

ADJUDICATION OF FERC ENFORCEMENT CASES: “SEE YOU IN COURT?”

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Synopsis: Several commentators in recent pages of this journal, and elsewhere, have opined on claimed inadequacies and virtues of the current investigative and prosecutorial practices of the enforcement program of the Federal Energy Regulatory Commission (FERC or the Commission). We submit that prior commentators have identified and addressed important issues, but those commentators have only hinted at the root cause of the claimed problems: the fact that the Commission itself—the five Presidentially-appointed individuals who act through votes and orders as “the Commission”—is *adjudicating*, or purporting to adjudicate, many of these enforcement cases. Enforcement is divided into two critical phases: investigation and adjudication. We offer that most of the controversies surrounding *investigations* have as their root cause the manner in which the case may ultimately be *adjudicated*.

Almost all FERC enforcement matters are either dropped in the investigatory phase or settled. So, the reader asks: “why does *adjudication* matter?” The simple answer is that the litigated cases are probably the most important to shaping the future of the law in this area and garner the most public attention. Even those that do settle, do so because of the calculations of the Commission and the subjects of the enforcement investigation as to what will happen in the adjudicatory process absent settlement. The more penetrating answer is that controversies surrounding the investigative process are largely driven by the prospect of adjudication, and the manner of that prospective adjudication, even in the many cases that will, in the end, not be adjudicated. So, all cases are greatly affected by the few that are adjudicated.

This article reviews the current paths for the *adjudicative* phase of FERC enforcement cases and presents an analysis of some of the alleged pros and cons of the current system. We focus on activities that occur in the investigative phase of enforcement matters that are driven by the fact that the Commission *later* plays an adjudicatory role in these cases. We review comparatively the adjudicatory processes of other agencies with similar enforcement powers over economic activities. We advance the thesis that many of the current criticisms of FERC

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enforcement processes have, as their *root cause*, a basic structural reality: the fact that the Commission adjudicates, or purports to adjudicate many of the cases (as well as investigates and prosecutes them). Finally, we propose that the system move towards FERC enforcement cases being litigated—as an original matter—in federal trial court, rather than at the Commission. We evaluate whether such an approach could be developed with current statutes and regulations or would require new law.

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I. INTRODUCTION: THE GROWING PAINS OF A NEW FERC ENFORCEMENT ERA

Recent articles in this publication have reviewed the current FERC enforcement process and its roots in the Energy Policy Act 2005 (EPA 2005).¹ By way of brief background, as prior commentators have established, since almost its inception the Federal Power Commission and then its successor the FERC, have held “enforcement powers.”² However, in the wake of what came to be known as the “California Energy Crises” and the “August 2003 Blackout” in the Northeastern United States, Congress passed the EPA 2005 that handed the FERC sweeping new powers—both substantive and remedial.³ EPA 2005 amended Part II of the Federal Power Act (FPA), the Natural Gas Act (NGA), and the Natural Gas Policy Act (NGPA), and gave the Commission the authority to assess civil penalties of up to \$1 million per day per violation, for violations of rules, regulations, and orders issued under these statutes.⁴

The Commission and its Staff began to flex these new enforcement muscles almost immediately, most notably with the initiation of the *Energy Transfer Partners, L.P.*, and *Amaranth Advisors L.L.C.* proceedings.⁵ In these and other early cases, the FERC attempted (and in some cases succeeded) to use its newly granted penalty authority as leverage to obtain sizeable settlements for allegations of market manipulation as well as a large suite of settlements over the natural gas “shipper-must-have-title” rules.⁶ But, some of these cases were adjudicated. What followed was almost a decade of developments in cases and policy pronouncements that sometimes addressed perceived inadequacies or flaws in the enforcement process.⁷ The Commission instituted rules and policies that responded to some criticisms about the transparency and fairness of the process.⁸ But strong criticisms remain, particularly in the areas of discovery and disclosure of material, staff access to the Commission during an investigation, and the length and cost of the investigatory and adjudicative processes. Many of these criticisms were featured in the Scherman et al article, which asserts that there was a “wide spread perception” that the process has become “lop-sided and unfair.”⁹ Some of the criticism and answers played themselves out recently on the very public stage of the hearing over the confirmation of now Chairman of the FERC, Norman C.

1. William S. Scherman, Brandon C. Johnson, & Jason J. Fleischer, *The FERC Enforcement Process: Time for Structural Due Process and Substantive Reforms*, 35 ENERGY L.J. 101 (2014); Allison Murphy, Todd Hettenbach, & Thomas Olson, *The FERC Enforcement Process*, 35 ENERGY L.J. 283 (2014).

2. Murphy et al., *supra* note 1, at 285-86.

3. *Id.* at 288-89.

4. *Id.*

5. Order to Show Cause, *Energy Transfer Partners, L.P.*, 120 F.E.R.C. ¶ 61,086 (2007); Order to Show Cause, *Amaranth Advisors L.L.C.*, 120 F.E.R.C. ¶ 61,085 (2007).

6. See, e.g., Order Approving Stipulation and Consent Agreement, *In re Bangor Gas Co., LLC*, 118 F.E.R.C. ¶ 61,186 (2007).

7. Murphy et al., *supra* note 1, at 290-91.

8. Revised Policy Statement on Enforcement, *Enforcement of Statutes, Regulations, and Order*, 123 F.E.R.C. ¶ 61,156 (2008); Policy Statement on Compliance, *Compliance with Statutes, Regulations, and Orders*, 125 F.E.R.C. ¶ 61,058 (2008); Revised Policy Statement on Penalty Guidelines, *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 F.E.R.C. ¶ 61,216 (2010); Interpretive Order Regarding No-Action Letter Process, *Informal Staff Advice on Regulatory Requirements*, 113 F.E.R.C. ¶ 61,174 (2005); Interpretive Order Modifying No-Action Letter Process, *Informal Staff Advice on Regulatory Requirements*, 117 F.E.R.C. ¶ 61,069 (2006).

9. Scherman et al., *supra* note 1, at 102.

Bay. Senators peppered the nominee with questions about the enforcement process. Bay staunchly defended the current process as being within the bounds of agency authority and established government processes, in some cases asserting that the Commission affords subjects of investigations more process than many other agencies do.¹⁰ Notably, he was confirmed by the Senate despite these questions being raised. Then, in a direct response to the Scherman et al article, FERC staff penned an article in this journal rebutting some of the criticisms and claiming that “proposed reforms are unnecessary.”¹¹ More recently, draft legislation addressing some FERC investigatory process matters floated in Congressional committees, but as of this writing do not seem poised for passage.¹²

We submit that each side in this debate is making some valid points and yet each side is exaggerating or minimizing the problems, respectively. More importantly, the specifics upon which these commentators focus are just symptoms of a larger condition; while the REAL problem is not really being addressed. We submit that the REAL problem is having the Commission, rather than a federal court, adjudicate these cases that do not settle before the “Order to Show Cause” (OSC) stage (described further *infra*, section II, A).

II. THE CURRENT ADJUDICATIVE PATHS

As we discuss below, what happens in the investigative process largely matters because of what follows: the settlement or adjudication of a case. Prior commentators have well-summarized, and largely focused on, the details of the FERC enforcement investigative process.¹³ What have garnered less attention are the varying adjudicative processes. To really understand what may or may not be broken in the current *investigative* system, we must begin at the end: *adjudication*.

As currently practiced by the Commission, FERC civil penalty enforcement “adjudication” or “litigation” paths—what happens when cases do not settle—are different under the FPA, the NGPA, and NGA.¹⁴ The FPA outlines two different possible processes by which the Commission can “assess” penalties for Part II violations. The NGPA provides for a *de novo* review process in federal court. The NGA contains no provisions specifying the process for meting out penalties under that statute. In short, the various statutory schemes are a hodgepodge. In 2006, the FERC issued a policy statement addressing the processes the Commission will

10. *Lafleur and Bay Nominations: Hearing Before the Committee on Energy and Natural Resources*, 113th Cong. 15 (2014) (testimony of Norman C. Bay, Nominee, Fed. Energy Reg. Comm’n), <https://www.congress.gov/113/chr/shrg88084/CHRG-113shrg88084.pdf> [hereinafter *Lafleur and Bay Hearing*].

11. *Id.* at 28; Murphy et al., *supra* note 1, at 283.

12. Title IV—Energy Efficiency and Accountability, Subtitle B, Chapter 1—Market Manipulation, Enforcement and Compliance, Sec. 4212 (Discussion Draft May 20, 2015), available at <http://docs.house.gov/meetings/IF/IF03/20150603/103551/BILLS-114pih-SubtitleB-Accountability.pdf>.

13. Murphy et al., *supra* note 1, at 291-97; Scherman et al., *supra* note 1, at 108-11.

14. We put some of these terms in quotes because they may be terms of art in certain contexts, such as under the Administrative Procedure Act (APA). Moreover, in some current cases, parties, including the authors, are litigating the meaning of such terms. We do not intend here to ascribe any particular statutory meaning to the term “adjudication” but use it here as a general rubric. Moreover, nothing in this article is meant to present, modify, or characterize any legal position taken by any litigant. This is an academic and (we hope) scholarly presentation.

use when assessing civil penalties under all its governing statutes.¹⁵ That policy statement added some gloss to the statutes. And since then, the Commission has, by pronouncement or practice, shaped these courses a bit more (and courts in litigated or reviewed cases may do so as well, though these cases are just starting to wend their way through the courts, even ten years out from EAct 2005). In light of those sources, we attempt to summarize below the processes as currently practiced.

A. *The Order to Show Cause*

As currently practiced, the common jumping off point for any civil penalty adjudication under any of the Commission's statutes is what is generally referred to as the "Order to Show Cause and Notice of Proposed Penalty" (OSC).¹⁶ In all cases, if an enforcement matter does not settle and staff succeeds in convincing the Commission to pursue enforcement (as it invariably does, more about which anon), before issuing an order assessing a civil penalty the Commission will issue an OSC.¹⁷ In the first post-EAct 2005 OSCs, the order contained a full recitation of the preliminary determinations of the Commission.¹⁸ More recently, the OSC attaches a "Staff Report" which is supposed to contain a statement of the material facts constituting, as well as the legal basis for, the violation.¹⁹ Interestingly, though no response is expressly contemplated by statute, the Commission routinely directs respondents to present "any legal or factual arguments that could justify not issuing the assessment or a reduction or modification of the proposed penalty."²⁰ In practice, the Commission also provides for the staff to file a reply to the respondents' arguments.²¹ There is some debate about whether this phase of the process constitutes "adjudication" or merely a continuation of the investigative process (because, for example and most notably, the FERC claims that it can continue investigating while the OSC process is ongoing—and it has done so in several cases).²² Regardless, the process from the OSC forward is where the paths for (or to) adjudication start to diverge depending on which statute is involved.

15. Statement of Administrative Policy, *Process for Assessing Civil Penalties*, 117 F.E.R.C. ¶ 61,317 (2006).

16. Revised Policy Statement on Enforcement, *Enforcement of Statutes, Regulations, and Orders*, 123 F.E.R.C. ¶ 61,156 at P 35 (2008).

17. *Id.*

18. Order to Show Cause, *Energy Transfer Partners, L.P.*, 120 F.E.R.C. ¶ 61,086 at PP 4-22 (2007); *Amaranth Advisors L.L.C.*, 120 F.E.R.C. ¶ 61,085 at P 5 (2007).

19. See, e.g., Order to Show Cause, *Houlihan Chen, Powhatan Energy Fund, LLC, HEEP Fund, LLC, CU Fund, Inc.*, 149 F.E.R.C. ¶ 61,261 at P 2 (2014).

20. *Process for NGPA Penalty Assessment*, FERC, <http://www.ferc.gov/resources/processes/enforcement/ngpa-text.asp>.

21. 120 F.E.R.C. ¶ 61,085 at P 1.

22. See, e.g., Order Assessing Civil Penalties, *Barclays Bank PLC, Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith*, 144 F.E.R.C. ¶ 61,041 at P 22 (2013).

B. The FPA Adjudicative Process

In an FPA case, the OSC will direct the respondent to respond on the merits and will also observe that the respondent has the option to choose between either (a) an administrative hearing before an Administrative Law Judge (ALJ) at the Commission prior to the finalization of the penalty under section 31(d)(2), or (b) an immediate penalty assessment under section 31(d)(3) followed by a district court “*de novo* review” adjudication.²³ The process is supposed to work like this:

1. The “ALJ Route”

If the person elects an administrative hearing before an ALJ at the Commission, the Commission will issue a hearing order (unless it determines, and it has done so in one case, that there are not material issues of fact that require a trial).²⁴ The ALJ will conduct a hearing under Part 385 of the Commission’s regulations.²⁵ Staff from the Office of Enforcement serves as trial Staff at the hearing. The Section 385 rules provide for rights of discovery—and in actual practice, Respondents sometimes do obtain discovery from the FERC Staff as well as third parties.²⁶ Discovery is available to both sides, but not as of right, except among the parties. Participants must apply to the ALJ for the issuance of discovery and trial subpoenas to third parties.²⁷ The hearing itself is a hybrid of paper, electronic, and live procedures.²⁸ Pre-filed testimony of party-sponsored witnesses is typical with cross-examination live on the stand. The Federal Rules of Evidence do not apply to the hearing, though (in our experience) as a practical matter the ALJ’s seem to apply evidentiary standards that are *about* what one might expect in a bench trial in a federal district court.²⁹ Sometimes, ALJ’s will permit opening statements, while closing arguments are almost unheard of. Parties file post-hearing briefs with proposed findings of fact and conclusions of law.

The ALJ will issue an “Initial Decision” and determine whether a violation or violations occurred.³⁰ If a violation is found, the Initial Decision will recommend any appropriate penalty, taking into account factors described in various Commission Policy Statements on Enforcement. The hearing record is

23. This section of the article describes the process used to assess penalties under “Part II” of the FPA to which the enhanced penalty authority of the Commission applies. Lesser penalties are available under “Part I” of the FPA. FPA section 31(a) grants the Commission the authority to monitor and investigate compliance with licenses, permits, and exemptions for hydropower projects issued under Part I. It allows the assessment of penalties but this authority is rarely used. In any event, the process for adjudicating penalty cases under Part I is virtually identical to that under Part II.

24. See, e.g., Order on Show Cause Response, *Moussa I, Kourouma d/b/a Qantum Energy LLC*, 135 F.E.R.C. ¶ 61,245 at PP 9-10 (2011).

