No. 18-2326

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL ENERGY REGULATORY COMMISSION, Petitioner-Appellee,	)	
v.	)	On Appeal from the United States District Court for the Eastern District of Virginia
POWHATAN ENERGY FUND, LLC, et al., Respondents-Appellants.	)	

APPELLANTS' PETITION FOR REHEARING
OR REHEARING EN BANC

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March 27, 2020

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INTRODUCTION AND STATEMENT OF PURPOSE

Rehearing or rehearing en banc is warranted for four reasons.

First, the panel overlooks material legal matters by providing incompatible answers to the question of when Federal Energy Regulatory Commission ("FERC") claims for civil penalties under the Federal Power Act ("FPA") "first accrue[]"—and thus when the five-year limitations period in 28 U.S.C. § 2462 begins. After holding in Part II that FERC's claim accrues *sixty days after the Commission issues a penalty assessment order* ("PAO"), the panel in Part III adopts the opposite view that FERC's claim accrues *at the time of the alleged violation*.

The decision misunderstands the fact that, regardless of the adjudicator selected—district court judge or administrative law judge ("ALJ")—or how far the enforcement action has progressed, *FERC's claim is the same*: that respondents violated the FPA and should face civil penalties. That single claim cannot "first accrue[]" under § 2462 at multiple points in time. By holding that it can, the panel nullifies the statute of limitations for district court actions, granting FERC *unlimited* time to bring its claim before a federal judge—an initial five years from the alleged violation to issue an Order to Show Cause ("OSC"), then an *indefinite* amount of time to issue a PAO, then an *additional five years and sixty days* from the PAO to file suit. *See* Chart, *infra* p. 10.

Second, the holding in Part II contravenes Supreme Court precedent. *Gabelli v. Securities & Exchange Commission*, 568 U.S. 442, 448-49 (2013), held that under § 2462, a claim for civil penalties "accrues—and the five-year clock begins to tick—when a defendant's allegedly fraudulent conduct occurs." The panel (initially) refuses to accept this accrual date, asserting that FERC's claim cannot accrue until all "statutory prerequisite[s]" to filing a district court action are complete. *FERC v. Powhatan Energy Fund, LLC*, 949 F.3d 891, 894 (4th Cir. 2020) ("Op."). But this conflicts with Supreme Court decisions instructing that preconditions to filing suit *within the plaintiff's control* do not delay claim accrual. *See McMahon v. United States*, 342 U.S. 25 (1951); *Reading Co. v. Koons*, 271 U.S. 58 (1925).

Third, the panel's further holding that FERC's pre-suit administrative process is a "proceeding" that stops § 2462's five-year clock squarely conflicts with *United States v. Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985), which held that administrative processes do *not* toll the statute of limitations. Moreover, even the decisions on which the panel relies—*3M Co. (Minnesota Mining & Manufacturing) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), and *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987)—treat only certain administrative actions, namely *statutorily mandated adversarial adjudications*, as "proceedings" under § 2462. In straining to fit FERC's administrative process into that category, the decision dramatically expands the definition of adjudication, contradicting *Meyer* and *3M*.

Fourth, the decision raises an exceptionally important question: Can the electric industry count on *Gabelli*'s promise of a "fixed" five-year statute of limitations, or can FERC evade *Gabelli* and bring civil penalty actions "at any distance of time" from the underlying conduct? 568 U.S. at 448, 452 (quoting *Adams v. Woods*, 2 Cranch 336, 342 (1805)). If the panel decision stands, the latter result—which Chief Justice John Marshall described as "utterly repugnant to the genius of our laws," *Adams*, 2 Cranch at 342—prevails.

BACKGROUND

Because the FPA provides no limitations period for enforcement actions, the general statute of limitations for civil penalties in 28 U.S.C. § 2462 applies. In relevant part, § 2462 provides: "[A]n action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued…."

