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EBA BRIEF

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The End of Humphrey's Executor – Will it Be an Invitation to Regulatory Chaos at FERC?

Harvey L. Reiter

If the statutory "for cause" protections against dismissal of FERC commissioners[1] are unconstitutional, does that invalidate formal investigations of market manipulation (or other types of actions) undertaken by the agency? According to a complaint against FERC, filed last year in federal district court by distributed energy aggregator American Efficient, LLC, the answer is yes: FERC's "improper insulation" from presidential oversight is unconstitutional and, therefore, so is its investigation of the company.[2] More than ninety years ago, a unanimous Supreme Court held in *Humphrey's Executor v. U.S.*[3] that similar statutory "for cause" protections for FTC commissioners are constitutional.

But now, with the U.S. Supreme Court widely-predicted to overturn *Humphrey's Executor* later this year,[4] the central theory of American Efficient's complaint against FERC is nearly certain to take center stage.

ON THE DOCKET

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1 42 U.S.C. § 7171(b)(1).

2 *American Efficient LLC et al. v. FERC*, Case No. 1:25-cv-68, Memorandum Opinion and Order (M. D. NC Nov. 24, 2025).

3 *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935).

4 Wiktoria Gucia, *Legal Experts Sound Alarm on 'Very Bad Sign' in SCOTUS Case*, The Daily Beast (Dec. 8, 2025), https://www.yahoo.com/news/articles/legal-experts-sound-alarm-very-181258890.html?guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAACwubT3nU6gu6br_O8olSbeR9HBL0Wzxfz dKoLUYvL0vj40mUidB5yYtJNd36CJuuct3yv_XhPAI2t7aRcZnfQ4GbYKD4kCNSebm27ZpY0P1YgCgvZmnXvN247gvYOSueIm7ByjC1x_nw5MJ9xRN h43YQESonDKEhzh8ZTlfyp4h&guccounter=2.

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Indeed, with a Fifth Circuit decision last summer that answered "likely yes" to a similar question involving the NLRB,[1] FERC's very ability to function may be at risk.

The Challenges to Humphrey's Executor

Soon after taking office, President Trump began firing Democratic members of what he described in an executive order as "so-called" independent agencies,2 officials who, under the enabling statutes of those agencies – and like Humphreys (the FTC Commissioner fired by President Roosevelt) – could only be fired for cause.3 Those firings prompted a string of lawsuits by the fired officials, who argued that their firings violated the Humphreys precedent. Those officials uniformly won preliminary injunctions from the lower courts restoring them to office.4 But the President won stays of those injunctions and the Supreme Court agreed to reexamine Humphreys in cases involving the firings of FTC Commissioner Rebecca Slaughter5 and Federal Reserve Board member Lisa Cook.6 Those cases are likely to be decided by the end of the current Supreme Court term.

American Efficient's Lawsuit Against FERC

In December 2024, FERC issued a show cause order directing American Efficient to demonstrate why it should not be required to disgorge over $250 million in profits and pay over $700 million in civil penalties for alleged market manipulation and tariff violations.[7] American Efficient brought suit in a North Carolina federal district court the next month to block the agency from proceeding.

American Efficient made two basic claims: First, citing *SEC v. Jarkesy,*[8] it argued that the "in house" nature of the FERC investigation violated the Seventh Amendment and Article III of the Constitution, which together guarantee defendants the right to a jury trial of claims that are legal in nature.[9] Second, the company argued that the for-cause protections accorded FERC commissioners against dismissal violated Article II of the Constitution by depriving the President of the ability to "control or direct the investigation given FERC's nominally independent status."[10]

American Efficient sought a preliminary injunction, invoking only its Seventh Amendment argument in support of the requested relief.[11] In late November 2025, the district court denied the motion based on its finding that the defendant's right to a *de novo* jury trial to contest FERC's penalty assessment satisfied the defendant's Seventh Amendment and Article III objections.[12] American Efficient's Article II claim remains pending – for now. That would likely change should the predictions about the demise of *Humphrey's Executor* prove correct. Key to the survival of that claim, however, will be the breadth of the Supreme Court's ruling in *Trump v Slaughter.* Court observers have predicted that the Court will strike down for cause protections generally as unconstitutional, while creating a carve-out for

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1 Space Exploration Technologies Corp, v. NLRB, 151 F.4th 761 (5th Cir. 2025) ("Space X").

2 *Ensuring Accountability for All Agencies* (Feb. 18, 205), https://www.whitehouse.gov/presidential-actions/2025/02/ensuring-accountability-for-all-agencies/.

3 Harvey L. Reiter, How the Supreme Court's Inconsistent Approach to Granting Emergency Relief Will Exacerbate, Rather Than Mitigate the Disruption Its Emergency Stay Policy Is Supposed to Address, 2026 Cardozo L. Rev. de novo 1, 3-4 (2026), https://cardozolawreview.com/wp-content/uploads/2026/01/Reiter-FINAL.pdf.

4 *Id*. at 5.

5 *Trump v. Slaughter*, No. 25A264, 606 U.S. ___ (2025) (granting certiorari before judgment), https://www.supremecourt.gov/opinions/24pdf/25a264_o759.pdf.

6 *Trump v. Cook*, No. 25A312 (U.S. Oct. 1, 2025) (order deferring stay application for oral argument). https://www.supremecourt.gov/orders/courtorders/100125zr_7648.pdf.

7 American Efficient, LLC, 189 FERC ¶ 61,196 (2024).

8 603 U.S. 109, 122-123 (2024).

9 American Efficient LLC et al. v. FERC, Case No. 1:25-cv-68, Complaint, ¶¶ 2- 4 (M.D. NC filed Jan. 29, 2025), https://storage.courtlistener.com/recap/gov.uscourts.ncmd.100828/gov.uscourts.ncmd.100828.1.0.pdf.

10 Id. at ¶ 6.

11 American Efficient LLC et al. v. FERC, Case No. 1:25-cv-68, Memorandum Opinion and Order (M. D. NC Nov. 24, 2025), slip. Op. at 13.