25. 18 C.F.R. §§ 385.101-.2202 (2013).

26. §§ 385.401-.411.

27. § 385.409(a).

28. §§ 385.501-.510.

29. Opinion No. 523, *Entergy Servs., Inc.*, 142 F.E.R.C. ¶ 61,022 at P 55 (2013) (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 F.E.R.C. ¶ 61,173 PP 97-98 (2010), *reh’g denied*, 136 F.E.R.C. ¶ 61,244 (2011)). Although, we note that most practitioners suspect that even federal judges apply the rules of evidence less rigorously in bench trials because they are not performing a “gate keeping function” to prevent jurors from being exposed to objectionable evidence.

30. 18 C.F.R. § 385.708(b) (2013).

supposed to have developed the facts necessary to any such determination. The ALJ decision is not itself effective upon issuance. There is an automatic appeal process, and the decision-maker here is not a court, but the Commission.³¹ The Commission will consider the Initial Decision of the ALJ and any “exceptions” filed with the Commission by trial Staff or the respondent. The Commission treats the ALJ’s decision “as part of the record” and does not treat the ALJ’s Initial Decision with “any special deference” as to questions of law.³² However, if the ALJ—as the trier of fact—has made a determination on the credibility of a witness, such determination would be entitled to “some deference.”³³ If the Commission determines that there is a violation, the Commission will issue an order and may assess any appropriate penalty, taking into account all relevant factors.³⁴

If a violation is found, a respondent may request a rehearing no later than thirty days after the issuance of the order assessing the penalty.³⁵ If that rehearing request is denied, the respondent can seek a review of the case in a Court of Appeals.³⁶ Alternatively, a respondent may appeal an order assessing penalty directly to the Court of Appeals without first seeking rehearing.³⁷ The Court of Appeals reviews the Commission’s findings of fact under the “substantial evidence standard.”³⁸ This deferential standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.”³⁹ Findings of law are reviewed under the arbitrary and capricious standard.⁴⁰ This process can take several years.

2. The “*De Novo* Review Route”

If a respondent to an OSC in an FPA case elects an immediate penalty assessment by the Commission, the Commission is supposed to do just that—“promptly assess such penalty.”⁴¹ Even though the statute does not require or even authorize the Commission to make a “determination of a violation” as with the

31. §§ 385.711-.712.

32. *La. Pub. Serv. Comm’n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970)). Administrative law judges’ findings “are not entitled to any special deference,” but instead “are treated as ‘part of the record,’” such that “‘in the last analysis, it is the agency’s function, not the [administrative law judge’s], to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency’s choice that governs.’” *Id.*

33. *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5th Cir. 1986) (citing *Ward v. NLRB*, 462 F.2d 8, 12 (5th Cir. 1972)).

34. 18 C.F.R. § 385.703 (2013).

35. § 385.713.

36. 16 U.S.C. § 825l(b) (2011); *See, e.g., Hunter v. FERC*, 711 F.3d 155, (D.C. Cir. 2013). *See also Walker Operating Corp. v. FERC*, 874 F.2d 1320 (10th Cir. 1989).

37. 16 U.S.C. § 823b(d)(2)(B) (2011); *See, e.g., Bluestone Energy Design, Inc. v. FERC*, 74 F.3d 1288, 1293 (D.C. Cir. 1996) (observing that § 823b(d)(2)(B) “does not require a party challenging a penalty to seek rehearing; a party against whom the Commission assesses a penalty may appeal directly to an appropriate court within sixty days”).

38. 16 U.S.C. § 825l(b); *See also La. Pub. Serv. Comm’n*, 522 F.3d at 391.

39. *FPL Energy Main Hydro LLC v. FERC*, F.3d 1151, 1160 (D.C. Cir. 2002).

40. 5 U.S.C. § 706(2)(A) (2011).

41. 16 U.S.C. § 823b(d)(3)(A) (2011).

ALJ path, in practice, the Commission has used the OSC process in such cases to analyze the facts and law, including the competing positions of staff and the Respondent.⁴² The Commission issues (usually a rather lengthy) order setting forth the material facts that constitute the violation, its view of the law supporting such violations, and assessing what it views as the appropriate penalty. This process typically takes at least six months from the issuance of the OSC. Revealing a rare crack in the foundation, one Commissioner recently dissented to some aspects of this process, noting in the face of these sometimes lengthy proceedings, that “there can be no disagreement that a prompt assessment is an assessment of an immediate nature.”⁴³

If the assessed penalty is not paid within sixty days, the Commission may commence an action in a United States district court seeking enforcement of the order.⁴⁴ In such a case, FPA section 31(d)(3)(B) authorizes the court to review “*de novo* the law and facts involved.”⁴⁵ The district court can “enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in [p]art . . .” the Commission’s penalty assessment.⁴⁶

There has never been an FPA *de novo* review case that has proceeded past an initial pleading stage. So the precise meaning of *de novo* review under the FPA has yet to be defined by a Court. The best available test case thus far is *FERC v. MacDonald*, wherein the court held that:

Section 31 of the Federal Power Act, 16 U.S.C. § 823b(d)(3)(B) specifies that when FERC brings an action in district court to enforce a civil penalty assessment, the court must make a *de novo* review of the assessment. Accordingly, I will give no deference to FERC’s decision. Instead, I will make “a fresh, independent determination of ‘the matter’ at stake.”⁴⁷

However, the case settled shortly after this preliminary pronouncement. So we do not really know how the courts will conduct the *de novo* review.

The FERC recently filed several enforcement actions in federal district court under the FPA for alleged market manipulation in electricity markets.⁴⁸ The cases are FERC’s first post-EPA 2005 enforcement cases filed in district court under the FPA. The defendants in these cases claim that the full array of federal trial court procedures should apply, including the right to discovery, pretrial motions, the application of the Federal Rules of Evidence, and a hearing, including the right to a jury trial.⁴⁹ The FERC, on the other hand has been a bit more open-ended in

42. See generally Order Assessing Civil Penalties, *Houlian Chen, Powhatan Energy Fund, LLC, HEEP Fund, LLC, CU Fund, Inc.*, 151 F.E.R.C. ¶ 61,179 at PP 33, 37 (2015) (finding violations in Order Assessing Penalties where respondents had elected immediate penalty assessment).

43. *Barclays Bank PLC*, 143 F.E.R.C. ¶ 61,024 (2013) (LaFleur, Comm’r, dissenting).

44. 16 U.S.C. § 823b(d)(3)(B) (2011).

45. *Id.*

46. *Id.*

47. *FERC v. MacDonald*, 862 F. Supp. 667, 672 (D.N.H. 1994) (citing *Doe v. United States*, 821 F.2d 694, 697-98 (D.C. Cir. 1987) (emphasis added); § 823b(d)(3)(B)).

48. See, e.g., *FERC v. City Power Marketing, LLC*, Case No. 1:15-cv-01428-JDB (D.D.C. Sep. 1, 2015); *FERC v. Powhatan Energy Fund, LLC*, Case No. 3:15-cv-0452 (E.D. Va. Jul. 31, 2015); *FERC v. Maxim Power Corp.*, Case No. 3:15-cv-30113 (D. Mass. Jul. 1, 2015); *FERC v. Barclays Bank PLC*, No. 2:13-cv-02093, (E.D. Ca. Oct. 9, 2013); *FERC v. Lincoln Paper & Tissue, LLC*, No. 1:13-cv-13056 (D. Mass. Dec. 2, 2013).

49. Joint Report in Compliance with Fed. R. Civ. P. 26(f) and Court’s Order Requiring Joint Status Report, *FERC v. Barclays Bank*, No. 2:13-cv-02093-TLN-DAD, 2013 WL 7045794 (E.D. Ca. Dec. 16, 2013); *Lincoln*

its position. It has demanded a jury trial in these cases while at the same time claiming that the courts can and should affirm the penalty assessment summarily based on the record developed solely at the agency.

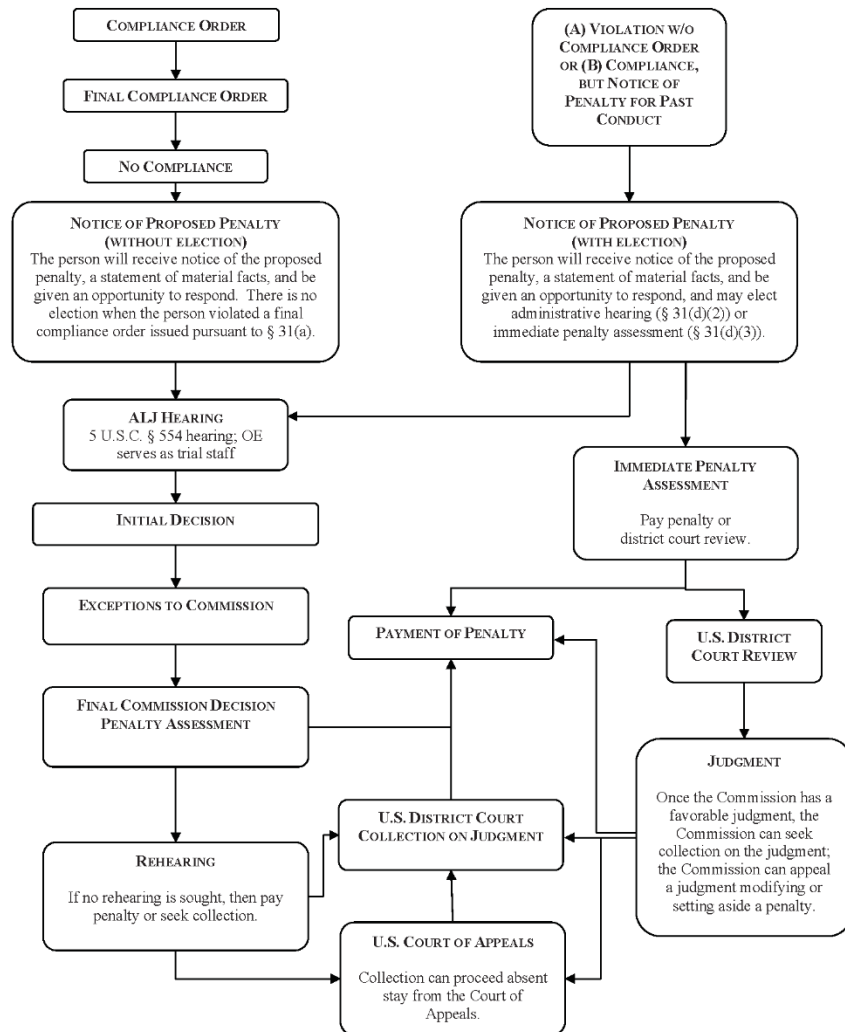
By whatever means the district court gets there, the Commission and the respondent can appeal the court's final order to a United States Court of Appeals. The Court of Appeals will then make certain that the District Court applied the correct legal standards, before reviewing the District Court's findings of fact and application of the law.⁵⁰ The Court of Appeals will review factual findings for clear error and will review questions of law *de novo*.⁵¹ We do not really know how long these *de novo* review processes will take. But it is instructive that both the *Barclays* and *Lincoln* cases have been in federal court for nearly two years and counting, though most commentators agree that the length of the proceedings to date likely has to do somewhat with this very debate over *de novo* review.

To summarize this discussion, we offer the following charts to illustrate the FPA adjudicative processes and which appear as appendices to the 2006 Statement of Administrative Policy Regarding the Process of Assessing Civil Penalties, Docket No. AD07-4-000 (Dec. 21, 2006).

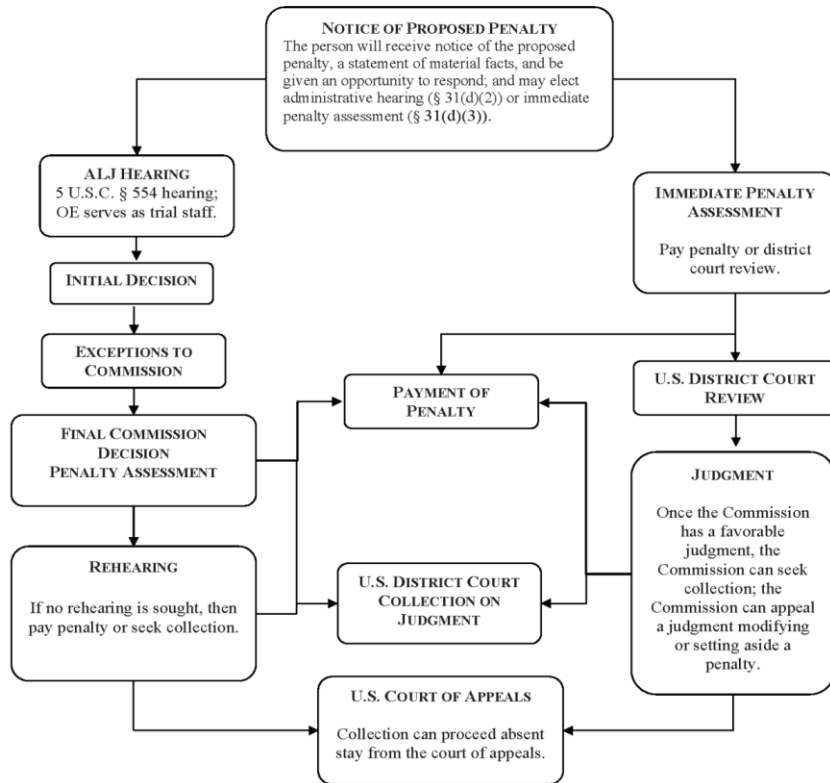
Paper & Tissue, LLC's Memorandum of Law Concerning the Contours of the Trial, *FERC v. Lincoln Paper & Tissue, LLC*, No. 1:13-cv-13056-DPW, 2014 WL 7148814 (D. Mass. May 9, 2014).

50. *Cuddy v. Carmen*, 762 F.2d 119, 123 (D.C. Cir. 1985) (citing Fed. R. Civ. P. 52(a)).