Under FPA § 31(d), FERC must provide a "notice of the proposed penalty" that informs the respondent of its statutory right to elect procedures for adjudication within thirty days. 16 U.S.C. § 823b(d)(1). Under the "Default Option," FERC provides "an opportunity for an agency hearing … before an [ALJ,]" after which "a determination of violation" is made and the Commission assesses a penalty. *Id.* § 823b(d)(2)(A). But if the "Alternate Option" is selected, FERC "shall promptly

assess" a penalty and, if the penalty remains unpaid after sixty days, "shall institute an action" in federal district court in which the "court shall have authority to review de novo the law and the facts involved." *Id*. § 823b(d)(3).

This case focuses on trading of an electricity financial product between June 1, 2010 and August 3, 2010, which FERC began investigating in August 2010. JA 374-75. On December 17, 2014, FERC issued an OSC, which provided the statutorily required notice of proposed penalty and of respondents' right to elect the Alternate Option. JA 376-78. Respondents exercised that right and, on May 29, 2015, FERC issued a PAO. JA 379-80. Respondents did not pay the assessed penalty, and FERC filed its action on July 31, 2015. JA 380-81.

Respondents moved for partial dismissal because FERC's claims for all but four days of the challenged trading were time-barred. The district court denied the motion but certified an interlocutory appeal, which this Court granted. On February 11, 2020, the panel affirmed.

ARGUMENT

I. THE PANEL'S INTERNALLY INCONSISTENT DECISION OVERLOOKS THE NATURE OF FERC'S CLAIM

A. The Holdings in Parts II and III Are Irreconcilable

As the panel explained, "[a]t the heart of this case is the meaning of 28 U.S.C. § 2462—specifically, when a claim has 'first accrued'—as applied to the enforcement scheme Congress set out in the FPA's Alternate Option." Op. 896.

Remarkably, the panel contradicts itself on this central question, adopting multiple and inconsistent accrual dates for the same FPA claim.

The panel emphasizes in Part II that "FERC's claim did not accrue"—and § 2462's five-year limitations period did not start running—"*until [FERC] had issued the PAO* and [respondents] refused to pay the assessed penalties for 60 days." *Id*. at 901 (emphasis added). Yet the panel reverses course in Part III, adopting an entirely different accrual date when asserting that "as prescribed by § 2462, FERC has five years *from the date of the commission of the unlawful conduct* to investigate an alleged violation and issue a notice of proposed penalty, which it does through an OSC." *Id*. at 904 (emphasis added). The decision never explains how FERC's claim for civil penalties under the FPA's Alternate Option can "first accrue[]" under § 2462 at two different times.

Compounding the confusion, the panel's position in Part II rests on its view that FERC's claim could not accrue "until each statutory prerequisite to suit was met." *Id*. at 894. But the panel abandons that premise when addressing the Default Option in Part III. Before FERC "commence[s] the requisite ALJ adjudication" under the Default Option, *id.* at 902, it must issue a notice of proposed penalty and allow the recipient to elect adjudicatory procedures. 16 U.S.C. § 823b(d); *see* 18 C.F.R. § 385.1508(a). The panel nonetheless concludes that, under the Default

Option, FERC's claim accrues at the time of the alleged violation, *not* when all statutory prerequisites are satisfied. Op. 902-03.[1]

B. The Decision's Contradictions Stem from a Misunderstanding of FERC's Claim

The fundamental disconnect between the accrual dates in Parts II and III of the decision demonstrates that the panel overlooked the nature of FERC's claim in an FPA enforcement action. This oversight is material because § 2462's five-year year limitations period runs "from the date when *the claim* first accrued" (emphasis added).

A claim accrues when "all of its elements have come into existence such that an omniscient plaintiff could prove them in court." *William A. Graham Co. v. Haughey*, 646 F.3d 138, 146 (3d Cir. 2011); *see RSM, Inc. v. Herbert*, 466 F.3d 316, 323 (4th Cir. 2006) (under § 2462, claims "accrue[d]" when "the elements of each violation occurred"). Here, FERC's claim is that respondents engaged in "manipulative" trading that violated the FPA and therefore should be subject to civil penalties and disgorgement. Am. Compl. ¶¶ 110-12, JA 85-86. Under FERC's anti-

