No. 18-2326

In the

United States Court of Appeals

For the Fourth Circuit

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner-Appellee,

v.

POWHATAN ENERGY FUND, LLC, *et al.*,

Respondents-Appellants.

On Appeal from the U.S. District Court for the Eastern District of Virginia
Honorable M. Hannah Lauck | Case No. 3:15-cv-00452

Brief for *Amici Curiae* Edison Electric Institute, Electric Power Supply Association, and Energy Trading Institute in Support of Respondents-Appellants and Reversal

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CORPORATE DISCLOSURE STATEMENT

Edison Electric Institute (EEI) is the national association of investor-owned electric utility companies. It has no parent company, subsidiaries or affiliates. EEI has no outstanding shares or debt securities in the hands of the public, and no publicly-owned company has a 10% or greater ownership interest in EEI.

Electric Power Supply Association (EPSA) is a national trade association that represents the competitive power industry and is incorporated under the laws of the District of Columbia. EPSA is not publicly held. There is no parent corporation or any publicly held corporation that owns 10% or more of EPSA's stock.

Energy Trading Institute (ETI) is a non-profit organization. ETI is not publicly held. There is no parent corporation or any publicly held corporation that owns 10% or more of ETI's stock.

Dated: January 22, 2019

/s/ *Matthew A. Fitzgerald*
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STATEMENT OF INTEREST[1]

This brief is filed jointly by Edison Electric Institute (EEI), Electric Power Supply Association (EPSA), and Energy Trading Institute (ETI) as *amici curiae* in support of the statute of limitations arguments made by Respondent-Appellants Powhatan Energy Fund, LLC, HEEP Fund, Inc., CU Fund, Inc., and Houlian Chen. All parties have consented to the filing of this brief.

EEI is the association that represents U.S. investor-owned electric companies, international affiliates and industry associates worldwide. EEI members provide electricity for about 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States and contributes $880 billion to the U.S. economy through direct employment, contracts, supply chains, investments, and the jobs and investments induced by these activities. Collectively, these activities and investments represent five percent of the nation's gross domestic product.

EEI members own about 75% of transmission system facilities in the country, and they include both vertically integrated utilities and competitive transmission

[1] No counsel for a party authored this brief in whole or in part. No party, no party's counsel, and no person or entity other than the *amici* themselves and their counsel have made a monetary contribution to the preparation or submission of this brief.

developers, as well as power producers that participate in wholesale power markets. EEI's members make considerable investments in energy infrastructure—investments the Federal Energy Regulatory Commission ("FERC") and Congress have recognized are critical to ensure a reliable, cost-effective, and modern bulk power system.

EEI's members are extensively regulated, and FERC's jurisdiction is broad. The national electric grid includes nearly a quarter-million miles of high-voltage lines, most of which are subject to FERC's jurisdiction, as well as generation capable of generating over 400 million megawatt hours of electricity per month.

EPSA's members include 14 companies, along with state and regional partners, that represent the competitive power industry in their respective regions. EPSA's members have significant financial investments in electric generation and electricity marketing operations across the country.

EPSA seeks to promote a favorable market environment for the competitive electric industry; to support the development of state and federal legislative and regulatory policies that encourage the development and implementation of competitive wholesale markets for electricity; and to improve the public's awareness of the competitive electric industry.

The Energy Trading Institute is a non-profit organization and the preeminent champion of open, transparent, competitive, and fair electricity and related markets in the United States of America. The Institute ethically and responsibly communicates with government legislators, regulators, and policy makers to promote laws and policies that create, sustain, and advance electricity and related markets with these traits. The Institute represents a diverse group of energy market participants, ranging from asset owning entities, marketers, hedge funds, exchanges and companies that support participation in the competitive markets.

Amici are thus particularly well-positioned to understand and explain to this Court the implications of this case far beyond these Respondents. The five-year statute of limitations in 28 U.S.C. § 2462 should begin ticking when the alleged violation occurs. That clear and simple rule combines a reasonable reading of the word "accrue" in the statute with the practical need to avoid an absurd result—that the government itself controls whether and when the limitations period ever begins for its own enforcement actions.

As a regulated industry, this industry craves certainty, steadiness, and repose from long-past missteps. *Amici*'s members, as well as other market participants and ultimately electricity customers, are all best off with a clear statute of limitations. *Amici* express no position on the underlying alleged violations in this case.

ARGUMENT

I. The district court accepted the foundations of the correct ruling—that accrual occurs at the time of the alleged violation.

The district court believed that this question was a close and uncertain one. The court *sua sponte* certified an immediate appeal, stating its order addressed "a controlling question of law as to which there is substantial ground for difference of opinion." Order, Dkt. 108. The court also stayed the proceedings to await the outcome of this appeal, first *sua sponte* and then again on the parties' request. *Id.*; *see also* Order, Dkt. 117 (granting a stay through the mandate on this appeal).

