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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FEDERAL REGULATORY ENERGY COMMISSION,

Plaintiff,

vs.

VITOL. INC., ET AL,

Defendants.

CASE NO. 2:20-cv-00040-KJM-AC

The Hon. Kimberly J. Mueller

NOTICE OF MOTION BY THE EDISON ELECTRIC INSTITUTE, THE ELECTRIC POWER SUPPLY ASSOCIATION, AND THE ENERGY TRADING INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN CONNECTION WITH THE PENDING F.R.CIV.P 12(b)(6) MOTION FILED BY DEFENDANT VITOL, INC. CURRENTLY SET FOR HEARING ON MAY 15, 2020

[Pro Hac Vice Applications By Counsel For the Proposed Amici To Be Filed]

Date: June 26. 2020
Time: 10:00
Courtroom: 3

TO THE COURT AND ALL COUNSEL:

PLEASE TAKE NOTICE that on June 26, 2020 or as soon thereafter as the matter may be heard, before the Honorable Kimberly J. Mueller in Courtroom 3 of the U.S. District Court for the Eastern District of California, 501 I Street, Sacramento, California 95814, proposed amici curiae the Edison Electric Institute ("EEI"), the Electric Power Supply Association ("EPSA"), and the Energy Trading Institute ("ETI") (collectively "the Proposed Amici") will and hereby do request, pursuant to their concurrently filed Motion for Leave to File their amicus brief ("the Motion"), leave to file, and have considered by the Court, their amicus brief in support of the pending F.R.Civ.P. 12(b)(6) motion by Defendant Vitol, Inc. (Docket No. 30) currently set for hearing on May 15, 2010. The amicus brief which the Proposed Amici request to be filed and considered is Exhibit "A" to the declaration of Leslie M. Werlin, Esq. attached in support of the Motion and is directed to the question of the factors the Court is requested to consider when construing the statute of limitations under 28 U.S.C. §2462 ("Section 2462"), a question not yet addressed by the Ninth Circuit.

Pursuant to the Court's standing order, Counsel for Proposed Amici conferred with counsel for the parties. Counsel for Vitol, Inc. has consented to the filing of the Proposed Amici's amicus brief. Counsel for FERC did not consent. In addition, counsel for the Proposed Amici inquired if Vitol, Inc. and FERC would agree that the Proposed Amici's time for this Motion could be shortened so that the Proposed Amicus brief could be considered in connection with the scheduled May 15 hearing on Vitol, Inc.'s motion. Again, counsel for Vitol, Inc. was agreeable. Counsel for FERC was not.

The grounds for the Motion are as follows:

1. The Proposed Amici's amicus brief will address factors which the Court should consider in determining the following questions pertinent to a Section 2462 statute of limitations analysis: (a) what is the accrual date of the Section 2462 statute of limitations period for FERC to file an enforcement action in District Court under 16 U.S.C. 823b(D)(3); and (b) when does FERC commence a proceeding for such enforcement under Section 2462. These questions have not been decided by The Ninth Circuit.

2. The determination of the accrual of the statute of limitations and determination of when a proceeding is commenced under Section 2462 are matters of importance not only to the parties to this action but all persons and entities subject to FERC's nationwide enforcement jurisdiction.

3. As set forth in the Motion, the Proposed Amici are particularly well-positioned to assist the Court in its examination, analysis and determination of the correct interpretation of Section 2462.

In addition, additional McGuireWoods' counsel for the Proposed Amici will make *pro hac vice* ("PHV") applications to this Court.

The Motion will be based on this Notice, the declaration filed in the support of the Motion, the points and authorities submitted with the Motion and the amicus brief which the Motion requests be considered by the Court, along with the records and files in this action.

DATED: May 4, 2020

Respectfully submitted,

MCGUIREWOODS LLP

By: /s/Leslie M. Werlin
Leslie M. Werlin
Attorneys for Proposed Amici

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EASTERN DISTRICT OF CALIFORNIA

FEDERAL REGULATORY ENERGY COMMISSION,

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MOTION BY THE EDISON ELECTRIC INSTITUTE, THE ELECTRIC POWER SUPPLY ASSOCIATION, AND THE ENERGY TRADING INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN CONNECTION WITH THE PENDING F.R.CIV.P 12(b)(6) MOTION FILED BY DEFENDANT VITOL, INC. CURRENTLY SET FOR HEARING ON MAY 15, 2020

[A COPY OF THE PROPOSED AMICUS BRIEF IS ATTACHED AS EXHIBIT "A" TO THE DECLARATION OF LESLIE M. WERLIN FILED IN SUPPORT THIS MOTION]

[Pro Hac Vice Applications By Counsel For the Proposed Amici To Be Filed]

Date: June 26, 2020
Time: 10:00 am
Courtroom: 3

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE COURT SHOULD GRANT THIS MOTION

Pending before the Court as Docket No. 30 is a motion brought by Vitol, Inc. to dismiss pursuant to F.R.Civ.P. 12(b)(6) based on 28 U.S.C. §2462 ("Section 2462), the statute of limitations applicable to the claims asserted by the Federal Regulatory Energy Commission ("FERC").[1]

Proposed Amici Curiae who are the Edison Electric Institute ("ETI"), the Electric Power Supply Association ("EPSA"), and the Energy Trading Institute ("ETI") (collectively "the Proposed Amici"), request leave file the Amicus Curiae brief, a copy of which is Exhibit "A" to the declaration of Leslie M. Werlin, Esq. which is part of this motion ("the Amicus Brief").[2]

The Amicus Brief will address factors which the Proposed Amici believe this Court should consider in determining the following questions pertinent to a Section 2462 statute of limitations analysis: (a) what is the accrual date of the Section 2462 statute of limitations period for FERC to file an enforcement action in District Court under 16 U.S.C. 823b(D)(3); and (b) when does FERC commence a proceeding for such enforcement under Section 2462. These questions have not been decided by The Ninth Circuit.

The Amicus Brief should be considered by this Court for the following reasons.