[1] The decision is equally contradictory regarding *the stopping point* for § 2462's five-year clock. According to the panel, *the OSC* must be "issu[ed] … within five years of the allegedly unlawful conduct" under the Alternate Option. Op. 901. But if the Default Option is elected, the OSC does *not* stop the clock; rather "a § 2462 'proceeding' before an ALJ must take place" and "must be commenced within five years of the wrongful conduct." *Id*. at 902-03. Thus, the OSC retroactively qualifies as a "proceeding" that satisfies § 2462 *only if* the Alternate Option is subsequently chosen.

manipulation rule, the elements of such a claim are: "(1) us[ing] a fraudulent device, scheme or artifice … or engag[ing] in any act, practice, or course of business that operates or would operate as a fraud or deceit …; (2) with the requisite scienter; (3) in connection with the purchase or sale of … electric energy or … transmission of electric energy subject to the jurisdiction of the Commission." *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49 (2006). By FERC's telling, those elements came into existence when the challenged trades were executed. Am. Compl. ¶¶ 84-100, JA 79-83. That is when FERC's claim "first accrued."

Notably, if respondents had selected the Default Option, FERC's *claim*—that respondents violated the FPA and should face penalties—would be no different; it simply would be adjudicated before an ALJ rather than a federal district court judge. Because FERC's claim is the same under either the Default or the Alternate Option, it cannot "first accrue[]" at different points depending on which procedural path is chosen. Yet that is what the decision dictates. *See* Op. 901, 902-03.

Likewise, under the Alternate Option, there is no distinction between the claim asserted in the OSC and the claim adjudicated in district court. The claim is the same throughout and arises (and thus accrues) from the alleged misconduct, *not* FERC's penalty assessment. The FPA directs the district court to review de novo "the law and the facts involved." 16 U.S.C. § 823b(d)(3)(B). The court below—

like the other courts that have considered the question—specifically rejected FERC's argument that de novo review of "the law and the facts involved" is limited to the "findings" in FERC's PAO and self-styled administrative record. JA 34-35. Instead, the federal court action involves a "plenary trial," JA 35, of whether respondents violated the FPA.

The precise penalty assessed in FERC's PAO simply is not part of the claim. The penalty may be modified by the court—or even by FERC itself before the district court's decision. 16 U.S.C. § 823b(d)(3)(B), (d)(4). Because FERC's "claim" under the Alternate Option arises from the alleged violation and is unchanged by the PAO, that claim "first accrued" when the alleged violation occurred. The panel's holding that the claim "first accrued" (or, more accurately, re-accrued) at a later point solely "for purposes of filing the district court action," Op. 901, creates two different accrual dates for the same claim.

II. THE HOLDING IN PART II CONFLICTS WITH SUPREME COURT PRECEDENT ON CLAIM ACCRUAL

A. Part II's Holding Violates Gabelli

Gabelli held that "a claim based on fraud accrues—and the five-year clock [in § 2462] begins to tick—when a defendant's allegedly fraudulent conduct occurs," emphasizing that § 2462 "sets a *fixed date* when exposure to the specified Government enforcement efforts ends." 568 U.S. at 448 (emphasis added). Part II of the decision contravenes *Gabelli* by holding that FERC's fraud-based claim

accrues—and § 2462's "five-year clock begins to tick," *id.*—not when the allegedly fraudulent conduct occurs but rather sixty days after FERC issues a PAO. Op. 901.

By so holding, the decision fails to "set[] a fixed date when exposure to [FERC's] enforcement efforts ends." *Gabelli*, 568 U.S. at 448. As the chart below shows, the decision allows FERC to expose alleged wrongdoers to civil penalties *indefinitely* by postponing the initiation of federal court adjudication for *two* five-year periods *and* an *undefined* interlude in which FERC "promptly assess[es]" a penalty.[2]