The building blocks of the correct outcome already stand in the district court's order. The court recognized that statutes of limitations need to be read so that they carry practical effect and understood that its holding undercut "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty." *Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013); JA 390-91. The district court also repeatedly acknowledged that the steps FERC must take between an alleged violation and adjudicating it are under FERC's control. JA 406, 409, 411, 412. In short, the district court came within a stone's throw of the correct outcome here, but then erroneously turned back.

A. The district court admitted it was rejecting the "commonsensical" view of § 2462.

The district court accepted that it was "commonsensical that the claim would accrue at the time of the violation." JA 390. The court agreed that the proper reading of a statute of limitations is a practical one. "Statutes of limitations are to be interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of time within which an action must be brought." JA 401 (quoting *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967)). And the court acknowledged that starting the statute of limitations when the violation occurs "comports well with the overall structure of § 823b," and in fact was the *more practical* of the constructions argued to the court. JA 390; JA 416 ("Respondent's arguments seem more consistent with the overall statutory scheme of § 823b and the purposes of statutes of limitations.").

B. The district court understood that the steps FERC must take before filing in court are under FERC's control.

After extensive weighing of the arguments, the district court ruled that it would follow the "plain language" of § 2462, specifically the word "accrue." JA 390. The court decided that the cause of action could not "accrue" until FERC had the "right to commence any action in a district court." JA 390. Because the statute

provides for several steps between an alleged violation and a court filing, the court found no accrual would occur until all the steps had occurred. That is where the district court's analysis went wrong.

Certainly several steps must occur between a violation and a federal lawsuit. Those steps are "(1) FERC issues an OSC [order to show cause and notice of proposed penalty]; (2) the alleged violator has chosen the Alternate Option; (3) a penalty has been assessed by order; (4) sixty days have elapsed without the violator paying the assessed penalty; and (5) FERC has instituted a suit in a district court." JA 404.

The key is that FERC *controls those steps*—both what they are and when they occur. Because FERC controls the steps, if the law pegs accrual only to their end, FERC—which serves as both the investigator and the prosecutor of potential violations—controls whether its own time limit ever even begins. This is fundamentally unfair to alleged violators.

Step One. FERC issues an Order to Show Cause and Notice of Proposed Penalty. *See* 16 U.S.C. § 823b(d)(1) (requiring FERC to give notice of its proposed penalty). FERC decides when to do this. The district court aptly observed in an earlier order that FERC's process for issuing such an order is an "elaborate and often lengthy investigatory process the Commission conducts as an enforcer, not as a

neutral arbiter." *Federal Energy Reg. Comm'n v. Powhatan Energy Fund, LLC,* 286 F. Supp. 3d 751, 766 & n.25 (E.D. Va. 2017) (noting that the investigation stage here lasted over four years).

Step Two. Upon receiving the Order, the alleged violator chooses what the court termed the "Alternate Option," meaning *de novo* adjudication in the district court (or by not making an election waives it). By statute, the target gets only 30 calendar days to make this election. 16 U.S.C. § 823b(d)(2)(A) (requiring "an election . . . within 30 calendar days after receipt of notice"). The Order itself also notifies the target of this time limit. 16 U.S.C. § 823b(d)(1) (requiring FERC's order to "inform such person of his opportunity to elect in writing within 30 days after the date of receipt of such notice to have the [Alternate Option] apply"). Consistent with the statute, history shows that the targets do make this election within 30 days. *See infra*, Table 2, at p. 19.

Step Three. FERC assesses its penalty by issuing an Assessment Order. "[N]o procedural requirements apply to the order assessing penalties except that it be "'promptly assessed.'" *Powhatan Energy Fund, LLC*, 286 F. Supp. 3d at 760 (quoting 16 U.S.C. § 823b(d)(3)(A)). As the district court understood, "no additional factfinding occurs" during this time. *Id.* at 766. In fact, FERC can point to "nothing in the statute, regulation, or policy statement that requires [it] to act as a neutral

decision-maker when making its penalty assessment under the Alternate Option." *Id.* at 768. There is no evidentiary standard FERC must meet, and there are no procedures FERC must follow apart from those it voluntarily chooses to place on itself. *Federal Energy Reg. Comm'n v. Silkman*, 233 F. Supp. 3d 201, 219 (D. Me. 2017); *Powhatan Energy Fund*, 268 F. Supp. 3d at 767-68.

Rightly viewed, the Assessment Order is simply another step in the prosecutorial process. There is no two-sided process on the path to an Assessment Order. Targets have no discovery rights, face no neutral decision-maker, have no right to appear live at FERC, and cannot cross-examine any witnesses against them.