12 Id. at 30-34 (noting that American Efficiency would have no obligation to pay any penalties unless FERC's assessment were upheld after a de novo trial).

members of the Federal Reserve.[13] Should the Court rule that broadly, it would likely certainly impact American Efficient's pending Article II claim.

But even if the Court's ruling invalidates the for cause protections for FERC commissioners, it will not ensure that American Efficient will prevail in invalidating FERC's investigation. Here, the Supreme Court's decision in *Collins v. Yellen*[14] may pose a roadblock. In that case, the court held that just because an official may have been given unconstitutional protections against dismissal, that does not mean that the actions they took after having been lawfully appointed are invalid.[15] Relying on *Collins*, the Tenth Circuit, for example has held that "plaintiffs who succeed in a constitutional challenge to a removal provision are not automatically entitled to relief—they must show that the removal provision caused some harm to them beyond the mere existence of the unconstitutional provision."[16] Also citing *Collins v. Yellen*,[17] the Sixth and Second Circuit Courts of Appeal have reached similar conclusions, holding that the plaintiff would also have to show that the unconstitutional removal provisions would have affected the outcome.[18] In other words, if the relevant agency officers were lawfully appointed, absent evidence that a president would have fired them but for the unconstitutional "for cause" protections, a plaintiff could not successfully claim harm from agency action that is otherwise within the agency's authority.[19]

But the opinions of these other Courts of Appeals are not binding on the North Carolina federal district court where the American Efficient case is pending because that court is part of the Fourth Circuit. And the Fifth Circuit, at least preliminarily, has taken a far different view from the Second, Sixth, and Tenth Circuits on this question. Specifically, in *Space Exploration Technologies Corp. v. NLRB,* the Fifth Circuit reads *Collins v. Yellen* only to bar claims for *retroactive* relief from actions taken by agencies whose members have unconstitutional removal protections.[20] More importantly, it ruled, at least preliminarily, that the for cause protections given NLRB board members likely rendered the entire structure of the agency unconstitutional and the investigations it undertook invalid.[21] That ruling has potentially enormous implications for FERC.[22] We explore those next.

The Space X Opinion – A Road Map to Regulatory Chaos?

The *Space X* case dates back to 2024, when the NLRB agreed to investigate whether Space X engaged in unfair labor practices by firing employees who had complained about CEO Elon Musk's public behavior on social media. Space X contested the charges, but also sought – and prevailed in obtaining – a preliminary injunction from a federal district court in Texas to block the investigation altogether on grounds that the agency was unlawfully structured.

Its successful argument? Space X claimed that the statutory job protections of NLRB board members weren't covered by the *Humphrey's Executor* precedent. The NLRB, it noted, has more executive functions than the FTC had in 1935 and, unlike the FTC, the NLRB is not expressly required to be bipartisan.[23] The district court concluded that Space X was likely to prevail on this point, and that forcing Space X to face an unlawful investigation would

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13 As discussed, infra, a bipartisan group of former FERC commissioners has argued in an amicus brief for a similar carve out for FERC commissioners.

14 594 U.S. 220, 258 n.23 141 S.Ct. 1761, 210 L.Ed.2d 432 (2021).

15 Id.

16 Leachco, Inc. v. Consumer Safety Prod. Comm'n, 103 F.4th 748, 757 (10th Cir. 2024), cert. denied, ___ U.S. ___, 145 S. Ct. 1047, 220 L.Ed.2d 378 (2025).

17 Collins v. Yellen, supra.

18 YAPP USA Auto. Sys. Inc. v. NLRB, No. 24-1754, 783*783 2024 WL 4489598 at *3 (6th Cir. 2024) and Consumer Fin. Prot. Bureau v. L. Offs. of Crystal Moroney, P.C., 63 F.4th 174, 180 (2d Cir. 2023).

19 Collins v. Yellen, supra at 258 n. 23 (actions of constitutionally appointed officers are not automatically "tainted"; they still have "the power to undertake other responsibilities of [their] office.").

20 Space Exploration Technologies Corp, v. NLRB, supra, 151 F.4th at 779 (SpaceX).

21 *Id*. at 781. In addition to Space X, Energy Transfer and Findhelp also "faced unfair labor practice complaints" and, like Space X obtained preliminary injunctions from other federal district courts in Texas. Id.at 766. The three cases were consolidated in the Fifth Circuit's ruling.

22 This author has explored the broader ramifications for other "independent" agencies of the Space X decision in a January, 2026 article. Harvey L. Reiter, *The Likely Weakened Role of "Independent Agencies" in a Post-Humphrey's Executor World*, Yale J. On Reg: Notes & Comments (Jan. 17, 2026), https://www.yalejreg.com/nc/the-likely-weakened-role-of-independent-agencies-in-a-post-humphreys-executor-world-by-harvey-l-reiter/.

23 *Id*.

constitute irreparable harm.[24] On appeal, the Fifth Circuit affirmed the lower court's ruling, together with similar rulings by two other federal district courts in Texas.[25]

As a ruling affirming a preliminary injunction, the Fifth Circuit's opinion—at least nominally—is interim in nature.[26] In this regard, it expressly leaves undecided until a final merits decision whether the challenged removal provisions, if found unconstitutional, are severable from the rest of the National Labor Relations Act (NLRA).[27] That's no small thing, for if the removal provisions ultimately are found to be severable, the hearings the NLRB had ordered would logically be allowed to proceed. But the Fifth Circuit sided with the lower court, which had concluded that "'[a] statute *must be found* to be inoperative or unconstitutional as it was written before the issue of severance can be reached.'"[28]

Thus, under the Fifth Circuit's view, its finding that Space X was *likely* to prevail on the merits of its constitutional claim was not a sufficient finding to permit a decision on severability.

If the Supreme Court ultimately overturns *Humphrey's Executor* (with no carve-out for NLRB board members), by definition, there will be a final finding on constitutionality, and the Fifth Circuit will likely have to address severability.[29]

There are strong reasons why the Fifth Circuit *should* find the NLRB's removal provisions severable from the rest of the Act. "Generally speaking," the Fifth Circuit itself observed, "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact."[30] "[T]he court's task," it added, is "simplified" where, *as in the NLRA*, "Congress has expressly provided a severability clause."[31] As important, there are functioning agencies whose heads have always been subject to removal at will by a president. The EPA can still investigate polluters, and the IRS is fully empowered to investigate tax fraud, for example.