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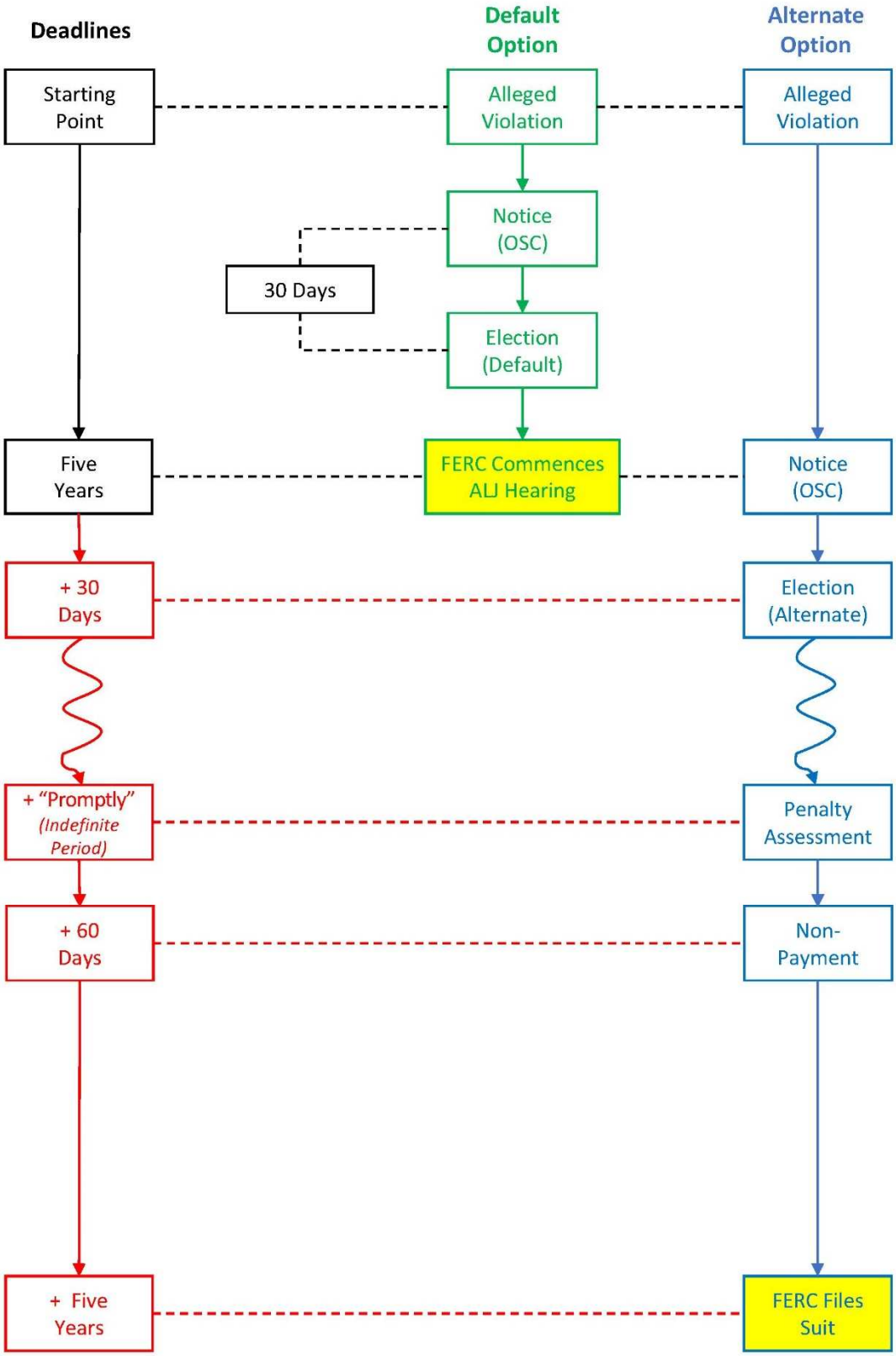
[2] The decision acknowledges that the FPA "does not define the crucial term 'promptly,'" but accepts FERC's argument that respondents could sue "to force FERC to issue a PAO in a timely manner." Op. 903. In addition to violating the maxim that statutes should not be interpreted to yield absurd results, this supposed solution—a lawsuit of indefinite duration sandwiched between two five-year clocks—in no way "sets a fixed date when exposure to [penalties] ends." *Gabelli*, 568 U.S. at 448.