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[1] Counsel for Vitol, Inc. consented to the filing of the Proposed Amici's amicus brief. Counsel for FERC did not consent. In addition, counsel for the Proposed Amici inquired if Vitol, Inc. and FERC would agree that the Proposed Amici's time for this Motion could be shortened so that the Proposed Amicus brief could be considered in connection with the scheduled May 15 hearing on Vitol, Inc.'s motion. Again, counsel for Vitol, Inc. was agreeable. Counsel for FERC was not.

[2] As set forth in the Notice of this Motion, additional counsel from the firm of McGuireWoods LLP will be seeking pro hac vice admission on the Proposed Amici's behalf.

A. The Proposed Amici Are Particularly Well-Positioned To Assist The Court In Its Examination, Analysis And Determination Of The Correct Interpretation Of Section 2462.

The Proposed Amici collectively represent the electricity companies that handle the bulk of the nation's electricity and are subject to FERC's wider Federal Power Act jurisdiction to which 2462 applies (not just the regulation in this case). They are in a unique position to supply information and analysis as to the broader implications of the Section 2462 statute of limitations analysis.

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

EEI members own about 75% of transmission system facilities in the country, and they include both vertically integrated utilities and competitive transmission No counsel for a party authored this brief in whole or in part. No party, no party's counsel, and no person or entity other than the *amici* themselves and their counsel have made a monetary contribution to the preparation or submission of this brief. EEI's members make considerable investments in energy infrastructure investments FERC and Congress have recognized are critical to ensure a reliable, cost-effective, and modern bulk power system.

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

EPSA's members include 16 companies, along with state and regional partners, that represent the competitive power industry in their respective regions. EPSA's members have significant financial investments in electric generation and electricity marketing operations across the country. EPSA seeks to promote a favorable market environment for the competitive electric industry; to support the development of state and federal legislative and regulatory policies that encourage the development and implementation of competitive wholesale markets for electricity; and to improve the public's awareness of the competitive electric industry.

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

In addition, as set forth in the Notice of this Motion, the Proposed Amici Counsel are also positioned to assist the Court in its analysis of Section 2462.

B. The Proposed Amici Will Give The Court Valuable Industry Insights.

The Proposed Amici believe that the Court in *Federal Energy Regulatory Commission v. Powhatan Energy Fund, LLC* (4th Cir. 2020) 949 F.3d 891 incorrectly determined the operation of Section 2462. Most specifically, that Court assumed that a determination that Section 2462 essentially imposes no statute of limitations "can be, in actuality, of benefit to the regulated party" 949 F.3d at 901 because otherwise the industry it regulates "would risk the imposition of civil penalties based on slipshod investigates hastily undertaken to protect against the effect of a premature limitations period." 949 F.3d at 900.

The Proposed Amici assert that the industry does NOT agree with the Fourth Circuit's analysis. There is no such "benefit" from a world in which FERC is unbounded by time because it might otherwise conduct "slipshod" investigations due to time pressures. Also, the idea that there are no ways to relieve any such claimed time pressures (for example through tolling agreements)

is contrary to the industry experience. In addition, in the OSC phase of FERC's process before filing an action, FERC is not a "neutral decision-maker" as FERC claims and as the Fourth Circuit and other court have assumed. These points are not already in the briefing.

C. The Correct Construction Of Section 2462 Is Important To The Industry FERC Oversees.

The determination of the accrual of the statute of limitations and determination of when a proceeding is commenced under Section 2462 are matters of importance not only to the parties to this action but all persons and entities subject to FERC's nationwide enforcement jurisdiction.

II. THE COURT HAS THE AUTHORITY AND BROAD DISCRETION TO TO GRANT THIS MOTION

As this Court recognized in *Jamul Action Committee v. Stevens* 2014 WL 3853148, at *5–6 (E.D. Cal, Aug. 5, 2014-KJM)

> "The district court has broad discretion regarding the appointment of amici . . . An amicus brief should normally be allowed when, among other considerations, the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide."

See also Coleman v. Newsom 2019 WL 2410434, at *1 (E.D. Cal., June 7, 2019-KJM) ("Amicus curiae fulfill the role by submitting briefing designed to supplement and assist in cases of general public interest, supplement the efforts of counsel, and draw the court's attention to law that might otherwise escape consideration.")

That the Proposed Amici represent the industry subject to FERC oversight does that bar the submission of the Amicus Brief. As this This Court further noted *Jamul* at 5, amicus status is not bared simply because the amicus seeks to assert own interests.

> While '[h]istorically, amicus curiae is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and advises the Court in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another' . . . the Ninth Circuit has said 'there is no rule that amici must be totally disinterested.' . . . The court has the

ability to glean useful information from the Tribe's filing without being swayed by any pure advocacy.

As noted above, because the correct construction of Section 2462 is important to the industry FERC oversees, the Amicus Brief should be considered. In *Missouri v. Harris,* 2014 WL 2987284, at 4 (E.D. Cal., July 1, 2014-KJM), this Court recognized that "participation as amici is appropriate where, as here, legal issues in the action have potential ramifications beyond the parties directly involved."

III. CONCLUSION

For the foregoing reasons, this Motion should be granted.

DATED: May 4, 2020

Respectfully submitted,

MCGUIREWOODS LLP

By: /s/Leslie M. Werlin
Leslie M. Werlin
Attorneys for Proposed Amici

DECLARATION OF LESLIE M. WERLIN

I, Leslie M. Werlin, declare as follows:

1. I am an attorney admitted to practice before this Court. I have been a member of the State Bar of California since December 1975. I am with the law firm of McGuireWoods LLP, counsel for the Proposed Amici who hereby request permission to Amicus Brief, a copy of which is attached hereto as Exhibit "A" ("the Amicus Brief"). This declaration is submitted in support of the motion for leave to file the Amicus Brief made by the Proposed Amici ("the Motion") to be considered in connection with the motion made by Vitol, Inc. ("Vitol") pursuant to F.R.Civ.P. 12(b)(6) (Docket No. 30) currently set for hearing on May 15, 2020. The Amicus Brief is directed to the question of the statute of limitations under 28 U.S.C. §2432 on the claims brought against Vitol, Inc. by the Plaintiff Federal Regulatory Commission ("FERC").

