121 FERC ¶ 61,282
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Energy Transfer Partners, L.P. Docket No. IN06-3-003

Energy Transfer Company

ETC Marketing Ltd.

Houston Pipeline Company

Oasis Pipeline, L.P.

Oasis Pipeline Company Texas, L.P.

ETC Texas Pipeline Ltd., Oasis Division

ORDER DENYING EXPEDITED REQUEST FOR REHEARING AND STAY AND ADDRESSING FUTURE CIVIL PENALTY PROCEDURES

(Issued December 20, 2007)

1. ETP[1] filed an expedited request for rehearing and stay of a Commission order to show cause and notice of proposed penalties regarding alleged violations of the Natural

[1] ETP states that it is referring to Energy Transfer Partners, L.P., Oasis Pipeline, L.P., and "their affiliated companies listed above" when it refers to "ETP" in its request for rehearing. ETP Aug. 27, 2007 Expedited Request for Rehearing and Stay, Docket IN06-3-003, at 4 n.3 (ETP Request for Rehearing). While ETP's request for rehearing does not appear to list the affiliated companies that it refers to in its pleading, we assume, for purposes of this order, that ETP includes Energy Transfer Partners, L.P., Energy Transfer Company, ETC Marketing Ltd., Houston Pipeline Company, Oasis Pipeline, L.P., Oasis Pipeline Company Texas, L.P., and ETC Texas Pipeline LTD., Oasis Division.

Gas Act (NGA), Market Behavior Rule 2,[2] and the Natural Gas Policy Act of 1978 (NGPA).[3] In this order, the Commission denies ETP's expedited request for rehearing and stay and addresses certain aspects of the Commission's civil penalty procedures under the Federal Power Act (FPA), NGPA, and NGA.

I. Background

2. On July 26, 2007, the Commission issued the Order to Show Cause directing Energy Transfer Partners, L.P., Energy Transfer Company, ETC Marketing Ltd., and Houston Pipeline Company to show cause, in no less than 30 days, why the Commission should not find that they had manipulated markets at Houston Ship Channel and Waha, Texas, on specific dates between December 2003 and December 2005, and why the Commission should not revoke their blanket certification to sell gas subject to the Commission's jurisdiction. The Order to Show Cause further directed them to show why they should not pay NGA civil penalties in the amount of $82,000,000 and disgorge $69,866,966 in unjust profits, plus interest, resulting from market manipulation.

3. The Order to Show Cause further directed Oasis Pipeline[4] to show cause why the Commission should not find that Oasis Pipeline: (1) unduly discriminated against non-affiliated shippers and unduly preferred one or more affiliated shippers; (2) charged rates in excess of the maximum lawful rate for service under NGPA section 311;[5] (3) failed to file an amended operating statement; and (4) should pay civil penalties in the amount of $15,500,000 and disgorge $267,122 in unjust profits, plus interest.

4. In the Order to Show Cause, the Commission stated that, after ETP provides an answer, the Commission has many options on how to proceed. The Commission may

> [w]ith respect to the manipulation issues under the NGA, request briefs or set specified issues for a trial-type hearing, with full discovery, before an administrative law judge, or issue an order on the merits. And with respect to the transportation issues under the NGPA, the Commission may request briefs, set specified issues for a trial-type hearing before an administrative law judge, or issue an order on the merits. Should the Commission enter an

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[2] 18 C.F.R. § 284.403(a) (2007).

[3] *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 (2007) (Order to Show Cause).

[4] Oasis Pipeline includes Oasis Pipeline, L.P., Oasis Pipeline Company Texas, L.P., and ETC Texas Pipeline LTD., Oasis Division.

[5] 15 U.S.C. § 3317 (2000).

> order imposing penalties against ETP on the NGPA issues, ETP would have a right to have that order reviewed in a United States district court.[6]

5. On August 27, 2007, ETP filed an expedited request for rehearing and stay of the Order to Show Cause. In its request for rehearing, ETP alleges that the Commission erred by finding that: (1) the Commission can require ETP to litigate the NGPA charges in an agency adjudication before the Commission assesses any penalty and before ETP can seek *de novo* review in a federal district court; and (2) the Commission can require ETP to litigate the NGA charges in a Commission adjudication without an opportunity to have its potential civil penalty reviewed *de novo* by a federal district court.

II. Motions to Intervene

6. On August 23, 2007, O'Connor & Hewitt, Ltd. (O'Connor) filed a motion to intervene in this proceeding. On September 7, 2007, ETP[7] filed an answer in opposition to O'Connor's motion to intervene. On September 12, 2007, O'Connor filed a response to ETP's answer.

7. On October 31, 2007, the Interstate Natural Gas Association of America (INGAA) filed a motion for limited intervention on the issue of the availability of *de novo* review in the federal district courts of the Commission's civil penalty orders under new NGA section 22.[8]

III. Discussion

A. Procedural Issues

1. O'Connor Motion to Intervene

8. O'Connor seeks to intervene in this proceeding pursuant to Rules 209,[9] 210,[10] and 214[11] of the Commission's Rules of Practice and Procedure. It states that it is the

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[6] Order to Show Cause, 120 FERC ¶ 61,086 at P 3 n.3.

[7] In ETP's answer to O'Connor's motion to intervene, it states that ETP includes Energy Transfer Partners, L.P. and its affiliates, including Houston Pipe Line Company LP.

[8] 15 U.S.C. § 717t-1 (Supp. V 2005).

[9] 18 C.F.R. § 385.209 (2007).

[10] 18 C.F.R. § 385.210 (2007).

[11] 18 C.F.R. § 385.214 (2007).

authorized agent of sellers in a gas purchase agreement (GPA) with Houston Pipe Line Company L.P., the buyer for sales of O'Connor's natural gas. O'Connor asserts that the terms of the GPA state that it will be paid for natural gas sold to HPL based upon the monthly index price published for the Houston Ship Channel Index (HSC Index). It maintains that it sold all of its natural gas production for the months of January 2004, October 2004, January 2005, February 2005, July 2005, September 2005, October 2005, and December 2005 based upon the HSC Index.

9. O'Connor states that, in August 2007, it became aware of the Commission's Order to Show Cause in this proceeding, alleging that ETP manipulated wholesale natural gas prices at HSC by suppressing those prices to benefit ETP's financial positions and other physical positions. It asserts that the Commission alleged that ETP manipulated the HSC Index, in violation of Market Behavior Rule 2,[12] for each of the months O'Connor lists above and that "'[e]ntities that sold physical gas to ETP at the artificially reduced IFERC HSC index were harmed by ETP's trading manipulations.'"[13] It maintains that, as such, it has a material interest directly impacted by the outcome of these proceedings and therefore it should be able to intervene. It also asserts that it has the right to file a complaint against the ETP entities, including Houston Pipe Line Company L.P., and that this right is best asserted by intervening in this proceeding.

10. In its answer to O'Connor's motion to intervene, ETP states that the Commission's regulations plainly state that "'[t]here are no parties, as that term is used in adjudicative proceedings, in an investigation under [Part 1b of the Commission's regulations] and *no person may intervene as a matter of right in any investigation*.'"[14] It asserts that O'Connor cites general procedural rules, as the basis for O'Connor's motion, that do not apply to investigations under 18 C.F.R. pt. 1.b. ETP claims that, while the Commission has discretion to grant interventions in investigations in unusual circumstances for good cause,[15] a Commission investigation is usually a matter between the Commission, the entity under investigation, and the witnesses that the Commission calls. ETP states that, absent unusual circumstances, which are not present here, the Commission's rules have a strong presumption against allowing outside parties to intervene in investigations.

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[12] 18 C.F.R. § 284.403(a) (2007).

[13] O'Connor Aug. 23, 2007 Motion to Intervene, Docket No. IN06-3, at 3 (quoting Order to Show Cause, 120 FERC ¶ 61,086 at P15, 39).

[14] ETP Sept. 7, 2007 Answer to O'Connor's Motion to Intervene, Docket No. IN06-3, at 3 (quoting 18 C.F.R. § 1.b.5 (2007) (emphasis added)).

[15] *Id.* at 3-4 (citing *cf. Williams Gas Pipelines Central, Inc.*, 94 FERC ¶ 61,285 (2001) (*Williams*)).

11. ETP maintains that O'Connor has already filed an action against Houston Pipe Line Company L.P., ETP, and related parties in the 377th District Court, Victoria County Texas (Texas Litigation). It asserts that the Texas Litigation is premised on the same basic factual allegations as the motion to intervene. ETP further states that the Commission indicated in the Order to Show Cause and its Notice of Extension of Time that this investigation is not one that would benefit from outside interventions. It asserts that, in adjudications or other proceedings where intervention is contemplated, the Commission's public notice will indicate the dates for filing interventions and protests.[16] It maintains that the Order to Show Cause only set a deadline for ETP to respond. Further, ETP notes that the Commission extended the amount of time for ETP to file a response to the Order to Show Cause,[17] but the Commission did not mention interventions or a deadline for interventions.

12. ETP also asserts that O'Connor's claims are improper for Commission review because those claims are subject to binding arbitration. ETP states that the Commission has recognized, "'[i]n a situation such as this, where the arbitration clause clearly applies to this dispute . . . the appropriate course is to send th[e] matter to arbitration.'"[18]

13. O'Connor responded to ETP's answer stating that ETP failed to discuss relevant sections of the Commission's regulations that are applicable to the Show Cause Proceeding.[19] It also asserts that ETP left out relevant, express wording of one of the Commission's regulations that changes the otherwise unambiguous meaning of the regulation. O'Connor maintains that ETP misrepresented O'Connor's legal position in the Texas Litigation. It also notes that ETP seeks to use Part 385 to support its request for rehearing, but now claims that O'Connor cannot use the same regulations to intervene in this proceeding. O'Connor states that ETP did not dispute O'Connor's right to file a complaint against ETP pursuant to 18 C.F.R. § 284.403 (2007) and provides no explanation as to why this right has not been best asserted by O'Connor's intervention in this proceeding.

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[16] *Id.* at 4 (citing 18 C.F.R. § 385.210(b) (2007)).

[17] *Id.* (citing Notice of Extension of Time, Docket No. IN06-3-002, at 1 (issued Aug. 2, 2007)).

[18] *Id.* at 6 (quoting *PPL EnergyPlus, LLC*, 98 FERC ¶ 61,151, at 61,541, *reh'g denied*, 99 FERC ¶ 61,257 (2002)).

[19] O'Connor Sept. 12, 2007 Answer to ETP's Answer, Docket No. IN06-3, at 2.

2. INGAA Motion to Intervene

14. INGAA states that, in accordance with Rule 214(b) of the Commission's Rules of Practice and Procedure, it has an interest in this proceeding.[20] INGAA asserts that it is a national, non-profit trade association, representing the interstate natural gas pipeline industry operating in the United States, as well as comparable companies in Mexico and Canada. It states that its U.S. members transport virtually all of the natural gas sold in interstate commerce, and that the Commission regulates its members pursuant to the NGA. INGAA maintains that ETP's request for rehearing presents an issue of first impression regarding whether federal district court review of the Commission's imposition of civil penalties under the NGA is available. INGAA asserts that, because the Commission regulates its members under the NGA, its members may be subject to civil penalty orders in the future and therefore have a direct interest in the question of the availability of *de novo* review in district court.