Chart: The Statute of Limitations for Adjudication of an FPA Civil Penalties Claim Under the Panel Decision



The panel contends that "[t]he FPA's statutory prerequisites to filing suit set this case apart from *Gabelli*," framing *Gabelli* as merely "decid[ing] against applying the fraud discovery rule." Op. 899. But there is no more fundamental prerequisite to bringing an action than discovering the alleged violation. The statute relevant to *Gabelli* allows the SEC to bring civil penalty actions "'[w]henever it shall appear to the [SEC] that any person has violated any provision of this subchapter….'" *Id*. (quoting 15 U.S.C. § 80b-9(e)(1)). The alleged violation *becoming apparent to—i.e., being discovered by*—the SEC is a statutory prerequisite to filing suit. *Gabelli* nonetheless held that the SEC's claim accrued when the allegedly fraudulent conduct occurred, not when the purported violation was discovered.

B. The Supreme Court Has Recognized That Statutory Prerequisites Within the Plaintiff's Control Do Not Forestall Claim Accrual

The panel's decision to delay (or re-start) accrual of FERC's claim under the Alternate Option hinges on the notion that "until a prospective plaintiff satisfies any [statutory prerequisites to filing suit,] … that claim has not 'accrued.'" Op. 897-98. But the Supreme Court has recognized the perversity of delaying claim accrual based on prerequisites to suit that are, as here, within the plaintiff's control.

McMahon held that claims under the Suits in Admiralty Act accrued on the date of injury even though no suit could be brought until a claim had been administratively disallowed, explaining that if the claim did not accrue until

administrative disallowance, the petitioner "would have it in his power, by delaying [the administrative] filing, to postpone indefinitely commencement of the running of the statute of limitations." 342 U.S. at 27. Similarly, *Koons* held that a wrongful death claim accrued at the time of death—not upon the appointment of an administrator with exclusive authority to file suit—because "[i]f the persons who are the designated beneficiaries of the right of action created may choose their own time for applying for the appointment of an administrator and consequently for setting the statute running, the two-year period of limitation so far as it applies to actions for wrongful death might as well have been omitted from the statute." 271 U.S. at 65.

Consistent with *McMahon* and *Koons*, several lower courts have rejected interpretations of § 2462 that would allow an agency to delay the start of the limitations period by postponing statutory prerequisites to filing suit that are within the agency's control. *See, e.g.*, *DLS Precision Fab LLC v. U.S. Immigration & Customs Enf't*, 867 F.3d 1079, 1086-87 (9th Cir. 2017); *Meyer*, 808 F.2d at 920; *Core*, 759 F.2d at 482-83; *Fed. Election Comm'n v. Nat'l Right to Work Comm., Inc.*, 916 F. Supp. 10, 13-14 (D.D.C. 1996). There is no reason to permit a different result here.

While the panel contends that "the procedures mandated under the Alternate Option are extensive, not 'minimal,'" Op. 899, many of the procedures the decision

invokes are *not* statutorily required.[3] As the Supreme Court has underscored, administrative acts that are not *statutorily required* preconditions to filing suit are "irrelevant" in determining when the limitations period begins. *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 65-66 (1953).

III. THE DECISION CREATES CONFLICTS WITH OTHER CIRCUITS

A. The Decision Contradicts Core

The panel's decision squarely conflicts with *Core*, in which the Fifth Circuit held that, under § 2462, a claim "accrues at the time of the underlying violation," and rejected arguments that the government's claim accrued on the "date of the final administrative order assessing the penalty" or that "the limitations period was tolled during the administrative proceedings." 759 F.2d at 481, 483-84. Under *Core*, the government had five years from the alleged violation to bring its enforcement action in federal court, notwithstanding an administrative process that necessarily preceded the court action.

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[3] The decision asserts that "[u]pon the recipient's selection of the Alternate Option, FERC is required to commence the [OSC] Process…." *Id.* But upon such election, the FPA simply directs FERC to "promptly assess" a penalty. 16 U.S.C. § 823b(d)(3)(A). The decision further asserts that "the agency action mandated by the Alternate Option contemplates extensive factfinding." Op. 900. In actuality, "once a party elects to proceed under the Alternate Option … *no additional [agency] factfinding occurs.*" JA 39.