But it is far from clear that the Fifth Circuit will find the NLRA's dismissal provisions severable. On the contrary, if it adopts the reasoning of the district court that granted Space X the injunction, it will reject severability. The Fifth Circuit has already adopted the lower court's position in the *Space X* case that a ruling on severability would have to wait until the constitutionality of the removal provision is finally resolved. The lower court, however, had gone a step further, saying that the removal provisions, in any event, were not severable.[32] If the Fifth Circuit follows the reasoning of the lower court and rules that the removal provisions are not severable, it opens the door to all manner of challenges to FERC's authority.

To be sure, we do not know whether, assuming the Supreme Court overturns *Humphrey's Executor*, it will fashion any carve-outs. Some court observers have interpreted comments during oral argument from some of the justices as signaling a desire to preserve the removal protections of Federal Reserve governors based on "distinct historical tradition.[33] An amicus brief filed on behalf of eleven former FERC commissioners urges a similar carve-out for FERC commissioners on grounds that there is historical precedent for preserving the independence of rate

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[24] See Space Exploration Technologies Corp. v. NLRB, 741 F. Supp. 3d 630 (W. D. TX 2024).

[25] Space Exploration Technologies Corp, v. NLRB, supra, 151 F.4th at 767. See Space Exploration Technologies Corp. v. NLRB, 741 F. Supp. 3d 630 (W. D. TX 2024); Energy Transfer, LP v. NLRB, 742 F. Supp. 3d 755, 762 (S.D. Tex. 2024): Aunt Bertha d/b/a Findhelp v. NLRB, No. 24-cv-798, 2024 WL 4202383 (N.D. Tex. Sept. 16, 2024).

[26] *See, e.g., Cook County, Illinois v. Wolf*, 962 F. 3d 208, 234 (7th Cir. 2020) ("There would be no point in the merits stage if an issuance of a stay must be understood as a sub silentio disposition of the underlying dispute.").

[27] 151 F.4th at 773.

[28] *Id*. (quoting *Space Exploration Techologies Corp., supra*, 741 F. Supp. 3d at 638 (emphasis in original)).

[29] The author says "likely" because in at least one of the three consolidated cases– Space X – the case could become moot. In February, the NLRB dismissed the complaint after a finding by the National Mediation Board that Space X was part of the airline industry and therefore subject to the Railway Labor Act, not the NLRA. *Space Exploration Technologies* , 53 NMB No. 8 (Jan. 14, 2026). But the other cases remain live. The January 23, 2026 joint status report of Energy Transfer and the NLRB proposes to treat Energy Transfer's motion for preliminary injunction as a motion for summary judgment with a briefing schedule. *Energy Transfer LP v. NLRB*, No. 3:24-cv-00198 (S.D. TX Jan. 23, 2026). There is also the separate question whether, under Space X's theory of the case, the NLRB had any authority to act, even to dismiss the complaint.

[30] *Id*. at 772.

[31] *Id*.

[32] *Space Exploration Technologies Corp. v. NLRB, supra*, 741 F. Supp. 3d at 638-39 (finding that severing the NLRA's removal provisions would "circumvent the legislature without clear legislative intent").

[33] Graham Steele, Agency *Independence and the Federal Reserve's Regulatory Functions*, Yale J. on Reg. Notice and Comment (June 28, 2025), https://www.yalejreg.com/nc/agency-independence-and-the-federal-reserves-regulatory-functions-by-graham-steele/.

setting agencies.[34] In the absence of such a carve-out, it is difficult to see what types of FERC proceedings could escape challenge if Space X (or one of the other two employers if Space X's complaint becomes moot)[35] prevails on severability.

Several examples come to mind.

When an electric utility seeks a rate increase under Federal Power Act (FPA) section 205 or a gas pipeline seeks to raise its rates under NGA section 4, FERC typically will invoke its authority to suspend the rate increase and make it subject to refund. But the Fifth Circuit has endorsed Space X's contention that being "subject[ed] to an illegitimate proceeding, led by an illegitimate decisionmaker" is a remediable harm.[36] Space X, the court emphasized, was "prospectively challenging the NLRB's authority to proceed at all — "rather than challenging actions taken in the agency proceedings."[37] In other words, SpaceX was challenging "the Board's very power to act."[38]It is no stretch then to envision challenges to other actions FERC routinely undertakes. Environmental groups opposed to a new hydro project or a proposed gas pipeline could seek to halt any FERC proceedings to consider applications for licenses or certificates of convenience and necessity. Opponents of a merger could seek to block FPA section 203 proceedings. Competitors of companies seeking authorization to merge under FPA section 203 could seek to block those proceedings, too. And of course, there is American Efficiency's complaint, pending in federal district court in North Carolina, which seeks to block FERC from conducting investigations under the FPA based on an alleged lack of constitutional authority.

The Impact of the Space X Decision May Not be Confined to the Fifth Circuit.

It is true that as a ruling on a preliminary injunction, the Fifth Circuit's decision was interim in nature and not technically binding on the lower courts within its jurisdiction.[39] But those courts are not likely to ignore that ruling either.[40]

As discussed earlier, the Fifth Circuit has taken a position at odds with other Circuit courts, and the conflict is not likely to be resolved by the Supreme Court any time soon. When a labor union moved to intervene in the *Space X* appeal, the Fifth Circuit denied the motion. The union then sought leave from the U.S. Supreme Court to intervene in order to file a simultaneously submitted petition for writ of