Yet this penalty-assessment phase typically takes FERC months. *See* JA 390 (noting that "the possibility exists that the intended 'prompt' penalty assessment might not be prompt after all").

And at the end of the process, the Assessment Order nearly always matches the initial Order. That is, FERC controls the process completely and it does what its enforcers want. The chart below compares the recommended penalties in FERC's initial Order to Show Cause and Notice of Proposed Penalty compared to those later issued in Assessment Orders. The rare cases in which there is any difference at all are in bold and described:

Table 1: Comparison of Staff-Proposed Penalties to FERC-Assessed Penalties[2]

Case Name / Docket No.	Remedy Proposed by FERC Staff Civil Penalty (CP); Disgorgement (D)	Commission Assessed Remedy
Barclays Bank PLC, et al. / IN08-8-000	CP: Barclays - $435,000,000 Brin - $1,000,000 Smith - $1,000,000 Levine -$1,000,000 Connelly - $15,000,000 D: Barclays - $34,900,000 141 FERC ¶ 61,084 (Oct. 31, 2012)	CP: Barclays - $435,000,000 Brin - $1,000,000 Smith - $1,000,000 Levine -$1,000,000 Connelly - $15,000,000 D: Barclays - $34,900,000 144 FERC ¶ 61,041 (July 16, 2013)
Kourouma / IN11-2-000	CP: $50,000 134 FERC ¶ 61,105 (Feb. 14, 2011)	CP: $50,000 135 FERC ¶ 61,245 (June 16, 2011)
Lincoln Paper and Tissue, LLC / IN12-10-000	CP: $4,400,000 D: $379,016.03 140 FERC ¶ 61,031 (July 17, 2012)	**CP: $5,000,000** D: $379,016.03 144 FERC ¶ 61,162 (Aug. 29, 2013) (the Commission increased the civil penalty to remove cooperation credit)
Competitive Energy Services, LLC IN12-12-000	CP: $7,500,000 D: $166,841.13 140 FERC ¶ 61,032 (July 17, 2012)	CP: $7,500,000 D: $166,841.13 144 FERC ¶ 61,163 (Aug. 29, 2013)
Richard Silkman / IN12-13-000	CP: $1,250,000 140 FERC ¶ 61,033 (July 17, 2012)	CP: $1,250,000 144 FERC ¶ 61,164 (2013)

[2] This chart shows all Federal Power Act-related cases post EPAct 2005 that proceeded to the Assessment Order stage. The Energy Policy Act of 2005, Public L.109-58.

Case Name / Docket No.	**Remedy Proposed by FERC Staff Civil Penalty (CP); Disgorgement (D)**	**Commission Assessed Remedy**
Houlian Chen, et al. / IN15-3-000	CP: CU Fund - $10,080,000 HEEP Fund - $1,920,000 Chen - $1,000,000 Powhatan - $16,800,000 D: CU Fund - $1,080,576 HEEP Fund - $173,100 Powhatan - $3,465,108 149 FERC ¶ 61,261 (Dec. 17, 2014)	CP: CU Fund - $10,080,000 HEEP Fund - $1,920,000 Chen - $1,000,000 Powhatan - $16,800,000 D: CU Fund - $1,080,576 HEEP Fund - $173,100 Powhatan - $3,465,108 151 FERC ¶ 61,179 (May 29, 2015)
Maxim Power Corp., et al. / IN15-4-000	CP: Maxim - $5,000,000 Mitton - $50,000 150 FERC ¶ 61,068 (Feb. 2, 2015)	CP: Maxim - $5,000,000 Mitton - $50,000 151 FERC ¶ 61,094 (May 1, 2015)
City Power Marketing, LLC and K. Stephen Tsingas / IN15-5-000	CP: City Power - $14,000,000 Tsingas - $1,000,000 D: $1,278,358 (Joint and Several) 150 FERC ¶ 61,176 (Mar. 6, 2015)	CP: City Power - $14,000,000 Tsingas - $1,000,000 D: $1,278,358 (Joint and Several) 152 FERC ¶ 61,012 (July 2, 2015)
ETRACOM LLC and Michael Rosenberg / IN16-2-000	CP: ETRACOM - $2,400,000 Rosenberg - $100,000 D: ETRACOM - $315,072 153 FERC ¶ 61,314 (Dec. 16, 2015)	CP: ETRACOM - $2,400,000 Rosenberg - $100,000 D: ETRACOM - $315,072 155 FERC ¶ 61,284 (June 17, 2016)
Coaltrain Energy, L.P., et al. / IN16-4-000	CP: Coaltrain - $26,000,000 Peter Jones – $5,000,000 Shawn Sheehan - $5,000,000 Robert Jones - $1,000,000 Jack Wells - $500,000 Jeff Miller - $500,000 Adam Hughes - $250,000 D: Coaltrain - $4,121,894 154 FERC ¶ 61,002 (Jan. 6, 2016)	CP: Coaltrain - $26,000,000 Peter Jones – $5,000,000 Shawn Sheehan - $5,000,000 Robert Jones - $1,000,000 Jack Wells - $500,000 Jeff Miller - $500,000 **Adam Hughes – none** D: Coaltrain - $4,121,894 155 FERC ¶ 61,204 (May 27, 2016) (Hughes was not found liable)