15. INGAA notes that the Commission did not establish a time limitation for intervention under Rule 214(d). It further notes that the Commission's regulations provide that no person may participate or intervene as a matter of right in investigation proceedings.[21] However, it asserts that there is good cause for the Commission to allow INGAA to intervene. It claims that its members' views and interests cannot be adequately represented by other parties. INGAA asserts that the Commission has allowed intervention by third parties in investigation proceedings where, as here, that party's interest is affected.[22]

Commission Determination

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept O'Connor's answer to ETP's answer because it has provided information that assisted us in our decision-making process.

17. Rule 214(c)(2) of the Commission's rules and regulations states that "[i]f an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted."[23] Here, ETP filed an answer opposing

[20] INGAA Oct. 31, 2007 Motion to Intervene, Docket IN06-3, at 2 (citing 18 C.F.R. § 385.214(b)).

[21] *Id.* (citing 18 C.F.R. § 1b.11 (2007)).

[22] *Id.* (citing *Williams Gas Pipelines Central Inc.*, 94 FERC at 62,026).

[23] 18 C.F.R. § 214(c)(2) (2007).

O'Connor's motion to intervene and therefore, under Rule 214(c)(2), O'Connor is not a party until the Commission expressly grants its motion to intervene. Under Rule 214(b)(2), a movant seeking to intervene in a proceeding must state the movant's interest in sufficient factual detail.

18. On November 15, 2007, the Commission issued an order delaying our decision on INGAA's motion to intervene, stating that we would rule on INGAA's motion at the same time we consider ETP's request for rehearing.[24]

19. INGAA cites *Williams* as support for its motion to intervene.[25] However, as is well recognized, the Commission has broad discretion in managing our proceedings.[26] Here, the ETP proceeding began with an investigation under Part 1b of the Commission's regulations.[27] As a general proposition, when a Part 1b investigation becomes an enforcement action, we find that it would be inappropriate to allow entities to intervene as parties to the proceeding. We find that allowing parties to intervene during an enforcement action potentially would be contrary to the public interest and would interfere with the Commission considering issues in a timely and judicious manner. This is because in such an enforcement proceeding, the Commission is considering closely the particular actions/inactions, rights, obligations and, potentially violations and penalties of the subject party - here, ETP. Such a proceeding is different from a rate filing, rulemaking, or other proceeding where the rights of third parties are clearly affected. Allowing third parties to intervene in enforcement proceedings in pursuit of their own objectives could delay or sidetrack a proceeding extending or even creating additional uncertainty for the subject party. Further, in the *Williams* case, the Commission did not allow the Missouri Public Service Commission to intervene until after the Commission had already approved the Stipulation and Consent Agreement. The Missouri Public

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[24] *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,176 (2007).

[25] We note that, in *Williams*, the Commission allowed the Missouri Public Service Commission to intervene in an investigative proceeding seeking clarification after the Commission had issued an order approving a Stipulation and Consent Agreement. *See Williams*, 94 FERC ¶ 61,285.

[26] *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (agencies have broad discretion over the formulation of their procedures) (*Vermont Yankee*); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1578-79 (D.C. Cir. 1992) (the Commission has discretion to mold its procedures to the exigencies of the particular case) (*MMPA*); *Woolen Mill Assoc. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990) (the decision as to whether to conduct an evidentiary hearing is in the Commission's discretion) (*Woolen Mill*).

[27] 18 C.F.R. § 1b (2007).

Service Commission sought clarification as to whether the Stipulation and Consent affected William's obligation to prove, and the parties' right to challenge, gas replacement costs incurred at the subject storage field as prudent and appropriate for recovery from ratepayers. In contrast, there is no settlement here that has potential impacts on other entities and neither O'Connor nor INGAA has provided us with any compelling reason to allow them to intervene in an enforcement action at the liability stage of this proceeding. Therefore, we reject both O'Connor and INGAA's motions to intervene.[28]

B. Substantive Issues

1. Availability of District Court Review - Statutory Framework

20. ETP argues generally that an adjudication of civil penalties under either the NGA or the NGPA should proceed in a *de novo* trial in federal district court. In order to fully describe ETP's arguments, we begin with a discussion of the relevant NGPA, FPA, and NGA civil penalty provisions. While FPA civil penalties are not at issue in this case, it is important to understand the FPA civil penalty procedural framework in addressing statutory construction arguments pertaining to the NGPA and NGA.

21. Congress granted the Commission NGPA civil penalty authority when it passed the Natural Gas Policy Act of 1978.[29] NGPA section 504 grants the Commission the authority to assess penalties against any person who knowingly violates any provision of the NGPA.[30] NGPA section 504(b)(6)(E) sets forth the process for the Commission to assess civil penalties stating that "[b]efore assessing any civil penalty under this paragraph, the Commission shall provide to such person notice of the proposed penalty. Following receipt of notice of the proposed penalty by such person, the Commission shall, by order, assesss [sic] such penalty."[31] If the person fails to pay the penalty within 60 calendar days after the assessment, then the Commission:

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[28] If liability is found, and if the Commission considers disgorgement of unjust profits to be an appropriate remedial step, the Commission may consider allowing affected entities to demonstrate how allocations should be made.

[29] Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3350 (1978).

[30] 15 U.S.C. § 3414 (2000 & Supp. V 2005). We note that, when Congress passed the Energy Policy Act of 2005 (EPAct 2005), it increased the Commission's original NGPA civil penalty authority from not more than $5,000 for any one violation to no more than $1,000,000 for any one violation. EPAct 2005, Pub. L. No. 109-58, § 314, 119 Stat. 594, 691 (2005). This level is consistent with the civil penalty level that EPAct 2005 set under the NGA and the FPA.

[31] 15 U.S.C. § 3414(b)(6)(E) (2000).

> shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have the jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.[32]

In EPAct 2005, Congress increased the civil penalty amount that the Commission can assess under section 504(b)(6)(A)(i) from $5,000 per any one violation to $1,000,000 for any one violation.[33]

22. FPA section 31(a) requires that the Commission monitor and investigate compliance with licenses, permits, and exemptions for hydropower projects issued under Part I.[34] If the Commission finds a violation, it can assess civil penalties under section 31(c). After notice and opportunity for public hearing, the Commission can also issue a compliance order to the person who is in violation of the license, permit, or exemption. If the person violates the compliance order, the Commission can assess civil penalties under section 31(c)[35] or issue a revocation order under section 31(b) "[a]fter notice and opportunity for an evidentiary hearing."[36] Section 31(d)[37] establishes the process for assessing civil penalties issued pursuant to FPA section 31(c). As is the case for FPA Part II violations, the Commission first provides notice of the proposed penalty. The notice gives the person 30 days after the date of receipt the right to choose between either an Administrative Law Judge (ALJ) administrative hearing at the Commission prior to assessment of a penalty under section 31(d)(2) or an immediate assessment of penalties under section 31(d)(3).[38] If the person chooses an immediate assessment of penalties and

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[32] 15 U.S.C. § 3414(b)(6)(F) (2000).

[33] EPAct 2005, Pub. L. No. 109-58, § 314, 119 Stat. 594, 690-91 (2005). NGPA section 504(b)(6)(A)(i) now reads that the person shall be subject to "a civil penalty, which the Commission may assess, of not more than $1,000,000 for any one violation . . . ." 15 U.S.C. § 3414(b)(6)(A)(i).

[34] 16 U.S.C. § 823b(a) (2000).

[35] 16 U.S.C. § 823b(c) (2000 & Supp. 2005).

[36] 16 U.S.C. § 823b(b) (2000).

[37] 16 U.S.C. § 823b(d) (2000).

[38] However, the FPA provides a different procedure for a violation of a final compliance order. If the person is in violation of a final compliance order under section 31(a), section 31(d) does not provide the option of choosing review in district court. In that instance, the Commission will hold a hearing before an ALJ under section

(continued…)

does not pay any penalty assessed, the Commission will institute an action in district court and the district court will have authority to review *de novo* the law and facts involved.

23. FPA section 316A grants the Commission authority to assess civil penalties against any person who violates FPA Part II or any rule or order thereunder.[39] Section 316A states that "[s]uch penalty shall be assessed by the Commission, after notice and opportunity for public hearing,"[40] according to the same provisions as are applicable under FPA section 31(d). Thus, prior to assessing a civil penalty against any person under FPA Part II, the Commission provides the person notice of the proposed penalty pursuant to the procedures set forth in FPA section 31(d)(1).[41] The notice gives the person 30 days after the date of receipt to choose between either an administrative hearing before an ALJ at the Commission prior to assessment of the proposed penalty under section 31(d)(2) or an immediate assessment of penalties under section 31(d)(3). Although it is not required by statute, the Commission will allow the person 30 days to respond to the notice with any legal or factual arguments that could justify the Commission altering its proposed penalty.[42] Thereafter, the Commission will conduct any hearing necessary and issue its penalty assessment order. Under section 31(d)(3)(B), if the person does not pay the penalty within 60 days following the assessment order, the Commission shall institute an action in district court. The district court "shall have authority to review de novo the law and facts involved . . . ." The Energy Policy Act of 1992 amended Part II of the FPA to add section 316A, which granted limited civil penalty authority over certain Part II violations and adopted certain of the Part I procedures as described above. EPAct 2005 increased the Commission's FPA section 316A civil penalty authority to $1,000,000 for each day that a violation or failure or refusal continues and expanded coverage to any violation of Part II, but did not change the procedures described above.[43]

31(d)(2)(A) and then assess the penalty. The person can appeal the Commission's assessment order under section 31(d)(2)(A) to the U.S. court of appeals, but a *de novo* review in district court is not available.

[39] 16 U.S.C. § 825o-1 (2000 & Supp. V 2005).

[40] *Id.*

[41] 16 U.S.C. § 823b(d)(1) (2000).

[42] The Commission has done so under FPA Part I penalties. *Statement of Admin. Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317, at P 5 n.17 (2006) (citing *Am. Hydro Power Co. LP*, 71 FERC ¶ 61,078, at 61,284 (1995)) (Civil Penalty Statement).

[43] EPAct 2005, Pub. L. No. 109-58, § 1284, 119 Stat. 594, 980 (2005).

24. Congress first gave the Commission NGA civil penalty authority under EPAct 2005.[44] Under NGA section 22, the Commission can assess a civil penalty of "not more than $1,000,000 per day per violation."[45] Section 22(b) states that "[t]he penalty shall be assessed by the Commission after notice and opportunity for public hearing."[46] Section 22(c) also states that "[i]n determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation."[47] NGA section 22 contains no reference to *de novo* review by a district court.

a. NGPA

ETP Request for Rehearing

25. ETP claims that the Commission erred in concluding that the Commission can require ETP to litigate its NGPA charges in a Commission adjudication prior to instituting a *de novo* review in district court.