51. *Id.*



PROCESS FOR FPA PART II PENALTY ASSESSMENT



C. The NGA Process

The NGA is silent on the process for assessing civil penalties because under the pre-EPA 2005 NGA, no civil penalties were available. “The only statutory guidance given [in EPA 2005] is that the penalty shall be assessed by the Commission after notice and opportunity for public hearing.”⁵² The Commission noted this in the 2005 Policy Statement on Enforcement and “stated its intent to provide an administrative process for penalty assessment,” though the Commission also claimed that it can utilize a “paper hearing.”⁵³

In actual practice, once a respondent files its response to the OSC, the Commission seems to follow the same process that it follows under the FPA if the respondent has not elected the *de novo* review route. If the respondent chooses to pay the amount of the proposed penalty, the process will terminate. However, in all of the cases so far in which the respondent has not paid, the Commission has referred the matter to an ALJ for hearing procedures. The NGA civil penalty process does not include the possibility for the respondent to receive a *de novo* review in district court, because there is no statutory provision permitting *de novo* review.⁵⁴ The Commission claims that it could circumscribe the hearing, for example, by directing the “ALJ to compile a record but omit the initial decision and instead certify the record to the Commission for decision, accompanied by a report or a recommended decision in lieu of an initial decision.”⁵⁵

If the Commission sends the case to an ALJ via a hearing order, the “ALJ will conduct a hearing under Part 385 of the Commission’s regulations” just like in the FPA adjudicative process.⁵⁶ That means: a hearing with Office of Enforcement Staff acting as trial staff, an Initial Decision by the ALJ, exceptions briefed to the Commission by participants who object to the Initial Decision and Commission review of exceptions.⁵⁷ The standard of review is the same as it would be for an FPA ALJ hearing: no deference to the ALJ’s recommendations as to law, with “attentive consideration” to factual findings.⁵⁸ The Commission will issue an order and may assess any appropriate penalty, which is also subject to rehearing and appeal to a United States Court of Appeals, where the standard is abuse of discretion.⁵⁹

The following chart illustrates the NGA adjudicative process (originally published in the 2006 Statement of Administrative Policy Regarding the Process of Assessing Civil Penalties, Docket No. AD07-4-000 (Dec. 21, 2006)).

52. Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties, *Process for Assessing Civil Penalties*, 117 F.E.R.C. ¶ 61,317 at PP 6-7 & n.26 (2006) (citing 15 U.S.C. § 717t-1(b) (2011)).

53. *Id.* at P 6 (citing Policy Statement on Enforcement, *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 F.E.R.C. ¶ 61,068 at PP 1-2, 17-29 (2005)).

54. See generally 15 U.S.C. §§ 717-717z. See also *Energy Transfer Partners, L.P. v. FERC*, 567 F.3d 134, 138, 145 (5th Cir. 2009) (describing the FERC’s view that “unlike the NGPA and the [FPA], the NGA does not provide for *de novo* review of a penalty in a federal district court”).

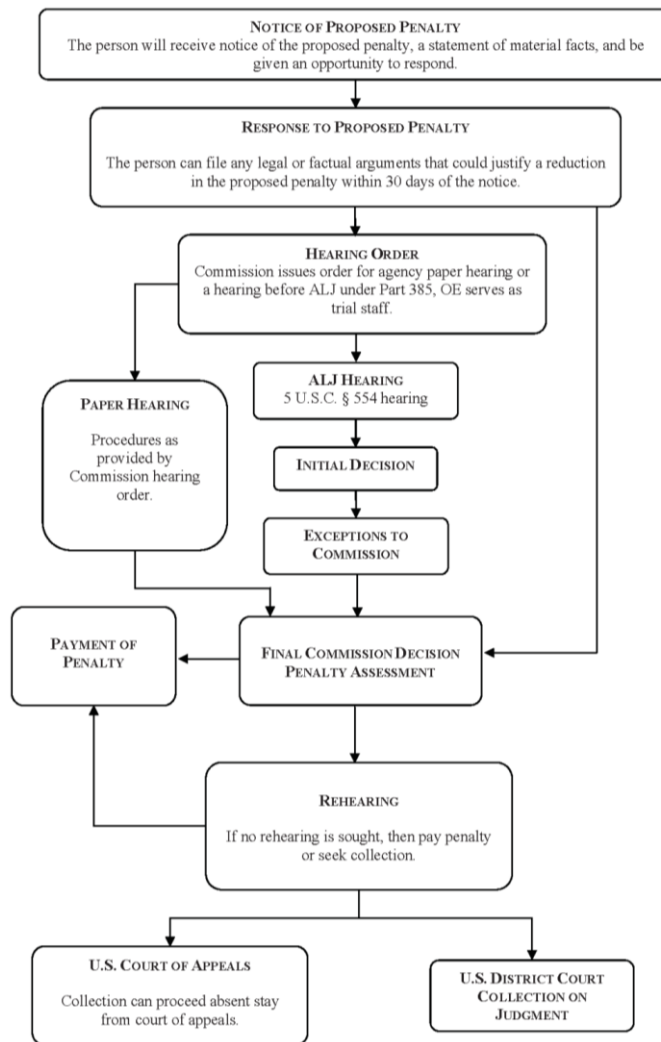
55. 117 F.E.R.C. ¶ 61,317 at P 7 & n.24.

56. *Id.* at P 7.

57. *Id.*

58. *La. Pub. Serv. Comm’n*, 522 F.3d at 395 (quoting *Greater Boston Television Corp.*, 444 F.2d at 853).

59. 15 U.S.C. § 717r(b) (2011); *Michigan Gas & Electric Co. v. FERC*, 290 F.2d 374, 376-77 (D.C. Cir. 1961).

PROCESS FOR NGA PENALTY ASSESSMENT

D. The NGPA Process

NGPA section 504(b)(6)(A) allows the FERC to assess a civil penalty on “any person who knowingly violates any provision” of the NGPA or “any rule or order” issued under the NGPA.⁶⁰ NGPA sections 504(b)(6)(E) and (F) establish a process by which the Commission can assess the civil penalties.⁶¹ First, the Commission is required to give notice of the alleged violation and proposed penalty.⁶² As with the FPA process, the respondent “can choose to pay the proposed penalty and terminate the process, or can contest the penalty”.⁶³ Unlike the NGA and FPA ALJ hearing routes, and like the FPA *de novo* route, the NGPA does not expressly provide for an on-the-record ALJ hearing—or any hearing. Instead, the Commission is supposed to consider the response to the proposed penalty and assess the penalty by order.⁶⁴ If the respondent does not make the required payment within sixty (60) days of the assessment order, the Commission may initiate an action in United States district court at which time the court provides a *de novo* review:

If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (E), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review *de novo* the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.⁶⁵

The following chart illustrates the NGPA adjudicative process (again, as it originally appeared in the 2006 Statement of Administrative Policy Regarding the Process of Assessing Civil Penalties, Docket No. AD07-4-000 (Dec. 21, 2006)).

60. 5 U.S.C. § 3414(b)(6)(A) (2011).

61. §§ 3414(b)(E)-(F).

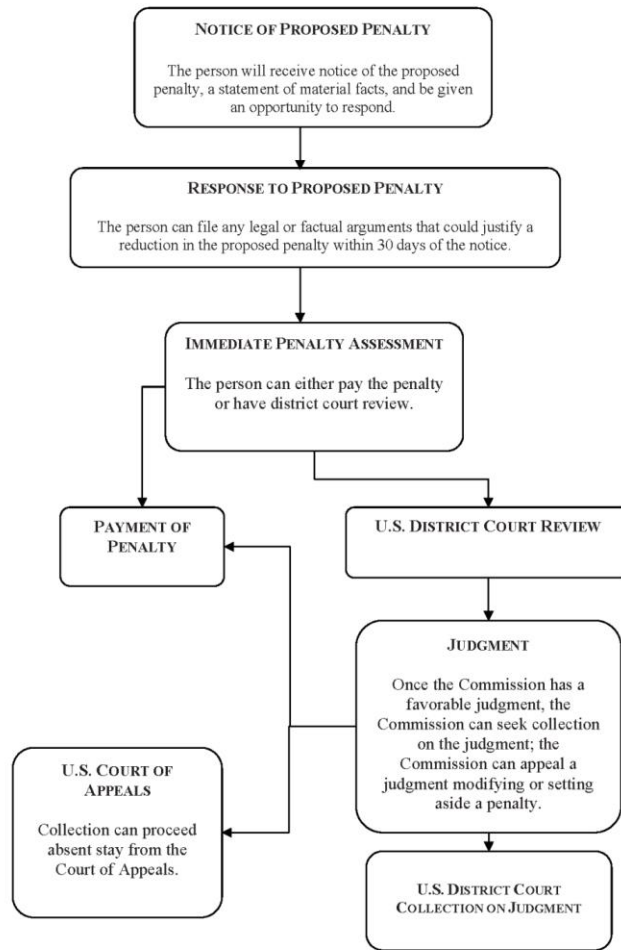
62. § 3414(b)(E).

63. § 3414(b)(F).

64. § 3414(b)(E).

65. Compare 15 U.S.C. § 3414(b)(6)(F), with 16 U.S.C. § 823b(d)(3)(B) (2011).

PROCESS FOR NGPA PENALTY ASSESSMENT



III. RECENT CRITICISMS AND DEFENSES OF THE INVESTIGATIVE PROCESS: WHAT IS REAL AND WHAT IS NOT

Having reviewed the adjudicatory process, we now return to the investigations stage and some of the recent criticisms and defenses of the current investigative process. We are not trying to rehash here ALL of the debate points raised in prior commentary. And we do not address commentary attacking or defending substantive legal rules such as the meaning of “market manipulation” or the contours of the “electric reliability standards.” In what follows, we isolate the elements of the investigative process that we submit are being driven by (or are troublesome because of) the adjudicative process.

A. *One-Sided and Burdensome Discovery*

Most FERC enforcement investigations take more than a year. Some take several years and some take more than five years.⁶⁶ Many investigations involve extensive “trial preparation” type discovery, but only by the Enforcement Staff. One of the main criticisms of the current process is just how long and expensive the process can be. The Commission has acknowledged this concern and Enforcement Staff (Staff) do seek, where possible, to minimize the time and expenses of an investigation. Yet, some commentators have labeled the process “brutal.”⁶⁷

There is no question that government investigation can be burdensome and stressful for the respondent—whether an organization or an individual (and the FERC investigates both). It is not supposed to feel good. In our experience, the Staff is usually reasonable in trying to tailor sometimes overly broad initial data and document requests, and often permit a schedule that will allow the subject to respond in an efficient manner. Enforcement Staff, after all, have limited resources and cannot spare the time to review unnecessary discovery. Of course, that built in “check” does not prevent Enforcement Staff from requesting large quantities of data and documents that it intends in good faith to review when it makes the request, but which it later determines not to review (and no one would ever know whether Enforcement Staff reviewed it or not). Yet, Enforcement Staff must know from their own experience and published statistics that, in the majority of cases, they will end up determining that “there is no there there” and the case will close with no further action. Given that experience, it is not logical to assume that Staff starts an investigation with some inherent animus toward a subject that hardens them against consideration of the possible burdens Staff may be imposing. However, it is frankly impossible for Enforcement Staff to *really* appreciate the burden and expense of their discovery requests—how could they? They are not,

66. See generally OFFICE OF ENFORCEMENT, U.S. OF AM. FED. ENERGY REG. COMM’N, 2014 REPORT ON ENFORCEMENT 4 (2014), <http://www.ferc.gov/legal/staff-reports/2014/11-20-14-enforcement.pdf> (describing several cases where investigation began in 2011 or 2012 and settlement issued in 2014) [hereinafter 2014 REPORT ON ENFORCEMENT]. See also Order Assessing Civil Penalties, *Maxim Power Corp. et al.*, 151 F.E.R.C. ¶ 61,094 at P 28 (2015) (investigating actions that took place in July 2010); and Order Assessing Civil Penalties, *Barclays Bank PLC, Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith*, 144 F.E.R.C. ¶ 61,041 at P 9 (2013) (noting that investigation began in 2007, culminating in Order Assessing Civil Penalties in 2013).

67. Scherman et al., *supra* note 1, at 120.

and cannot be, privy to the inner workings of counsels' and the subjects' efforts to respond.

Motives and intentions aside, the fact remains that the Enforcement Staff "wants what it wants" and has the power to get it. So, in many cases subjects are required to expend, at a minimum, hundreds of thousands of dollars on discovery efforts that can sometimes take years. The burden is especially high with respect to requests for communications documents such as emails, IMs and voice recordings because subjects must review these documents one-by-one before producing them in order to assert an applicable privilege over the document or risk a waiver of said privilege.

Investigations usually involve what the Staff formally refers to as "investigative testimony" but which the vernacular universally terms a "deposition." We use the common phrase here. Sometimes witnesses are deposed for days and days, and sometimes they get deposed twice. Sometimes a second deposition is necessary because of some new development in the case. However, seasoned observers have noted this pattern: Enforcement Staff sometimes takes an early deposition to scout out the basics of a case from a key witness; but if Enforcement Staff reaches a conclusion that it will prosecute, it takes another, much more detailed deposition, simply because it can (unless the respondent is prepared to have a fight about it in a U.S. District Court subpoena enforcement action filed by Staff—an effort that rarely succeeds given the deference courts afford to agency investigations). Each deposition usually requires travel to Washington, D.C., and preparation sessions with counsel so the witness is adequately prepared for the process and to assert and protect his or her rights. Some subjects are large corporations with staff who can manage to devote the resources to support this effort, but many are medium sized or even small businesses or individuals that cannot reasonably sustain these costs without real financial burden.

Part of the reason for this sometimes intensive activity by Enforcement Staff seems to be a notion that if the case will ultimately be presented to the Commission for enforcement action, the case must be virtually ready for trial—that is, Enforcement Staff will have so thoroughly investigated the matter that it has not merely a basis to allege that a violation was committed but that it has progressed to the point where it has all the information necessary to prove that case in an adversarial adjudication. Case in point: in most cases, the second type of deposition referred to above is videotaped. As any seasoned trial lawyer knows, a principal reason for the expensive and intimidating videotaping of a deposition is this: in an adjudication, the Staff intends to use the video tape as potentially impactful impeachment if the witness on the stand varies his or her testimony from the deposition. A conclusion many draw from this pattern is that Staff is taking discovery not just to make a charging decision, to simply "learn the facts," but also to prepare to try a case. In addition, we suspect that Staff have sometimes been in the situation of presenting a case internally to management or a Commissioner and been turned back for not having enough information on a particular point.