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[34] *Trump v. Slaughter*, No. 25-332, Brief of Amici Curiae Bipartisan Former Commissioners of the Federal Energy Regulatory Commission (FERC) In Support of Respondents (U.S. Sup. Ct. filed Nov. 13, 2025), https://lnkd.in/esKs_ZTF. EBA Brief's Editor-in-Chief, Jim Mitchell, has pointed out a separate, but equally important implication should the Court end FERC's independence. While such a ruling would presumably be aimed at preserving the President's executive power under Article II, it would also undermine the Article II powers of Congress. As Mitchell points out, Congress chose, through the Department of Energy Organization Act, (DOE Act) to "split responsibilities and authority of two then-existing agencies (the Federal Power Commission [(FPC)] and the Atomic Energy Commission [(AEC)]) between DOE, which is clearly under the President's control, and two newly-established independent regulatory agencies [FERC and the Nuclear Regulatory Commission]. This, he adds, reflected Congress's desire to separate some of the FPC's and AEC's functions and delegate them to DOE, while reserving the rest to FERC and the NRC. In particular, Mitchell noted that the DOE Act separated the promotion of atomic energy for peaceful purposes – which it left with DOE – from the regulation of nuclear power plants by the NRC to avoid the conflict of interest if one agency was responsible for promoting both objectives. January 6 , 2026 email from James Mitchell to author. This author has similarly argued that giving a President the unlimited power to fire independent commissioners would allow a president to rob an agency of a working quorum, crippling its ability to operate in contravention of Congress's Article II power to create *functioning* administrative agencies. *See, e.g.*, Harvey Reiter, *Will Independent Federal Agencies Remain Independent?*, Law360 (Feb. 21, 2025), https://www.law360.com/articles/2300246. The quorum problem is one unique to multimember independent agencies. The Vacancies Reform Act, which allows for the temporary replacement of presidentially appointed officials with career officers, expressly does not apply to vacancies at multimember agencies, including FERC. 5 U.S.C. §§ 101, 103–105, 3345(a).

[35] *See* note 33, *supra*.

[36] Space Exploration Technologies Corp. v. NLRB, supra, 151 F.3d at 771.

[37] {CITE}

[38] *Id*.

[39] See Cook County v Wolf, supra, 962 F. 3d at 234.

[40] *See, e.g. Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025) (admonishing lower court that "[a]lthough our interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases.").

certiorari, which cited the circuit split.[41] The Supreme Court denied the motion in December 2025.[42]

Nor, finally, is the impact of the *Space X* decision on FERC likely to be confined to cases involving entities located in the Fifth Circuit. A coalition of parties from across the country could bring their challenges to FERC authority to district courts in the Fifth Circuit so long as one of their members was located there and had standing.[43] And in cases where parties may want to challenge a rulemaking directly in the Fifth Circuit, as long as one of the petitioners has its place of business there, all of the aligned parties could file a joint petition for review in the Fifth Circuit.[44] Of course, others opposed might bring dueling petitions in other circuits hoping to win the random selection process,[45] but some percentage of these types of cases are sure to wind up in the Fifth Circuit.

FERC may be in for a wild ride.

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[41] Office of Professional Employees Int'l Union v. Space Exploration Technologies Corp., No. 25M35, Petition for Writ of Certiorari (filed Sup. Ct. Oct. 31, 2025); Office of Professional Employees Int'l Union v. Space Exploration Technologies Corp., No. 25M35, Motion to Intervene to File Petition for Writ of Certiorari (filed Sup. Ct. Oct. 31, 2025).

[42] *Office of Professional Employees Int'l Union v. Space Exploration Technologies Corp*., No. 25M35, Order Denying Petition for Writ of Certiorari (Sup. Ct. Dec. 8, 2025), https://www.supremecourt.gov/orders/courtorders/120825zor_i4ek.pdf.

[43] *See, e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006): *Civil Liberties Union of Ohio, Inc. v. Taft*, 385 F.3d 641, 646 (6th Cir. 2004) ("The presence of one party with standing is sufficient to satisfy the Article III 'case' or 'controversy' requirement.").

[44] *See, e.g.,* 16 U.S. Code § 825l(b) (governing petitions for review of final decisions under the Federal Power Act).

[45] 28 U.S.C. § 2112(a).

POETRY IN MOTION(S) – AND COMMENTS, AND LETTERS, AND ….

By Philip M. Marston*

Imagine, a moment, if all FERC rules
Were drafted using poetic tools!
Why, the CFR would shrink in a minute
To tomes no longer quite so infinite.

The Staff would be seen toting volumes of Pope,
Coleridge, Homer, Shakespeare – they'd lope
Down the halls in iambic delight:
Oh Lord! what a marvelous, heart-warming sight!

-- *Letter to FERC Commissioner Vicki A. Bailey regarding her concurrence in verse at 85 FERC ¶ 61,124 (1998) (footnote omitted)*

I. Meschinot lives!

Sometime in the 1400's, the Breton writer Jean Meschinot penned a work -- in verse -- calling for fair and just government by princes, judges, and other officials. He included a few choice stanzas for attorneys, criticizing those who represented only wealthy clients while neglecting those who couldn't match their fees. It was in effect a pleading in the court of public opinion in favor of what were then called "*pro deo*" legal services. A reasonably direct, yet still poetic, English translation might render it thus:

We hold a woman mad
Who, for money, sells self and honor;
Yet you do worse and oft bear more dishonor.
Like the wind, your tongues swirl 'round
For the highest bidder and greatest toll.
'Tis scandalous! They lose enough, who lose their soul.[1]

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* Having retired from a half-century of energy-related legal practice and membership in the Energy Bar Association, Mr. Marston is now the self-styled Chief Word Officer at WordStorm House, a wordsmithery, located at www.wordstormhouse.com. Excerpts from *Jonathan's Seed*, part of a forthcoming 17th century Virginia historical epic, *A Sea of Swans*, are available there, along with some non-FERC related poetry and other works.

[1] As printed in a 19th century edition that slightly modernized the medieval French spelling, the verse reads:

Nous tenons une femme à folle
Qui son corps et son honneur vend
Pour argent ; mais ceci m'affole,
Car vous faictes pire souvent;
Vos langues tournent comme vent
Au plus donnant : c'est grant diffame !

As a pleading in an actual court or quasi-judicial body such as the Federal Energy Regulatory Commission (FERC), such a plea would be dismissed due to the generalized, fact-free assertion regarding loss of soul and the absence of a demonstrated link between the facts found and the divine choices made.[2] In short: no facts; no law: no case.

The court of public opinion, however, is a far more complex and nuanced forum. What is most striking is that Meschinot's plea can still be remembered *five and a half centuries* after it was "entered in the record." *That* is effective advocacy – and not a bad day's work for a mostly-forgotten poet!