26. ETP cites the Commission's 2006 statement of administrative policy regarding civil penalties to support its assertion that the Commission cannot conduct a trial-type ALJ hearing under NGPA section 504:

> Under the NGPA, the Commission is required to give notice of the alleged violation and proposed penalty. The person can choose to pay the proposed penalty and terminate the process, or can contest the penalty. The NGPA does not provide for an on-the-record hearing before an ALJ. Rather, after considering the response to the proposed penalty (and in the absence of a settlement of the matter), the Commission assesses the penalty by order after considering the facts presented. If the person does not make the required payment within 60 days of the assessment order, the Commission will institute an action in United States district court at which time the court provides a *de novo* review of the law and facts involved. Once the Commission has a favorable judgment, the person can either pay the penalty or appeal the district court decision.[48]

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[44] EPAct 2005, Pub. L. No. 109-58, § 314, 119 Stat. 594, 690-91 (2005) (to be codified at 15 U.S.C. § 717t-1).

[45] 15 U.S.C. § 717t-1(a) (Supp. V 2005).

[46] 15 U.S.C. § 717t-1(b) (Supp. V 2005.

[47] 15 U.S.C. § 717t-1(c) (Supp. V 2005).

[48] Civil Penalty Statement, 117 FERC ¶ 61,317 at P 12.

27. ETP states that the Commission concluded in the Civil Penalty Statement that "[t]he NGPA does not provide for an on-the-record hearing before an ALJ."[49] ETP contends that this statement is in conflict with the Order to Show Cause where the Commission indicated that we can conduct "a trial-type hearing before an administrative law judge, or issue an order on the merits" on the alleged NGPA violations. ETP asserts that, while administrative policy statements are not binding, the Commission must at least explain why it is deviating from a previously-announced policy.[50]

28. ETP contends that the Commission's position also violates the NGPA's legislative history. It states that, prior to enacting the NGPA, Congress considered competing House of Representatives and Senate bills. According to ETP, under the House version, H.R. 5289, "'[c]ivil penalties would have been assessed by the Commission after a hearing on the record. The assessment would have been enforced, modified or set aside in the appropriate district court.'"[51] ETP asserts that the House version would have expressly provided that a Commission "'determination to assess such penalty . . . be made on the record after opportunity for an agency hearing pursuant to section 554 of title 5, United States Code.'"[52] ETP states that the Senate bill "'did not contain a comparable provision, relying instead on a section of the [NGA] under which the Commission may bring an action in U.S. District Court if it appears a person is engaged or about to engage in acts or practices that constitute or will constitute violations of the Act.'"[53] ETP maintains that the NGPA conference agreement on the competing provisions drew from both the Senate and House bills:

> [t]he conference agreement adopts procedures for civil enforcement based upon the Natural Gas Act, as in the Senate passed bill. In addition, the conference agreement includes a modified version of the House provision,

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[49] ETP Request for Rehearing at 11 (citing Civil Penalty Statement, 117 FERC ¶ 61,317 at P 12).

[50] ETP Request for Rehearing at 11 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) ("an agency changing course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"); *Trunkline LNG Co. v. FERC*, 921 F.2d 313, 320 (D.C. Cir. 1990); *Consol. Edison Co. v. FERC*, 823 F.2d 630, 636-37 (D.C. Cir. 1987); *Grace Petroleum Corp. v. FERC*, 815 F.2d 589, 591 (10th Cir. 1987); *see also Algonquin Gas Transmission Co.*, 64 FERC ¶ 63,014, at 65,054 (1993)).

[51] *Id.* at 11-12 (citing S. Rep. No. 95-409, at 120-21 (1978) (Senate Report)).

[52] *Id.* at 12 (citing H. Rep. 5289, at 43 (1977)).

[53] *Id.* (citing Senate Report at 12-21).

> making violators of any provision, rule or order subject to a civil penalty of up to $5000 for knowing violations of the Act or knowing violation of rules and orders pursuant to the Act . . . . The Commission is given the authority to assess civil penalties. *V[i]olators may obtain review of the Commission's assessment through a trial de novo in Federal district court.*[54]

29. ETP contends that the legislative history shows that Congress expressly rejected a process where the Commission would hold an agency hearing prior to seeking enforcement of the assessment in federal district court.

Commission Determination

30. NGPA section 504(b)(6)(E) sets forth the process for the Commission assessment of civil penalties. The Commission first provides notice of the proposed penalty to the person. The Commission then assesses the civil penalty. If the person fails to pay the penalty within 60 calendar days after the assessment, then the Commission institutes an action in district court. The court has authority to review *de novo* the law and the facts involved. NGPA section 504(b)(6)(E) does not require the Commission to follow any specific process between the issuance of notice and the assessment of civil penalties.

31. At bottom, ETP argues that the Commission cannot institute procedure or conduct any meaningful inquiry between the issuance of notice and the assessment of penalties. We disagree. There is nothing on the face of NGPA section 504(b)(6)(E) to preclude the Commission from conducting additional process before issuing an assessment of a penalty and, moreover, case precedent supports the conclusion that agencies generally are free to provide greater process than that required by statute. Courts have found that an agency has broad discretion to determine its procedure.[55] The Supreme Court held that "[a]gencies are free to grant additional procedural rights in the exercise of their discretion . . . ."[56] The Supreme Court has also stated that, even aside from the Administrative Procedures Act (APA), it has held for decades that "the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided

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[54] ETP Request for Rehearing at 12 (citing Senate Report at 120-21 (emphasis added)).

[55] *See Vermont Yankee*, 435 U.S. at 524-25 (agencies have broad discretion over the formulation of their procedures); *MMPA*, 963 F.2d at 1578-79 (the Commission has discretion to mold its procedures to the exigencies of the particular case); *Woolen Mill*, 917 F.2d at 592 (the decision as to whether to conduct an evidentiary hearing is in the Commission's discretion).

[56] *Vermont Yankee*, 435 U.S. at 524.

the responsibility for substantive judgments."[57] The Supreme Court quoted *FCC v. Schreiber* where the Court described this principle as:

> an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.[58]

Therefore, we find that the Commission can hold an administrative hearing if we believe it is appropriate, *e.g.*, if it is necessary to obtain a sound factual and legal basis for our determination.

32. The Commission's usual practice has been to permit the person to file with the Commission, within 30 days of the proposed penalty notice, any legal or factual arguments to justify the modification of the Commission's proposed assessment.[59] This is true even though section 504(b)(6)(E) does not explicitly provide the person with an opportunity to respond as a matter of right. Similarly, we find that, while NGPA section 504 does not provide a person with the right to require an evidentiary hearing before an ALJ, that does not prevent the Commission from holding such a proceeding if we find it is appropriate. This reading of NGPA section 504 is bolstered by NGPA section 501(a), which includes a catch-all provision, authorizing the Commission to "perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this Act."[60] If the Commission finds it appropriate to satisfy its obligations under the NGPA, in assessing civil penalties, then NGPA section 501(a) allows us to hold an ALJ hearing to carry out our functions under the NGPA.

33. ETP argues that the Commission has made contradictory statements in the Civil Penalty Statement and the Order to Show Cause. It asserts that, on the one hand, the

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[57] *Id.* at 524-25.

[58] *Id.* (quoting *FCC v. Schreiber* 381 U.S. 279, 290 (1965)).

[59] *See, e.g.*, *El Paso Natural Gas Co.*, 59 FERC ¶ 61,188, at 61,657 (1992); *Questar Pipeline Co.*, 57 FERC ¶ 61,058, at 61,224 (1991); *Transcontinental Gas Pipe Line Corp.*, 48 FERC ¶ 61,189, at 61,701 (1989); *Amoco Prod. Co. v. Natural Gas Pipeline Co. of Am.*, 82 FERC ¶ 61,038, at 61,172 , *order on reh'g*, 82 FERC ¶ 61,300, *order on reh'g and clarification*, 83 FERC ¶ 61,197 (1998).

[60] 15 U.S.C. § 3411(a) (2000).

Civil Penalty Statement states that the NGPA does not provide for an ALJ hearing[61] and, on the other hand, the Order to Show Cause states that ETP can be subject to trial-like procedures before an ALJ.[62] Instead, ETP maintains that it should be able to proceed directly to district court with the court considering the Commission's assessment in a *de novo* review. It is true that the Civil Penalty Statement states the fact that "[t]he NGPA does not provide for an on-the-record hearing before an ALJ."[63] However, we do not view this statement as contradictory to the statement in the Order to Show Cause. The statement was intended to convey the fact that the NGPA does not provide a person who receives notice of a proposed penalty with an ALJ hearing as a matter of right. For that matter, the NGPA does not prohibit such a proceeding either. As we note above, the Commission may hold such a hearing if we deem it appropriate in a particular case. In addition, implicit in our overall discussion of the NGPA penalty assessment process, in the Civil Penalty Statement, is a recognition that some Commission process is necessary to enable the Commission to make its determination.[64] Thus, allowing for such a process, including an ALJ hearing, when read in the context of the overall NGPA penalty discussion, is not inconsistent with our noting that the NGPA itself does not provide for an ALJ hearing. Finally, the provision of any additional process at the Commission in no way impedes the ability of a person to obtain *de novo* review by a district court as expressly permitted by the NGPA.

34. ETP contends that our interpretation violates the NGPA's legislative history. It reads the legislative history as precluding the Commission from holding such an ALJ hearing on the record. We disagree. We interpret the legislative history to be a debate over whether a person should be allowed, as a matter of right, to receive a hearing on the record at the Commission. In the end, Congress chose the Senate language which did not mandate an ALJ hearing. The legislative history does not state or imply that the Commission is precluded from holding a trial-like ALJ hearing or requiring other procedures prior to assessing the penalty. Instead, Congress created an affirmative right for the person to receive review of the Commission's assessment in a trial *de novo* in district court. Therefore, we find that NGPA section 504 authorizes the Commission to hold hearing procedures if we deem it necessary. However, we are not making a determination as to the necessity of such a proceeding at this time.

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[61] Civil Penalty Statement, 117 FERC ¶ 61,317 at P 12.

[62] Order to Show Cause, 120 FERC ¶ 61,086 at P 3 n.3.

[63] Civil Penalty Statement, 117 FERC ¶ 61,317 at P 12.

[64] *Id.* ("the Commission assesses the penalty by order *after considering the facts presented*") (emphasis added).

b. NGA

ETP Request for Rehearing

35. ETP seeks rehearing of the implicit conclusion in footnote 3 of the Order to Show Cause that *de novo* review is not available with respect to penalties assessed under the NGA. ETP notes that this conclusion likewise is evident in our Civil Penalty Statement where we concluded that "'[t]he NGA civil penalty process does not include the possibility for the person to receive a *de novo* review in district court, because there is no statutory provision permitting *de novo* review . . . .'"[65] ETP argues that the Commission's interpretation is in conflict with both the NGA and court precedent interpreting other statutes.

