, 2016 at 2:00 p.m., or as soon thereafter as the matter may be heard before the Honorable Troy L. Nunley, in Courtroom 2 of the above-referenced Court, located at 501 I Street, 15th Floor, Sacramento, California, proposed 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 will, and hereby do, move this Court for leave to file a brief as amici curiae in connection with the Motion to Affirm Civil Penalties (ECF Dkt. No. 136) filed by plaintiff Federal Energy Regulatory Commission (“FERC”).

As set forth in amici’s motion, the Court should grant leave to file the proposed amici curiae brief because these twelve administrative law professors have a substantial interest in this case and will provide the Court with unique information to assist the Court in resolving the issues raised by FERC’s Motion to Affirm Civil Penalties. This Motion is based upon this Notice, the Memorandum of Points and Authorities in support thereof, the proposed amici curiae brief attached hereto as Attachment 1, and any further evidence or argument the Court may consider upon hearing the motion.

Dated: November 7, 2016

Respectfully submitted,

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP

/s/ Jeremy Jones
Jeremy Jones (SBN 292596)
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Michael J. Anstett (*pro hac vice* pending)

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Louis J. Virelli III
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Stetson University College of Law

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Administrative law professors Jeffrey S. Lubbers; William Funk; Jonathan H. Adler;
3 Emily Hammond; Michael Herz; Linda Jellum; William S. Jordan, III; Harold J. Krent; Don
4 LeDuc; Ronald M. Levin; Nathan A. Sales; and Louis J. Virelli III respectfully move this Court to
5 grant them leave to file a brief as amici curiae in connection with the Motion to Affirm Civil
6 Penalties (ECF Dkt. No. 136) filed by plaintiff Federal Energy Regulatory Commission
7 (“FERC”). As explained in their proposed brief, amici are law professors who regularly write and
8 teach about federal administrative law and procedure. They therefore have a keen interest in the
9 proper development of federal administrative law and policy and are well positioned to provide
10 the Court with an institutional perspective on the broader implications of the statutory and due
11 process rights at stake in this civil penalty proceeding.

12 This Court has “broad discretion to appoint amici curiae.” *Hoptowit v. Ray*, 682 F.2d
13 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472
14 (1995); *see also Missouri v. Harris*, No. 2:14-cv-00341-KJM-KJN, 2014 U.S. Dist. LEXIS
15 89716, at *7 (E.D. Cal. June 30, 2014) (same). “Generally, courts have exercised great liberality
16 in permitting an amicus curiae to file a brief in a pending case,” and “[t]here are no strict
17 prerequisites that must be established prior to qualifying for amicus status; an individual seeking
18 to appear as amicus must merely make a showing that his participation is useful to or otherwise
19 desirable to the court.” *In re Roxford Foods Litig.*, 790 F. Supp. 987, 997 (E.D. Cal. 1991)
20 (quoting *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990)).

21 Even when the parties are well represented, “an amicus may provide important assistance
22 to the court.” *Jamul Action Comm. v. Stevens*, No. 2:13-cv-01920-KJM-KJN, 2014 U.S. Dist.
23 LEXIS 107582, at *13-15 (E.D. Cal. Aug. 5, 2014) (quotation omitted). Indeed, amicus briefs are
24 “frequently welcome” from nonparties “concerning legal issues that have potential ramifications
25 beyond the parties directly involved or if the amicus has ‘unique information or perspective that
26 can help the court beyond the help that the lawyers for the parties are able to provide.’” *NGV*
27 *Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005)
28 (quotation omitted); *see also California v. U.S. Dep’t of Labor*, No. 2:13-CV-02069-KJM-DAD,

1 2014 U.S. Dist. LEXIS 5439, at *3 (E.D. Cal. Jan. 14, 2014); *National Petrochemical & Refiners*
2 *Ass'n v. Goldstene*, No. CV-F-10-163 LJO DLB, 2010 U.S. Dist. LEXIS 61394, at *5 (E.D. Cal.
3 June 3, 2010).

4 In the end, “[t]he touchstone is whether the amicus is ‘helpful,’” *U.S. Department of*
5 *Labor*, 2014 U.S. Dist. LEXIS 5439, at *3 (citation omitted), and when the proposed brief meets
6 these standards, the amicus brief “should normally be allowed,” *Cnty. Ass'n for Restoration of*
7 *the Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999). Amici
8 respectfully submit that the proposed amici curiae brief readily meets these standards.*