One outgrowth of this environment results in additional calendar time for an investigation because of the bouncing back and forth between different Divisions in the Office of Enforcement. The Division of Investigations (DOI) houses the

bulk of legal talent of the Office of Enforcement—it is where the lawyers that lead the investigations live. But the analysts who conduct the bulk of the important and sometimes highly technical number crunching, upon which many of these cases turn, live in the Division of Analytics and Surveillance (DAS). These are separately managed organizations with sometimes-unrelated functions and with their own resource and schedule constraints. So as we know from informal information in cases on which we have worked, calendar time is often chewed up in pending communications between lawyers and analysts. Either the lawyers are waiting on the analysts to finish their work and bounce the ball back to the lawyers, or the analysts are waiting for the lawyers to get the data from the subjects so they can do their work, or the analysts are waiting for the lawyers to review the analysis DAS has already conducted. This progression leaves significant down time while the ball bounces back and forth—just normal bureaucracy. But we suspect it exists, in part, because of the perception by Enforcement Staff that the analytical piece must be “trial ready” when the Enforcement Staff finishes its investigation or else it may be overcalled by management or Commissioners.

While this kind of oversight should be viewed as a good thing by the bar and the public, nominally ensuring that only the most meritorious cases are pursued, it comes at a huge price: extensive discovery burden and lengthy investigations. This burden falls on Enforcement Staff as well, and it falls no less harshly (on everyone) in cases that may never be adjudicated. Most cases just go away or are settled before any adjudication, resulting in a significant incremental waste of resources (both Enforcement Staff’s and respondent’s) on cases that will never need this level of preparation.⁶⁸

However, there is probably something more than structural inefficiencies going on here. The current system also tactically incentivizes the Enforcement Staff to maximize its discovery efforts, yet the subject of an investigation is afforded no discovery rights. This is another major criticism of the process. Whereas Enforcement Staff can obtain, through Commission process, third party discovery (and keep that discovery to itself unless it is deemed *Brady* material), the subject cannot do so.⁶⁹ Staff correctly points out that most of the information that directly relates to the investigation comes from the files of the subject or from the witnesses to whom the subject usually has access. However, Staff takes the position that subjects of investigation (the entity) may not attend depositions unless through their counsel (who also represents the witness), which may not always be possible. The Staff has observed that subjects might have discovery rights later in the process, but that only occurs after the Staff has presented its case to the Commission and the Commission has made up its mind that there is likely a violation.⁷⁰ In any event, during the investigative discovery, there is no possibility of “return fire” from the subjects. Every seasoned litigator knows that the rule of potential “mutually assured destruction” that prevails in regular court litigation, where each side has to bear the burden and costs of discovery, is a pretty

68. See, e.g., 2014 REPORT ON ENFORCEMENT, *supra* note 66, at 12 (illustrating the number of self reports that close with no additional action); *Id.* at 21 (describing that over half of investigations closed in FY2014 were closed “upon finding of no violation or because staff concluded that the evidence was insufficient to support finding a violation”).

69. See generally *Brady v. Maryland*, 373 U.S. 83 (1963); Scherman et al., *supra* note 1, at 118.

70. Murphy et al., *supra* note 1, at 293-95.

effective deterrent to run-away discovery by either side. There is no such check in a FERC investigation.

Finally, Staff knows that they can take discovery before the Commission will make a preliminary decision about the merits—a decision that will be hard to turn around. So, the one-sided discovery is a powerful advantage for the Staff. They know it and it appears that they use it. Whether this is thoroughness of investigation (which sounds good) or taking advantage of one-sided discovery (which sounds bad) may be in the eye of the beholder. But there can be little debate that in cases that proceed as far as settlement or adjudication, Staff typically develops much more formalized evidence through extensive sworn data requests, sworn depositions, and expert analysis than would likely be necessary for Staff to *merely* make a determination that there is probable cause to determine that a violation may have occurred.

B. Brady Evidence

Another major area of criticism is the claim that Staff fails to turn over *Brady* material during an investigation as it is supposed to do under Commission policy.⁷¹ Staff claims that it does turn over *Brady* material and that most of the criticisms are based on an incorrect and overly expansive view of what *Brady* material actually is.⁷² We do not question the Staff's commitment to *Brady* disclosure, but frankly, there is a lot of judgment involved in determining what *Brady* material is. Yet, only Staff gets to make that determination in the first instance and it does so in a way that no investigative subject can review. While the Staff is making those decisions it is simultaneously advocating internally within the Commission for its case. So, we can at least say this: in several cases, there has been discovery material that any objective observer would agree the subjects would really love to have had (even if Staff did not think it was “exculpatory” or otherwise thought it fit into some technical exception to *Brady*). Yet, once Staff gave it up, the subjects felt it was too late in the process for them to have adequately exploited it—too late in time to make a difference as to how the Commission decided whether there was a basis for a violation.⁷³ A similar issue arises with respect to copies of deposition transcripts. Staff has been criticized for not allowing subjects to obtain copies of their deposition transcripts.⁷⁴ Staff claims that witnesses will eventually receive their transcripts if Staff relied upon them in the OSC process, and this is true.⁷⁵ However, subjects usually find that receiving them at that point is too late in the

71. Lafleur and Bay Hearing, *supra* note 10, at 28-29.

72. Policy Statement on Disclosure of Exculpatory Evidence, *Enforcement of Statutes, Regulations, and Orders*, 129 F.E.R.C. ¶ 61,248 (2009).

73. Expedited Motion for Thirty-Day Extension of Time, *Houlian Chen, Powhatan Energy Fund, LLC, HEEP Fund, LLC, CU Fund, Inc.*, No. IN15-3-000 (2014) (requesting extension of time, inter alia, because Staff had waited to provide potentially exculpatory *Brady* material until the issuance of the Order to Show Cause); Notice of Extension of Time, *Deutsche Bank Energy Trading, LLC*, No. IN12-4-000 (2012) (requesting additional time to respond to Order to Show Cause due to fact that Enforcement Staff had provided materials that “may be relevant to Deutsche Bank’s defense” three days prior to when the answer was due).

74. Scherman et al., *supra* note 1, at 125.

75. Lafleur and Bay Hearing, *supra* note 10, at 59, 63.

game to make effective use of them in persuading the FERC not to proceed to adjudication.⁷⁶

C. The Groundhog Days: Inefficient Use of Resources—on Both Sides of the “v”

Most cases result in the Staff determining to close the investigation with no additional action. Members of the public need only read the FERC’s Annual Report on Enforcement to grasp how many instances Staff exercises its discretion NOT to prosecute.⁷⁷ This is a point that often gets lost in the rhetoric that the process the Staff uses is “off-kilter.”⁷⁸ However, a substantial number of investigations result in a Staff “preliminary finding” of a violation. When Staff “preliminarily” determines a violation, it notifies the subject and typically presents a detailed written letter—a “Preliminary Findings Letter” (PF Letter) setting forth all the legal and factual bases for its finding and soliciting a response.⁷⁹ This is typically the first point at which the subject has the full benefit of the Staff’s thinking and a chance to fully respond. It takes Staff a long time and lot of taxpayer money to develop these letters. The FERC seems to be proud of its PF Letter process as providing more notice and process than any other agency provides in this type of investigative setting.⁸⁰ It may be true that this process is more involved than those of other agencies. Whether it is a better process is a bit more debatable as we shall discuss further below.

Typically, the response to a PF Letter is as long and detailed as the PF Letter itself, which is another criticism of the process that sounds in time and expense. Sometimes these responses are more than a hundred pages single-spaced. Many subjects feel compelled to develop and attach to the PF Letter response detailed (and expensive) expert reports or affidavits to review the complex trade or market issues that are frequently involved in such cases. This is where the respondent brings on a full court press to convince the Staff to reconsider its “preliminary findings.” However, in our experience, most of the time Staff’s “preliminary findings” are not so preliminary. It is apparent that the “preliminary findings” (though presented in a letter signed by the line attorneys who have investigated the case) have been “run up the flagpole” at least as far as senior management in the Office of Enforcement, and perhaps in other program offices at the FERC—perhaps even to the Chairman’s or all the Commissioners’ offices.⁸¹ For this reason, many practitioners seek to advocate with Staff informally well before they reach this stage, hoping to avoid the PF Letter altogether. But, as a matter of best practice, subjects have little choice but to prepare the detailed PF Letter response, even though they suspect it may do them little good.

76. See, e.g., 2014 REPORT ON ENFORCEMENT, *supra* note 66. See also 151 F.E.R.C. ¶ 61,094; and 144 F.E.R.C. ¶ 61,041.

77. See, e.g., 2014 REPORT ON ENFORCEMENT, *supra* note 66. Reports from prior years demonstrate the same trend.

78. Scherman et al., *supra* note 1, at 103.

79. Murphy et al., *supra* note 1, at 293. Sometimes the Preliminary Findings are presented in less laborious fashion through a live meeting with a PowerPoint presentation by Staff. *Id.* at n.58.

80. LaFleur and Bay Hearing, *supra* note 10, at 37-38.

81. Murphy et al., *supra* note 1, at 294 & n.63.

After the PF Letter stage, if Staff is not convinced to change their mind (and they rarely are), they seek settlement authority from the Commission.⁸² Staff cannot settle a case without authority because ultimately, according to Commission practice, only the Commission can approve a settlement, by order. At this stage, although the process is somewhat opaque and may have evolved over time, it appears that the Staff share their PF Letter, the PF Letter response and probably other materials with the entire Commission. It appears that they actually meet with individual Commissioners and/or their staffs to obtain this authority. But, subjects do not participate in these discussions.

Many cases do settle, but some do not. If a case does not settle, the matter proceeds to the “1b.19” stage. This is a reference to 18 C.F.R. § 1b.19 which provides that:

In the event the Investigating Officer determines to recommend to the Commission that an entity be made the subject of a proceeding governed by part 385 of this chapter . . . the Investigating Officer shall . . . notify the entity that the Investigating Officer intends to make such a recommendation. Such notice shall provide sufficient information and facts to enable the entity to provide a response. Within 30 days of such notice, the entity may submit to the Investigating Officer a non-public response . . . showing why a proceeding governed by part 385 of this chapter should not be instituted against said entity . . .⁸³

Some refer to this 1b.19 process as a “Wells process” in reference to Rule 5(c) of the SEC’s Rules on Informal and Other Procedures, but FERC does not refer to it as a “Wells process.”⁸⁴ Typically, the Staff provides a 1b.19 letter that simply refers back to their PF Letter. Usually, Respondents submit a 1b.19 response that also somewhat mirrors their PF Letter response. However normally, the respondents cannot simply resubmit the same PF Letter response letter, because these materials are now required, by regulation, to be submitted to the Commission and are not strictly addressed to Staff. The response needs to be “re-voiced” for that audience. This does not sound like it should cost respondents a lot of time and money, but it does.

As almost always occurs, if the case is not declined by the Commission at the 1b.19 stage, the Commission issues the OSC, which may signal the beginning of the adjudicative phase of the matter (if it will follow an adjudicative path at the Commission, as opposed to a district court proceeding). Though it is debatable how much of a true “adjudication” follows, based on the way these issues are handled, it is clear that the Commission currently considers this an “adjudicative phase.” Because, among other reasons, this is the juncture at which the Commission “brings down the wall”⁸⁵ that separates the “functions of Trial Staff” and “decisional Staff” and effectuates the separation of functions rules (a subject addressed in more detail below).⁸⁶ Once again, the Staff and the respondents mount their cases in writing. The Staff issues a lengthy “Report” that is attached

82. 123 F.E.R.C. ¶ 61,156 at P 34.

83. 18 C.F.R. § 1b.19 (2013).

84. 17 C.F.R. § 202.5(c) (2013).

85. The wall “coming down” (rather than “going up”) seems to be the universal vernacular—so maybe it is supposed to be like a garage door.

86. Order No. 718, *Ex Parte Contacts and Separation of Functions*, 125 F.E.R.C. ¶ 61,063 (2008) [hereinafter Order No. 718].

to the OSC and that, almost uniformly, simply recycles the same case that was described in writing in the prior two steps. Nominally, Staff claims that it addresses in this report the defenses and arguments that are presented in the prior stages, but in our experience they rarely do so or do so only perfunctorily. And, once again, the respondents must present their written response, in great detail.⁸⁷ For reasons that we do not understand, the Commission has steadfastly refused to allow respondents to just submit their prior papers.⁸⁸ So, the respondents, once again, have to create an entirely new brief, even if the substance of their arguments on the law and the facts is unchanged. This is a formal and very significant submission, so even if the respondent in concept, is “cutting and pasting” from prior submissions, in actual practice these papers need to be combed through and quality checked almost like an original work. This results in more time and expense for respondents already several years into an investigation. The Commission’s current practice provides Staff with a right to reply to the respondent’s answer. Frequently, this reply recycles a lot of the material from the Staff Report though sometimes Staff slips in a few “new” points that (most of the time) probably could have been addressed in its report, but were omitted or perhaps strategically withheld. The subjects of the investigations will then feel compelled to seek leave to respond. Again resulting in more time and expense—with little in the way of tangible results.⁸⁹

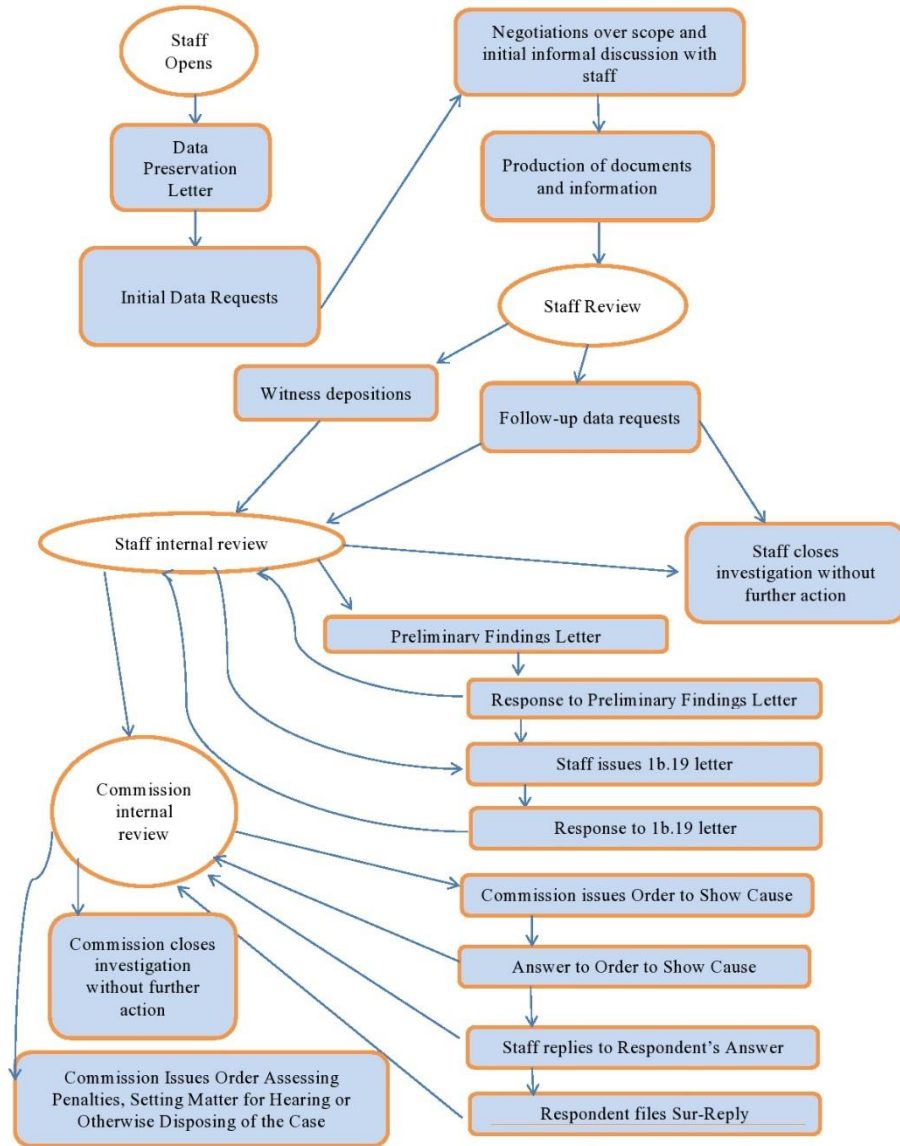
This three-round process—from PF Letter issuance to OSC issuance—can easily take over one year. We attempt to illustrate this process graphically in the following chart.