There may be a lesson today for practitioners who address broad questions of public policy in agency rulemakings or precedent-setting cases, or in highlighting an otherwise obscure or complicated claim in a particular case. In such matters, an advocate's main adversary may not be the arguments of opposing counsel, but rather the tsunami of competing voices for dozens of completely varying interests, all clamoring to be heard. Here, the first step in advancing a client's interest is making sure at least that the filing is *read*, that the client's voice is heard.

While this problem is hardly new, it is exacerbated by the ease with which pleadings can now be created and electronically filed. At the ten federal agencies receiving the greatest number of public comments during 2025, there were 1,913,540 comments filed via www.regulations.gov.[3] For its part, the FERC (whose e-Library system is not included in the regulations.gov database) received an additional 19,781 documents that were categorized as "Comments or Protests"; "Briefing or Arguments of Law"; "Interventions"; or "Pleadings or Motions".[4] Standing out in such a mass is a challenge indeed.

So-called "artificial intelligence" built on large language models may exacerbate the trend. Such tools can – quite literally in seconds – create lengthy and detailed professional *looking* and professional *sounding* pleadings. By so expanding the "record" far beyond what the drafters of the Administrative Procedure Act could conceive in 1947, such a flood of documents can completely overwhelm the ability of agencies to engage in "reasoned decision-making" based on such a massive record.[5] In response, agencies could use similar software agents to summarize, screen, and evaluate the comment flood – but from there it is only a short step to task software with drafting orders for agency decision. While such drafts would presumably still be reviewed by human beings before becoming law, it is not clear whether the exercise of coercive government power in this fashion would be accepted as legitimate by citizens of a free republic.

II. Raising Your Voice While Lowering the Temperature: A Role for Poetic Madness

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Il perd assez qui perd son âme.

La Borderie, Arthur Le Moyne de. JEAN MESCHINOT, SA VIE ET SES OEUVRES, SES SATIRES CONTRE LOUIS XI (SUITE ET FIN), Bibliothèque de l'école des chartes (1896) (doi: https://doi.org/10.3406/bec.1895.447818, p. 610). Also available at https://ia800400.us.archive.org/19/items/jeanmeschinotsav00lemo/jeanmeschinotsav00lemo.pdf).

[2] *See, e.g. Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 52 (1983), *citing Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 168 (1962) (requiring "a rational connection between the facts found and the choice made").

[3] Source: author's search of data at www.regulations.gov, conducted January 26, 2026 for "comments" submitted via the site during calendar 2025.

[4] For the entire period beginning in 1984, when the Commission commenced its restructuring of natural gas regulation with Order No. 380's general prohibition of pipeline "minimum commodity bills", over 420,000 such documents have been filed.

[5] For example, a few minutes' research shows that LLM-based programs such as www.perplexity.ai can, in seconds, compose a well written model comment that complies with applicable Commission procedural rules, and transforms generally-articulated concerns (e.g. rate impact, environmental protection, cost-effectiveness, etc.) into a multiple page pleading that cites and quotes relevant case and commentary. One expects that this will lead to ever more sophisticated "mass" filing campaigns and inundate regulators with the same infinity of information that the "pre-Google" search engines struggled to deal with. In such a world, it is not clear how agencies will be able to maintain meaningful public participation in agency decision-making.

The traditional temptation for speakers trying to be heard in a room crowded with many speakers is to raise the voice and if that doesn't work, to pile on adjectives and adverbs. A complaint about "injustice" – a solid noun that has moved millions over centuries – must be freighted with "great," "terrible," "supreme," "manifest," or perhaps even "plainly manifest." Experienced practitioners, however, know that a surfeit of adjectives normally either conceals a weak case or reveals an inexperienced advocate. Different tools, however, may be more effective, including occasional use of vivid or imagined language, (perhaps a mere allusion to an evocative literary title or phrase) [6] – or in more extreme cases, even verse.

A. "IFFOETTMEPGDCTTCOBFSS."

Expressing the client's position in poetic form may be useful to help frame an overall discussion or capture a particular argument.[7] As the FERC neared the end of its complex proposed rulemaking intended to complete the core regulatory framework for open-access transportation in the early 1990s, the Chairman invited one final round of public comment, limited to a single page per commenter. The usual approach in such a case would be to submit three or possibly four "bullet points" to capture the core of far more complex and nuanced positions. In this case, however, one of the new entrants in the natural gas marketing business, decided to use verse to focus attention on two key revisions it sought to the proposed rule:

- Greater flexibility in managing transportation agreements by pooling supply points and optimizing use of transportation services, particularly serving potential new gas-fired cogeneration facilities that might have highly variable supply needs; and
- More clearly enforceable separation between transporting pipelines and affiliated marketing companies.

The proposed rule appeared unworkably complex and vague on this latter score, because it proposed only that the pipeline's transportation business must function "independently" of its affiliated gas marketing personnel, but only "*to the maximum extent practicable giving due consideration to the continuation of bundled firm sales services*" by the pipeline itself.[8] In the best tradition of Washington acronyms, paraphrased as "*independent functioning for operating employees to the maximum extent practicable giving due consideration to the continuation of bundled firm sales services"* the proposed standard could be reduced to "*IFFOETTMEPGDCTTCOBFSS."* While this acronym seemed an apt way to capture the confusion and ambiguity of the proposed standard, it resulted in a jaw-cracker and raised the question how to highlight the objection in a single-page pleading while still addressing the other arguments as well.

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[6] In the gas supply shortage years of the 1970s, a brief or section of a brief was titled "A Tale of Two Cities" to illustrate an argument over the respective curtailment allocations of two similarly named cities located at different points on the pipeline. The argument had nothing to do with Dickens' famous novel, but it so aptly captured the gist of the claim of unfair treatment of the two cities that this brief can be recalled decades later, while those of dozens of larger or more economically important parties have long-since been forgotten.