By contrast, according to the panel, FERC's claim does not accrue until sixty days after it issues a PAO, giving FERC two five-year stretches, separated by a period of indefinite duration, before it must file suit. Additionally, the panel's separate holding that FERC's OSC is a "proceeding" that satisfies § 2462 contradicts *Core*'s determination that administrative processes do *not* stop the clock. While respondents flagged *Core*—Opening Br. 21 n.5, 28-29, 31-32—the decision never mentions it.

B. The Decision Is Also Contrary to 3M *and* Meyer

Even courts that do not follow *Core* limit which agency processes count as "proceedings" under § 2462, explaining that only "mandatory" "adversarial adjudication" stops the clock; an agency's pre-suit "prosecutorial determinations" do not. *Meyer*, 808 F.2d at 920-21; *3M*, 17 F.3d at 1459 n.11; *see* Op. 901. In concluding that FERC's OSC fits within the former category, the decision stretches the definition of mandatory adversarial adjudication beyond what it can bear.

Adjudication involves "the determination of past and present rights and liabilities." *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 53 (4th Cir. 2011) (citation omitted). Under the Alternate Option, FERC is *not* authorized to make "a determination of violation," unlike it is after an ALJ hearing under the Default Option. 16 U.S.C. § 823b(d)(2)(A), (d)(3). Moreover, "[i]nvestigatory proceedings, no matter how formal, which do not lead to the issuance of an order

containing the element of final disposition … do not constitute an adjudication." *Int'l Tel. & Tel. Corp. v. Local 134, Int'l Bhd. of Elec. Workers*, 419 U.S. 428, 443 (1975) (emphasis added, citation omitted). Both *3M* and *Meyer* involved administrative proceedings leading to a "final judgment." *3M*, 17 F.3d at 1457; *Meyer*, 808 F.2d at 917. FERC's OSC process does *not* culminate in a final determination. *See FERC v. Barclays Bank PLC*, 247 F. Supp. 3d 1118, 1125 n.18, 1128 (E.D. Cal. 2017) (noting FERC's concession that a PAO is "not 'final'"); 16 U.S.C. § 823b(d)(5) (allowing FERC to institute collection action "*after the appropriate district court has entered a final judgment* in favor of the Commission under [the Alternate Option]" (emphasis added)).[4]

As the court below recognized, the district court action "gives Respondents their *first* opportunity for an adversarial adjudication…." JA 400. Because FERC only assesses penalties on a *non-final* basis subject to de novo review, its role under the Alternate Option is "akin to that of a prosecutor," not an adjudicator. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 244-47 (1980).

[4] Critically, this de novo review action is *not* a collection action—unlike *Meyer* and other decisions holding that § 2462's limitations period *for a collection action* begins when there is a *final* agency order imposing penalties *after* statutorily authorized adjudication. *See* Reply Br. 9 & n.3. A new clock begins for *collection actions* because a defendant's failure to pay a final judgment gives rise to a new claim. By contrast, a respondent's failure to pay the PAO, which is preliminary in nature, does not give rise to a new claim.

In concluding otherwise, the panel points to FERC's regulations on *ex parte* communications and separation of functions, Op. 902 (citing 18 C.F.R. §§ 385.2201, 385.2202), but never explains how these provisions transform the OSC into an adjudication. Moreover, while FERC has *chosen* to subject the penalty assessment process to these regulations, nothing in the FPA *requires* these procedures. Agency processes that are not required by statute cannot affect the limitations analysis. *See Unexcelled*, 345 U.S. at 65-66.

The decision lets FERC forestall (or re-start) claim accrual under the Alternate Option by supposedly adjudicating civil penalty claims ahead of the district court based on its "general … authority" under 16 U.S.C. § 825h, Op. 900, and its self-created policies. If this stands, nothing would stop the SEC—or any other agency with similar "general" authority—from circumventing *Gabelli* by interposing its own administratively invented "adjudication," no matter how distant that process might be from actual, statutorily required adjudications.

IV. THE ISSUE RAISED IS EXCEPTIONALLY IMPORTANT

Under the panel's decision, the regulated community has no protection against "claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 568 U.S. at 448-49 (citation omitted). This case thus presents a question of exceptional importance, most immediately for the electric power industry, which accounts for roughly five percent

of U.S. gross domestic product. M.J. Bradley & Assocs., LLC, *Powering America: The Economic and Workforce Contributions of the U.S. Electric Power Industry* 6-9 (Aug. 2017), https://mjbradley.com/sites/default/files/PoweringAmerica.pdf.