2. I am informed that prior to filing this motion, Todd Mullins, Esq. of McGuireWoods LLP conferred with counsel for Vitol and FERC to determine if they would consent to the filing of the Amicus Brief and I understand that counsel for Vitol consents and counsel for FERC does not consent. I am further informed, inquiry was made about whether Vitol, Inc. and FERC would agree that the Proposed Amici's time for this Motion could be shortened so that the Proposed Amicus brief could be considered in connection with the scheduled May 15 hearing on Vitol, Inc.'s motion. Again, counsel for Vitol, Inc. was agreeable. Counsel for FERC was not.

3. In addition to the Motion, applications for pro hac vice admission for purposes of the Motion will be submitted to the Court on behalf of the following McGuireWoods LLP attorneys: Todd Mullins, Esq., Matthew Fitzgerald, Esq. and Noel Symons, Esq.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 4, 2020, at Los Angeles, California.

/s/ Leslie M. Werlin
Leslie M. Werlin

EXHIBIT A

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FEDERAL ENERGY REGULATORY COMMISSION, Plaintiff, vs. VITOL INC. and FEDERICO CORTEGGIANO, Defendants.	Case No. 2:20-CV-00040-KJM-AC **BRIEF OF *AMICI CURIAE* EDISON ELECTRIC INSTITUTE, ELECTRIC POWER SUPPLY ASSOCIATION, AND ENERGY TRADING INSTITUTE IN SUPPORT OF DEFENDANTS ON STATUTE OF LIMITATIONS ISSUES** The Hon. Kimberly J. Mueller

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STATEMENT OF INTEREST[1]

This brief is filed jointly by the Edison Electric Institute (EEI), Electric Power Supply Association (EPSA), and Energy Trading Institute (ETI) as *amici curiae* in support of the statute of limitations arguments made by Defendant Vitol, Inc. and in opposition to arguments made by Plaintiff Federal Energy Regulatory Commission ("FERC") in its opposition to that motion.

As stated in their moving papers, *Amici* are particularly well-positioned to understand and explain to this Court the implications of this case far beyond these Defendants. As a regulated industry, this industry craves certainty, steadiness, and repose from long past missteps. *Amici*'s members, as well as other market participants and ultimately electricity customers, are all best off with a clear statute of limitations. *Amici* express no position on the underlying alleged violations in this case or the non-limitations issues presented in Defendants' motion to dismiss.

ARGUMENT

The governing statute of limitations, 28 U.S.C. § 2462, provides that "an action . . . for the enforcement of any civil fine [or] penalty . . . shall not be entertained unless commenced within five years from the date on which the claim first accrued." With the support of a recent Fourth Circuit decision, FERC argues that this means it gets five years to investigate a violation, then an unbounded period in which it should "promptly" issue a penalty assessment, and then five *more* years after that to file suit in court. That view cannot be squared with the simple language of § 2462.

In particular, the Fourth Circuit accepted this theory on the mistaken premise that it would be *good* for the regulated industry. That is false. No regulated entity that *amici* are aware of favors a ten-year statute of limitations sandwich with FERC having free reign during the middle—effectively controlling when its second five-year period begins.

On the contrary, Judge Nunley was correct on this exact issue when he ruled five years ago that "the Court in this case follows the plain directive from *Gabelli* and finds that the clock starts to

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

tick when the underlying violations occurred." *FERC v. Barclays Bank PLC*, 105 F. Supp. 3d 1121, 1131 (E.D. Cal. 2015). And Judge Nunley was also correct in holding that agency proceedings do not stop the running of the clock—only court filing does. *FERC v. Barclays Bank PLC*, No. 2:13-CV-02093-TLN-DB, 2017 WL 4340258, at *9 (E.D. Cal. Sept. 29, 2017).

I. The Fourth Circuit incorrectly interpreted the 5-year statute of limitations in § 2462.

The Fourth Circuit's interpretation of § 2462 is incorrect and dubious on its face for at least three reasons. *See FERC v. Powhatan Energy Fund LLC*, 949 F.3d 891 (4th Cir. 2020).

First, it cannot be right that there are two different accrual points, years apart, for the exact same claim. That is, the core allegation that FERC brought in *Powhatan*, as here, is that an energy market actor unlawfully manipulated the market. It makes little sense to say that single claim, based on specific alleged acts, "accrued" first on the day the offense occurred, and then "accrued" again years later, when FERC issued a penalty assessment that the accused refused to pay. The Fourth Circuit offered no other example of a statute of limitations that stacks on itself to double its length. Doing that runs counter to the point of § 2462, which, according to the Supreme Court, is to "set[] a fixed date when exposure to the specified Government enforcement efforts ends." *Gabelli v. S.E.C*, 568 U.S. 442, 448 (2013).

Second, FERC and the Fourth Circuit provide no real limit on the interlude between the five-year periods: the period when FERC should "promptly" assess a penalty. 16 U.S.C. § 823b(d)(3)(A) (FERC "shall promptly assess [a] penalty, by order"). The statute "does not define the crucial term 'promptly.'" *Powhatan*, 949 F.3d at 903. The Fourth Circuit's solution was that if FERC delayed an unreasonably long time in assessing a penalty, a defendant could use the APA to "sue to force FERC to issue a [penalty order] in a timely manner." *Id.* at 903. From the perspective of the industry who would be placed in that position, that is an illusory option. No investigation target should have to sue to prod the agency into assessing a multi-million dollar penalty against it. It creates yet another prerequisite to timely action, and this time, it is a step that must be taken by the accused entity—the very entity that the limitations period is intended to protect.

The Fourth Circuit then opined that "a reasonable time for agency action is usually counted in weeks or months, not years." *Id.* at 903–04. And indeed, in this case it took just two-and-a-half

months for FERC to issue its penalty assessment. Compl. ¶¶ 39-41. But as a matter of history, FERC always takes months and often more than a year to issue its penalty orders.[2] This history shows not only that it takes a long time, but that the amount of time it will take in any given case is unpredictable. Moreover, this is how long FERC took in these cases when it was fully aware that the defendants in these cases, and indeed the entire industry, would argue in the face of this unsettled question that the clock only stops ticking with court filing. One can only expect FERC will take even longer if it is granted a license from the courts to take whatever time it wants.