87. 144 F.E.R.C. ¶ 61,041 at P 20 & n.63.

88. *Id.*

89. 18 C.F.R. § 385.213(a)(2) (precluding the filing of an answer to an answer); *City Power Marketing, LLC and K. Stephen Tsingas*, 152 F.E.R.C. ¶ 61,012 at P 37 & n.97 (2015) (rejecting respondents answer in response to Enforcement Staff’s Reply); 151 F.E.R.C. ¶ 61,179 at P 33 n.72 (rejecting Chen’s attempt to file supplemental Answer en route to assessing civil penalties); 151 F.E.R.C. ¶ 61,094 at P 21 & n.28 (accepting respondents’ joint Supplemental Answers en route to assessing civil penalties).

Anatomy of a Non-Public, Informal FERC Investigation (These processes usually span at least one year, frequently several years)



White = internal processes
Gray = processes transparent to subject

D. Staff's One-Sided Access to the Commission

From the very outset of an investigation and throughout the investigative and adjudicatory process the Office of Enforcement Staff enjoys (at least theoretically in all cases, and in practice in some cases) direct written and personal access to the Commissioners, their staffs, and the other program and legal offices in the Commission who may advise the Commission on the enforcement matter. This has been another major area of criticism—that by the time of the Preliminary Findings and settlement process, Staff has unfettered access to the Commission all the way through the process before an OSC, yet subjects do not enjoy such access. Indeed, even if some of a respondent's paper submissions are conveyed to Commissioners at some point in the process, by policy, Commissioners have stated that they will not meet with respondents in enforcement actions at any time.⁹⁰

Subjects rightly believe that at some point in the process, the Staff are not merely neutral fact investigators. We do not question that at the beginning of every investigation, Staff are merely trying to “get the facts” and bring an open mind to the question of whether a violation occurred. The facts speak for themselves: Staff closes far more investigations than they pursue to settlement or litigation. But, at some point, in the cases that matter to this discussion, the Staff starts to become convinced that something happened that violated the rules. This is the natural outcome in some cases. Violations happen. By then, they surely start to become advocates for that point of view. They and their management are “invested” in the case. It is just human nature. And it stands to reason that in all internal communications up their management chain and to the Commission, that point of view is seeping in to the presentation and the view of the subjects is being (subconsciously perhaps, but nevertheless) discounted, and the respondents are not present to advance the case in his or her own words. Notably, the Commission has stated that Staff need not respond to the arguments presented in the 1b.19 response—at least not publicly or in a way that the subjects can view.⁹¹ At the 1b.19 stage, it appears that, again, the Staff has the ability to engage in non-public and one-sided communications with the Commission. Unquestionably, at this stage of the process, the Enforcement Staff believe in their case and are advocating, if necessary, internally within the Commission for the Commission to agree and take the case to the next level. It seems inevitable that through these communications, Staff would obtain a good sense from the Commission about what the important issues are and how to shape their case in a certain way. It may be that in this process the case actually gets “pared back” or reshaped somewhat *in the respondent's favor*. However, the fact remains that the process occurs without the active participation of the respondents and to date has uniformly resulted in an OSC if the case did not settle.

The Commission is not blind to the actual and perceived problems associated with one-sided access. Staff and the Commission point to the imposition of the *ex parte* communication rule and the “separations of functions” rules at the OSC stage of the process as protections against the acknowledged problems with one-

90. 123 F.E.R.C. ¶ 61,156 at P 27.

91. 141 F.E.R.C. ¶ 61,041 at P 18; 123 F.E.R.C. ¶ 61,156 at P 21.

sided access to the Commission.⁹² The notion here is that “Trial Staff” for the Office of Enforcement who will litigate the case on behalf of the Commission are “walled off” from the Commission and from those who advise the Commission—so called “Decisional Staff.”⁹³ We have no doubt that Commission staffers honor this wall of separation and that Trial Staff, once designated, do not communicate about the case with Commissioners and Decisional Staff. But, the notion that this meaningfully protects against unbalanced presentations to the Commission is questionable for two reasons. First, by the time the “wall has come down”, it is too late based on the way all the other processes are set up. The people who become “Trial Staff” have already enjoyed months, sometime years, of access to the Commissioners and Decisional Staff. As the outcome in case after case shows, by the time of the OSC, the game is up (at least for the Commission). If for no other reason than that they have given Staff settlement authority, which they surely do not take lightly, the Commissioners must, by this point, have already become convinced that there was likely a violation—based primarily on the one-sided access from Staff. Notably, dissents in enforcement cases that reach the OSC stage are extremely rare.⁹⁴ Second, under its current practice the Commission designates as “decisional” a significant team from the same Office of Enforcement—senior staff, supervisors, line lawyers and analysts.⁹⁵ The notion that these colleagues of the newly designated Trial Staff—who have been living with the Trial Staff who worked on and reported internally on the case for years—are now, all of the sudden, unaffected by those prior exposures just does not withstand common-sense scrutiny.

What to make of all of this? Here is the dilemma: this one-way access is necessarily built in to the process as currently practiced. The Staff work for the Chairman and the Commissioners. The Commission (through the Chairman or as a full body) has a job to do here: to oversee the Staff in its investigations and charging decisions. In addition, under current practices, the Commission has to authorize settlement and the terms and conditions of the same. Nobody questions that the Commission must perform these functions. How can the Commission do that job without interacting with the Staff? Clearly, that Commission process has to take place *outside* the public eye and without the involvement of the respondents. Respondents do not invite Staff to internal meetings amongst themselves or with their counsel to discuss the investigation and possible settlement considerations. Why should anyone expect the Commission to invite the respondents into their version of the same process? The difference (and the problem) is that the folks with whom the Staff are meeting will later be some of the same folks running the “adjudication phase” if the case does not settle (except for de novo review cases). Notably, in all the OSC proceedings that have occurred since EAct 2005, not once has the Commission done anything materially different than what the Staff recommended in the Staff Report and which was very

92. See generally Order No. 718, *supra* note 86. See also 18 C.F.R. § 385.2201.

93. *Id.*; Murphy et al., *supra* note 1, at 295 & n.70.

94. We have only located two cases out of more than 100 matters that involved dissents on the merits. 151 F.E.R.C. ¶ 61,094 (Clark, Comm’r, dissenting); Order to Show Cause, *Seminole Energy Services, LLC, Seminole Gas Co., LLC, Seminole High Plains, Lakeshore Energy Servs., LLC, Vanguard Energy Servs., LLC*, 126 F.E.R.C. ¶ 61,041 (2009) (Moeller, Comm’r, dissenting).

95. See generally Order No. 718, *supra* note 86.

likely the same thing that was contained all the way back in the PF Letter and the 1b.19 papers.⁹⁶ What does that tell you? It does not mean that Staff and the Commission are intentionally rigging cases against respondents—it means we probably have a structural problem.

This whole set up presents another problem: once the wall comes down, these rules can frustrate settlement. There is always a chance of settlement—even after the OSC stage begins. It has happened in a few cases.⁹⁷ However, after the OSC stage when the wall is down, Trial Staff who are the most well-informed about the pros and cons of the case, cannot then advise the Commission about settlement. At the same time, the respondents cannot talk settlement directly with the Decisional Staff or the Commission who have to authorize a settlement.⁹⁸ These constraints on the Commission's settlement function only exist because of these rules designed to account for the role of the Commission as "adjudicator"—rules that are of dubious value in the first place. This is no way to run a railroad.

* * *

The current system may or may not be unconstitutional; it may or may not be extra-statutory, it may be rigorous and fulsome of process or inherently unfair, but it is unquestionably inefficient, too time-consuming for both sides, too expensive for respondents, and not an optimal use of Staff or Commission time and resources. The process raises legitimate "perception of fairness" questions for respondents that are, at the very least, a distraction to all involved. We can do better. We think the answer lies in shifting adjudicative functions away from the Commission and into the courts.

IV. WHAT IS THE ANSWER? "SEE YOU IN COURT"

These cases should be adjudicated in federal court. This would mean that the Commission would file an original action in a federal court to enforce its rules and regulations, seek a determination of a violation and the imposition of the civil penalty and any other remedy that it views as appropriate. The case would proceed like any other federal court civil action. The case would likely involve preliminary motions, initial disclosures, discovery for both sides, the application of the Federal Rules of Evidence and Federal Rules of Civil Procedure, the availability of summary judgment, and the availability of trial, where appropriate. A neutral federal judge, with a fresh view of the matter, would referee the case and in some cases the matter might be tried to a jury on the merits. The Judge would have the final say on the penalty and any other remedy. All of this would be reviewable by a federal Court of Appeals. As we discuss further below, this would make many

96. 152 F.E.R.C. ¶ 61,012 (order assessing civil penalties); 151 F.E.R.C. ¶ 61,179 (order assessing civil penalties); *Lincoln Paper & Tissue, LLC*, 144 F.E.R.C. ¶ 61,162 (2013); 144 F.E.R.C. ¶ 61,041; *Rumford Paper Co.*, 142 F.E.R.C. ¶ 61,241 (2013); *Deutsche Bank Energy Trading, LLC*, 142 F.E.R.C. ¶ 61,056 (2013); *Seminole Energy Services, LLC, Seminole Gas Co., LLC, Seminole High Plains, LLC, Lakeshore Energy Servs., LLC, Vanguard Energy Servs., LLC*, 135 F.E.R.C. ¶ 61,010 (2011); *Energy Transfer Partners, L.P.*, 128 F.E.R.C. ¶ 61,269 (2009); *Amaranth Advisors, et al.*, 128 F.E.R.C. ¶ 61,154 (2009); *Oasis Pipeline, L.P.*, 126 F.E.R.C. ¶ 61,188 (2009).

97. 142 F.E.R.C. ¶ 61,241 at P 9; *Deutsche Bank Energy Trading, LLC*, 142 F.E.R.C. ¶ 61,056 at P 6.

98. See generally Order No. 718, *supra* note 86.

of the problems (whether perceived or actual) with the current investigative and adjudicatory system simply fall away—or at the very least become much less nettlesome.

And why not take these cases to court? As we discuss below, it is what a lot of other federal agencies with more longstanding, and equally significant, large-scale enforcement programs are able to do (or in some cases must do).

A. *Adjudicatory Paths of Peer Agencies*

Several of the FERC's peer agencies already have some level of authority to pursue civil penalty enforcement cases in district court. For some agencies, such as the Department of Justice Antitrust Division, this is the only option. Others, such as the Federal Trade Commission ("FTC"), can pursue enforcement actions such as injunctions and other equitable remedies before a U.S. District Court but may only seek a civil penalty in district court after an administrative order has been violated. Still other agencies such as the U.S. Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC"), have the option of pursuing enforcement cases administratively or filing a complaint in a U.S. District Court. With the CFTC and SEC, the pendulum, until recently, had been squarely within the "file in court" camp. However, recent comments by leaders of the CFTC and SEC indicate that the agencies may be pursuing more of their cases administratively.⁹⁹ Whether this is a passing fad or the way of the future remains to be seen. Here we present an overview of the ability of these agencies to enforce civil penalties in district court.

1. DOJ Antitrust Division

The DOJ Antitrust Division has authority to bring civil penalty enforcement actions in federal district court to pursue violations of various antitrust laws.¹⁰⁰ The Clayton Act provides DOJ Antitrust with the authority to seek civil penalties in some situations, such as violation of section 7A(g)(1), which provides for up to \$10,000 penalty per day for a violation of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.¹⁰¹ The DOJ Antitrust Division initiates civil litigation for such violations by filing a complaint in district court, where the Federal Rules of Civil Procedure and Evidence apply fully.

2. The Federal Trade Commission

The FTC can initiate enforcement actions to pursue violations of both consumer protection and antitrust laws. Through a combination of administrative and civil adjudicatory paths, the FTC can seek and enforce injunctions, seek and enforce equitable remedial measures, such as disgorgement and asset freezing, and assess and pursue civil penalties.

In some situations, the FTC may file suit for civil penalties directly in federal district court. Civil penalty authority more often arises in the context where a

99. Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J. (May 6, 2015, 10:30 PM), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803>.

100. The DOJ Antitrust Division also has the authority to seek injunctions and criminal penalties as well. 15 U.S.C. §§ 1, 2, 4, 24 (2011).