[7] The use of poetic tools in *decisional* documents such as court opinions raises additional issues. For differing views on the use of verse in opinion writing, *see* Gerald Lebovits, "*Poetic Justice: From Bad to Verse*", 74 NY State Bar Assn. Journal 48 (September 2002) and Lucas K. Hori, "Bons Mots, *Buffoonery, and the Bench: The Role of Humor in Judicial Opinions*," 60 UCLA L. Rev. Disc. 16 (2012).

[8] See then proposed section 284.285(h).

The solution adopted was a poem, using a light-hearted tone to underscore a deadly serious policy argument. The final one page pleading (with the explanatory notes spilling atop a second page) read as follows:[9]

Ten thousand pages you have parsed
For wisdom in our time,
But now we're down to just one sheet
To state the bottom line,
And summarize the steps required
To make your ruling shine:

Remember that your efforts here
Will largely go for nought
Unless your Mega-Rule will let
Folks manage what they've bought.

I. Abolish FERC's Resale Restrictions

A shipper's got to have the right
To sell, assign, or share
'Lest all those fabled cogen loads
Just vanish in thin air,
And Midlands's empty towers, like
Ozymandias, stare.

II. Mandate Availability of AFDP's

Once resale shackles fall away,
The effort's still not through
'Til all can use AFDP's
To ship the gas to you
With all the flexibility
The pipes claim as their due.

III. Separate Deregulated Merchant from Regulated Pipeline

The Rule says pipes may price their gas
In deregulated bliss
Just so long as they observe
IFFOETTMEPGDCTTCOBFSS.

This standard won't survive, we must
Respectfully insist;
It merely means "refunds galore"
When for the Court, it's grist.

Instead they must now separate
Employees that they share,
If shippers and suppliers plan
On being treated fair.

Now with these three revisions, we've
A rule that is first class,
One we'll work to implement,

Respectf'ly,
Hadson Gas

Footnotes in the pleading characterized the IFFOETTMEPGDCTCOBFSS standard as one having "rhyme, but no reason" and referred the reader to earlier pleadings making the detailed arguments. The

[9] Supplemental Comments of Hadson Gas Systems, Inc. Following Technical Conference, FERC Docket No. RM91-11 (January 31, 1992). (footnotes omitted).

note further explained that inserting two extra vowels could transform the proposed gobbledygook into a rhythmic, rhyming, and pronounceable "if-fo-ett-mep-gdictt-cob-fiss."

Shortly after the comment was filed, and presumably because of its unusual form and style, one industry trade publication reproduced it in full, taking up a full page of that issue – thereby ensuring that this particular comment would be widely read, probably including by the Commissioners themselves. In short, after five centuries, Meschinot's example lives!

B. "Pipeline perestroika paranoia paradox…"

Scholars of the Homeric poems today widely believe that the poems emerged from an oral tradition that existed long before the written versions we know today. While hardly an epic, the poem "*Pipeline perestroika paranoia paradox"* shares an oral genesis with the Homeric works (although it is true that a few notes were briefly scribbled on a paper napkin as the poet waited to speak at an EBA public forum after lunch one day). The EBA forum took place while the Commission was considering further steps required to complete the transition to a competitive, open-access regime. Then Chairman Martin Allday termed the issue the "how-do-we-get-there" problem and had determined to address it through the proceeding that ultimately produced Order No. 636 and its progeny.

Now, around this same time, the Russian word "*perestroika*" was in vogue for referring to Mikhail Gorbachev's then-ongoing restructuring of the Soviet Union's centrally planned, opaque and tightly controlled economy. Listening to other speakers at the EBA forum, the author thought that Russian term might aptly apply by analogy to the then-ongoing restructuring of America's centrally planned, opaque and tightly controlled natural gas economy. As done in *IFFOETTMEPGDCTTCOBFSS*, the author sought to highlight the need for greater separation between the transportation and gas merchant functions then performed by interstate pipelines.

To be sure, restructuring FERC's regulations along those lines posed considerable risks to traditional industry business models, legacy assets, and long careers. Understandably, this created apprehension – fear even – for how the Chairman's "how-do-we-get-there" questions might ultimately be answered. Others viewed such fears as excessive, even unreasonable, producing what might be termed "*perestroika* paranoia" -- or more specifically "pipeline *perestroika* paranoia."

That was a fatal moment: once the phrase formed in the mind over a plate of *chicken à la conférence* at the EBA forum, there was no going back: the power of rhythm and rhyme took over in a process that Homer would have understood. Thus, with no more than a few notes scribbled on a napkin next to the unfortunate fowl, the author's otherwise conventionally serious (and now completely forgotten) speech concluded with the following:

Said the Chairman to his counsel
as they sat one day in thought:
'What's the single greatest problem
our experiment has wrought?"

Quoth the counsel to the Chairman:
'It's a real Pandora's box;
And the moniker it's given is
'the *perestroika* paradox':
It's the *perestroika* paranoia
"how-do-we-get-there?" paradox.

Charles Stalon thought to solve it
by selling gas in blocks,
And thought "block billing" solved
the *perestroika* paradox.
But producers said, 'no drilling,
if to blocks you go for billing':
It's the pipeline *perestroika* paranoia paradox.

Now Bush is getting ready,
with DOE's investiture,
To order all the pipelines
to try divestiture!
That's got to be the answer!
Let's open up the box
And solve the *perestroika* paranoia paradox.

It's the *perestroika* paranoia…
Gotta go; been good to *knoia* ya…
Pipeline *perestroika* paranoia paradox!

Coffee was then enjoyed, and the napkin, the audience and the speaker returned to their usual duties, but the last forty-plus years of pipeline – and regulatory -- *perestroika* have answered Chairman Allday's "how do we get there" question and confirmed the wisdom of the remarkably successful, bipartisan, policy consensus the agency has followed since.

C. "Five, Eastern Time…"

In the early years of this century, the FERC proposed a rule change to shift the deadline for electronically-filed documents from 5:00 pm Eastern Time to midnight Eastern Time. The proposal had practical significance for practitioners and the too-often disregarded workhorse support staff whose daily lives were likely to be upset. Because so many FERC proceedings have multiple participants coupled with simultaneous filing dates, it was common for attorneys to defer filing until relatively close to the deadline, to avoid offering adverse parties an opportunity for an extra rebuttal by revising their own drafts later the same day.

