No. 22-15584

In the

United States Court of Appeals

For the Ninth Circuit

FEDERAL ENERGY REGULATORY COMMISSION,

Plaintiff-Appellee,

v.

VITOL INC.; FEDERICO CORTEGGIANO,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of California, Sacramento
Honorable Kimberly J. Mueller, Chief District Judge
Case No. 2:20-cv-00040-KJM-AC

BRIEF OF EDISON ELECTRIC INSTITUTE, ELECTRIC POWER SUPPLY ASSOCIATION, AND ENERGY TRADING INSTITUTE AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, amici certify the following:

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

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

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

Dated: August 5, 2022

Respectfully submitted,

/s/ Matthew A. Fitzgerald
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STATEMENT OF INTEREST OF AMICI CURIAE*

This brief is filed jointly by Edison Electric Institute (EEI), Electric Power Supply Association (EPSA), and Energy Trading Institute (ETI) as amici curiae in support of Appellants. All parties have consented to the filing of this brief.

EEI is the association that represents U.S. investor-owned electric companies, international affiliates, and industry associates worldwide. EEI members provide electricity for about 220 million Americans and own about 75% of transmission system facilities in the country.

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 able to generate over 400 million megawatt hours of electricity per month.

EPSA's members include 15 companies, along with state and regional partners, that represent the competitive power industry in their respective regions. 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

* 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.

competitive wholesale markets for electricity; and to improve the public's awareness of the competitive electric industry.

The Energy Trading Institute is a nonprofit organization and the preeminent champion of open, transparent, competitive, and fair electricity and related markets in the United States. The Institute communicates with government legislators, regulators, and policy makers to promote laws and policies that create, sustain, and advance electricity and related markets with these traits. The Institute represents a diverse group of energy market participants.

Amici are thus particularly well-positioned to understand and explain to this Court the implications of this issue far beyond these parties.

SUMMARY OF ARGUMENT

Amici urge this Court to reverse, and hold that the five-year statute of limitations clock in 28 U.S.C. § 2462 begins ticking when the alleged violation occurs. That simple rule combines a reasonable reading of the word "accrue" in the statute with the practical need to avoid an absurd result—that the government itself controls whether and when the limitations period ever begins for its own enforcement actions.

The electric industry is pervasively regulated, and subject to a much larger set of rules than other industries that compete for the same investor dollars. Many

of those rules are administered by FERC. More rules mean more chances that FERC—rightly or wrongly—may believe that someone may have broken a rule (as FERC's record of enforcement cases far beyond this one shows). Amici seek to aid the Court's understanding of the broader implications of the issue on appeal by presenting here FERC's timeline in other real recent cases. Congress intended the statute of limitations to provide the industry with certainty, steadiness, and repose that are particularly essential in this heavily regulated environment. Amici express no position on the underlying alleged violations in this case.

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, the district court here ruled that this means FERC 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 language of § 2462.

In particular, the Fourth Circuit's errant opinion on this issue accepted this theory on the mistaken premise that it would be *good* for the regulated industry.

FERC v. Powhatan Energy Fund, LLC, 949 F.3d 891, 900-01 (4th Cir. 2020). That theory is badly mistaken. Amici speak for the "regulated parties," *id.* at 901, and none appreciates the holding that FERC has 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 harder, once memories have faded, key personnel have moved on, documents are no longer available and relevant rules may have changed several times. And, this issue is critical to the industry as a whole because, as the record of similar FERC electricity enforcement cases shows, these cases already take a long time and include agency-imposed procedures that are of no practical effect other than delay. Absent a real statute of limitations these cases will no doubt needlessly drag on for far beyond five years. If defendants prefer delay in any given case, there is a ready-made, oft-employed solution: consensual tolling agreements. But statutes of limitations should follow "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty." *Gabelli v. SEC*, 568 U.S. 442, 448 (2013).

Thus, 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 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).

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 here, two days' trades took six years to reach federal court. FERC has not contended here or anywhere else that its investigations and pursuit of violations would be slipshod if FERC was granted only five years. And if the holding below is given effect by other courts, the industry will face unknowably long investigations, no matter how few the facts at issue.