Step Four. Sixty days must go by without payment by the target. Exactly like the 30-day election period, § 823d sets this period by statute. 16 U.S.C. § 823b(d)(3)(B) ("If the civil penalty has not been paid within 60 calendar days after the assessment order has been made . . . the Commission shall institute an action in the appropriate district court"). Under the statute, refusing to pay for 60 days is the proper (and only) method for the target to express disagreement with FERC's assessed penalty.

Step Five. FERC files its lawsuit. This step is under FERC's control as well, of course.

As a whole, therefore, the investigation and assessment period and its timeline falls under FERC's control. The district court recognized this fact, repeatedly. JA 406 (noting that these phases are "subject to few statutory or regulatory requirements and [are] almost exclusively within the Commission's control"); JA 409 ("the timing of the case . . . remains almost exclusively in the Commission's control"); *id.* ("the amount of time largely remained within the Commission's control"); JA 411 ("the plaintiff in this action (FERC) exercised substantial—indeed, nearly *exclusive*—control over the nature and speed of the administrative proceedings"); JA 412 ("the Commission almost exclusively controls the amount of time the administrative proceedings take").

In ruling that FERC "*almost* exclusively" controls the timeline, the court apparently referred to the 90 days that the statute allocates to the target to make its decisions. That is, FERC *exclusively* controls all except 90 days of the 5-year limitations period. Yet even those 90 days—a 30-day period to elect a path, and 60 days to elect whether to pay the penalty, are set by statute and the initiation of each period is also statutorily committed exclusively to control by FERC. They are not open-ended opportunities for a respondent to stretch out a timeline even if one wanted to.

To be sure, under the proper view of the statute of limitations FERC must organize itself to account for these short statutory periods of time, so that it can still sue within five years of the alleged violation. But FERC has not (at least, not yet) argued that it cannot do this.

C. When prerequisites to filing suit are within the government's control, they cannot delay "accrual" of the cause of action.

When the predicates to the government filing suit are within the government's control, they cannot constitute accrual of the statute of limitations without destroying its purpose. The district court's ruling obliterates the statute of limitations, because FERC now controls whether the time limit ever starts ticking. No time limit should be left entirely under the control of the party who must abide by it.

The meaning of the word "accrue" does not compel the district court's conclusion here. "In common parlance a right accrues when it comes into existence." *Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013) (unanimously rejecting a discovery rule for accrual under § 2462). As the Court held in *Gabelli*, "the standard rule is that a claim accrues when the plaintiff has a complete and present cause of action." *Id.*

Here, FERC's right to pursue enforcement "comes into existence" when the alleged violation occurs. Although FERC must check some boxes along the way, no external forces limit FERC from doing so. In enforcement, the government in many contexts must undertake some steps before filing in court, but those steps do not prevent the limitations period from running. For instance, in *Gabelli* the SEC pursued fraudulent market timing violations. The SEC stated that for more than a year after the violations, the SEC did not discover the conduct because the defendants had taken affirmative acts to conceal it. *S.E.C. v. Gabelli*, No. 1:08-cv-3868, Dkt. 1 ¶ 46 (S.D.N.Y. Apr. 24, 2008). That type of violation, particularly when concealed, required meaningful investigation to unearth and reach the stage where the SEC could file a complaint in court. Even so, that time counted against the 5-year period in § 2462.

Similarly, in many criminal contexts, prosecution cannot begin without significant investigation and an indictment from a grand jury. Like FERC here, the

prosecutor must do some work ahead of filing in court—the police must investigate the incident, the prosecutor must call a grand jury, present facts and witnesses, and obtain the indictment.

Yet these necessary steps do not delay the beginning of the limitations period. "In common parlance," the government acquired "a complete and present cause of action" when the alleged violation occurred. *Gabelli*, 568 U.S. at 448; *id.* (calling it "the most natural reading of the statute" that "a claim . . . accrues—and the five-year clock begins to tick—when a defendant's allegedly [violative] conduct occurs"). The government's time spent arranging itself and checking necessary boxes before filing in court do not affect the running limitations period.

II. The limitations issue carries implications far beyond this case, and consequences of the endless limitations period would be severe.