Had the Commission shifted to a midnight filing deadline and maintained simultaneous filing, the work day for many East Coast attorneys – and their support staff – would have frequently ended around 11:00 or 11:30 pm on days when filings were due. In addition, given the nationwide scope of many FERC proceedings, the change would also have introduced a kind of "time zone arbitrage", where counsel in western time zones could maintain their defensive practice of not filing too far before the deadline, yet still end the workday at a more manageable 9:00 pm Pacific Time (or even 8:00 pm for Alaska or 7:00 pm for Hawaii). Alternatively, an attorney on Eastern Time with an affiliated office on Pacific Time might complete the filing during normal business hours, email it to colleagues on Pacific Time, go home, attend a child's soccer match while reading *Inside Ferc* at half-time, then go to bed while the filing was made shortly before midnight Eastern by colleagues on West Coast.

Hence, the real parties with interest in the proposed rule change were the attorneys and their dedicated employees, not their clients. This tended to put the attorneys in the unusual position of defending their own interests. As a solo practitioner, Mr. Marston decided to express his concerns *pro se*,

but using an unusual humorous and poetic filing that might better put a spotlight on the personal and human interests at issue, while considering that conventionally-minded filings by others would fill in the details of the arguments.[10]

> *Currently, both Internet and paper filings must be received by the close of business, i.e., 5 p.m., to be considered to have been filed on that date. . . . The Commission is interested in receiving public comments. . .*
> *-- 72 Fed. Reg. 42330, at 42333 (Aug. 2, 2007)*

Pursuant to the Acts and rules (which don't exclude poetic tools)
The undersigned submits this thought on changing filing rules:

I. Statement of Issues and Comment

The purpose of your deadline – just like the hanging kind –
Is to serve that wondrous role of focusing the mind:
An argument by cocktail time that's failed to come full flower
Will hardly bloom much brighter as one nears the midnight hour.

And who will gladly file at Five – and so be picked apart
By those who wait past dinnertime to cast the final dart?
Indeed the midnight deadline just favors those who roam
To Juneau or Oahu to make their legal home!

Since work expands to fill the time allowed for its completion
A midnight deadline stretches out our toils paracletian.
So let us stay with 5:00 pm, as graybeards have of old
And time our bytes accordingly to reach th' Commission's fold.

II. Conclusion and Prayer for Relief

The path of wisdom's rarely clear in policy and law
But here it's simple: 5:00 Eastern Time!
Respectfully,
Marston Law

The proposed change in the filing deadline was opposed by a number of comments, but supported by a few others. Ultimately, the Commission retained the 5:00 pm Eastern Time deadline, where it has stayed since.[11]

[10] Comments of Philip M. Marston, Esq., Pro Se, FERC Docket No. RM07-16 (Sept. 10, 2007).

[11] *Filing Via the Internet*, Order No. 703, 121 FERC ¶ 61,171, at PP 30-31 (2007). *See also* the recent *Order Addressing Arguments Raised on Rehearing*, 192 FERC ¶ 61,125, at PP 27-29 (August 6, 2025) (reaffirming the filing deadline and re-articulating concerns about the potential need for counsel to act defensively by deferring filings until shortly before a midnight deadline).

D. "Tis late after Christmas" or the Grinch that stole my refund.

A different instance of using verse in advocacy is to cut through complex legal or factual issues or to specifically highlight some aspect of a matter. Such was the case when an interstate pipeline sought "reverse refunds" following a court appeal. The pipeline's customers objected that this amounted to a prohibited retroactive or "*nunc pro tunc*" rate increase. The case presented a complex rate filing history and the interaction of court and Commission action, and therefore required factual and legal research as well as reflection – yet the pipeline sought and received an exceptionally short time period for protests or comments: four business days between the December 18 public notice and the December 26 reply deadline. With diligence, determination – and strong coffee – a draft response was completed by around 2:00 am on December 26, ready to be finalized during business hours later in that day.

At that moment, however, the effectiveness of Jean Meschinot's plea to the court of public opinion suggested itself. It *was*, after all, the night after Christmas; the house indeed *was* as quiet as a mouse…. Hence the following one page "executive summary" was drafted between 2:00 and 3:00 am and attached the following morning as a cover sheet and filed with the formal protest, and request for summary rejection:[12]

> 'Tis late after Christmas and all through the house
> The children are sleeping, and quiet as a mouse.
>
> But up in the den, what a furious toil
> Where Papa is burning the old midnight oil.
> For shippers, it seems, have been put in a pinch
> By their friend [the pipeline] -- of Christmas, the Grinch!
>
> Now before we endeavor to argue the law
> We beg to point out a procedural flaw:
> The notice is short (and on holidays yet!);
> There's no time for research -- just enough to say "*Nyet*!"
>
> Still, the issue will turn on a court's mandate
> And some arguments raised a few years too late.
> And with *obiter dicta* infecting the case,
> The pipeline's assertions seem badly off-base.
>
> Not to mention the pipeline's contentions are sunk
> On the courts' prohibitions of "*nunc pro tunc*".
>
> So let's take up the case of the "reversing refund"
> And savor the joys of Filed Rate Doctrine fun.[13]

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[12] Protest and request for summary rejection of Western Natural Gas & Transmission, FERC Docket No. RP85-122 (Dec. 26, 1990).

[13] Whether due to the poetic plea, the complexity of the facts and the law, the substantive arguments, or merely the press of regulatory business, the Commission waited several years before ruling, even though the public notice had been originally limited to four work days over the Christmas holiday. The order ultimately sided with the pipeline's arguments and the challenged tariffs were accepted with retroactive effect. *Order on Refund Report and Accepting Revised Tariff Sheets*, *Colorado Interstate Gas Company*, 64 FERC ¶ 61,339 (1993) and *Order Denying Rehearing*, 69 FERC ¶ 61,179 (1994).