Third, the Fourth Circuit wrongly justified its odd creation of two limitations periods out of one statutory provision by suggesting that extended investigation and pre-suit periods of time would be good for the regulated industry. The court worried that an investigation limited to four to five years would be "potentially slipshod" and "hastily undertaken." *Powhatan*, 949 F.3d at 900-01. Thus, the court suggested that the far longer timeframe it was creating, two five-year periods with an unbounded middle period, "can be, in actuality, of benefit to the regulated part[ies]." *Id.* at 901.

This theory is badly mistaken. *Amici* speak for the "regulated parties," and none appreciate the holding that FERC has more than *two* five-year periods, separated by an unbounded interregnum, in which to pursue any single violation. A double-long statute of limitations with an unlimited halftime multiplies uncertainty and makes eventually litigating the issues far more difficult, once memories have faded, key personnel have moved on, and relevant rules may have changed several times. If defendants prefer delay in any given case, there is a ready-made, oft-employed solution which the Fourth Circuit ignored: consensual tolling agreements. Statutes of limitations should follow "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty." *Gabelli*, 568 U.S. at 448.

[2] *See, e.g., Maxim Power Corporation et al.*, 151 FERC ¶ 61,094 (2015) (within two months of the *de novo* election); *but see Coaltrain Energy, L.P., et al.*, 155 FERC ¶ 61,204 (2016) (almost four months after election); *Powhatan and Chen*, 151 FERC ¶ 61,179 (2015) (more than four months); *ETRACOM LLC and Michael Rosenberg*, 155 FERC ¶ 61,284 (2016) (five months); *Lincoln Paper and Tissue, LLC*, 144 FERC ¶ 61,162 (2013) (a year); *Competitive Energy Services, LLC*, 144 FERC ¶ 61,163 (2013) (a year); *Richard Silkman*, 144 FERC ¶ 61,164 (2013) (a year).

Moreover, the general limitations period in § 2462 shows that Congress wanted actions for civil penalties to begin within five years. That means also that Congress wanted to establish that if the government cannot organize itself to seek civil penalties within five years, such an action should never happen at all. And despite all of the discussion of the complexity of FERC investigations, in many cases (including this one), the subject of all of the investigation and process boils down to a few days—a handful of actions in the energy market. Yet in this case, two days' trades took six years to reach this Court. FERC has not actually contended here or anywhere else, as the Fourth Circuit speculated, that its investigations and pursuit of violations would be "slipshod" if FERC was granted only five years. And if the Fourth Circuit's holding is given effect by other courts, the industry will be faced with unknowably long investigations in the future, no matter how few the facts at issue.

II. The steps FERC must take before filing in court are under FERC's control, so those steps should not delay accrual or create a double-long limitations period.

A. Pre-filing steps are under FERC's control.

It is uncontested that several steps must occur between a violation and a federal lawsuit (although FERC has added non-statutory and unnecessary extra elements to the process). Those steps are: (1) FERC issues an order to show cause and notice of proposed penalty; (2) the alleged violator selects the Alternate Option; (3) FERC issues a penalty assessment by order; (4) 60 days elapse without the violator paying the assessed penalty; and then (5) FERC files suit in a district court.

The key is that FERC *controls those steps*—both what they are and when they occur. Because FERC controls the steps, pegging accrual of a five-year period to their end means that FERC—which serves as both the investigator and the prosecutor of potential violations—controls whether its own (second) time limit ever even begins. This is fundamentally unfair.

Step One. FERC issues an Order to Show Cause and Notice of Proposed Penalty. *See* 16 U.S.C. § 823b(d)(1) (requiring FERC to give notice of its proposed penalty). FERC decides when to do this. According to the Fourth Circuit, there is a five-year window to issue an Order to Show Cause. *Powhatan*, 949 F.3d at 901.

FERC normally takes all, or nearly all, of that period. *FERC v. Powhatan Energy Fund, LLC,* 286 F. Supp. 3d 751, 766 & n.25 (E.D. Va. 2017) (noting that the investigation stage in that case lasted over four years, and calling it an "elaborate and often lengthy investigatory process the Commission conducts as an enforcer, not as a neutral arbiter"). In this case, excluding the agreed tolling period, FERC took more than four and a half years to issue its Order to Show Cause. Compl. ¶¶ 58-59, ¶ 35.

Step Two. Upon receiving the Order, the alleged violator nearly always chooses the "Alternate Option," meaning *de novo* adjudication in the district court. By statute, the target gets only 30 calendar days to make this election. 16 U.S.C. § 823b(d)(2)(A) (requiring "an election . . . within 30 calendar days after receipt of notice"). Consistent with the statute, history shows that the targets do make this election within 30 days. *See infra*, Table 2, at p. 15-16.

Step Three. FERC assesses its penalty by issuing an Assessment Order. Although the statute "calls for FERC to 'promptly assess' penalties 'by order' [it] . . . does not set out any required procedures for arriving at such order." *Barclays Bank PLC*, 2017 WL 4340258, at *7 (Nunley, J.). "FERC determines—*without obtaining any additional evidence or argument*—whether a violation exists, and if so, 'promptly' assesses the penalty." *Id.* at *7. "[N]o additional factfinding occurs" during this time. *Powhatan Energy Fund, LLC*, 286 F. Supp. 3d at 766. In fact, FERC can point to "nothing in the statute, regulation, or policy statement that requires [it] to act as a neutral decision-maker when making its penalty assessment under the Alternate Option." *Id.* at 768. "FERC's determination that Defendants violated the law is simply a mechanism for getting the case into district court." *Barclays Bank PLC*, 2017 WL 4340258, at *13.

Rightly viewed, the Assessment Order is simply another step in the prosecutorial process. There is no two-sided process on the path to an Assessment Order. Targets have no discovery rights, face no neutral decision-maker, have no right to appear live at FERC, and cannot cross-examine any witnesses against them. This process amounts to FERC "deciding whether to civilly prosecute Defendants." *Barclays Bank PLC*, 2017 WL 4340258, at *13. Yet this penalty-assessment phase typically takes FERC months.