The decision gives FERC more than ten years—potentially *much* more, depending how "promptly" FERC chooses to assess a penalty—to file suit under the Alternate Option. The panel suggests that allowing FERC to bring FPA actions at its leisure "can be, in actuality, of benefit to the regulated [community]." Op. 901. The major electric industry trade associations disagree, declaring an unbounded limitations period "damaging to both industry and customers." Amici Curiae Br. 24-27.

Nor would requiring FERC to file suit within five years of the alleged violation "materially disrupt" the FPA's enforcement scheme. Op. 900. Even the panel agrees that "FERC must issue the OSC … within five years of the alleged misconduct," *id*. at 901, and FERC's investigation occurs *before* an OSC is issued; once the Alternate Option is elected, "*no additional factfinding occurs*" at the agency. JA 39.

Endeavoring to give FERC "latitude" in its "complex and technical" investigations, Op. 900, 904, the panel offers a policy-driven interpretation of § 2462 that allows FERC to delay indefinitely federal court adjudication of its claim. But as the Supreme Court recently underscored, the limitations period—which *Gabelli*

holds must be a "fixed" five years from the alleged misconduct—"reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. It is Congress, not th[e] Court[s], that balances those interests." *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) (citation omitted).

CONCLUSION

Rehearing or rehearing en banc should be granted.

Respectfully submitted,

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March 27, 2020

CERTIFICATE OF COMPLIANCE

In accordance with Rules 35(b)(2) and 40(b) of the Federal Rules of Appellate Procedure, the undersigned counsel for appellant certifies that the accompanying brief is printed in 14 point proportionally spaced typeface, with serifs, and, including footnotes, contains no more than 3,900 words.

According to the word-processing systems used to prepare the brief, Microsoft Word, and a manual count of the text on the chart, it contains 3,893 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, table of contents, table of citations, signature block, certificates of counsel, and addendum).

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2020, I caused this Petition for Rehearing to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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STATUTORY ADDENDUM

Section 209 of the Investment Advisers Act, 15 U.S.C. § 80b-9, provides:

15 U.S.C. § 80b-9. Enforcement of subchapter

(a) Investigation

Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter or of any rule or regulation prescribed under the authority thereof, have been or are about to be violated by any person, it may in its discretion require, and in any event shall permit, such person to file with it a statement in writing, under oath or otherwise, as to all the facts and circumstances relevant to such violation, and may otherwise investigate all such facts and circumstances.

(b) Administration of oaths and affirmations, subpena of witnesses, etc.

For the purposes of any investigation or any proceeding under this subchapter, any member of the Commission or any officer thereof designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

(c) Jurisdiction of courts of United States

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who without just

cause shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Action for injunction

Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, or that any person has aided, abetted, counseled, commanded, induced, or procured, is aiding, abetting, counseling, commanding, inducing, or procuring, or is about to aid, abet, counsel, command, induce, or procure such a violation, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice, or in aiding, abetting, counseling, commanding, inducing, or procuring any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this subchapter, or of any rule, regulation, or order thereunder, to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this subchapter.

(e) Money penalties in civil actions

(1) Authority of Commission

Whenever it shall appear to the Commission that any person has violated any provision of this subchapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 80b-3(k) of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

* * * *

Section 385.1508 of the Federal Energy Regulatory Commission's Regulations, 18 C.F.R. § 385.1508, provides:

18 C.F.R. § 385.1508 Commission administrative procedures (Rule 1508).

(a) If the respondent is not entitled to an election pursuant to Rule 1506(b)(3)(ii) or does not timely elect to have the procedures of Rule 1509 apply, the Commission will commence a proceeding in accordance with the provisions of subpart E of this chapter.

(b) The Commission's Rules of Practice and Procedure in part 385 of this chapter will apply, as appropriate, to any evidentiary proceeding to assess a civil penalty.

(c) An assessment order under this section shall include the administrative law judge's findings and the basis for such assessment.