E. "The Little Hydro Facility That Could" and an appreciative reply.

Poetic madness can strike agency officials as well as practitioners. In a concurrence entitled "The Little Hydro Facility That Could," Commissioner Vicky A. Bailey used verse to drive home her point there that "*the power of markets and negotiation that ultimately reigns preeminent*:"[14] At issue was a basic conflict between a "qualifying facility" (or "QF") under the applicable law, and an unwilling buyer, summarized by the Commissioner in few words:

> As a QF, of course, to the buyer's annoyance;
> Seller could market its output, at the cost of avoidance,
> So the buyer in question (a "muni" in Texas)
> Must pay off the seller for the prior nexus.

Continuing in verse, the concurrence recited the facts, explained the Commission's rationale for its decision, and underlined a broader policy point about markets and mandates.[15]

As one versifier to another, a thank you note seemed appropriate. The following letter was therefore duly sent:[16]

> …. Hence when a friend sent me by fax
> Your missive re South Texas facts
> Along the River Guadalupe
> 'bout the price a town should pay
> For certain electricity
> To generate felicity,
> I turned at once to trusty keyboard
> To write this note – hope you're not bored –
> And thank you for taking time
> To put your views in meter and rhyme.
>
> It forces one to reason clearly,
> Fashion text that much more nearly
> Captures the sense of Commission decision
> And states it with far greater precision.
>
> Imagine, a moment, if all FERC rules
> Were drafted using poetic tools!
> Why, the CFR would shrink in a minute
> To tomes no longer quite so infinite.
> The Staff would be seen toting volumes of Pope,
> Coleridge, Homer, Shakespeare – they'd lope
> Down the halls in iambic delight:
> Oh Lord! what a marvelous, heart-warming sight!

---

[14] Order Denying Reconsideration, Cuero Hydroelectric, Inc. v. the City of Cuero, Texas, 85 FERC ¶ 61,124 (1998), (concurrence of Commissioner Vicky A. Bailey).

[15] Perhaps reflecting the concerns mentioned *supra*, the concurrence stressed in concluding prose, that despite use of light-hearted verse in the concurrence, the underlying matters had indeed been given full, careful and serious consideration.

[16] Published here with Ms. Bailey's gracious consent.

And perhaps, just perhaps, there might be one
Seen perusing a tome of John Marston!

An appended footnote observed that *that* Marston poet had been thrown in prison by England's King James I for offending the authorities by his poetry and satire, but that the 16th century French poet, Clement Marot, once got himself *out* of prison with a poem to the King. Versifying can be a dangerous profession.

F. A. Karen Hill (1943-2015): In Memoriam.

Ms. Karen Hill, a friend, colleague, fellow EBA member since 1976, passed away in 2015. We had begun our legal adventure the same month on the same floor of the same firm. Unable to attend the memorial gathering in 2015 and inspired by the Energy Law Journal's published tribute to her,[17] the author offered in her memory this personal contribution for decades of shared experience and EBA mentors from another age.

A. Karen Hill
IN MEMORIAM
UPON ASSUMING VERY SENIOR STATUS 2015

Two score less one year ago
Way back in '76
Ms. Hill and I launched legal lives
At MLB before the world knew "clicks".

To her left: J. David Mann;
To her right: Fred Moring.
We labored long and learned our craft,
For FERC was never boring.

Jack Holsinger and Paul E. Keck;
Tom Watson; Jim Vasile…
Our colleagues taught us what we know
With patience, craft and zeal.

Then I joined FERC with Sheila
And she, in brief, joined Feit.
Our paths, they kept on crossing
As passing ships, at night,

For I bounced from the Chairman
To solicit briefs from Feit;
While Karen counseled Martha H.
As restructuring began to bite.

Not all was work; far from it:
In June of '88;

[17] "*In Memoriam: Alice Karen Hill*", 35 Energy L. J. at xvi (2015).

She gave our kids a puppy…
…who grew…and ate…and ate!

The years went by; my beard turned gray;
Children grew and moved away;
But Karen kept a family with all those here today:
Ne'er averse to adverse friends within the EBA.

So gather now and weep and laugh
And laugh and weep – and live!
For that is surely what she'd want,
The gift she'd want to give.

G. Potomac Morning.

After remote solo energy practice had become feasible, the author established his legal practice in Alexandria, some hundred yards from the Potomac River and a few minutes walk along the riverfront from his residence. Early one Christmas Eve, the frigid morning commute seemed graced by peace, calm and beauty as a heron walked atop the ice-bound river and a silver Boeing 737 coasted nearly silently to the airport: a magical moment. Reflecting the next day, the author wrote:

Yester morn' I walked to work along the Nation's river;
I saw the rising sun, a landing plane -- well, it made me shiver;
And caused me to bethink me some on what *is* art and beauty:
That is what I pondered, as I walked to work and duty.

The fruit of that reflection became "*Potomac Morning*":

The Potomac shone this morning:
A touch of ice that graced its breast
Allowed a heron, god-like, to tiptoe towards its nest;
Above, a silver boeing sailed softly north to rest.

This is art: God's sovereign grace
Captured in an instant
Of man's brief time and space.

May grace shine Christmas morning
And touch your heart with fire
That kindles joy unbounded
And quenches just desire;

And may that fire run wild
Until at last it glows
In the heart of every stranger
Where the wind of sorrow blows.

This is joy: a glimpse of the sublime

Captured in an instant
Of man's small space and time.

The heron sleeps; the boeing rests;
Tomorrow both will rise anew to face tomorrow's tests;
But not tonight -- when unbound life
Is born unheard by the unwed wife.

III. Conclusion

"Versifying" is merely casting words into particular forms of rhythm, rhyme and general cadence. "Poetry" may result when verse has something worth saying with the special emphasis that its technical tools offer. Versified *advocacy* appears to sit in a gray zone between verse and poetry, for while it uses technical tools of verse to convey a substantive message, that message is nearly always mundane and narrow -- and thus of no interest at all to humanity as a whole.

This implies that poetic forms can be effectively deployed in advocacy only on rare – indeed very rare -- occasions. Ah, but where it does fit, such verse may pay considerable dividends by ensuring that the client's interests are heard without raising either one's voice or the blood pressure of adverse colleagues.

And who knows: perhaps some future historian will pause an instant to wonder how an obscure 15th century Franco-Breton poet came to play a role, however minuscule, in helping usher in a 21st century golden age for American natural gas.

* * * * *