36. ETP maintains that it is well settled that federal district courts have original jurisdiction with respect to claims involving penalty liability for alleged NGA violations. It notes that 28 U.S.C. § 1331 grants federal district courts with original jurisdiction over civil actions that arise under the Constitution, laws, or treaties of the United States. Further, it contends that district courts historically have had jurisdiction over penalty and forfeiture actions.[66]

37. ETP states that courts have held that civil penalty actions require jury trials at the defendant's option. It cites *Tull v. United States* where the court considered the Environmental Protection Agency's assessment of $22 million in civil penalties under the Clean Water Act.[67] ETP asserts that the court compared such penalty proceedings to the 18th century action in debt, which required a jury trial under the Seventh Amendment.

38. As discussed in greater detail below, ETP relies heavily on NGA section 24, which states that federal district courts have "'*exclusive jurisdiction of violations* of [the NGA] or the rules, regulations, and orders thereunder, and of all suits in equity and

[65] ETP Request for Rehearing at 13 (citing Civil Penalty Statement, 117 FERC ¶ 61,317 at P 7).

[66] *Id.* at 14 (citing *Lees v. United States*, 150 U.S. 476 (1893) (*Lees*)).

[67] *Id.* (citing *Tull v. United States*, 481 U.S. 412 (1987) (*Tull*)). ETP states that "[w]hile *Tull* is distinguishable insofar as the Clean Water Act expressly provides for district court imposition of civil penalties, the Court's decision further reinforces an understanding of civil penalties as specially requiring judicial review." ETP Request for Rehearing at 14 (quoting *Tull*, 481 U.S. at 422 ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to exact compensation or restore the status quo, were issued by courts of law, not courts of equity")).

actions brought *to enforce any liability or duty created by*, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder.'"[68] ETP states that, in this instance, the civil penalties are for liabilities created by alleged violations of the NGA and the Commission's rules, regulations, or orders thereunder. It therefore contends that NGA section 24 grants federal district courts exclusive jurisdiction over actions to support such liabilities.

39. ETP states that another statute also provides jurisdiction to federal district courts on a generic basis:

> The *district courts shall have original jurisdiction*, exclusive of the courts of the States, *of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture*, pecuniary or otherwise, included under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.[69]

40. ETP maintains that the Commission incorrectly cited two cases in the Civil Penalty Statement to support the concept that *de novo* review should not be presumed. *Consolo v. Federal Maritime Commission* considered the appropriate standard of review when a federal appellate court is conducting direct review of an agency decision under the Administrative Procedure Act.[70] ETP notes that the court found that *de novo* review should not be presumed in such an instance absent a specific statutory authorization. ETP asserts that where the district court has original jurisdiction, as ETP asserts that the district court does in this instance, there is no need to presume a *de novo* standard, and therefore, *Consolo* is inapposite.

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[68] 15 U.S.C. § 717u (2000 & Supp. V 2005) (emphasis added).

[69] 28 U.S.C. § 1355. ETP Request for Rehearing at 15 (quoting *Nuclear Reg. Comm'n v. Radiation Tech., Inc.*, 519 F. Supp. 1266, 1274 (D.N.J. 1981) (*RTI*) (citing 28 U.S.C. § 1355 as supporting district court's determination that it had jurisdiction over action for collection of civil penalties under Atomic Energy Act; the court also held that the appropriate standard of review was *de novo* even though statute was silent on the point)). ETP maintains that there are two other statutes that grant jurisdiction to district courts which potentially apply here: (1) 28 U.S.C. § 1337 (creating original jurisdiction over actions arising under any Act of Congress regulating commerce) and (2) 28 U.S.C. § 1345 (original jurisdiction over civil actions "'commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress'").

[70] ETP Request for Rehearing at 16 (citing *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607 (1966) (*Consolo*)).

41. ETP claims that the second case the Commission cited, *Chandler v. Roudebush*, also fails to support the Commission's view.[71] *Chandler* involved a federal employee's discrimination claims. According to ETP, the district court found that the petitioner was not entitled to a *de novo* review of her claim and that the review of the administrative record would be sufficient. ETP states that the court of appeals affirmed, but the Supreme Court reversed this finding, stating that, while the statute in question did not actually use the term *de novo* review, the petitioner's right to such a review is well established.[72] ETP therefore maintains that *Chandler* actually supports its argument.

42. ETP also cites a number of Supreme Court opinions generally addressing *de novo* review of agency action under various federal laws. ETP concludes from this precedent that there is a presumption in favor of judicial review of an agency action.[73] It contends that this presumption can only be rebutted with "'clear and convincing evidence'" that Congress did not mean to include review.[74] It notes that there is wide variety in the specific statutory provisions included in civil penalty statutes administered by different federal agencies. ETP states that "the interpretation of one word or phrase in one context of one statute might require a different interpretation when considered in the context of a different statute."[75] It, therefore, states that the cases it includes in its rehearing request are only meant to illustrate the general principles relied upon.

43. ETP quotes at length from a decision of a U.S. district court in New Jersey analyzing the civil penalty provisions of the Atomic Energy Act. In that case, according to ETP, the Nuclear Regulatory Commission (NRC), through the Attorney General, had initiated a collection proceeding in federal district court to enforce a civil penalty after agency adjudication. ETP notes that the governing statute did not require agency adjudication. Instead, ETP asserts it only required written notice of the charges, the proposed penalty, the opportunity to respond in writing, and notice, if the company did not respond, that the agency would institute a collection action.[76] It notes that the court considered whether the district court or the court of appeals had jurisdiction and what the appropriate standard of review was. ETP states that the district court held that it had

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[71] *Id.* at 16 (citing *Chandler v. Roudebush*, 425 U.S. 840 (1976) (*Chandler*)).

[72] *Id.* at 16 (citing *Chandler*, 425 U.S. at 844-45).

[73] *Id.* (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)).

[74] *Id.* at 18 (quoting *Bd. of Governors of the Fed. Reserve Sys. v. MCorp. Fin.*, 502 U.S. 32, 44 (1991)).

[75] *Id.*

[76] *Id.* (citing *RTI*, 519 F. Supp. at 1269).

jurisdiction and that the standard of review should be *de novo*. ETP asserts that the court based its decision on: (1) the principle that, even when a statute is silent, there is a right to jury trial when the government sues to collect penalties;[77] (2) references in the legislative history regarding a full hearing on the merits; and (3) the common theme throughout the legislative history is to provide the NRC with civil penalty authority similar to that previously granted to other regulatory agencies whose statutory schemes included *de novo* review in federal district court.

44. ETP states that the court found that, at the time the Atomic Energy Act civil penalty provision was passed, the civil penalty structure administered by the Federal Communications Commission, the Federal Aviation Agency, and the Federal Trade Commission required the agency to pursue civil penalties through a *de novo* trial or a civil action or suit.[78]

45. ETP suggests that the *RTI* court also considered the legislative history in determining if *de novo* review was available. It states that the NRC requested that *de novo* review in district court be eliminated for civil penalties, but Congress did not grant

[77] *Id.* at 19 (citing *RTI*, 519 F. Supp. at 1278 (citing *United States v. J.B. Williams Co.*, 498 F.2d 414, 422-23 (2d Cir. 1974))).

[78] *Id.* at 20 (citing *RTI*, 519 F. Supp. at 1283-86. ETP notes that the *RTI* court analyzed the statutory scheme of different agencies. According to ETP, the court cited: (1) a Communications Act provision, 47 U.S.C. § 504(a), where "'any suit for recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial *de novo* . . .'"; (2) Federal Aviation Act civil penalty section 49 U.S.C. § 1473(b)(1) (1976) (amended in 1978) that provides for a jury trial on any issue of fact where the penalty exceeds $20; and (3) Federal Trade Commission Act section 15 U.S.C. § 45 (since amended but still providing for civil action to recover a civil penalty) which provides for penalties to be recovered in a civil action brought by the United States. ETP states that the *RTI* court noted that Congress later amended the Federal Aviation Act to preclude *de novo* review for civil penalties, proving that Congress expressly states where it does not want to provide for *de novo* review. ETP maintains that the FPA itself specifically carves out, in FPA sections 31(a) and (d), a narrow category of cases where *de novo* review is not available. ETP contends that the FPA provides that, where a person ignores a final order to comply with the terms of a license, the Commission can assess penalties without the option for district court review that is otherwise available under the FPA.

the NRC's request to eliminate this review.[79] ETP also states that the court found that, even though the NRC provided an ALJ hearing, a *de novo* review was appropriate where the NRC was acting as both a prosecutor and judge in the penalty proceedings.[80]

46. ETP also cites *Athlone Industries, Inc. v. Consumer Product Safety Commission* where the Consumer Product Safety Commission (CPSC) began an administrative proceeding to assess penalties against a company for alleged violations of the Consumer Product Safety Act.[81] ETP states that the court considered the language of the Consumer Product Safety Act which provided that "'[i]n determining the amount of any penalty to be sought upon commencing an action seeking to assess a penalty for violation of section [19(a)], the Commission shall consider [several enumerated factors].'"[82] ETP asserts that the court looked at the nature of the word "action" and found that it meant court action, while the word "proceeding" meant administrative hearings.[83] ETP notes that, in considering whether the CPSC lacked statutory authority "'to assess civil penalties in an administrative proceeding,' the court relied in part upon the fact that the statute in question did not refer to CPSC's authority to 'assess the civil penalty.'"[84] ETP acknowledges that the NGA, NGPA, and the FPA all refer to the Commission assessing civil penalties. ETP states that, although the *Athlone* court's textual analysis of the relevant statute does not apply here, the case is instructive for the concept that there is no presumption in favor of an administrative hearing for imposition of civil penalties absent clear congressional intent.

47. ETP asserts that, although NGA section 22 does not expressly specify the required procedures to impose civil penalties, NGA section 24 answers these questions. It maintains that, pursuant to NGA section 24, federal district courts have "'exclusive jurisdiction'" over actions to enforce liabilities created by the act. It asserts that NGA section 22 civil penalties are liabilities under the act and therefore any action to enforce these penalties fall under the jurisdiction of district courts. ETP contends that the Civil Penalty Statement recognized that the NGA "'provide[s] for enforcement of Commission rules and regulations in district court under NGA section 20(a),' and that the act provides

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[79] *Id.* at 21 (citing *RTI*, 519 F. Supp. at 1286 n.11).

[80] *Id.* (citing *RTI*, 519 F. Supp. at 1286).

[81] *Id.* at 22 (citing *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485 (D.C. Cir. 1983) (*Athlone*)).

[82] *Id.* (quoting *Athlone*, 707 F.2d at 1487 (citation omitted)).

[83] *Id.* (citing *Athlone*, 707 F.2d at 1490-91).