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

Table 1: Comparison of Staff-Proposed Penalties to FERC-Assessed Penalties[3]

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

[3] This chart shows all Federal Power Act-related cases post EPAct 2005 that proceeded to the Assessment Order stage. The Energy Policy Act of 2005, Pub. L. No. 109-58.

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

Case Name / Docket No.	Remedy Proposed by FERC Staff Civil Penalty (CP); Disgorgement (D)	Commission Assessed Remedy
Vitol Inc. and Federico Corteggiano / IN14-4-000	CP: Vitol - $6,000,0000 Corteggiano - $800,000 D: Vitol: $1,227,143 168 FERC ¶ 61,013 (July 10, 2019)	CP: **Vitol - $1,515,738** **Corteggiano - $1,000,000** D: Vitol - $1,227,143 169 FERC ¶ 61,070 (Oct. 25, 2019) (Commission decreased Vitol penalty but increased Corteggiano penalty)

This data further belies one of FERC's central premises here: that when the Commission issues the Order to Show Cause and Notice of Proposed Penalty, it is acting as a neutral decision-maker. FERC's history of issuing penalties that mirror those in the Notice of Proposed Penalty, as shown above, makes that difficult to believe. It is further undercut by the fact that before the OSC issues, the Commission must authorize a potential settlement, which means it already has reviewed staff's non-public version of the facts and the law and has already made up its mind, at least preliminarily, that there is a basis for a violation. This all occurs before the "separation of functions" and "*ex parte*" rules—which FERC claims are hallmarks of neutrality—are even in force. So, it is of little surprise that, once the Commission takes on the mantle of "adjudicator," the outcome at the end of the day is usually just what staff proposes.

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

Step Five. FERC files its lawsuit. This step is under FERC's control as well, of course. Under the Fourth Circuit's view, this phase receives a second 5-year limitations period under § 2462. *Powhatan*, 949 F.3d at 894.

As a whole, therefore, the investigation and assessment period and its timeline falls under FERC's control. To be sure, under the proper view of the statute of limitations FERC must organize itself to account for the two short statutory periods of time given for alleged violators to make their elections (a total of 90 days), so that it can still sue within five years of the alleged violation. But FERC has not argued that it could not do this.

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

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

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

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

violation, particularly when concealed, required meaningful investigation to unearth and reach the stage where the SEC could file a complaint in court. Even so, that time counted against the 5-year period in § 2462.

Similarly, in many criminal contexts, prosecution cannot begin without significant investigation and an indictment from a grand jury. Like FERC here, the prosecutor must do some work ahead of filing in court—the police must investigate the incident, the prosecutor must call a grand jury, present facts and witnesses, and obtain the indictment.

Yet these necessary steps do not delay the beginning of the limitations period. "In common parlance," the government acquired "a complete and present cause of action" when the alleged violation occurred. *Gabelli*, 568 U.S. at 448; *id.* (calling it "the most natural reading of the statute" that "a claim . . . accrues—and the five-year clock begins to tick—when a defendant's allegedly [violative] conduct occurs"). *See also Barclays Bank PLC*, 105 F. Supp. 3d at 1131 ("The Court in this case follows the plain directive from *Gabelli* and finds that the clock starts to tick when the underlying violations occurred"). The government's time spent arranging itself and checking necessary boxes before filing in court do not affect the running limitations period.

The Supreme Court has recognized this principle in other parallel contexts. For instance, in *McMahon v. United States*, the Court addressed a limitations period that began when "the cause of action arises." 342 U.S. 25, 26 (1951). Although the petitioner in that case could not actually file suit until his claim had been administratively disallowed, the Court ruled that his time period began with his original injury, not the later administrative ruling. Otherwise, the Court noted, the petitioner "would have it in his power, by delaying [the administrative] filing, to postpone indefinitely commencement of the running of the statute of limitations." *Id.* at 27; *id.* at 28 (declining to consider whether to toll the limitations period during the 60 days a claim would be pending).

Likewise, in *Reading Co. v. Koons*, the Supreme Court interpreted the exact statutory term in this case—when a cause of action "accrued." 271 U.S. 58 (1926). The Court ruled that a wrongful death claim "accrued" when the decedent died, not later upon the appointment of the administrator, who was the only person authorized to file suit. The Court was concerned—exactly

as this Court should be here—that starting the period later, at a time under the control of the beneficiaries, would make the limitations period meaningless. *Id.* at 65. The Court ruled that "the word 'accrued' [must] be taken to apply uniformly to the time when the events have occurred which determine that the carrier is liable, even though the particular person through whose agency the liability is to be enforced has not yet been designated." *Id.* at 64.

As in *Koons*, "the word accrued" should "be taken to apply uniformly to the time when the events have occurred which determine that the [accused] is liable." *Id.* Like the date of injury in *McMahon* and the date of death in *Koons,* here, that is the date of the alleged offenses.

The Ninth Circuit has taken the same path. In the immigration enforcement context, the Ninth Circuit has rejected "a reading of [§ 2462 under] which the limitation period begins to run only when the penalty has been imposed." *DLS Precision Fab LLC v. U.S. Immigration & Customs Enforcement*, 867 F.3d 1079, 1086 (9th Cir. 2017). The Court observed that finding accrual only after a penalty had been imposed "would extend the limitations period indefinitely" and that such an outcome "could not have been Congress's intent." *Id.* FERC has identified no reason why it should get more than ten years when all other agencies get five.

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

If this Court were to accept the theory that "accrual" occurs only after FERC issues its penalty assessment and the defendant does not pay, the consequences for industry and customers would go well beyond the facts and circumstances of this case.

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

The five-year limitations period in 28 U.S.C. § 2462 broadly applies to all FERC enforcement under the Federal Power Act—not just to energy trading as here. FERC opens many inquiries and investigations and litigates with some frequency. Given the expansive web of regulations and tariff provisions that FERC enforces, even well-intentioned and careful market participants and owners and operators of FERC-jurisdictional energy infrastructure can potentially find themselves subject to an investigation or subsequent enforcement action.