101. 15 U.S.C. §§ 12-27; 15 U.S.C. § 18a.

cease-and-desist order has been violated and the FTC must petition a federal district court to enforce the cease-and-desist order and assess civil penalties. For example, the FTC may seek civil penalties in district court under authority of 15 U.S.C. section 45(m)(1)(A) and (B). These sections allow the FTC to seek civil penalties for knowing violations of trade regulation rules, and provide authority to seek civil penalties for knowing violations of adjudicatory holdings by non-parties. To prove the “actual knowledge” requirement the FTC typically shows that it provided the violator with a copy of the determination in question, limiting wrongdoers to a “single bite of the apple.”¹⁰²

The FTC more often will seek injunctive or equitable relief by filing enforcement actions in district court.¹⁰³

3. U.S. Commodity Futures Trading Commission

The CFTC has the ability to seek injunctions, assess civil penalties, and pursue other equitable remedies, such as disgorgement and asset freezes. The remedies available to the CFTC are essentially the same whether an enforcement action is pursued administratively or in court. Section 6c of the CEA, 7 U.S.C. section 13a-1, provides the CFTC with the authority to file an action in United States district court to enjoin or restrain violations, impose civil penalties for violations of the CEA, or require restitution or disgorgement.¹⁰⁴ The statute provides:

In any action brought under this section, the Commission may seek and the court shall have jurisdiction to impose, on a proper showing, on any person found in the action to have committed any violation—

(A) a civil penalty in the amount of not more than the greater of \$100,000 or triple the monetary gain to the person for each violation; or

(B) in any case of manipulation or attempted manipulation in violation of section 9, 15, 13b, or 13(a)(2) of this title, a civil penalty in the amount of not more than the greater of \$1,000,000 or triple the monetary gain to the person for each violation.¹⁰⁵

The CFTC has not always had the flexibility to pursue both administrative and judicial remedies; it was initially limited to imposing penalties for violations through administrative proceedings. Only in 1992 did Congress amend the CEA

102. *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last visited Aug. 16, 2015).

103. The following statutes provide the FTC with authority to seek injunctions in district court: 15 U.S.C. §§ 45(m)(1)(A), 45(a), 53(b), 56(a), 57(b) (2011). In addition to injunctive relief, the FTC has utilized § 13(b) to permanently bar deceptive trading practices and impose various forms of monetary equitable relief. *FTC v. World Travel Vacation Brokers Inc.*, 861 F.2d 1020, 1024-28 (7th Cir. 1988). Including restitution and disgorgement. *United States v. Zaken Corp.*, 57 F. Supp. 3d 1233, 1243 (C.D. Cal. 2014) (citing *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d at 1088-89). And freezing assets and appointing receiverships. *Federal Trade Commission Act*, § 5(1), 15 U.S.C. § 45(l) (2011).

104. 7 U.S.C. § 13a-1 (2011); *see also* *U.S. Commodity Futures Trading Comm'n v. Hall*, 49 F. Supp. 3d 444, 455 (M.D.N.C. 2013), *aff'd*, 49 F. Supp. 3d 444 (M.D.N.C. 2014) (district court adopting magistrate judge's recommendation to impose permanent injunction and civil penalty against violator).

105. 7 U.S.C. § 13a-1. The maximum civil penalty amount that court may impose has been raised by regulation for acts committed after Oct. 23, 2008. *U.S. Commodity Futures Trading Comm'n*, 49 F. Supp. 3d at 454 (M.D.N.C. 2013) (citing 17 C.F.R. § 143.8(a)(1)(ii)(D) (2013)).

to allow the courts to impose civil penalties for violations of the CEA in the context of a suit for injunctive relief brought by the CFTC.¹⁰⁶ The CFTC has been pursuing contested enforcement actions exclusively through the district courts since *In the Matter of Anthony J. DiPlacido*, which was filed in 2001. These cases all seek both injunctive and other equitable relief as well as the imposition of civil penalties.¹⁰⁷

Recently the CFTC has indicated that it intends to return to pursuing more enforcement actions administratively. The CFTC's enforcement chief, Aitan Goelman, explained that the "overwhelming reason for the move is the agency's lack of resources," including "its bandwidth for discovery-intense litigation."¹⁰⁸ Unlike the SEC (which was given additional administrative adjudicatory authority under Dodd-Frank), the CFTC has always been able to try its cases administratively.¹⁰⁹ Currently, the CFTC does not have its own ALJs on staff.¹¹⁰ The CFTC did not have the best success rate before its administrative courts, and has not brought an enforcement action administratively in over ten years, and the lack of current ALJ experience in the complex subject matters faced in CFTC adjudications would seem to make for a rough transition.¹¹¹ Goelman has stated publicly, however, that the majority of the CFTC's enforcement cases will still be brought in district court, and that cases would be brought administratively on a "case-by-case" basis.¹¹²

4. Securities and Exchange Commission (SEC)

The SEC has authority to pursue enforcement cases both administratively and directly in a U.S. district court and has nearly the same remedies available to it in each venue.¹¹³ The SEC has authority to seek civil penalties in district court, as both sections 78u(d) and 78u-1 provide jurisdiction for U.S. district courts to enter civil penalties against violators of certain securities laws.¹¹⁴ The SEC will initiate a lawsuit in federal district court, with a trial under the Federal Rules of Civil Procedure. Notably, the SEC is not limited to pursuing a civil penalty in federal district court and may bring other parallel actions, either on its own or through the Attorney General.¹¹⁵

106. See generally Dan M. Berkovitz, *The Resurrection of CFTC Administrative Enforcement Proceedings: Efficient Justice or Biased Forum?*, FUTURES & DERIVATIVES L., Mar. 2015, at 1, 7.

107. *Id.* at 8 & n.79 (citing, e.g., CFTC v. Wilson, 13 Civ. 7884 (S.D.N.Y. filed Nov. 6, 2013)).

108. Stephanie Russell-Kraft, *Cash Strapped CFTC Faces Troubled Return to Admin Court*, LAW360.COM (Nov. 14 2014, 3:28 PM), <http://www.law360.com/articles/595182/cash-strapped-cftc-faces-troubled-return-to-admin-court>.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. 15 U.S.C. § 78u(d) (2011) (describing SEC authority to seek injunctions and civil penalties in district court for violations of the Securities Exchange Act); 15 U.S.C. § 78u-1 (2011) (describing SEC authority to seek civil penalties in district court for insider trading).

114. *Id.*

115. 15 U.S.C. § 78u-1(d)(3). In addition to enforcing civil penalties, the SEC is able to obtain injunctive and equitable relief, such as an asset freeze or receivership. 15 U.S.C. § 78u(d)(1). A court may also award ancillary relief, such as disgorgement of profits and clawback of executive compensation. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 §§ 308, 304, 116 Stat. 745. Moreover, courts recognize that the SEC may seek

The SEC may also pursue enforcement cases administratively, including assessing monetary penalties.¹¹⁶ A person losing before the SEC administratively may appeal to the Court of Appeals. The court will have jurisdiction to “affirm or modify and enforce or to set aside the order in whole or in part.”¹¹⁷ The SEC’s findings of fact are conclusive so long as they are supported by substantial evidence.¹¹⁸

A recent Wall Street Journal article reported that the SEC wins 90% of the cases it brings before its Administrative Law Judges, as compared to a 69% success rate in federal court, prompting some commentators to cry foul.¹¹⁹ Former SEC Commissioner Joseph Grundfest, currently a professor at Stanford University, commented that “[b]y bringing more cases in its own backyard, the agency is not only increasing its chances of winning but giving itself greater control over the future evolution of legal doctrine.”¹²⁰ Combined with the deference given to agency adjudications by appellate courts, the trend towards conducting more contested enforcement actions before SEC ALJs has prompted some to note that the SEC is “looking to improve its chances of success.”¹²¹

Perhaps in response to these accusations, the SEC released a document entitled “Division of Enforcement Approach to Forum Selection in Contested Cases” early this year. The four-page guide speaks in generalities and notes at the outset that “[t]here is no rigid formula dictating the choice of forum.”¹²² The non-exhaustive list of factors includes:

- The availability of the desired claims, legal theories, and forms of relief in each forum
- Whether any charged party is a registered entity or an individual associated with a registered entity.
- The cost-, resource-, and time-effectiveness of litigation in each forum. This includes the speed at which hearings are held; the ability of the SEC to obtain all relief on a matter in a single proceeding; the use of motions for summary judgment and the cost/benefit of pre-trial discovery.
- Fair, consistent and effective resolution of securities law issues and matters. This “factor” appears to weigh heavily in favor of adjudicating more actions before ALJs, to allow them to develop and use their expertise to ensure consistent application and development of securities law.¹²³

Insight into the SEC’s forum selection process is important because of the role forum choice appears to play in the SEC’s success rate, as shown in the Wall Street Journal article.¹²⁴ Perhaps because of this advantage—perceived or

disgorgement to “depriv[e] violators of the fruits of their illegal conduct.” *S.E.C. v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014) (citing *S.E.C. v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997)).

116. 15 U.S.C. §78u-2(a)(1) (2011).

117. 15 U.S.C. § 78y(a)(3) (2011).

118. *Id.*

119. Eaglesham, *supra* note 99.

120. *Id.*

121. *Id.* (quoting Michael Piwowar, a Republican SEC commissioner).

122. *Division of Enforcement Approach to Forum Selection in Contested Actions*, U.S. SEC. AND EXCH. COMM’N, <https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf>.

123. *Id.*

124. Eaglesham, *supra* note 99.

actual—targets of SEC administrative proceedings have recently challenged the constitutionality of the SEC’s use of administrative proceedings, under various theories including violation of the Seventh Amendment’s right to a trial by jury and the Appointments Clause. Courts in both the Southern District of New York and the Northern District of Georgia have issued injunctions on the grounds that the SEC’s manner of appointing and retaining ALJ’s violates the Appointments Clause, which leads these observers to wonder whether the trend towards enforcement in the administrative arena is here to stay.¹²⁵

* * *

The following chart demonstrates the various enforcement powers of the several agencies discussed above. This is not an exhaustive list, by any means, but meant to represent that other agencies pursuing similar enforcement goals have the ability to seek civil penalties, and other remedies, by filing suit in U.S. district court.

Agency Enforcement Authority: Administrative and Judicial Paths			
Agency	Civil Penalty	Injunction	Restitution
DOJ Antitrust Division	Court (15 U.S.C. § 18a)	Court (15 U.S.C. §§ 4, 25)	n/a
FTC	Court (limited circumstances, 15 U.S.C. § 45m(1)(A))	Agency & Court (15 U.S.C. §§ 45(b), 53(b))	Court (using 15 U.S.C. § 53(b))
CFTC	Agency & Court	Agency & Court	Agency & Court
SEC	Agency & Court	Agency & Court	Agency & Court

B. Why Court Would Be Better

We develop below how most of the problems and criticisms addressed in Part III above would fade away or become much less significant if the Commission was not adjudicating these cases and why it would be better public policy for the Commission to pursue enforcement in the courts like most agencies can do, as discussed in Section IV.A.

1. Making the Process Faster and Cheaper

Avoiding Commission adjudication and in favor of a federal trial court case could eliminate the three-part PF Letter/1b.19/OSC process. Because all of the adjudicative processes will occur in one step in federal court, in all the cases that settle, the participants could simply utilize a PF Letter (or a 1b.19) process,

125. *Duka v. SEC*, No. 15 Civ. 357 (RMB), 2015 WL 4940083 (S.D.N.Y. Aug. 12, 2015); *Hill v. SEC*, No. 1:15-CV-1801-LMM, 2015 WL 4307088 (N.D. Ga. June 8, 2015). On September 17, 2015, Judge Richard Berman of the Southern District of New York denied the SEC’s application to stay the preliminary injunction of the SEC’s administrative proceedings against *Duka* pending appeal. *SEC v. Duka*, No. 15 Civ. 357 (RMB), 2015 WL 5547463 (S.D.N.Y. Sep. 17, 2015). *But see Jarkey v. SEC*, No. 14-5196, 2015 WL 5692065 (D.C. Cir. Sep. 29, 2015) (affirming district court’s dismissal for lack of subject matter jurisdiction and holding that securities law provided an exclusive avenue for judicial review of claims, which precludes “concurrent district-court jurisdiction over challenges [an ongoing administrative proceeding] like *Jarkey’s*”).

followed by settlement.¹²⁶ In cases that do not settle, in addition to avoiding the PF Letter or 1b.19 process (whichever one does not occur), the OSC process could also be eliminated and the Commission could just bring a case in court. This would likely make the cases take less time and be less resource-intensive with no real difference in the outcomes.

Court adjudication would also likely reduce the required level of investigative scope (due to the availability of discovery in court). Staff would be less likely to fully prepare for a case that may not ever have to be adjudicated because if it is adjudicated, Staff can take clean-up (or even substantial) discovery under the Federal Rules of Civil procedure. In addition, because the Commission will not have to adjudicate the case, Staff will not have as much of an incentive to use the one-sided discovery to improve its chances of convincing the Commission on the merits before an adjudication. For the majority of cases that would not proceed to court, this will result in less discovery—by all metrics—on net. It might result in less discovery even for cases that go to court if the agency discovery process pares the cases back and allows trial court discovery to be more tailored. “How can that be” you say, if there is a discovery “do over” in court? It could work like this: Staff could take less discovery in the investigation because it will not need as much (and if the case does not settle it will know it can take more in court) but when it gets to court the discovery will be governed by both the rule of “Mutually Assured Destruction” and the supervision of a neutral judge, not to mention that the discovery would be governed by the Federal Rules of Civil Procedure. It really could be less “net discovery.”

Finally, better clarity in the process and the prospect of a more neutral adjudicatory process might lead more cases to settle—reducing the resource drains on all involved. Though this is hard to predict, the Commission might be more amenable to settling some cases if it knows that the next step is a federal court case where it is a mere litigant, rather than potentially years more of adjudicative process over which it has control. Some might see this as a loss of important prerogatives and public benefits to the Commission. But, we submit that is short-term thinking. The Commission can still seek to enforce its rules as prosecutor and litigant. In cases where it is truly in the right, the Commission will win, and those cases will, frankly, be clothed with additional legitimacy because the case was won in what no one would debate was a fair and neutral litigation process. We think the Commission should not underestimate the value of this imprimatur of the courts with respect to its enforcement positions, nor should it discount its chances of prevailing in well-founded cases in federal court.