If this Court were to accept the district court's theory that "accrual" occurs only when the target refuses to pay the assessed penalty because it would prefer *de novo* adjudication of the allegations in federal court, the consequences for industry and customers would go well beyond the facts and circumstances of this case.

A. The limitations period at issue applies broadly to Federal Power Act enforcement by FERC.

The five-year limitations period in 28 U.S.C. § 2462 broadly applies to all FERC enforcement under the Federal Power Act—not just to energy trading as

here. FERC opens many inquiries and investigations and litigates with some frequency. Given the complex web of regulations and tariff provisions that FERC enforces, even well-intentioned and careful market participants and owners and operators of jurisdictional energy infrastructure can potentially find themselves subject to an investigation or subsequent enforcement action.

According to its annual reports, FERC's enforcement office has opened more than one hundred inquiries in the past two years. *See* FERC Office of Enforcement, 2017 Report on Enforcement 53–55, Docket AD07-13-011 (Nov. 16, 2017) (Enforcement Report 2017); FERC Office of Enforcement, 2018 Report on Enforcement 62–64, Docket AD07-13-012 (Nov. 15, 2018) (Enforcement Report 2018).[3]

Along with, or following, those inquiries, FERC opens an average of more than twenty full investigations each year. From 2013 to 2018, the Office of Enforcement opened 24, 17, 19, 17, 27, and 24 investigations each successive year. *See* FERC Office of Enforcement, 2013 Report on Enforcement 22, Docket AD07-13-006 (Nov. 21, 2013) (Enforcement Report 2013); FERC Office of Enforcement, 2014 Report on Enforcement 21, Docket AD07-13-008 (Nov. 20, 2014)

[3] FERC Enforcement Reports from 2007 through 2018 are available at: https://www.ferc.gov/enforcement/enforce-res.asp?csrt=9255361642728561006.

(Enforcement Report 2014); FERC Office of Enforcement, 2015 Report on Enforcement 23, Docket AD07-13-009 (Nov. 19, 2015) (Enforcement Report 2015); FERC Office of Enforcement, 2016 Report on Enforcement 26, Docket AD07-13-010 (Nov. 17, 2016) (Enforcement Report 2016); Enforcement Report 2017, at 24; Enforcement Report 2018 at 25.

Most of those investigations involved potential Federal Power Act (the act under which FERC regulates EEI's members) cases. *See* Enforcement Report 2013, at 22; Enforcement Report 2014, at 21; Enforcement Report 2015, at 23; Enforcement Report 2016, at 26; Enforcement Report 2017, at 24; Enforcement Report 2018, at 25 (outlining investigations of potential market manipulation, potential tariff violations, market behavior rule issues, and potential violations of Commission orders).

Federal Power Act cases cover a broad array of regulatory requirements. They are not limited to the anti-market manipulation rules allegedly violated here. *See* 16 U.S.C. § 824v(a); 18 C.F.R. § 1c.2. Instead, FERC enforcement actions under the Federal Power Act can involve electric reliability standards that broadly regulate grid security, 16 U.S.C. §§ 824o, 824o-1; tariff and FERC market rules that govern almost every aspect of the FERC-created organized electric markets, *i.e.*, 18 C.F.R. §§ 35.1, 35.28, 35.41; statutes regulating public utility transmission and interstate

sales of electric energy at wholesale, 16 U.S.C. §§ 824, 824d, 824e; and rules relating to filings and disclosures to FERC under 16 U.S.C. § 825c and 18 C.F.R. Ch. 1, Subch. B, Pt. 35. Even well-intentioned, well-run market participants can find themselves subject to investigation as FERC attempts to ensure compliance with this array of rules and regulations. And FERC has received hundreds of self-reports of violations over the past several years. Enforcement Report 2018, at 17 (noting 498 self-reports over the past five years).

B. These investigations and enforcement have tremendous stakes.

The money at stake in these investigations and enforcement is significant. The Federal Power Act provides for civil penalties of over $1 million per day, per violation. 16 U.S.C. § 825o-1(b).[4] This high penalty mark governs in all of these types of cases, not just market manipulation cases, and the same enforcement procedures apply. 16 U.S.C. § 823b; 18 C.F.R. Ch. 1, Subch. A, Pt. 1b.

As of late 2018, FERC was litigating three actions in federal court, seeking nearly $100 million in civil penalties and disgorgement. Enforcement Report 2018,

[4] The $1 million-per-day penalty cap listed in 16 U.S.C. § 825o-1(b) has been adjusted upward for inflation, and is now moving to $1,269,500 per day. *Civil Monetary Penalty Inflation Adjustments Order No. 85*, 166 FERC ¶ 61,014 (2019) (increasing the cap under the Federal Civil Penalties Inflation Adjustment Act of 2015, effective as of publication in the Federal Register).

at 6 (listing $98.6 million in civil penalties and disgorgement); *id.* at 7 (noting over $ 200 million more in civil penalties still pending before Commission).