[84] *Id.* at 23 (quoting *Athlone*, 707 F.2d at 1491).

for '*collection actions* in district court under NGA section 24 . . . .'"[85] ETP maintains that nothing in the plain language of NGA section 24 suggests that this section is limited to only collection actions. It states that, once the Commission assesses a civil penalty, NGA section 24 requires the Commission to institute an enforcement action in federal district court. It asserts that this answers what is a public hearing and that the standard of review is *de novo*. ETP concedes that the text of the NGA seems to contradict ETP's interpretation because NGA section 22 grants the Commission authority to assess a civil penalty after notice and opportunity for public hearing. However, it asserts that the identical formula is used in the FPA and expressly contemplates that the Commission "'shall promptly assess such penalty'" before "'institut[ing] an action in the appropriate [federal] district court . . . .'"[86] It states that interpreting the NGA in any other way would violate the principle of statutory construction that separate parts of a statute be interpreted in a harmonious way, not in a way that would render a section unnecessary.[87]

48. ETP states that the settled doctrine is that comparable provisions of the FPA and NGA should be construed in *pari materia*.[88] It states that NGA section 22 was modeled on FPA sections 31 and 316A.[89] ETP contends that the important phrase in all three sections is "'*shall be assessed by the Commission, after notice and opportunity for public hearing.*'" It maintains that this phrase was first used regarding the Commission's civil penalty authority when Congress granted the Commission this authority under FPA Part I in 1986 in FPA section 31(c). It contends that one might interpret this to mean that the Commission holds some kind of public hearing and then the process concludes with assessing a penalty. According to ETP, under this interpretation, the word assess would be almost the same as impose. However, ETP notes that, once the entirety of section 31 is considered, especially section 31(d), it is clear that assessing a civil penalty is not the same as imposing a civil penalty, but is instead one step in a larger process. It states that the assessment is the beginning of the process rather than the end.

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[85] *Id.* at 23-24 (quoting Civil Penalty Statement, 117 FERC ¶ 61,317 at P 6 n.20 (citations omitted) (emphasis added)).

[86] *Id.* at 24 (quoting 16 U.S.C. § 823b(d)(3)).

[87] *Id.* at 24-25 (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995); *ErieNet, Inc. v. Velocity Net*, 156 F.3d 513, 516 (3d Cir. 1998) (*ErieNet*); *Metro. Edison Co.*, 57 FERC ¶ 63,001, at 65,004-05 (1991); *In re the Transp. of Liquid and Liquefiable Hydrocarbons by Natural Gas Pipelines*, 22 FERC ¶ 61,013, at 61,024, *reh'g denied* 24 FERC ¶ 61,004 (1983)).

[88] *Id.* at 25 (citing *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956)).

[89] ETP Request for Rehearing at 25 (noting that FPA section 31 was enacted in 1986 and FPA section 316A was enacted in 1992).

49. ETP notes that, when Congress enacted the Energy Policy Act of 1992, it increased the Commission's civil penalty authority to include violations of certain FPA Part II provisions. ETP states that Congress added section 316A to the FPA, which states "'shall be assessed by the Commission, after notice and opportunity for public hearing . . . .'", and then incorporated all the steps for assessment referencing the provisions of FPA section 31(d). It contends that NGA section 22 also states that civil penalties "'shall be assessed by the Commission, after notice and opportunity for public hearing.'" It maintains that, even though NGA section 22 does not define assessment like FPA section 31(d) does and does not have an incorporation of FPA section 31(d) like FPA section 316A, this does not mean that the procedures that the Commission applies when it assesses a civil penalty should not apply when the same term is used in NGA section 22. ETP asserts that any other interpretation would violate the concept that comparable provisions of the NGA and FPA should be interpreted in *pari materia*.[90] It also contends that "'[a] new statute of a fragmentary nature must be construed as intended to fit harmoniously into the existing system, unless a contrary legislative purpose is plainly indicated.'"[91]

50. ETP notes that the term "public hearing" in the FPA requires the option of a federal district court forum or an agency hearing. It asserts that the identical term in the NGA must include at least the opportunity for adjudication in a federal district court. It states that this view is entirely consistent with the exclusive grant of jurisdiction to district courts in NGA section 24.

51. ETP states that nothing in the legislative history of the new NGA civil penalty provisions indicates that Congress intended to create a new statutory scheme with no opportunity for *de novo* review in federal district court. It cites a General Accounting Office (GAO)[92] report reviewing the Commission's compliance and enforcement

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[90] *Id.* at 28 (citing *Ky. Utils. Co. v. FERC*, 760 F.2d 1321, 1325 (D.C. Cir. 1985) (applying a common risk allocation rationale to NGA section 4(d) and the analogous FPA section 205(d)); *Fla. Power & Light Co. v. FERC*, 660 F.2d 668, 677 & n.23 (5th Cir. 1981), *cert. denied sub nom. Fort Pierce Utils. Auth. v.* FERC, 459 U.S. 1156 (1983) (acknowledging that "practice" in FPA section 205(c) must be read in *pari materia* with analogous NGA section 4(c)); *FPC v. Sierra Pac. Power Co.*, 350 U.S. at 352-53 (construction of the NGA as not authorizing unilateral contract changes is equally applicable to the FPA)).

[91] *Id.* (quoting *United States v. Fixico*, 115 F.2d 389, 393 (10th Cir. 1940) (citation omitted)).

[92] ETP notes that the General Accounting Office was later renamed the Government Accountability Office.

programs, which the GAO prepared after the passage of the Energy Policy Act of 1992.[93] ETP states that the GAO recommended that Congress formally grant the Commission civil penalty authority under the NGA, similar to the existing NGPA authority. ETP notes that EPAct 2005 legislative history does not discuss the grant of NGA civil penalty authority in any detail. ETP states that, in February 2005, the FERC General Counsel testified at a hearing before the House Subcommittee on Energy and Air Quality of the Committee on Energy and Commerce on behalf of the Commission. It asserts that she recommended that a provision similar to FPA civil penalty authority be added for any violation of the NGA. It contends that the Committee requested specific legislative text for the changes proposed by the Commission. ETP asserts that the then-FERC Chairman provided NGA civil penalty language that is materially the same as the language that was later enacted in EPAct 2005. ETP states that it is clear that Congress meant to grant the Commission civil penalty authority that is comparable to that under the FPA and NGPA, complete with federal district court adjudication.

52. ETP states that significant policy considerations argue in favor of recognizing ETP's right to adjudicate potential civil penalty liability at the federal district court. It states that EPAct 2005 granted the Commission significant civil penalty authority under the NGA. It maintains that the Commission should not be both a prosecutor and judge in penalty proceedings.

Commission Determination

53. We begin our analysis with the statutory text of NGA section 22(b): "The penalty shall be assessed by the Commission *after* notice and opportunity for public hearing."[94] Unlike the language in the NGPA and Parts I and II of the FPA, discussed in detail above, NGA section 22 contains no language addressing *de novo* review. Rather, unlike the specific steps and *de novo* review in the other statutes administered by the Commission, section 22(b) requires only that the Commission provide the person with notice and an opportunity for a public hearing,[95] before it assesses the civil penalty. ETP

[93] *Id.* at 30 (citing United States General Accounting Office, Report to the Chairman, Environment, Energy and Natural Resources Subcommittee, Committee on Government Operations, House of Representatives, GAO/RCED-93-122, NATURAL GAS: FERC's Compliance and Enforcement Programs Could be Further Enhanced (May 1993) (GAO Report)).

[94] 15 U.S.C. § 717t-1(b) (Supp. V 2005) (emphasis added).

[95] As noted in the Order to Show Cause, the opportunity for public hearing can take many forms, including the Commission requesting briefs or setting specified issues for a trial-type hearing, with full discovery, before an administrative law judge, or issuing an order on the merits. Order to Show Cause, 120 FERC ¶ 61,086 at P 3 n.3.

in effect asks us to read into NGA section 22(b) words that were included in the FPA but that were not included in the NGA. It argues that the phrase "[such] penalty shall be assessed by the Commission after notice and opportunity for public hearing" in section 22(b) is the same phrase used in FPA sections 316A and, therefore, Congress must have intended to include in the NGA the additional FPA section 316A language which explicitly references the procedures of FPA section 31(d).

54. ETP claims that, since courts have held that comparable FPA and NGA provisions must be read in *pari materia*, we must read in the opportunity for *de novo* review in federal district court. While in *pari materia* arguments may be valid up to a point, the fact is that we are faced with the precise language contained in one statute, but not in another. Simply put, the FPA expressly provided for *de novo* review by a district court; the NGA did not. While it is true that NGA section 22(b) is identical to one phrase of FPA section 316A, FPA section 316A is explicitly limited by FPA section 31(d) and NGA section 22(b) is not. In contrast to the cases cited by ETP, therefore, the relevant NGA and FPA provisions here are not "in all material aspects substantially identical."[96] Indeed, FPA section 316A shows that Congress knows how to incorporate specific penalty assessment procedures when it wants to. The two statutes therefore are not comparable in this respect and the comparability principle does not apply.[97] Here, any

[96] *FPC v. Sierra Pac. Power Co.*, 350 U.S. at 353. ETP cites several cases, including *Florida Power & Light Co. v. FERC*, for the proposition that analogous FPA and NGA sections must be read *in pari materia*. *Fla. Power & Light Co. v. FERC*, 660 F.2d at 677 & n.23. There, the U.S. Court of Appeals for the Fifth Circuit noted that the term "practice" should be given a similar meaning in analogous provisions of the FPA and NGA - FPA section 205(c) and NGA section 4(c). We note that FPA section 205(c) and NGA section 4(c) are nearly identical and given this similarity between provisions it was logical for the court to give a similar meaning to the term "practice." *See FPC v. Sierra Pac. Power Co.*, 350 U.S. at 349. ETP's reliance on *Kentucky Utilities Co. v. FERC*, 760 F.2d 1321, is similarly distinguishable. Here, while several of the words used in NGA section 22(b) and FPA sections 31(c) and 316A are the same, key parts of those provisions, indeed the parts that give meaning to the identical words, are different.

[97] For example, in *C. W. Latimer, Jr. v. Sears Roebuck and Co.*, the court held that the principle that "statutes in pari materia must be read together, as with most canons of statutory construction, has its opposite number in the dichotomy of well-worn but serviceable canons readily available for use on both sides of any disputed question of interpretation." *C. W. Latimer, Jr. v. Sears Roebuck and Co.*, 285 F.2d 152, 157 (5th Cir. 1960) (*Latimer*). The *Latimer* court held that a statute was not in *pari materia* if "'its scope and aim are distinct or where a legislative design to depart from the general purpose or policy of previous enactments may be apparent.'" *Id.* (quoting Llewellyn, Remarks on the Theory of Appellant Decisions and the Rules or Canons about how

(continued…)

question of ambiguity regarding *de novo* review is most reasonably resolved by the fact that the explicit language of NGA section 22 does not provide for *de novo* review in a federal district court, whereas the explicit language of FPA section 316A does.

55. ETP also argues that nothing in the legislative history of the new NGA section 22 civil penalty authority indicates that Congress intended to create a new statutory scheme with no opportunity for *de novo* review in federal district court. However, ETP does not and cannot cite anything definitive in the legislative history of new NGA section 22 to support its assertion that Congress meant to include *de novo* review in a federal district court for civil penalties under the NGA. Congress did not enumerate such review in NGA section 22.[98] In fact, as ETP admits, the legislative history of EPAct 2005 does not discuss the grant of NGA civil penalty authority in any detail.[99] In view of the different language contained in three different statues we administer, we must conclude that Congress understood existing law, and, when enacting a new, related law that Congress did so deliberately and consciously, and we must give meaning to their choice. Congress specifically provided for *de novo* review in district court under the FPA and NGPA civil penalty provisions. However, in contrast, Congress did not provide for *de novo* review in district court under the NGA civil penalty provisions. We must conclude that Congress deliberately provided otherwise in the NGA.