I. 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.

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 within 30 days the option of *de novo* review in district court; (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.

Moreover, the process at the agency is of no practical effect. 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 respondents elect a trial in federal district court.

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

Table 1: Post EPAct 2005 Federal Power Act Enforcement[1]

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

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

Case Name	Dates of Conduct	OSC & Notice of Proposed Penalty	*De Novo* Election Date
Footprint Power LLC, Footprint Power Salem Harbor Operations LLC IN18-7-000[2]	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
GreenHat Energy, LLC, John Bartholomew, Kevin Ziegenhorn, and the Estate of Andrew Kittell IN18-9-000	6/2015 to 6/2018	5/20/2021	6/11/2021
PacifiCorp IN21-6-000	8/2009 to 8/2017	4/15/2021	5/7/2021
Boyce Hydro Power, LLC Project Nos. 10809-052, et al.	5/2020 to 12/2020	12/9/2020	No election made[3]
Ampersand Cranberry Lake Hydro LLC, P-9685-034, P-9685-036	7/2021 to 10/2021	10/21/2021	11/22/2021

Moreover, as to the actual penalty assessed, FERC controls the process completely and it does what its enforcers want. The chart below compares the

[2] 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.

[3] Boyce Hydro Power filed for bankruptcy protection on July 31, 2020 and was in bankruptcy proceedings at the time of its response to the Commission's Order to Show Cause.

recommended penalties in FERC's initial Order to Show Cause and Notice of Proposed Penalty compared to those later issued in Assessment Orders—after the intermediate period that the ruling below renders unbounded by time limitations. The rare cases in which there is any difference at all are in bold and described:

Table 2: Comparison of Staff-Proposed Penalties to FERC-Assessed Penalties[4]

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	CP: $7,500,000 D: $166,841.13	CP: $7,500,000 D: $166,841.13

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

Case Name / Docket No.	Remedy Proposed by FERC Staff Civil Penalty (CP); Disgorgement (D)	Commission Assessed Remedy
Services, LLC IN12-12-000	140 FERC ¶ 61,032 (July 17, 2012)	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)
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)

Case Name / Docket No.	Remedy Proposed by FERC Staff Civil Penalty (CP); Disgorgement (D)	Commission Assessed Remedy
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)
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)
GreenHat Energy, LLC, Luan Troxel in her capacity as Executor for the Estate of Andrew Kittell, John Bartholomew, and Kevin Ziegenhorn / IN18-9-000	CP: GreenHat - $179,000,000 Bartholomew - $25,000,000 Ziegenhorn - $25,000,000 Kittel – none D: $13,072,428 (Joint and Several) 175 FERC ¶ 61,138 (May 20, 2021)	CP: GreenHat - $179,600,573 Bartholomew - $25,000,000 Ziegenhorn - $25,000,000 Kittel – none D: $13,072,428 (Joint and Several) 177 FERC ¶ 61073 (Nov. 5, 2021) (the Commission used the actual market harm number instead of the OE approximation)
Boyce Hydro Power, LLC / Project Nos. 10809-052, 10810-058, 2785-104	CP: $15,000,000 173 FERC ¶ 61,217 (Dec. 9, 2020)	CP: $15,000,000 175 FERC ¶ 61,049 (Apr. 15, 2021) (Boyce is in bankruptcy and the Commission agreed to subordinate its claims)

Case Name / Docket No.	Remedy Proposed by FERC Staff Civil Penalty (CP); Disgorgement (D)	Commission Assessed Remedy
Ampersand Cranberry Lake Hydro LLC, P-9685-034, P-9685-036	CP: $600,000 177 FERC ¶ 61,028 (Oct. 21, 2021)	CP: $600,000 179 FERC ¶ 61,037 (Apr. 21, 2022)

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.

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 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. 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 Ninth Circuit has followed the same line of thinking. 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 Enf't*, 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.* The same is true here.