And over the past eleven years FERC has negotiated settlements in these enforcement actions of more than $1.2 billion—"$776 million in civil penalties and approximately $511 million in disgorgements." Enforcement Report 2018, at 12.

C. Virtually all targets elect the *de novo* judicial path, just as Respondents here did.

On its face § 823b provides two paths to adjudication of alleged violations—either administrative or judicial—at the option of the respondent. But in practice, virtually all targets elect a trial in federal district court.

As the table below shows, since 2005 (when Congress created the modern era of FERC enforcement in EPAct 2005) only one respondent has chosen an administrative proceeding before an Administrative Law Judge. Meanwhile, at least a dozen respondents have chosen the same path as Respondents here: a "prompt" penalty assessment followed by a *de novo* trial in the district court:

Table 2: Post EPAct 2005 Federal Power Act Enforcement[5]

Case Name	Dates of Conduct	OSC & Notice of Proposed Penalty	*De Novo* Election Date
Barclays Bank PLC, Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith IN08-8-000	11/2006 to 12/2008	10/31/2012	11/29/2012
Moussa Kourouma, d/b/a Quntum Energy LLC IN11-2-000	3/13/2009 to 6/8/2009	2/14/2011	*Elected an ALJ instead*
Deutsche Bank Energy Trading, LLC IN12-4-000	1/29/2010 to 3/24/2010	9/5/2012	10/4/2012
Lincoln Paper and Tissue, LLC IN12-10-000	7/2007 to 2/2008	7/17/2012	8/14/2012
Rumford Paper Company IN12-11-000	7/2007 to 2/2008	7/17/2012	8/14/2012
Competitive Energy Services, LLC IN12-12-000	7/2007 to 2/2008	7/17/2012	7/27/2012
Richard Silkman IN12-13-000	7/2007 to 2/2008	7/17/2012	7/27/2012
Houlian Chen, Powhatan Energy Fund, LLC, HEEP Fund, LLC, CU Fund, Inc. IN15-3-000	6/1/2010 to 8/18/2010	12/17/2014	1/12/2015
Maxim Power Corp., Maxim Power (USA), Inc., Maxim Power (USA) Holding Co. Inc., Pawtucket Power Holding Co., LLC, Pittsfield Generating Co., LP, and Kyle Mitton, IN15-4-000	7/2010 to 8/2010	2/2/2015	3/4/2015
City Power Marketing, LLC and K. Stephen Tsingas, IN15-5-000	7/2010	3/6/2015	4/6/2015
ETRACOM LLC and Michael Rosenberg, IN16-2-000	5/14/2011 to 5/31/2011	12/16/2015	1/14/2016
Coaltrain Energy, L.P., Peter Jones, Shawn Sheehan, Robert Jones, Jeff Miller, Jack Wells, IN16-4-000	6/15/2010 to 9/2/2010	1/6/2016	2/5/2016
Footprint Power LLC, Footprint Power Salem Harbor Operations LLC IN18-7-000	6/2013 to 7/2013	6/18/2018	7/13/2018

[5] This table lists all FPA-related investigations post EPAct 2005 in which FERC issued an Order to Show Cause and Notice of Proposed Penalty.

As the chart shows, the path Respondents chose here is the path taken by nearly every serious Federal Power Act enforcement. Targets recognize the need for a neutral decision-maker by the time an Order to Show Cause issues. *See, e.g.*, *Federal Energy Reg. Comm'n v. Silkman*, 2019 WL 113782, at *12-13 (D. Me. Jan. 4, 2019) (describing extensive contacts and reports between FERC enforcement staff and the Commissioners about the investigation in the months before the Order to Show Cause issued).

D. FERC investigations and enforcement already take a long time.

The district court recognized that FERC investigations are not always "prompt." It noted that "'prompt' seems generous" given that FERC had "conducted a nearly five-year investigation into two months of allegedly manipulative trading." JA 390-91. And the court recognized that "the investigation and penalty assessment process imposed few statutory or regulatory requirements or limits on the Commission." *Id.; id.* at 29 (stating that "more than five years passed between the start of the Two-Month Alleged Manipulation Period and FERC's action in this Court, which gives Respondents their *first* opportunity for an adversarial adjudication").