9 As administrative law scholars, the twelve undersigned professors have a strong interest in
10 the proper resolution of the administrative law and due process issues presented here. As amici
11 explain in their proposed brief, they have grave concerns about the broader implications of
12 FERC’s apparent position that the scope of a district court’s “de novo review” of a civil penalty
13 assessment under section 31(d) of the Federal Power Act, 16 U.S.C. § 823b(d), can be defined
14 and circumscribed by the amount of “process” the agency unilaterally, and on an *ad hoc* basis,
15 allows a defendant in assessing the civil penalty. Amici note, too, that FERC has made similar
16 arguments about the scope of the “de novo review” mandated by section 31(d)(3) in other cases.
17 *See FERC v. City Power Mktg., LLC*, Civ. A. No. 15-1428 (JDB), 2016 U.S. Dist. LEXIS
18 105421, at *24-32 (D.D.C. Aug. 10, 2016) (describing FERC’s arguments); *FERC v. Maxim*
19 *Power Corp.*, Civ. No. 15-30113-MGM, 2016 U.S. Dist. LEXIS 107770, at *14-21 (D. Mass.
20 July 21, 2016) (same); Petitioner Federal Energy Regulatory Commission’s Memorandum of
21 Points and Authorities Regarding Review Procedures Mandated by the Federal Power Act, *FERC*
22 *v. Powhatan Energy Fund LLC*, Civ. A. No. 3:15-CV-452-MHL (E.D. Va. Dec. 31, 2015), ECF
23 No. 39, at 2 (arguing that “the most appropriate procedure would be a motion to affirm the Order
24 Assessing Penalties followed by responsive briefing”).

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27 * Additionally, no party’s counsel authored the proposed amici curiae brief in whole or in
28 part, and no party or party’s counsel made a monetary contribution to fund the preparation or
submission of the proposed amici curiae brief. *Cf. Fed. R. App. P. 29(c)(5)*.

1 Although the district courts in the *City Power* and *Maxim Power* cases have rejected
2 FERC’s arguments, amici recognize that the law in this area remains unsettled. *Compare City*
3 *Power*, 2016 U.S. Dist. LEXIS 105421, at *25 (concluding that, “[n]otwithstanding the
4 significant proceedings that occurred at the agency level, the Court will treat this as a standard
5 civil action, governed by the Federal Rules of Civil Procedure.”); *Maxim Power*, 2016 U.S. Dist.
6 LEXIS 107770, at *39 (concluding that section 31(d)(3)’s “*de novo* review means treating this
7 case as an ordinary civil action governed by the Federal Rules of Civil Procedure that culminates,
8 if necessary, in a jury trial”), *with FERC v. Silkman*, Civ. A. No. 13-13054-DPW, 2016 U.S. Dist.
9 LEXIS 48409, at *26 n.5 (D. Mass. Apr. 11, 2016) (noting that *de novo* review “may or may not
10 require other trial-like proceedings”). *See also* [ECF Dkt. No. 163] (Mar. 1, 2016) at 6
11 (explaining that this Court has not “conclusively determine[d] whether Defendants have the right
12 to a jury trial or another means of fact-finding, to call witnesses, to offer evidence, to cross-
13 examine FERC’s witnesses, or have the right of discovery”). As these cases illustrate, the
14 resolution of the legal issues presented in this case regarding the nature of the “*de novo* review”
15 by district courts required by the Federal Power Act undoubtedly will have ramifications for
16 parties other than those directly involved in this case.

17 Leave to file the proposed amici curiae brief should be granted because the undersigned
18 administrative law professors have significant expertise in the administrative law and policy
19 issues implicated by civil money penalty proceedings. As experts in this area, the undersigned
20 are well positioned to assist the Court in placing the core administrative law and due process
21 issues raised in the instant suit in a broader context. In the view of amici, FERC’s approach in
22 this case runs counter to longstanding principles of federal administrative law, the text and history
23 of the statute providing for “*de novo* review” by a court in this and other civil penalty assessment
24 cases, and basic due process. Indeed, allowing the type of truncated, hearing-less proceeding
25 advocated by FERC in this case would set an unfortunate precedent that would undermine the
26 court enforcement model used in other statutes for civil administrative penalties. In particular,
27 amici bring to the Court information regarding the historical underpinnings of administrative civil
28 penalty assessments and the “*de novo* review” contemplated by Congress in enacting

1 section 31(d). As amici explain in their proposed brief, that history belies the reading of
2 section 31(d) that FERC has advocated in this case and in other cases.

3 For these reasons, amici respectfully submit that the Court may find additional briefing
4 from the twelve undersigned professors helpful in grappling with the significant statutory
5 interpretation and due process issues arising in this case. *See, e.g., Garcia v. Google, Inc.*, 786
6 F.3d 733, 739 n.3 (9th Cir. 2015) (en banc) (acknowledging assistance of amicus briefs, including
7 from “copyright and Internet law scholars,” as being “helpful to our understanding of the
8 implications of this case from various points of view”); *321 Studios v. MGM Studios, Inc.*, 307
9 F. Supp. 2d 1085, 1106-07 (N.D. Cal. 2004) (granting motion of copyright law professors to file
10 an amicus brief). Amici therefore respectfully move the Court to grant permission to submit the
11 attached brief to express their views as scholars that a de novo, trial-type hearing governed by the
12 Federal Rules of Civil Procedure is not only legally required but also sound policy.

13 **CONCLUSION**

14 For the reasons set forth above, the Court should grant the twelve undersigned
15 administrative law professors leave to file a brief as amici curiae in this case.

16 Dated: November 7, 2016

Respectfully submitted,

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18 FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP

19 /s/ Jeremy Jones

20 Jeremy Jones (SBN 292596)

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