According to its annual reports, FERC's enforcement office has recently opened more than one hundred inquiries. *See* FERC Office of Enforcement, 2017 Report on Enforcement 53–55, Docket AD07-13-011 (Nov. 16, 2017) (Enforcement Report 2017); FERC Office of Enforcement, 2018 Report on Enforcement 62–64, Docket AD07-13-012 (Nov. 15, 2018) (Enforcement Report 2018).[4]

Along with, or following, those inquiries, FERC opens an average of about twenty full investigations each year. From 2013 to 2019, the Office of Enforcement opened 24, 17, 19, 17, 27, 24, and 14 investigations each successive year.[5]

Most of those investigations involved potential Federal Power Act cases. *See* Enforcement Report 2018 at 25 (outlining investigations of potential market manipulation, potential tariff violations, market behavior rule issues, and potential violations of Commission orders).

Federal Power Act cases cover a broad array of regulatory requirements. They are not limited to the rules allegedly violated here. Instead, FERC enforcement actions under the Federal Power Act can involve electric reliability standards that broadly regulate grid security, 16 U.S.C. §§ 824o, 824o-1; tariff and FERC market rules that govern almost every aspect of the FERC-created organized electric markets, *i.e.*, 18 C.F.R. §§ 35.1, 35.28, 35.41; statutes regulating public utility transmission and interstate sales of electric energy at wholesale, 16 U.S.C. §§ 824, 824d, 824e; and rules relating to filings and disclosures to FERC under 16 U.S.C. § 825c and 18 C.F.R. Ch. 1, Subch. B, Pt. 35. Even well-intentioned, well-run market participants can find themselves subject to investigation as FERC attempts to ensure compliance with this array of rules and regulations.

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[4] FERC Enforcement Reports from 2007 through 2019 are available at: https://www.ferc.gov/enforcement/enforce-res.asp?csrt=9255361642728561006.

[5] *See* FERC Office of Enforcement, 2013 Report on Enforcement 22, Docket AD07-13-006 (Nov. 21, 2013) (Enforcement Report 2013); FERC Office of Enforcement, 2014 Report on Enforcement 21, Docket AD07-13-008 (Nov. 20, 2014) (Enforcement Report 2014); FERC Office of Enforcement, 2015 Report on Enforcement 23, Docket AD07-13-009 (Nov. 19, 2015) (Enforcement Report 2015); FERC Office of Enforcement, 2016 Report on Enforcement 26, Docket AD07-13-010 (Nov. 17, 2016) (Enforcement Report 2016); Enforcement Report 2017 at 24; Enforcement Report 2018 at 25; FERC Office of Enforcement, 2019 Report on Enforcement, Docket AD07-13-013 (Nov. 21, 2019) (Enforcement Report 2019).

B. These investigations and enforcement have tremendous stakes.

The money at stake in these investigations and enforcement is significant. The Federal Power Act provides for civil penalties of over $1 million per day, per violation. 16 U.S.C. § 825o-1(b).[6] This high penalty mark governs in all of these types of cases and the same enforcement procedures apply. 16 U.S.C. § 823b; 18 C.F.R. Ch. 1, Subch. A, Pt. 1b.

As of late 2019, FERC was litigating three actions in federal court, seeking $85 million in civil penalties and disgorgement. Enforcement Report 2019 at 11 (listing $85 million in civil penalties and disgorgement); *id.* (adding that in the past six years, FERC has filed seven enforcement actions).

And over the past twelve years FERC has negotiated settlements in these enforcement actions of more than $1.2 billion—"$783.4 million in civil penalties and approximately $518 million in disgorgements." Enforcement Report 2019, at 18.

C. Virtually all targets elect the *de novo* judicial path.

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

As the table below shows, since 2005 (when Congress created the modern era of FERC enforcement through the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), only one respondent has chosen an administrative proceeding before an Administrative Law Judge. Meanwhile, at least a dozen respondents have chosen the same path as Defendants here: a "prompt" penalty assessment followed by a *de novo* trial in the district court:

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

Table 2: Post EPAct 2005 Federal Power Act Enforcement[7]

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

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

Footprint Power LLC, Footprint Power Salem Harbor Operations LLC IN18-7-000[8]	6/2013 to 7/2013	6/18/2018	7/13/2018
Vitol Inc., Federico Corteggiano IN14-4-000	10/25 & 10/28/2013	7/10/2019	8/9/2019

As the chart shows, the path Defendants chose here is the path taken by nearly every serious Federal Power Act enforcement. This shows how critical this issue is to the industry as a whole and demonstrates the fallacy of FERC's "neutral decision-maker" argument. Despite FERC's paper assurances, in the real world, targets recognize the need for an actually neutral decision-maker—a federal court—by the time an Order to Show Cause issues. *See, e.g., Federal Energy Reg. Comm'n v. Silkman*, No. 1:16-cv-205, 2019 WL 113782, at *12-13 (D. Me. Jan. 4, 2019) (describing extensive contacts and reports between FERC enforcement staff and the Commissioners about the investigation in the months before the Order to Show Cause issued).

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

FERC investigations are not always "prompt." One court noted that "'prompt' seems generous" given that FERC had "conducted a nearly five-year investigation into two months of allegedly manipulative trading." *FERC v. Powhatan Energy Fund, LLC*, 345 F. Supp. 3d 682, 696 n.23 (E.D. Va. 2018). Here, the alleged offenses occurred on just two days in October 2013, but FERC did not issue its Order to Show Cause until the summer of 2019, nearly six years later. Complaint, ECF No. 1, at ¶ 58, ¶ 35.