More broadly, in more than a dozen recent Federal Power Act investigations FERC has issued an Order to Show Cause and Notice of Proposed Penalty. In only

two cases did the process end within roughly two years of the alleged violations. *See Moussa Kourouma, d/b/a Quntum Energy LLC*, 134 FERC ¶ 61,105 (2011); *Deutsche Bank Energy Trading, LLC*, 140 FERC ¶ 61,178 (2012). Neither of these cases proceeded to the district court. *Kourouma* elected the administrative option. *Moussa Kourouma, d/b/a Quntum Energy LLC*, Docket No. IN11-2-000 (Mar. 16, 2011). *Deutsche Bank Energy Trading LLC* settled before FERC assessed a penalty by contested order. 142 FERC ¶ 61,056 (2013) (Order Approving Stipulation and Consent Agreement).

In all other cases the investigation period spanned more than four years, and often exceeded five years, from the date the alleged violations began. *See Barclays Bank PLC, et al.*, 141 FERC ¶ 61,084 (2012) (four to six years); *Lincoln Paper and Tissue, LLC*, 140 FERC ¶ 61,031 (2012) (over four years); *Rumford Paper Co.*, 140 FERC ¶ 61,030 (2012) (over four years); *Competitive Energy Services, LLC*, 140 FERC ¶ 61,032 (2012) (over four years); *Richard Silkman*, 140 FERC ¶ 61,033 (2012) (over four years); *Maxim Power Corporation, et al.*, 150 FERC ¶ 61,068 (2015) (four and half years); *City Power Marketing, LLC and K. Stephen Tsingas*, 150 FERC ¶ 61,176 (2015) (four and a half years); *ETRACOM LLC and Michael Rosenberg*, 153 FERC ¶ 61,314 (2015) (four and a half years); *Coaltrain Energy,*

L.P., et al., 154 FERC ¶ 61,002 (2016) (five years); *Footprint Power LLC and Footprint Power Salem Harbor Op. LLC*, 163 FERC ¶ 61,198 (2018) (five years).

In this particular case, the district court observed that FERC's active investigation was "comprised of three years of investigation conducted before Respondents had . . . the opportunity to provide any arguments or information countering the investigation." *Powhatan Energy Fund, LLC*, 286 F. Supp. 3d at 768 n.26 (quoting FERC asserting that it began investigating in August 2010 and sent letters to Respondents inviting response in August 2013).

Nor is there any reliable way to predict how long FERC will take to issue its Order Assessing Civil Penalties, after the target elects *de novo* review. While in one case FERC assessed a penalty within three months, in most cases it takes much longer and in many it has taken more than a year. *See, e.g., Maxim Power Corporation et al.*, 151 FERC ¶ 61,094 (2015) (within two months of the *de novo* election); *but see Coaltrain Energy, L.P., et al.*, 155 FERC ¶ 61,204 (2016) (almost four months after election); *ETRACOM LLC and Michael Rosenberg*, 155 FERC ¶ 61,284 (2016) (five months after election); *Lincoln Paper and Tissue, LLC*, 144 FERC ¶ 61,162 (2013) (a year after election); *Competitive Energy Services, LLC*, 144 FERC ¶ 61,163 (2013) (a year after election); *Richard Silkman*, 144 FERC ¶ 61,164 (2013) (a year

after election). In this case, it took more than four months between the election and the penalty assessment.

Thus, as the table below shows, in all recent Federal Power Act cases in which FERC has petitioned in the district court, more than five years elapsed between the beginning of the alleged violation and the filing of the petition.[6] In one case it took seven years.

Table 3: Time from Alleged Violation to Judicial Filing[7]

Case Name	Dates of Conduct	Date of Court action for review
Barclays Bank PLC, Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith IN08-8-000	11/2006 to 12/2008	10/9/2013
Lincoln Paper and Tissue, LLC IN12-10-000	7/2007 to 2/2008	12/2/2013
Competitive Energy Services, LLC IN12-12-000	7/2007 to 2/2008	12/2/2013
Richard Silkman IN12-13-000	7/2007 to 2/2008	12/2/2013
Houlian Chen, Powhatan Energy Fund, LLC, HEEP Fund, LLC, CU Fund, Inc. IN15-3-000	6/1/2010 to 8/18/2010	7/31/2015
Maxim Power Corp., Maxim Power (USA), Inc., Maxim Power (USA) Holding Co. Inc., Pawtucket Power Holding Co., LLC, Pittsfield Generating Co., LP, and Kyle Mitton, IN15-4-000	7/2010 to 8/2010	7/1/2015
City Power Marketing, LLC and K. Stephen Tsingas IN15-5-000	7/2010	9/1/2015
ETRACOM LLC and Michael Rosenberg IN16-2-000	5/14/2011 to 5/31/2011	8/17/2016

[6] In some cases, time frames may have been affected by so-called "tolling agreements" between FERC and enforcement targets. But tolling agreements do not affect the point here—that FERC investigations and enforcement actions stretch on for years and that FERC ultimately controls their pace. In any event, it appears no tolling agreement existed in this case.