56. A basic principle of statutory construction, as noted by ETP, is that separate parts of a statute should be interpreted in a harmonious way, not in a way that would render a

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Statutes are to be construed. 3 Vand.L.Rev. 395, 402 (1950)). Further, the court considered the difference in language between the two statutes it was comparing and noted the importance of having "the good sense of taking the statutory language as meaning what it says rather than attempting to divine the legislative intention by departing from the plain meaning . . . ." *Id.* Further, in *Ramapo Bank v. Camp*, the court found that *pari materia* does not apply where "the language and history of the two sections are clear and unambiguous, and it is quite obvious that the sections have independent statutory scope and purpose." *Ramapo Bank v. Camp*, 425 F.2d 333 (1970), *cert. denied sub nom Ramapo Bank v. Comptroller of the Currency*, 400 U.S. 828 (1970).

[98] We note that ETP cites testimony and documents that it claims supports the notion that the general intent was to create a similar statutory scheme between the NGA and FPA. However, we do not find these arguments persuasive. While GAO, and even the Commission, may have recommended that Congress grant the Commission NGA civil penalty authority, there is no legislative history as to the process to be applied in exercising this civil penalty authority. ETP cites no legislative history that NGA civil penalty authority was intended to involve *de novo* review in federal district court or was intended to be similar to the FPA in that respect.

[99] ETP Request for Rehearing at 31.

section superfluous.[100] For example, the Supreme Court found that its duty is to "construe statutes, not isolated provisions."[101] Courts have also found that, when interpreting a statute, they "are charged with the duty to consider the provisions of the whole law, its object, and its policy."[102] The *ErieNet* court also found that it must interpret a statute "'so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void, or insignificant.'"[103] ETP asserts that the Commission must read NGA section 24 as answering many of the questions left open by NGA section 22 regarding the civil penalty assessment process, and must conclude that NGA section 24 requires the Commission to seek enforcement of a penalty in a *de novo* trial in district court. NGA section 24 states that federal district courts:

> have exclusive jurisdiction of violations of this act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, brought to enforce any liability or duty created by, or to enjoin any violation of this act or any rule, regulation, or order thereunder. . . . Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder may be brought in any such district or the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found.[104]

57. ETP states that NGA section 24 provides federal district courts with the exclusive jurisdiction to enforce liabilities under the act, including section 22 civil penalties. While ETP asserts that NGA section 22 must be read in concert with section 24 or risk having a

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[100] ETP Request for Rehearing at 24-25 (citing *Gustafson v. Alloyd Co.*, 513 U.S. at 568; *ErieNet*, 156 F.3d at 516; *Metro. Edison Co.*, 57 FERC at 65,004-05; *In re the Transp. of Liquid and Liquefiable Hydrocarbons by Natural Gas Pipelines*, 22 FERC at 61,024).

[101] *Gustafson v. Alloyd Co.*, 513 U.S. at 568 (citing *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975), *superseded by statute as recognized in Batterton v. Francis*, 432 U.S. 416 (1977); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974), *superseded by statute as recognized in In Re Nadler*, 122 B.R. 162 (Bankr. D. Mass.1990)).

[102] *ErieNet*, 156 F.3d at 516 (citing *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849))).

[103] *ErieNet*, 156 F.3d at 516 (quoting *Penn. Med. Soc'y v. Snider*, 29 F.3d 886, 895 (3d Cir. 1994) (quoting 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06, at 119-20 (5th ed. 1992) (citations omitted)).

[104] 15 U.S.C. § 717u (2000).

provision of the NGA be superfluous, we also find that we must consider the interplay between these two provisions and NGA section 19.[105] NGA section 19(b) states:

> Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States . . . by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. . . . The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.[106]

58. Reading these provisions together, we find that ETP's NGA section 24 arguments must fail. First, NGA section 24 provides federal district courts with exclusive jurisdiction of "*violations* of this act or the rules, regulations, and orders thereunder." In order for the federal district court to have jurisdiction over violations, the Commission must have found that a violation occurred. In a civil penalty context, this means that the Commission, not a federal district court, must first conduct a process to determine whether a person has violated the NGA and then assess penalties, as appropriate, against that person. NGA section 22(b) sets forth this process as the Commission providing notice and the opportunity for public hearing, followed by the Commission assessing a penalty against the person. Next, NGA section 24 provides that "[a]ny suit or action to enforce any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder" may be brought in the appropriate federal district court. In other words, once the Commission goes through a public hearing process and assesses civil penalties, then a suit can be brought in federal district court to enforce the liabilities that the Commission has determined.[107] The language of NGA section 24 indicates that

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[105] 15 U.S.C. § 717r (2000).

[106] *Id.*

[107] ETP cites *Lees* for the proposition that, where a statute imposes a penalty and forfeiture, jurisdiction lies with the district court unless expressly placed elsewhere. However, in *Lees*, the Supreme Court was considering "jurisdiction over actions to *recover* penalties and forfeitures" not jurisdiction to review agency adjudication assessing civil penalties. *Lees*, 150 U.S. at 478 (emphasis added).

the Commission would file in federal district court to pursue a collection action or an injunction, not to make a determination that a person violated the NGA.[108] The standard of review for an NGA section 24 collection action is substantial evidence.

59. Similarly, other agencies similarly have a substantial evidence standard of review for a collection action. For example, in *United States v. Thompson*, the court found that the Endangered Species Act of 1973 (ESA) specifically limits the district court to a substantial evidence standard in reviewing a collection action for civil penalties.[109] Additionally, the *Thompson* court found that:

> [e]ven if the ESA had not specifically articulated the standard of review for the penalties assessed under the ESA, basic principles of administrative law would prevent this Court from performing a trial *de novo.* In cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, the Supreme Court has held that consideration of agency action is to be confined to the administrative record and no *de novo* proceedings may be held.[110]

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[108] We also note that ETP cited 28 U.S.C. § 1355 to support its assertion that NGA section 22 allows for *de novo* review in federal district court. As with NGA section 24, 28 U.S.C. § 1355 vests district courts with "original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, included under any Act of Congress, except matters within the jurisdiction of the Court of International Trade . . . ." Just as with NGA section 24, 28 U.S.C. § 1355 grants district courts jurisdiction over collection actions and actions to enjoin violations of the act.

[109] *See United States v. Thompson*, 1993 U.S. Dist. LEXIS 17775, 9-10 (S.D. Ala. 1993) (*Thompson*); s*ee also Catalina Yachts, Inc. v. EPA*, 112 F. Supp. 2d 965 (C.D. Cal. 2000) (finding that, where the statute failed to enumerate the standard of review, the court should look to APA section and apply an abuse of discretion standard of review); *In the Matter of Romero & Busot, Inc.*, 785 F. Supp. 27 (D.C. P.R. 1992) (court reviewed EPA penalty assessment under abuse of discretion standard because petitioner challenged the amount of the civil penalty imposed).

[110] *Id.* at 10-11 (citing *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963) (citing *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, (1930) (finding that, in a suit brought to enjoin the enforcement of an order by the Secretary of Agriculture, a proceeding is a judicial review, not a trial *de novo*)); s*ee also Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 224, 227 (1943) (*de novo* review in action to enjoin enforcement of the Chain Broadcasting Regulations would be inappropriate: "Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress")

(continued…)

The court held that:

> [i]f a contrary principle were adopted, those who did nothing at the administrative level would receive a more liberal scope of review than those who did request a hearing and contest the penalty at the administrative level. Such would also run contrary to the basic principle of administrative law that, where Congress has allocated to the agency the duty to make these determinations in the first instance, the court should not intervene.[111]

60. Further, in *United States v. Chotin Transportation, Inc.*, the court found that judicial review of a civil penalty imposed by the United States Coast Guard was under the substantial evidence standard rather than *de novo* review.[112] The *Chotin* court found that *de novo* review was not appropriate because the statute "mandates adequate fact-finding procedures."[113] Similarly, NGA section 22 mandates that the Commission give an "opportunity for public hearing," providing appropriate fact-finding opportunities to allow for a substantial evidence standard of review both for the underlying penalty assessment order and any ensuing collection action.

61. We also find that the principle of construing comparable provisions of the NGA and the FPA *in pari materia* requires us to reject ETP's NGA section 24 argument. FPA section 317[114] is identical in relevant part to NGA section 24. If ETP's reading of NGA section 24 was correct and if that section was construed *in pari materia* with FPA section 317, then FPA section 31 would be rendered superfluous and be read out of the FPA.

62. Further, ETP ignores NGA section 19 in making these arguments. A seemingly logical extension of ETP's reading of the interplay between NGA sections 22 and 24 would render NGA section 19 superfluous with respect to Commission orders finding a violation of the NGA. Section 19 enumerates the procedures for a party to an NGA proceeding aggrieved by a Commission order to appeal to the U.S. court of appeals under the substantial evidence standard. We agree with ETP that we must read the various provisions of the NGA to harmoniously fit together with no provision being superfluous.

(citation omitted)).

[111] *Id.* (citing *Baltimore Gas & Elec. v. Nat'l Res. Def. Council, Inc.*, 462 U.S. 87, 100-103 (1983)).

[112] *United States v. Chotin Transp., Inc.*, 649 F. Supp. 356 (S.D. Ohio 1986) (*Chotin*).

[113] *Id.* at 360 (citations omitted).

[114] 16 U.S.C. § 825p (2000).

In doing so, we find that Congress established the following statutory scheme for the assessment of civil penalties under the NGA: (1) under NGA section 22(b), the Commission provides notice, opportunity to be heard, and assesses a civil penalty against a person; (2) under NGA section 19(a), the party can seek rehearing of the penalty assessment order; (3) under NGA section 19(b), if the party is aggrieved by the Commission's rehearing order, then the party can petition the appropriate court of appeals for review; (4) under NGA section 24, any collection action for civil penalties or to enjoin violations of the NGA would be brought in a federal district court. Under the statutory framework established by Congress in the NGA, NGA section 19 grants the U.S. court of appeals the authority to review final Commission orders, under a substantial evidence standard.

63. The U.S. Court of Appeals for the Fourth Circuit considered similar issues in *Consolidated Natural Gas Corp. v. FERC*.[115] In *Consolidated*, a natural gas company filed a district court action seeking to restrain a Commission show cause order proceeding. In vacating the district court judge's grant of the injunction, the court of appeals held that NGA section 19(b) "vests *exclusive* jurisdiction to review all decisions of the Commission in the circuit court of appeals."[116] The court found that the "district court was without jurisdiction to interfere with the Commission's proceedings through the issuance of an injunction."[117] Moreover, the court noted that ordinarily the court of appeals could not even review procedural or preliminary Commission orders prior to administrative remedies being exhausted and "even more so the district court may not review such orders."[118]

64. Finally, our interpretation of the NGA is not governed by the district court's analysis of the Atomic Energy Act in *RTI*. The *RTI* case involves the Atomic Energy Act civil penalty provisions, which state that:

> [w]henever the Commission has reason to believe that a person has become subject to the imposition of a civil penalty under the provisions of this section, it shall notify such person in writing (1) setting forth the date, facts, and nature of each act or omission with which the person is charged, (2) specifically identifying the particular provision or provisions of the section, rule, regulation, order, or license involved in the violation, and

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[115] *Consolidated Natural Gas Corp. v.* FERC, 611 F.2d 951 (4th Cir. 1979) (*Consolidated*).