More broadly, in more than a dozen recent Federal Power Act investigations FERC has issued an Order to Show Cause and Notice of Proposed Penalty. In only two cases did the process end within roughly two years of the alleged violations (which shows FERC is capable of

[8] Ultimately, on the recommendation of the FERC staff, the Commission issued an order terminating the order to show cause proceeding in *Footprint* (noted in Table 2) and therefore no penalties were assessed against Footprint. 166 FERC ¶ 61,150 (Feb. 25, 2019). The outcome is essentially consistent with the data presented in Table 1 above in that the Commission followed the staff's recommendation. Notably, such action occurred more than 6 years after the conduct in question and more than 7 and 8 months, respectively, after Footprint elected *de novo* review and the Commission issued the OSC and Notice of Proposed Penalty.

investigating well within five years though that is not the usual experience). *See Moussa Kourouma, d/b/a Quntum Energy LLC*, 134 FERC ¶ 61,105 (2011); *Deutsche Bank Energy Trading, LLC*, 140 FERC ¶ 61,178 (2012). Neither of these cases proceeded to the district court. *Kourouma* elected the administrative option. *Moussa Kourouma, d/b/a Quntum Energy LLC*, Docket No. IN11-2-000 (Mar. 16, 2011). *Deutsche Bank Energy Trading LLC* settled before FERC assessed a penalty by contested order. 142 FERC ¶ 61,056 (2013) (Order Approving Stipulation and Consent Agreement).

In all other cases the investigation period spanned more than four years, and often exceeded five years, from the date the alleged violations began. *See Barclays Bank PLC, et al.,* 141 FERC ¶ 61,084 (2012) (four to six years); *Lincoln Paper and Tissue, LLC*, 140 FERC ¶ 61,031 (2012) (over four years); *Rumford Paper Co*., 140 FERC ¶ 61,030 (2012) (over four years); *Competitive Energy Services, LLC*, 140 FERC ¶ 61,032 (2012) (over four years); *Richard Silkman*, 140 FERC ¶ 61,033 (2012) (over four years); *Maxim Power Corporation, et al.*, 150 FERC ¶ 61,068 (2015) (four and half years); *City Power Marketing, LLC and K. Stephen Tsingas*, 150 FERC ¶ 61,176 (2015) (four and a half years); *ETRACOM LLC and Michael Rosenberg*, 153 FERC ¶ 61,314 (2015) (four and a half years); *Coaltrain Energy, L.P., et al.,* 154 FERC ¶ 61,002 (2016) (five years); *Footprint Power LLC and Footprint Power Salem Harbor Op. LLC*, 163 FERC ¶ 61,198 (2018) (five years); *Powhatan Energy* (five years).

Thus, as the table below shows, in all recent Federal Power Act cases in which FERC has petitioned in the district court, more than five years elapsed between the beginning of the alleged violation and the filing of the petition.[9] In one case it took seven years.

[9] In some cases, time frames may have been affected by "tolling agreements" between FERC and enforcement targets. But tolling agreements are a matter of choice for both sides and do not affect the point here—that FERC investigations and enforcement actions stretch on for years and that FERC ultimately controls their pace.

Table 3: Time from Alleged Violation to Judicial Filing[10]

Case Name	Dates of Conduct	Date of Court action for review
Barclays Bank PLC, Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith IN08-8-000	11/2006 to 12/2008	10/9/2013
Lincoln Paper and Tissue, LLC IN12-10-000	7/2007 to 2/2008	12/2/2013
Competitive Energy Services, LLC IN12-12-000	7/2007 to 2/2008	12/2/2013
Richard Silkman IN12-13-000	7/2007 to 2/2008	12/2/2013
Houlian Chen, Powhatan Energy Fund, LLC, HEEP Fund, LLC, CU Fund, Inc. IN15-3-000	6/1/2010 to 8/18/2010	7/31/2015
Maxim Power Corp., Maxim Power (USA), Inc., Maxim Power (USA) Holding Co. Inc., Pawtucket Power Holding Co., LLC, Pittsfield Generating Co., LP, and Kyle Mitton, IN15-4-000	7/2010 to 8/2010	7/1/2015
City Power Marketing, LLC and K. Stephen Tsingas IN15-5-000	7/2010	9/1/2015
ETRACOM LLC and Michael Rosenberg IN16-2-000	5/14/2011 to 5/31/2011	8/17/2016
Coaltrain Energy, L.P., Peter Jones, Shawn Sheehan, Robert Jones, Jeff Miller, Jack Wells IN16-4-000	6/15/2010 to 9/2/2010	7/27/2016
Vitol Inc., Federico Corteggiano IN14-4-000	10/2013	1/6/2020

Nothing compels this delay. FERC certainly does not claim that it cannot in less than five years investigate enough to determine whether there is a basis to claim a violation, and data from settlement cases shows that FERC is at least capable of doing so.[11]

E. FERC's view leaves it unbounded in time, which is damaging to both industry and customers.

As the chart above shows, FERC has normally taken more than five years to bring these cases while the statute of limitations issue has been completely uncertain. After all, until *Powhatan*

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

[11] *E.g. Algonkian Gas Transmission Co.*, 166 FERC ¶ 61,012 (2019) (2 and a half years from conduct to settlement); *Westar Energy, Inc.*, 166 FERC ¶ 61,012 (2017) (two years and ten months).

in February 2020, there were no on-point Circuit court decisions on this question. Put differently, FERC did not normally keep its process within five years even when it could not be certain whether the statute of limitations was running.

If this Court were to rule that an "accrual" under 28 U.S.C. § 2462 happens at the *end* of these processes, the overall time would become unbounded. There would be nothing left to keep FERC's processes even within the *general vicinity* of five years from the alleged violation. Effectively it would be ten years, with an uncertain amount of time between the two five-year periods. There are numerous significant problems with this.

First, open-ended investigations are antithetical to the purpose of the general statute of limitations in 28 U.S.C. § 2462. Open-ended investigations needlessly damage their targets—both the companies and their employees. During the passing years, evidence may be lost, memories fade, and employees may leave the company. And this is a one-sided problem because FERC can address these issues while subjects cannot. Notably, FERC's own regulation for records retention by market participants permits them to destroy those records after "five years." 18 C.F.R. §35.41(d) (2012). So, subjects (who have no compulsory process rights until the case is filed in court) cannot expect more than five years after the fact to obtain counter-party and third-party materials that FERC declined to collect during the investigation but which could put the subject's trades into context. Once the public learns of the investigations, they cause even more problems. Opportunities may evaporate and employees may lose their jobs because of the long and public pendency of these cases.