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

If this Court were to accept the 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 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.

Most of FERC's investigations involve potential Federal Power Act cases. *See* FERC 2018 Report on Enforcement, Dkt. No. AD07-13-012, at 25. Federal Power Act cases cover a broad array of regulatory requirements. 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, 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.

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 could find themselves subject to an investigation or subsequent enforcement action.

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 $1.3 million per day, per violation. 16 U.S.C. § 825o-1(b); *Civil Monetary Penalty Inflation Adjustments Order No. 882*, 178 FERC ¶ 61,008 (2022) (2022 adjustment to $1.388 million per day). 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 2021, FERC was litigating four actions in federal court, seeking $80 million in civil penalties and disgorgement. FERC 2021 Report on Enforcement, Dkt. No. AD07-13-015, at 10; *id.* (adding that in the past eight years, FERC has filed nine enforcement actions).

And over the past fourteen years FERC has negotiated settlements in these enforcement actions of more than $1.3 billion—"$790 million in civil penalties and approximately $520 million in disgorgement." Enforcement Report 2021, at 18.

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

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* in February 2020, there were no on-point Circuit court decisions on this question.

So FERC did not normally keep its process within five years even when it could not be certain whether the statute of limitations was running. 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.[5] In one case it took seven years.

Table 3: Time from Alleged Violation to Judicial Filing[6]

Case Name	Dates of Conduct	OSC & Notice of Proposed Penalty	Order Assessing Penalty	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	10/31/2012	7/16/2013	10/9/2013
Lincoln Paper and Tissue, LLC IN12-10-000	7/2007 to 2/2008	7/17/2012	8/29/2013	12/2/2013
Competitive Energy Services, LLC IN12-12-000	7/2007 to 2/2008	7/17/2012	8/29/2013	12/2/2013
Richard Silkman IN12-13-000	7/2007 to 2/2008	7/17/2012	8/29/2013	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	12/17/2014	5/29/2015	7/31/2015

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

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

Case Name	Dates of Conduct	OSC & Notice of Proposed Penalty	Order Assessing Penalty	Date of Court action for review
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	5/1/2015	7/1/2015
City Power Marketing, LLC and K. Stephen Tsingas IN15-5-000	7/2010	3/6/2015	7/2/2015	9/1/2015
ETRACOM LLC and Michael Rosenberg IN16-2-000	5/14/2011 to 5/31/2011	12/16/2015	6/17/2016	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	1/6/2016	5/27/2016	7/27/2016
Vitol Inc., Federico Corteggiano IN14-4-000	10/2013	7/10/2019	10/25/2019	1/6/2020
PacifiCorp IN21-6-000	8/2009 to 8/2017	4/15/2021	None yet	No court filing to date
Boyce Hydro Power, LLC Project Nos. 10809-052, et al.	5/2020 to 12/2020	12/9/2020	4/15/2021	No court filing to date
Ampersand Cranberry Lake Hydro LLC, P-9685-034, P-9685-036	7/2021 – 10/2021	10/21/2021	4/21/2022	No court filing to date

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. Indeed, the Order to Show Cause in *PacifiCorp* was issued on April 15, 2021 and PacifiCorp timely made the election

for a *de novo* court case. Yet, almost 16 months after that order, FERC has still not yet assessed a penalty that could even lead to a court case, demonstrating that FERC's assessments are not "prompt" and FERC does not feel compelled to move expeditiously towards a court filing during the unbounded interregnum for which the ruling of the court below allows. There are several practical problems with this.

First, open-ended investigations conflict with 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.

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 can hurt both companies and electricity customers. Drawn-out resolution also leaves uncertainty for other industry members as to the meaning of the rules with which they must comply. 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 often passes its costs, including the cost of capital, on to customers through rates.

In short, regardless of ultimate liability or innocence, 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. 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). The rules need to be clear and precedents need to be set quickly to provide useful guidance to other actors.

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.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 4,624 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point size Adobe Caslon Pro font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2022, the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system, which will also serve counsel of record.

Dated: August 5, 2022

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