[116] *Id.* at 957 (emphasis added) (citation omitted).

[117] *Id.* at 958.

[118] *Id.* at 957.

> (3) advising of each penalty which the Commission proposes to impose and its amount. Such written notice shall be sent by registered or certified mail by the Commission to the last known address of such person. The person so notified shall be granted an opportunity to show in writing, within such reasonable period as the Commission shall by regulation prescribe, why such penalty should not be imposed. The notice shall also advise such person that upon failure to pay the civil penalty subsequently determined by the Commission, if any, the penalty may be collected by civil action. . . . On the request of the Commission, the Attorney General is authorized to institute a civil action to collect a penalty imposed pursuant to this section. The Attorney General shall have the exclusive power to compromise, mitigate, or remit such civil penalties as are referred to him for collection.[119]

The *RTI* court uses this language, in conjunction with an Atomic Energy Act section similar to NGA section 24, to determine that a collection action should take place in federal district court with review *de novo*. However, the *RTI* court found that the legislative history showed that the NRC had requested that *de novo* review be eliminated for civil penalties, but that Congress did not grant NRC's request. In contrast, as noted by ETP, there is no such definitive language regarding the NGA section 22 civil penalties found in the legislative history of EPAct 2005. Moreover, Congress expressly incorporated *de novo* review in the NGPA and the FPA (most recently as to FPA Part II, in the same act (EPAct 2005) adding civil penalty authority in the NGA) but not the NGA, providing evidence of intent absent in *RTI*.

65. In sum, court review of NGA civil penalties is governed by the language of the statute and Congress' intent when drafting that language. ETP cites a series of cases that it says generally support the proposition that district court review should be presumed in civil penalty cases where Congress fails to specifically enumerate otherwise in the statute.[120] For example, ETP cites *Tull* for the proposition that civil penalty proceedings

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[119] *RTI*, 519 F. Supp. at 1269 (citing 42 U.S.C. § 2282(b) - (c) (amended in 1980)).

[120] *See, e.g.*, *Tull*, 481 U.S. 412; *Athlone*, 707 F.2d 1485; *Lees*, 150 U.S. 476. ETP also attempts to distinguish the cases relied upon by the Commission in concluding that *de novo* review should not be presumed. ETP claims that, in *Consolo*, the Supreme Court was considering the appropriate standard of review where a federal appellate court is conducting direct review of an agency decision, as opposed to where the district court has original jurisdiction. As we discussed above, the district courts do not have original jurisdiction over a petition for review of adjudication by the Commission of NGA civil penalties. Instead, NGA section 22 provides for Commission adjudication of NGA civil penalties followed by the court of appeals reviewing such Commission action under NGA section 19. Similarly, in *Consolo*, the Supreme Court found that the Federal Maritime

(continued…)

are like 18th-century actions in debt, therefore requiring a jury trial under the Seventh Amendment. However, ETP admits that the specific language of the Clean Water Act, the statute in question in *Tull*, expressly provides for district court imposition of civil penalties. ETP also cites *Athlone* to support the proposition that there is no presumption in favor of an administrative hearing for imposition of civil penalties absent clear congressional intent. However, as ETP concedes, while the Consumer Product Safety Act does not include language allowing the CPSC to assess penalties, the NGA, NGPA, and FPA all include specific language that allows the Commission to assess civil penalties. As conceded by ETP, Congress has drafted a wide array of civil penalty statutes administered by a multitude of federal agencies and "'the interpretation of one word or phrase in one context of one statute might require a different interpretation when considered in the context of a different statute.'"[121] As a result, we must look at the language of the specific statute -- here, the NGA -- and the context in which it was enacted (simultaneously with amendments to the FPA which contained specific procedural language not included in the NGA) to determine the intent of Congress.

66. As ETP notes, in *Thunder Basin Coal Co. v. Reich*, the Supreme Court held that whether a statute is intended to preclude initial judicial review comes down to the "'statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review.'"[122] In this instance, we find that there clearly is meaningful review afforded persons under the NGA: NGA section 22(b) requires the Commission to provide the opportunity for a public hearing and NGA section 19 allows persons aggrieved by a Commission order to seek review in a U.S. court of appeals. What ETP's argument boils down to is that it would prefer review in a district court rather than a U.S. court of appeals, but it cannot argue that a U.S. court of appeals provides inadequate review. We find that the interplay between NGA sections 19, 22,

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Commission's order requiring a carrier to pay reparations should be heard at the court of appeals under a substantial evidence standard of review. In *Chandler*, the Supreme Court noted the finding in *Consolo* that "in the absence of specific statutory authorization, a de novo review is generally not presumed." *Chandler*, 425 U.S. at 862 (quoting *Consolo*, 383 U.S. at 619 n.17). The *Chandler* court found that there was a specific statutory authorization of a district court civil action, which both the plain language of the statute and the legislative history reveal to be a trial *de novo*. In contrast, nothing in the specific statutory authorization or legislative history of NGA section 22 overcomes *Consolo's* holding that *de novo* review is generally not presumed.

[121] ETP Request for Rehearing at 18 (quoting *Bd. of Governors of the Fed. Reserve Sys. v. McCorp. Fin.*, 50 U.S. at 44)).

[122] *Id.* at 17 n.15 (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994)).

and 24 clearly delineates Congress' intention that the Commission's assessment of NGA section 22 civil penalties should be reviewed by a court of appeals rather than a federal district court. We therefore deny rehearing.

2. Separation of Functions

ETP Request for Rehearing

67. ETP states that, despite the fact that the Commission refers to the conclusions in the Order to Show Cause as preliminary, the Commission's statements give, at the very least, the appearance of pre-judgment in this matter. ETP says that pre-judgment and even the appearance of pre-judgment is inconsistent with the demands of due process. It maintains that the Commission can address any unfairness by allowing ETP to adjudicate its potential civil liability in a federal district court.

68. ETP maintains that the potential for pre-judgment increases in an investigative context when the Commission begins in a prosecutorial role with investigators advising the Chairman, Commissioners, and staff. ETP states that courts have held that a *de novo* trial in district court is appropriate where an agency acts as "'both prosecutor and judge'" in penalty proceedings.[123] Given the fact that Congress has granted the Commission substantial, new enforcement authority, ETP maintains that it is even more important for the Commission to be aware of due process concerns.

69. ETP cites *Mathews v. Eldridge* as the balancing test that should be used when determining if administrative procedures meet due process requirements.[124] ETP states that the factors to be balanced under the *Mathews* test are

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[125]

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[123] *Id.* at 35 (quoting *RTI*, 519 F. Supp. at 1286 (citation and internal quotations omitted)).

[124] *Id.* at 36 (quoting *Cal. ex rel. Lockyer v. FERC*, 329 F.3d 700, 709 n.8 (9th Cir. 2003) (*Lockyer*) (citations omitted) (applying *Mathews v. Eldridge*, 424 U.S. 319 (1976) (*Mathews*) to determine if Commission proceeding under FPA section 203 provided due process)).

[125] *Id.* at 36 (quoting *Lockyer*, 329 F.3d at 710 (citations omitted)).

70. ETP states that, because the Commission is proposing civil penalties against ETP totaling $97.5 million, its private interest is substantial.[126]

71. ETP maintains that the risk of erroneous deprivation of its private interest is considerable given the multiple statements that suggest pre-judgment in the Order to Show Cause, the Commission's press release, and press reports. ETP notes that the general presumption that an agency is objective can be overcome when the agency may have improperly pre-judged the case. It asserts that the test for pre-judgment is whether "'a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[127] According to ETP, in *Cinderella v. FTC*, the Federal Trade Commission (FTC) Chairman made a speech in which he made negative comments regarding a party who had an appeal pending before the FTC.[128] ETP states that the court found that commissioners cannot pre-judge cases or give speeches that give the appearance of pre-judgment.[129] ETP quotes the *Cinderella v. FTC* court as follows:

> Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record. *There is a marked difference between the issuance of a press release which states that the Commission has filed a complaint because it has 'reason to believe' that there have been violations, and statements by a Commissioner after an appeal has been filed which give the appearance that he has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves.*[130]

ETP maintains that both of the concerns that the court identified - that the Commissioner will feel entrenched about a public statement he made regarding the case and the

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[126] *Id.* at 36-37 (citing *Cf. Jones v. Wildgen*, 320 F. Supp. 2d 1116, 1117 (D. Kan. 2004) (applying *Mathews* test to procedural due process regarding enforcement of ordinance violations and holding that fines of up to $1 million and the loss of rental property involved a substantial interest)).

[127] *Id.* at 37 & n.34 (quoting *Cinderella Finishing Sch. , Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (*Cinderella v. FTC*)). ETP also cites several cases it argues support its proposition.

[128] *Id.* at 37 (citing *Cinderella v. FTC*, 425 F.2d at 591).

[129] *Id.* at 38 (citing *Cinderella v. FTC*, 425 F.2d at 590).

[130] *Id.* at 38 (citing *Cinderella v. FTC*, 425 F.2d at 590 (emphasis added)).

appearance of pre-judgment – are present in the ETP case. ETP first considers the Order to Show Cause, which it asserts is more like a final order containing multiple factual conclusions. ETP lists numerous examples where it asserts that the Commission concludes, in the Order to Show Cause, that ETP has acted knowingly and wrongfully to manipulate prices.[131] ETP contends that there are many instances where the Commission concludes, in the Order to Show Cause, with no qualification, such as alleged or apparent, that ETP or Oasis "unduly discriminated," acted "knowingly," or "manipulated" prices. ETP argues that the Order to Show Cause reads more like an appellate brief than the impartial inquiry required under Commission regulation.[132] ETP states that it assumes that Office of Enforcement staff lead investigators wrote the Order to Show Cause. ETP asserts that, even though statements in the Order to Show Cause where the Commission appears to remain open-minded with respect to the charges at issue, are a problem. ETP states that, while these statements purport to demonstrate that the conclusions in the Order to Show Cause are preliminary, these statements underscore the appearance, if not the reality, of pre-judgment. It asserts that the Order to Show Cause raises concerns because it appears that the Commission reached these determinations with *ex parte* exposure to the opinions of Office of Enforcement staff.