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

If a particular subject is willing to accept a longer investigation, there is an easy fix. Sometimes, including here, a defendant and FERC mutually choose to enter into a tolling agreement. *Barclays Bank PLC*, 2017 WL 4340258, at *1. That device allows both sides to weigh the equities, risks and benefits of delay versus action in a particular case. Its availability answers the Fourth Circuit's concern about "slipshod investigations" and headlong rushes (that still take about five years) into court. The solution is not the blunderbuss approach of giving FERC an unlimited license to take its time. If FERC believes that five years is not enough, its remedy is to go to Congress and seek a change to the limitations period, not to interpret the statute to allow FERC to self-help its way around the limit Congress established.

In short, regardless of the ultimate liability or innocence adjudicated years later by the district court, long-term exposure to such *potential* liability damages the health of private electric companies. Such companies need to attract outside investment to continue to ensure reliable electric service. Those investments buy expensive assets like generation and transmission facilities used to serve all customers. For example, EEI's members alone typically invest more than $100 billion per year in generation, transmission, and distribution infrastructure.[12] Long-running risks of significant civil penalties and disgorgements from dragging-on investigations would make this capital flow harder to sustain or harder (and more expensive) to obtain.

Third, long and open-ended investigations make little sense given the policing job FERC enforcement is supposed to do. The rules, regulations, and tariffs being enforced are expansive and often change. *See, e.g.*, PJM Open Access Transmission Tariff (totaling 3,570 pages);[13] *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,262, at ¶ 23 (2009) (PJM changing its tariff provisions addressing how it distributed certain transmission credits in response to market

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[12] EEI, *Delivering America's Energy Future* 9 (Feb. 7, 2018), http://www.eei.org/issuesandpolicy/finance/wsb/Documents/EEI_WSB_Remarks.pdf. Since 2010, EEI's member companies have invested nearly $1 trillion to build smarter energy infrastructure and to integrate new generation. America's Energy Future, Electric Power Industry Outlook (Feb. 2020) at 7, https://www.eei.org/issuesandpolicy/finance/wsb/Documents/2020_Wall_Street_Briefing_Remarks_Web.pdf.

[13] https://www.pjm.com/directory/merged-tariffs/oatt.pdf.

behaviors). In these circumstances, the rules need to be clear and precedents need to be set quickly to provide useful guidance to other actors.

FERC has often recognized the importance of transparency in its rules, and how that transparency fosters efficient markets and just and reasonable rates. *E.g.*, News Release, Federal Energy Regulatory Commission, FERC Issues Final Rules to Improve Regional Market Transparency, Interconnections (April 19, 2018) (announcing the issuance of two final rules designed to "improve transparency in organized electric power markets").[14]

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

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

CONCLUSION

This Court should hold that the statute of limitations begins to run when the alleged violation occurs, such that FERC must file an enforcement action within five years of the alleged violation.

DATED: May 4, 2020

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[14] https://www.ferc.gov/media/news-releases/2018/2018-2/04-19-18-E-2.asp#.XEVTRFxKhPY.

CERTIFICATE OF SERVICE

I, Leslie M. Werlin, certify that on May 4, 2020, the foregoing **MOTION BY THE EDISON ELECTRIC INSTITUTE, THE ELECTRIC POWER SUPPLY ASSOCIATION, AND THE ENERGY TRADING INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN CONNECTION WITH THE PENDING F.R.CIV.P 12(b)(6) MOTION FILED BY DEFENDANT VITOL, INC. CURRENTLY SET FOR HEARING ON MAY 15, 2020** was filed electronically in the Court's Electronic Filing System ("ECF"); thereby upon completion, the ECF system automatically generated a Notice of Electronic Filing ("NEF") as service through CM/ECF to registered e-mail addresses of parties of record in the case.

/s/Leslie M. Werlin
Leslie M. Werlin

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Attorneys for Proposed Amici Curiae Edison Electric Institute, Electric Power Supply Association, and Energy Trading Institute

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FEDERAL REGULATORY ENERGY COMMISSION,

Plaintiff,

vs.

VITOL. INC., ET AL,

Defendants.

CASE NO. 2:20-cv-00040-KJM-AC

The Hon. Kimberly J. Mueller

[PROPOSED] ORDER GRANTING MOTION BY THE EDISON ELECTRIC INSTITUTE, THE ELECTRIC POWER SUPPLY ASSOCIATION, AND THE ENERGY TRADING INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN CONNECTION WITH THE PENDING F.R.CIV.P 12(b)(6) MOTION FILED BY DEFENDANT VITOL, INC. CURRENTLY SET FOR HEARING ON MAY 15, 2020

Date: June 26, 2020
Time: 10:00 am
Courtroom: 3

Whereas, on June 26, 2020, there came on for hearing a Motion by proposed Amici the Edison Electric Institute, the Electric Power Supply Association, and the Energy Trading Institute for leave to file an amicus curiae brief in connection with the pending F.R.Civ.P 12(b)(6) motion filed by defendant Vitol, Inc. set for hearing on May 15, 2020 ("the Motion"), and the Court having considered the Motion and any opposition,

IT IS HEREBY ORDERED that the Motion is GRANTED and the amicus curiae brief which is attached to the Motion is deemed filed.

Date: By:_____
UNITED STATES DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I, Leslie M. Werlin, certify that on May 4, 2020, the foregoing **[PROPOSED] ORDER GRANTING MOTION BY THE EDISON ELECTRIC INSTITUTE, THE ELECTRIC POWER SUPPLY ASSOCIATION, AND THE ENERGY TRADING INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN CONNECTION WITH THE PENDING F.R.CIV.P 12(b)(6) MOTION FILED BY DEFENDANT VITOL, INC. CURRENTLY SET FOR HEARING ON MAY 15, 2020** was filed electronically in the Court's Electronic Filing System ("ECF"); thereby upon completion, the ECF system automatically generated a Notice of Electronic Filing ("NEF") as service through CM/ECF to registered e-mail addresses of parties of record in the case.

/s/Leslie M. Werlin
Leslie M. Werlin