[7] This table lists all FPA-related investigations post EPAct 2005 that resulted in a penalty enforcement proceeding in federal district court.

Coaltrain Energy, L.P., Peter Jones, Shawn Sheehan, Robert Jones, Jeff Miller, Jack Wells IN16-4-000	6/15/2010 to 9/2/2010	7/27/2016

E. The district court's ruling leaves FERC unbounded in time, which is damaging to both industry and customers.

As the chart above shows, FERC has normally taken more than five years to bring these cases while the statute of limitations issue has been uncertain. After all, there are no on-point Circuit court decisions on this question to date. JA 382. Put differently, FERC has not normally kept its process within five years even when it cannot be certain whether the statute of limitations is running.

If this Court were to affirm the ruling below that "accrual" under 28 U.S.C. § 2462 only happens at the *end* of these processes, the time would become unbounded. There would be nothing left to keep FERC's processes even within the *general vicinity* of five years from the alleged violation. There are numerous significant problems with this.

First, open-ended investigations are antithetical to the purpose of the general statute of limitations in 28 U.S.C. § 2462. Open-ended investigations needlessly damage their targets—both the companies and their employees. During the passing years, evidence may be lost, memories fade, and employees may leave the company. Once the public learns of the investigations, they cause even more problems.

Opportunities may evaporate and employees may lose their jobs because of the long and public pendency of these cases.

Second, the sheer uncertainty caused by long-lingering threats of multi-million-dollar civil penalties and disgorgements hurts both the companies and electricity customers. Markets can be disrupted by remedies like disgorgement and uncertainties about the rules and their import that persist for years during these long investigations. Such uncertainty can increase finance costs for multi-billion-dollar investments, which in turn can increase the electricity prices for customers in an industry that passes its costs, including the cost of capital, on to customers through rates.

In short, regardless of the ultimate liability or innocence adjudicated years later by the district court, long-term exposure to such *potential* liability damages the health of private electric companies. Such companies need to attract outside investment to continue to ensure reliable electric service. Those investments buy expensive assets like generation and transmission facilities used to serve all customers. EEI's members alone typically invest more than $100 billion per year in generation, transmission, and distribution infrastructure.[8] Long-running risks of

[8] EEI, *Delivering America's Energy Future* 9 (Feb. 7, 2018), http://www.eei.org/issuesandpolicy/finance/wsb/Documents/EEI_WSB_Remarks.pdf.

significant civil penalties and disgorgements from dragging-on investigations would make this capital flow harder to sustain or harder (and more expensive) to obtain.

Third, long and open-ended investigations make little sense given the policing job FERC enforcement is supposed to do. The rules, regulations, and tariffs being enforced are complex and often change. *See, e.g.*, PJM Open Access Transmission Tariff (totaling 3,570 pages);[9] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at ¶ 23 (2009) (PJM changing its tariff provisions addressing how it distributed certain transmission credits in response to market behaviors). In these circumstances, the rules need to be clear and precedents need to be set quickly to provide useful guidance to other actors.

FERC has often recognized the importance of transparency in its rules, and how that transparency fosters efficient markets and just and reasonable rates. *E.g.*, News Release, Federal Energy Regulatory Commission, FERC Issues Final Rules to Improve Regional Market Transparency, Interconnections (April 19, 2018) (announcing the issuance of two final rules designed to "improve transparency in organized electric power markets").[10]

[9] https://www.pjm.com/directory/merged-tariffs/oatt.pdf.
[10] https://www.ferc.gov/media/news-releases/2018/2018-2/04-19-18-E-2.asp#.XEVTRFxKhPY.

Yet the open-ended investigation period accepted by the district court's opinion here unreasonably allows enforcement to lag far behind the evolution of market rules and tariffs. That hurts the target of the FERC investigation and may end up providing obsolete-at-best guidance to the rest of the industry, and stands in tension with the way FERC otherwise discharges its market oversight responsibilities.

Fourth, an open door to endless investigations also would place an improper thumb on the scale favoring settlement with the government regardless of actual culpability. As a regulated industry that ultimately recovers its costs from electricity customers, this industry craves certainty and steadiness. Removing the statute of limitations as a meaningful constraint on FERC's investigation and enforcement authority would pressure all companies, particularly those *least* culpable, toward settlement.

CONCLUSION

This Court should reverse and hold that the statute of limitations begins to run when the alleged violation occurs.

Dated: January 22, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limitation of Fed. R. App. P. 29(a)(5) because it contains 5,904 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally-spaced typeface using Microsoft Word, in 14-point size.

Dated: January 22, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, the foregoing was filed with the Clerk of this Court through the CM/ECF system, which will serve all counsel of record.

Dated: January 22, 2019

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