2. Eliminating Troublesome Process Issues

The Bar, the regulated community, Staff, and the Commission need not agree on whether the investigative process issues that are subject to current debate rise to the level of constitutional right deprivations, are merely sour grapes from investigative subjects, or something in between. We can all agree that these issues

126. Settlements may need to be approved by a U.S. District Court, in the manner of the SEC, to ensure compliance. Absent the authority of judicial approval, and the attendant power of contempt, an entity could choose to settle with the FERC and then refuse to pay—which would require the FERC to file suit to collect payment.

are annoying. Staff and Commissioners presumably do not enjoy spending their valuable time responding to respondents' and others' requests and complaints surrounding these issues. Counsel to respondents do not enjoy trying to explain to their frustrated clients why there is little to be done about what seems to them an endless and one-sided process. Wouldn't we like to just avoid all of this and focus enforcement cases on the merits? Taking a case to court would do just that as to most issues. The *Brady* timing issue would likely just go away.¹²⁷ Before any federal body could conceivably make a decision on the merits, the Staff would be required to provide, through trial court disclosure or discovery, all relevant evidence, including any *Brady* material. Moreover, these procedures would play out on a timetable set by the court. In such cases, the timing of the disclosure would not prejudice the subjects because the Commission will not be deciding the case—defendants would get the material long before anybody decides the case. The issue of deposition transcript access would go by the boards for the same reasons. Subjects would unquestionably be allowed discovery before any adjudication of their conduct takes place, including (surely) all deposition transcripts.

3. Improving the Perception of Fairness

Debates about *actual* procedural fairness issues aside, there has been enough commentary, written and otherwise, to demonstrate that, at a minimum, there are significant fairness *perception* problems here. This benefits no one. Staff and the Commission have to spend their time and energies defending the system to a skeptical public and some policymakers. Subjects and their counsel have to spend their time trying to deal with unfairness, real or imagined. What's more, the public and some policymakers may actually view this as simply bad government. Eliminating these perception issues would be a substantial public good—and that could occur if the Commission did not serve as the adjudicator in enforcement matters. Instead, we could move towards a system with a neutral decision-maker where commonly accepted rules of evidence and procedure apply. It is not insignificant that every FPA defendant (but one) given the choice thus far has elected *de novo* review. The sole exception occurred in in *Moussa I. Kourouma d/b/a Quntum Energy LLC*.¹²⁸ There, respondent Kourouma elected the procedure for a hearing before an ALJ provided by FPA section 31(d)(2).¹²⁹ In his response to the Order to Show Cause, Kourouma stated that he did not dispute the material facts and argued that he was entitled to summary disposition in as a matter of law.¹³⁰ Enforcement Staff agreed with Kourouma that a hearing was not necessary, but asked the Commission to grant summary judgment against Kourouma.¹³¹ The Commission agreed with the Staff's position, and issued a summary judgment against Kourouma essentially adopting the Enforcement Staff's recommendations, and specifically finding a hearing before an ALJ would

127. See generally, *Brady*, 373 U.S. at 83.

128. *Moussa I. Kourouma d/b/a Quntum Energy LLC*, 135 F.E.R.C. ¶ 61,245 (2011).

129. *Id.* at PP 2, 7.

130. *Id.* at P 7.

131. *Id.* at P 8.

not be necessary.¹³² So, we have numerous instances where respondents faced with a choice between a Commission-controlled ALJ hearing and *de novo* review in district court have chosen the *de novo* review route (and one instance where the respondent, in hindsight, might wish that he had done so). Clearly, there is appetite for the perceived increase in fairness available in a court case.

In particular, moving to a neutral adjudicator such as a U.S. district court just removes the central issue of Staff access to the Commission—from the start of the investigation through the issuance of the OSC. That issue—of when and whether the Commission can fairly flip from overseer of investigations and prosecutions or settlements to “adjudicator”—is at the heart of many of the issues outlined above. And it is just built in to the current system. With a move to original adjudication in district court—these issues, and others, would disappear.

4. Allowing the FERC Enforcement Staff to Continue to Do Its Job.

Nothing about taking these cases to court would meaningfully affect the most important jobs to which Enforcement Staff are suited: evaluating cases for investigation, investigating them, settling them or deciding to prosecute them. Some may believe that it would be materially harder for Staff to make a case if it had to go to court. The recent commentary we noted *supra* on SEC cases suggests this mindset. Even if that notion were a legitimate basis to keep these cases at the Commission, we do not think it is correct. The same standard of proof would likely apply—“preponderance of the evidence.”¹³³ Even though Commission adjudicatory processes do not technically involve federal civil procedural and evidentiary rules, the current cases could be prepared so that they can be presented under FRCP and FRE. The Division of Investigations which currently serves as Trial Staff in Commission adjudications is filled with highly experienced and capable federal district court trial lawyers. Indeed, the federal trial experience of many DOI lawyers equals or exceeds many in the energy bar who currently handle the FERC enforcement cases. These federal employee lawyers can practice in any federal court regardless of their state bar admissions, so local admissions are not a problem.¹³⁴ Commission statutes already explicitly provide for the appearance in the courts on behalf of the Commission of Staff lawyers, so they would not require co-counseling with the Department of Justice, or local United States Attorneys.¹³⁵

132. *Id.* at PP 9-11.

133. Administrative Procedure Act § 7, 5 U.S.C. § 556(d) (2011); Order Affirming Initial Decision and Ordering Payment of Civil Penalty, *Brian Hunter*, 135 F.E.R.C. ¶ 61,054 at P 16 (2011) (describing that ALJ had used preponderance of the evidence standard for manipulation claim).

134. See, e.g., LR, D. Mass. 83.5.3(c) (2015) (“An attorney who is employed by the United States or any of its departments or agencies may appear and practice as an attorney for the United States, any department or agency of the United States, or any officer or employee of the United States.”); Rules of the United States District Court for the District of Columbia, LCvR. 83.2(e) (2013) (“An attorney who is employed or retained by the United States or one of its agencies may appear, file papers and practice in this court in cases in which the United States or the agency is a party, irrespective of (c) and (d) above.”).

135. 16 U.S.C. § 825m(c) (2011).

5. Replacing the Patchwork with Whole Cloth

We already have FPA and NGPA *de novo* review processes. Although the contours of that process are as yet unclear, most commentators believe that eventually the courts will provide for a pretty robust federal trial court process. So, we already have many elements in place for trial court adjudication for at least *some* kinds of Commission enforcement cases. It cannot be so much of a leap to say that all of them could and should go that route. Moreover, there has never been an adequate explanation, we submit, for why any of these cases under the various statutes administered by the Commission should be handled differently. These varying adjudicatory processes were put into place by Congress or the Commission in different times and contexts but have not been brought up to date with other changes to the statutes; specifically, the manipulation provisions (by far, the most common kinds of enforcement cases litigated to date) and the penalty provisions, which are essentially identical in all three statutes.¹³⁶ In today's world it makes no sense to have this patchwork of different processes that apply depending only on which form of energy commodity is involved.

6. Serving the Public Interest

The best reason for moving these cases to federal court is that it is strongly in the public interest. We recognize that Congress has specifically provided in many instances for agencies to adjudicate enforcement cases and many agencies have been doing so for years. But that does not mean it is the best way for these cases to be handled. Aside from improving the fairness and efficiency of the process, pursuit of these cases in court would get the Commissioners out of a job they probably do not really want or need and to which they are not *uniquely* suited. It is an open secret that many Commissioners do not relish the enforcement job and would rather be spending their time on important policy issues affecting the investment in infrastructure, the effectiveness of organized market structures, or the development of renewable energy and other innovations. While it may be true that enforcement cases also serve these interests if they are meritorious, they surely do so much less directly than market design and the regulation of economic incentives (the carrots of the Commission's regulatory tool kit as compared to the sticks of enforcement). Moreover, to obtain that indirect benefit, it is enough for the Commission to investigate and prosecute or settle (which Staff still would do, subject to Commission oversight) enforcement cases without the Commissioners also having to be judge and jury. In such a world, the Commissioners and Staff would no longer have to listen to complaints from the industry about the perceived fairness of the "Investigator/Prosecutor/Judge/Jury" model. Moreover, the adjudication phase of a case is much more time consuming and controversial for the Commissioners than the investigative and settlement processes over which they could still provide substantial oversight.

Commissioners are typically experts in energy regulatory schemes and the markets, infrastructures, and economics they oversee. This is why their adjudication of markets complaints, merger cases, and tariff matters could and should continue (and the FERC ALJs would continue to assist in that important

136. 16 U.S.C. § 8250-1(b) (2011); 15 U.S.C. § 717t-1(a) (2011); 15 U.S.C. § 3414(b)(6)(A) (2011).

area where cases are set for hearing). However, they are not usually experienced judges of the kinds of intent, trading, and witness credibility issues that are frequently the most hotly contested issues in enforcement cases.¹³⁷ Let these experienced senior government energy officials devote their time and attention to making policy and rules and adjudicating those matters in which their expertise is paramount—where they really are the experts. It is what most of them came to Washington to do, not to judge enforcement cases. Let district court judges handle these cases, like the many other complex cases they handle every day. It would not materially add to their caseload—there are not that many of these cases that move beyond closure or settlement.

Some advance that by litigating these cases in court, the Commission would lose control over meaning of “its” law. It may be true that the Commission’s decisions would receive less deference if it were to litigate enforcement actions directly in U.S. District Court without first “adjudicating” the issue administratively. Traditionally, courts would apply *Chevron* deference to an agency decision that is the result of a formal adjudication or notice-and-comment rulemaking.¹³⁸ But lately, the Supreme Court has chipped away at *Chevron* deference, creating some doubt as to how much deference a Court of Appeals or District Court would give to an agency decision.¹³⁹ Thus, in the current climate, the FERC’s desire to “control” “its” law may be illusory, regardless of the venue.

V. THE WAY FORWARD: DO CURRENT STATUTES AND REGULATIONS ALLOW A PATH TO COURT?

As currently applied, and as the Commission’s policy statements have articulated, there does not *seem* to be a clear pathway for the Commission to bring (or be required to bring) all civil penalty enforcement actions directly in court without agency adjudication. We revisit that assumption here. Indeed, we examine the underlying question of whether such cases **MUST** be brought in a trial court—and for that, we must take a detour through the common law of England at the time of framing of the U.S. Constitution.

A. *The Right to a Jury Trial in a Civil Penalty Enforcement Action*

Though seemingly little known in the energy bar, but fairly well established by the courts, when the federal government seeks a civil penalty for a violation of a federal statute or regulation, the defendant may have a Constitutional right to a jury trial on the question of whether the violation occurred. Under the Seventh Amendment, defendants have a right to a jury trial where a right to a jury trial was

137. We acknowledge that the FERC ALJs do have experience and background in judging such issues, but their most valuable expertise, like the Commissions, is in substantive areas of energy law. And even in such cases, as noted, the Commission may only give the ALJs determinations of fact and credibility issues “some deference.” In addition, in many of the “adjudicatory” paths the ALJs are not, or may not be, involved. Even in NGA cases where a hearing seems required, the Commission has stated it can conduct a mere “paper hearing.”

138. *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001) (describing the two step process of *Chevron*, U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

139. See, e.g., *King v. Burwell*, 135 S. Ct. 2480 (2015). See also Andrew Rudalevige, *King v. Burwell: Who knew administrative law could be so much fun?*, WASH. POST (June 27, 2015), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/06/27/king-v-burwell-who-knew-administrative-law-could-be-so-much-fun/> (describing the Court’s reformation of *Chevron* deference).

available at common law.¹⁴⁰ Courts must apply the aptly named “historical test” to determine whether the Seventh Amendment right to a jury trial applies to a given civil cause of action.¹⁴¹ Courts must assess both the nature of the right and the nature of the remedy.¹⁴²

The first step in applying the historical test is to examine the nature of the right by comparing the civil cause of action to both legal and equitable claims that would have been available in England around 1791, or when the Seventh Amendment was adopted.¹⁴³ The second step is to determine whether the relief sought is legal or equitable in nature.¹⁴⁴ The Supreme Court applied this analysis to the questions of administrative civil penalties in *Tull v. United States*.¹⁴⁵ There, the Court determined that an action to enforce a civil penalty can be equated to the common law action to “collect a public debt” for which there was a jury trial right.¹⁴⁶ The Court’s conclusion remains valid, as demonstrated recently in *Hill v. SEC*, where the SEC acknowledged that “an enforcement action for civil penalties is ‘clearly analogous to the 18th-century action in debt’ and this remedy is legal in nature.”¹⁴⁷

This “historical” legal analysis reaches back before the time of our Constitution and embraces English common law that required a jury trial in the “law” courts for any debt to the sovereign, even though the sovereign might be able to enforce its will through other means in courts of “chancery” or “equity” where juries were not used.¹⁴⁸ Courts have clarified (expressly or by practice) that though the right to a jury trial covers the question of whether a violation occurred or so-called “liability,” the amount of the remedy itself can be set by a court sitting at bench (though fact issue relating to the penalty analysis may also be tried to a jury).¹⁴⁹ The Commission has acknowledged this right to a jury trial by demanding a jury in the several *de novo* review actions it has filed under the FPA.¹⁵⁰ Though

140. U.S. CONST. amend. VII.

141. Jarod S. Gonzalez, *SOX, Statutory Interpretation, and the Seventh Amendment: Sarbanes-Oxley Act Whistleblower Claims and Jury Trials*, 9 U. PA. J. LAB. & EMP. L. 25, 53-54 (2006).

142. *Id.* at 56, 60.

143. *Id.* at 56 & n.186 (citing *Chauffeurs, Teamsters & Helpers Local 391 v. Terry*, 494 U.S. 558, 565 (1990)).

144. *Id.* at 60 & n.214 (citing *Chauffeurs, Teamsters & Helpers Local 391 v. Terry*, 494 U.S. 558, 565 (1990)).

145. *Tull v. United States*, 481 U.S. 412, 414 (1987).

146. *Id.* at 419 (“Actions by the Government to recover civil penalties under statutory provisions therefore historically have been viewed as one type of action requiring trial by jury.”).

147. *Hill v. Sec. and Exch. Comm’n*, No. 1:15-CV-1901-LMM, 2015 WL 4307088, at *13 (N.D. Ga. June 8, 2015) (noting that the “SEC does not dispute Plaintiff’s argument that an enforcement action for civil penalties is ‘clearly analogous to the 18th-century action in debt’ . . . and this remedy is legal in nature” (quoting *Tull*, 481 U.S. at 420)).

148. *Tull*, 481 U.S. at 422 (“A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity.” (citing *Curtis v. Loether*, 415 U.S. 189, 197 (1974))); *See, e.g., United States v. Mundell*, 27 F. Cas. 23 (C.C.D. Va. 1795) (No. 15,834) (bail not required in a civil penalty case tried by a jury because it was an action in debt).

149. *Tull*, 481 U.S. at 425-27.

150. *See, e.g., FERC v. Barclays Bank PLC*, No. 2:13-cv-02093, 2013 WL 5576296 (E.D. Cal. Oct. 9, 2013) (trial pleading demanding a jury trial).

a litigant can waive the right by either expressly doing so or failing to request a jury under the FRCP, the right cannot be denied.

The Supreme Court has held that where Congress dictates that a civil penalty involving a “new public right” be adjudicated at the agency it has thereby created a new non-common law action that is “free from the strictures of the Seventh Amendment,” and thus not triable to a jury.¹⁵¹ Only where the agency has the ability to proceed to federal court (and does so) does the right to a jury trial attach.¹⁵² Accordingly, “the right to a jury trial ‘turn[s] to a considerable degree on the nature of the forum in which a litigant [finds] himself.’”¹⁵³ The logic of this theory, whereby Congress can deprive a defendant of a constitutional jury trial right simply by diverting an otherwise common law claim to agency adjudication, is debatable. The notion that a cause of action changes in nature depending on where it is brought seems backwards, though dicta in *Atlas* suggests this is how the Supreme Court might view it.¹⁵⁴

So, if there is a constitutional right to a jury trial, can a civil penalty action be adjudicated *anywhere else* but in a court (absent defendant consenting) without violating the Constitution? *Atlas* seems to have answered that question in the affirmative—if Congress says so in a statute. However, as we will see below, in evaluating whether current FERC policies, regulations, and statutes allow a pathway to court for enforcement of the FERC’s civil penalties, the answer may be “yes.” If it is “yes,” then it seems clear that a jury trial process would be secured for the defendant. This is an important point—because that method of adjudication would inhere all the “bells and whistles” of a federal court action. It would relieve the ongoing debates about whether the current processes are fair and make clear what the process will look like once the Commission has a ticket to the federal courthouse.

B. Possible Paths to Court Without the FERC’s Adjudication

1. Path One: Enforcement of Penalty Assessment Orders

There is, for all three of the FERC’s statutes, at least one path that would theoretically allow the FERC to assess a penalty, without an actual adjudication at the agency, followed by a federal court action that could provide a full and effective adjudication. As far as we can tell, no commentator has marked out this pathway clearly, but the signposts are there in the statutes.

First, each statute provides that before assessing a penalty the only absolute, unconditional, and non-discretionary requirement is that the agency provide “notice” and an “opportunity for a public hearing” (though the NGPA does not even expressly contemplate a hearing).¹⁵⁵ So, under each statute, the Commission could issue a penalty “order” after giving “notice” but without necessarily,

151. *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm’n*, 430 U.S. 442, 454 (citing *Curtis*, 415 U.S. at 194-95). A “public right” is one “where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.” *Id.* at 458.

152. *See generally id.*

153. *Tamosaitis v. URS Inc.*, 781 F.3d 468, 488 (9th Cir. 2014) (quoting *Atlas Roofing*, 430 U.S. at 458).

154. *Atlas Roofing*, 430 U.S. at 458.

155. 16 U.S.C. §823b(c) (2011); 15 U.S.C. §717t-1(b) (2011); 15 U.S.C. § 3414(b)(6)(E) (2011).

actually “adjudicating” or “hearing” the matter at the Commission, *so long as* the defendants knowingly agreed that no such hearing was required (they would be willing to waive such a hearing at the agency, in many cases, because a “hearing” would occur in court as we develop below).

Next, each statute has a provision allowing the FERC to go to a federal district court to seek a federal court order where it appears that a person is violating or is about to violate a Commission “order.” Here, for example, is the NGA provision:

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts 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 chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond.¹⁵⁶

So, if the subject does not pay the penalty, it is arguably “violating” a Commission “order.” Then, the Commission has its jurisdictional ticket to the courthouse. Most readers of these statutory provisions might conclude that they relate to “injunctive relief” from a court to require compliance with the FERC’s order or regulation that requires a subject to do or not do something “substantive.” The FERC statutes and regulations are replete with such requirements, including provisions relating to charging only “just and reasonable rates,” refraining from allowing marketing and transmission personnel to share information prohibited by the “Standards of Conduct,” or producing records to the Commission. However, an “order” is an “order” and these jurisdictional provisions do not preclude a federal court from ordering the defendant to pay the penalty the FERC has “ordered.” The FERC could not get around this by trying to cloak its legal remedy in equitable clothing, as a legal remedy cannot be disguised as equitable by label alone.¹⁵⁷

Now, here is where the Constitution comes in. If the FERC goes to court to enforce an “order” for a person to pay a “civil penalty,” the right to a jury trial is assured as we have discussed above. Once the Commission is properly before the court, given that a jury trial is in the offing, the matter can logically (and should in fairness) proceed like any other federal action where a jury trial is allowed. This should mean that the full panoply of Federal Rules of Civil Procedure and Federal Rules of Evidence can apply. Review of any final court order can be had in a Court of Appeals under the Federal Rules of Appellate Procedure. Utilization of this path for adjudicating civil penalty actions in the courts rather than at the agency would not require regulatory or statutory change.

Though we submit that the foregoing pathway is theoretically available under the texts of the current statute, we are also cognizant that the pathway is not

156. 15 U.S.C. § 717s(a) (2011). *See also* 16 U.S.C. § 825m(a) (FPA); 15 U.S.C. § 3414(b)(1) (NGPA).

157. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002); *Providence Health Plan v. McDowell*, 385 F.3d 1168, 1174 (9th Cir. 2004) (quoting passage from *Great-West* to note that a “claim for monetary damages against the [defendant] is a claim for a legal remedy, despite [plaintiff’s] attempt to disguise its claim in equitable clothes”).

without its ruts and thorn bushes. One of the problems with this approach is that it may require the subject of the order who does not pay the penalty to risk a criminal violation under one of the several provisions in the FPA and NGA that makes it a misdemeanor to commit a “knowing” violation of an order.¹⁵⁸ However, courts have construed these types of provisions to not be applicable for an otherwise ordinary and commonplace procedural act, such as triggering the aid of a court in reviewing an “order” by declining to comply.¹⁵⁹ And the Commission could easily make clear that it does not view exercising these rights to be the type of “violation” that is a crime.

Secondly, the sum total of the current enforcement and court jurisdiction provisions of the three statutes in question do seem to contemplate other processes, in some cases, and lack uniformity. The fact that Congress specified other and varying paths for enforcement adjudication as at least *possibilities*, some at the agency, some not at the agency, some in court (with or without *de novo* review), might suggest to some that Congress did not intend for the FERC enforcement adjudications uniformly to occur in court.¹⁶⁰ Moreover, the fact that, in some cases, Congress more clearly gave the pathway to court to other agencies in their statutes, as we have seen above, also suggests that Congress knew how to do so clearly when it wanted to and did not do so here.

2. Path Two: Jurisdictional Grant Allowing Original Enforcement Action in Federal Court

Another provision found in two of the three principal FERC statutes providing for civil penalties arguably allows, maybe even *requires*, the bringing of any enforcement action in federal court. The FPA and the NGA have a general jurisdictional provision like this one entitled “Jurisdiction of offenses; enforcement of liabilities and duties.”

The District Courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of this chapter or any rule, regulation, or order thereunder.¹⁶¹

This grant of jurisdiction seems very broad and by its terms embraces any violations for which civil penalties are available. Arguably, the provision requires

158. 16 U.S.C. 825o(b) (2011); 15 U.S.C. 717t(b) (2011).

159. *Fed. Power Comm’n v. Metro. Edison Co.*, 304 U.S. 375, 387 (1938) (holding that respondents are fully within their legal rights to refuse to respond to a data request or deposition summons if that “refusal is made in good faith and upon grounds which entitle [them] to the judgment of the court before obedience is compelled”). Good faith refusals to respond to administrative summons and subpoenas have received protective treatment from courts interpreting statutes similar to section 307 of the FPA. *See, e.g., Reisman v. Caplin*, 375 U.S. 440, 446-49 (1964) (finding that the Internal Revenue Code provision imposing the threat of prosecution on “any person summoned who neglects to appear or produce . . . does not apply where the witness appears and interposes good faith challenges to the summons”); *Anheuser-Busch, Inc. v. Fed. Trade Comm’n*, 359 F.2d 487 (8th Cir. 1966) (relying on *Reisman* to find that 15 U.S.C. § 50 [which is similar to 16 U.S.C. § 825f] did not authorize criminal prosecution of Anheuser-Busch for its good-faith refusal to respond to certain requests for information from the FTC).

160. 16 U.S.C. § 823b; 15 U.S.C. § 717t-1; 15 U.S.C. § 3414.

161. 16 U.S.C. § 825p (2011). *See also* 15 U.S.C. § 717u (2011) for the parallel provision in the NGA.

the bringing of an enforcement action only in a federal court. In other words, the exclusivity of the jurisdiction of the court may exclude the FERC itself from “enforcing” its orders. That notion seems at odds with other provisions in the statutes that, in some cases, suggest a “hearing” at the agency. Exclusivity aside, the statute does seem to grant federal district courts jurisdiction to entertain actions by the Commission to enforce its regulations and seek penalties, including through an original action in federal court that is not a “review” of prior agency adjudications. In particular, the language “all suits of equity and actions at law” seems broad enough to encompass any conceivable form of enforcement action, whether injunctive or for monetary remedies, a potentially broader remedial scope than is found in the above-cited “injunction” provisions.¹⁶² Notably, these jurisdictional provisions have not been interpreted by the courts in a way that precludes this reading. Most of the cases interpreting them have dealt with whether they preempt a private claim or a state tribunal from presiding over a matter related to energy.¹⁶³ Also, these provisions can fairly be read both to cover the situation where the Commission has—through its own processes—ordered or “assessed” a civil penalty to be paid, or simply goes to court to seek an adjudication of whether a “violation” of one of its general regulations or orders has occurred and, if so, to seek the imposition of a civil penalty.

* * *

We note that in all of its statutes, the Commission enjoys a general authority to “perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out . . .” the substantive provisions of the statutes.¹⁶⁴ Such a provision probably would not go so far as to allow the Commission to proceed to federal court to seek a civil penalty absent another provision in the Acts allowing it to do so.¹⁶⁵ However, it would seem to allow the making of any regulations or policy pronouncements that would be necessary to clarify or smooth any such pathway to the courts. This is an important point should the Commission decide to evaluate utilizing these current statutory pathways to the courts.

162. 16 U.S.C. § 825p.

163. *See, e.g., Weaver’s Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458 (1st Cir. 2009).

164. *See, e.g., 16 U.S.C. § 825h* (2011); *See also 15 U.S.C. § 717o* (2011).

165. *See, e.g., Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010) (stating “We recently distilled the holdings of these three cases into a two-part test. In *American Library Ass’n v. FCC* we wrote: ‘The Commission . . . may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.’”). *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (2005); *Laclede Gas Co. v. FERC*, 997 F.2d 936, 944 (D.C. Cir. 1993). “By contrast, FERC enjoys a great deal of flexibility in the remedy phase of an enforcement proceeding. Indeed, as we have often noted, FERC’s discretion is ‘at [its] zenith when the action assailed relates primarily . . . to the fashioning of . . . remedies and sanctions.’” *Id.* (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C.Cir.1967)).

C. A Possible Legislative Fix

The two pathways to court outlined above find an adequate basis in the statutes—and no respondent to an enforcement action is likely to claim otherwise, seeking instead to cling to an agency adjudication process, which nearly every respondent who has thus far had the choice to do so has rejected.

However, if there is no clear pathway to court adjudication of the FERC's enforcement cases, it seems that new legislation could easily mark out the pathway to court. If a legislative fix is the answer, your humble authors, not experienced in drafting legislation, leave that task to others better suited to it. But we note that based on the models available in the SEA, CEA, and other statutes, the task of crafting language suited to the FERC's context would not seem to be difficult.

One question that would arise in such a legislative effort is whether it would be wise to *require all* adjudications to occur in court (as occurs with DOJ cases, for example). The other option would be clearly to allow for that *possibility*—yet leave the choice of forum to the agency (as appears to be the case with the CFTC and the SEC), the defendants (as appears to be the case with FPA *de novo* review election), or both. We think a uniform and mandatory court adjudication approach would be best because it would do the best job of serving the interests described above in Section IV.B. However, we credit the point of view of some that, at least in some cases, the agency really will be the best place to adjudicate a case. All parties may even agree to that in some cases, though we believe that, given the choice, over the long term the respondents and the Commission will lean more heavily in the direction of court adjudication than otherwise.

We end on this thought: in many contexts, the Commission is all about getting the market pricing mechanisms right. A feature of some of the Commissions' market regulations (and even its market manipulation enforcement cases) is whether incentives or conduct are sending a good or a false "price signal" to the market—thereby aiding or depriving market participants of good price formation. Enforcement cases—settlements and adjudications alike—in the nascent Post EAct 2005 era, are kind of like that too. The "market" of enforcement is just beginning to send price signals to both the regulators and the regulated community about where the line between lawful conduct and a violation lies, and what is the relative seriousness of any particular violation. One of the perceived weaknesses in the current system of administrative adjudications is that the agencies, the FERC included, are perceived to have a home court advantage and obtain outcomes favoring the agency more often than the facts and the law would seem to justify. Whether this is true or not does not matter. This is about perception. The federal trial courts, with neutral finders of fact and clear and balanced rules of procedure, do not suffer from such perceived weaknesses. A win by the Commission before a federal trial court would be perceived as a more meaningful victory, setting a more trenchant precedent—a better "price signal" as to where the legal lines really are. So too, victories by defendants in the courts will send a good "price signal" to the Commission and the industry about the limits or relative materiality of various kinds of violations. Adjudication in the courts would be better "price signaling," better policy, better enforcement, and better government. So, let these cases be investigated by the FERC as they must, let them be dropped by the FERC in its discretion, or let them be settled by the FERC

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and the respondents in the interest of compromise. But if those outcomes do not obtain, let the parties say to one another: “See you in court!”