72. According to ETP, the order goes much further than an order setting a complaint for hearing or initiating agency adjudication. It notes that the Commission could have instead ordered Office of Enforcement staff to submit a detailed report, then issued a brief order, with the Office of Enforcement report attached, asserting that the report provides a basis for requiring ETP to show cause why the Commission should not find that ETP violated legal requirements and be subject to civil penalties. Instead, by issuing the Order to Show Cause as it did, the Commission gave the appearance, if not reality, of pre-judgment. ETP also asserts that the Commission made other statements that indicate pre-judgment in both the Commission's press release and in statements reported in the press.[133]

73. ETP maintains that the appearance of pre-judgment points to an inherent problem with how the Commission exercises its investigatory, prosecutorial, and adjudicatory functions in the new enforcement context. ETP contends that the Commission's position has been that Commission Rules 2201 and 2202 do not apply to investigations

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[131] For example, ETP notes that the Order to Show Cause stated "ETP's *most significant manipulation occurred* on September 28, 2005." ETP Request for Rehearing at 38 (quoting Order to Show Cause, 120 FERC ¶ 61,086 at P 9 (emphasis added)).

[132] *Id.* at 39 (citing 18 C.F.R. § 385.209(a)(2) (2007)).

[133] *Id.* at 41 (quoting Tom Fowler, *Filings Against Energy Companies May Point to a Big Shift*, Houston Chronicle, at 2 (July 26, 2007)).

undertaken pursuant to 18 C.F.R. Part 1b.[134] It states that the Commission has taken the position that until an investigation is set for a trial-like, evidentiary hearing, investigation staff can communicate about the investigation with the Commission.[135] It further notes that, once the matter is set for trial, investigators can serve as trial staff.[136] ETP maintains that the Commission does not subject the investigatory staff to the separation of functions and *ex parte* rules until too late in the process.[137]

74. ETP asserts that prior to the passage of EPAct 2005, when the Commission's ability to assess penalties was more limited in scope and amount, the Commission's approach may have been a more reasonable way to meet both due process concerns and the Commission's administrative considerations. It also states that it may "also have appeared reasonable in a context where the Commission simply noted the existence of Staff allegations and set those allegations for hearing."[138] However, ETP maintains that it is unfair for Office of Enforcement staff to discuss the evidence with the Commission, and draft the Order to Show Cause, including the factual findings, legal conclusion, and legal arguments. ETP contends that this same staff will presumably draft the Commission order that will address ETP's answer to the Order to Show Cause.

75. ETP states that Office of Enforcement staff already have the benefit of the Commission's mental impressions and thinking about the "pros" and "cons" of the case, and vice versa. It asserts that the only way to correct this unfairness is for the Commission to take the statutorily-mandated approach of adjudicating ETP's potential liability *de novo* in district court. It maintains that there is a significant risk of erroneous deprivation of ETP's protected interests under the second *Mathews* factor. Finally, It states that *Mathews* also requires consideration of the probable value of additional or substitute safeguards.

Commission Determination

76. We address first ETP's claim that our procedures thus far in this proceeding have not provided ETP with due process. As noted by ETP, the Commission's policy on the separation of Commission staff's functions is set forth in its 2002 Separation of Functions

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[134] *Id.* at 42 (citing *Statement on Admin. Policy on Separation of Functions*, 101 FERC ¶ 61,340, at P 26 (2002) (Separation of Functions Statement)).

[135] *Id.* (citing Separation of Functions Statement, 101 FERC ¶ 61,340 at P 27).

[136] *Id.* (citing Separation of Functions Statement, 101 FERC ¶ 61,340 at P 28).

[137] *Id.*

[138] *Id.* at 43 (citing *Northwest Pipeline Corp.*, 61 FERC ¶ 61,012 (1992); *Clifton Power Corp.*, 25 FERC ¶ 61,225 (1983)).

Statement.[139] The Separation of Functions Statement states that the APA "recognizes that Congress has generally vested Federal administrative agencies with both the power to initiate actions to enforce compliance with their statutes and the responsibility of ultimately determining the merits in those cases."[140]

77. As relevant here, APA section 554(d) addresses the procedures to be followed when an agency is engaged in the performance of investigative or prosecuting functions.[141] Section 554 applies to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) a matter subject to a subsequent trial of the law and the facts de novo in a court . . . ."[142] As a result, APA section 554 does not apply to the issue of NGPA section 504 civil penalties given that the recipient of the penalty has an affirmative right to receive review of the Commission's assessment in a trial *de novo* in district court.

78. As discussed above, the NGA civil penalty provisions do not provide for federal district court review *de novo*, nor does any other exception in APA section 554(a)[143] apply to these NGA provisions. Therefore, NGA section 22 civil penalty provisions fall within APA section 554(d). APA section 554(d)(2) requires agencies to separate the functions of "investigating or prosecuting" from the function of adjudicating.[144] However, section 554(d)(2) creates exemptions to the separation of functions requirement for: (A) the determination of licenses; (B) proceedings involving rates, facilities, or practices of public utilities or carriers; or (C) an agency or a member or members of the body comprising the agency. While the exemption in APA section 554(d)(2)(B) may be applied here, the exemption included in APA section 554(d)(2)(C) encompasses the FERC Commissioners that adjudicate NGA section 22 civil penalties.

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[139] Separation of Functions Statement, 101 FERC ¶ 61,340.

[140] *Id.* P 2 (citing *Fed. Trade Comm'n v. Cinderella Career and Finishing School, Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968) (*FTC v. Cinderella*)).

[141] 5 U.S.C. § 554 (2000).

[142] 5 U.S.C. § 554(a) (2000).

[143] *Id.*

[144] 5 U.S.C. § 554(d)(2) (2000).

79. In order to ensure that the Commission satisfies APA section 554(d)(2), the Commission promulgated separation of functions rules.[145] Rule 2202 states that:

> [i]n any proceeding in which a Commission adjudication is made after hearing, no officer, employee, or agent assigned to work upon the investigation or trial of the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusions or decision, except as a witness or counsel in public proceedings.[146]

In the Separation of Functions Statement, the Commission generally equates the term "hearing" to a trial-type evidentiary hearing before an ALJ, and therefore applies Rule 2202 in that context.[147] Rules 2201 and 2202 assist the Commission in ensuring that private parties' due process concerns are fully addressed, while still allowing the Commission to operate as a combined-function regulatory agency. Once the Commission sets a matter for a trial-type ALJ hearing, Rule 2202 is triggered. In that instance, Commission staff that is assigned to participate in the trial of a proceeding may not participate or advise the Commission as to the findings, conclusions, or decision.[148]

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[145] *See* 18 C.F.R. § 385.2202 (2007) (Rule 2202) (regulations governing separation of functions); *see also* 18 C.F.R. § 385.2201 (2007) (Rule 2201) (regulations governing off-the-record communications).

[146] 18 C.F.R. § 385.2202 (2007).

[147] Separation of Functions Statement, 101 FERC ¶ 61,340 at P 4 & n.5 (citing *Panhandle E. Pipe Line Co.*, 41 FERC ¶ 61,202, at 61,525 (1987) ("Since the case was never set for an adjudicatory hearing, the Commission's rules pertaining to separation of functions do not apply. . . ."), *order on reh'g and clarification* 42 FERC ¶ 61,270 (1988); *Seagull Shoreline Sys.*, 41 FERC ¶ 61,325, at 61,860 n.6 (1987) (finding staff panel proceeding to determine whether rates are just and reasonable under NGPA is an advisory proceeding, not an adjudication, and therefore separation of functions does not apply); *Mustang Fuel Corp.*, 31 FERC ¶ 61,265, at 61,535 (1985) (finding that separation of functions rule does not apply to non-evidentiary proceedings such as staff panel proceedings, but separation of functions was maintained as a matter of administrative discretion), *reh'g granted in part*, 36 FERC ¶ 61,001 (1986), *review granted in part sub nom. Mustang Energy Corp. v. FERC*, 859 F.2d 1447 (10th Cir. 1988), *cert. denied*, 490 U.S. 1019 (1989); *Tenneco Oil Co.*, 27 FERC ¶ 61,489, at 61,956-57 (1984) (finding that special marketing program proceedings not set for hearing are not adjudicatory and receipt of staff advice was proper); *Tenneco Inc.*, 14 FERC ¶ 61,097, at 61,182 (1981) (finding that declaratory order proceeding is not an adjudication subject to separation of functions)).

[148] *See* Separation of Functions Statement, 101 FERC ¶ 61,340 at 26 (finding that (continued…)

Here, if the Commission sets ETP's NGA and/or NGPA proposed civil penalties for a trial-type ALJ proceeding, then Commission policy prevents Office of Enforcement staff that assists in the trial of ETP's alleged market manipulation from making findings or advising the Commission as to whether or not to assess civil penalties. The Commission has found that these procedures do not compromise our decision making process, because "'mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the [Commissioners] at a later adversary hearing.'"[149] We find that the Commission has fully complied with both the APA requirements and the requirements of our rules and regulations.

80. We also find that our rules and regulations provide due process to ETP. As the Supreme Court put it in *Withrow v. Larkin*, those "serving as adjudicators" enjoy a "presumption of honesty and integrity" that must be overcome by an entity claiming that due process has been denied. Moreover, the courts have found that Commission members may have *ex parte* contact with staff investigators prior to authorizing an investigation, and that such contacts do not implicate due process concerns. For example, in *Air Products. & Chemicals, Inc. v. FERC*, entities petitioned the court for review of Commission orders denying certificates of public convenience and necessity to authorize transportation of natural gas produced in the offshore federal domain.[150] As part of their appeal, the parties asserted that the Commission violated the separation of functions in the administrative review process in considering allegations that the entities transported natural gas without the appropriate certificates. The court rejected the petitioners' argument that communication between the Commission's Office of Enforcement and the Commission violated the separation of functions.[151] The court held that the communication merely recommended that a private investigation was warranted.[152] The court found that the "practice of reviewing the recommendations of the investigatory staff of the FERC and then ordering a formal investigation is clearly within the exception to the APA."[153] The court stated that courts have held that this feature does not infringe on Fifth Amendment due process rights.[154]

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an "investigation triggers neither Rule 2201, which assumes a proceeding with parties, nor Rule 2202, which assumes a trial-type evidentiary hearing").

[149] *Id.*

[150] *Air Prods. & Chemicals, Inc. v. FERC*, 650 F.2d 687 (5th Cir. 1981) (*Air Products*).

[151] *Id.* at 708.

[152] *Id.* at 709.

[153] *Id.* at 709-10 (citing *Withrow v. Larkin*, 421 U.S. 35 (1975); *Kennecott Copper Corp. v. Fed. Trade Comm'n*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909

(continued…)

81. In this case, ETP does not allege that a particular act violated the separation of functions. Rather, it alleges that the structure of the Commission itself, which combines a number of functions, is improper. *Air Products* rejected this allegation without qualification: "The FERC, as does many other agencies, combines the functions of investigator, prosecutor and judge. . . . The courts have . . . uniformly held that this feature does not make out an infringement of the *due process clause of the Fifth Amendment*."[155]

82. ETP states that the Commission should apply the *Mathews* test in determining whether its due process rights have been violated. In *Mathews*, the Supreme Court applied a three-part balancing test to consider whether a person's due process rights had been violated because he did not receive an evidentiary hearing prior to the termination of his Social Security disability benefit payments.[156] The Supreme Court held that this was not a denial of his procedural due process.[157]

(1974), *reh'g denied*, 416 U.S. 963 (*Kennecott v. FTC*); *FTC v. Cinderella*, 404 F.2d at 1315).

[154] *Id.* at 710 (citing *FTC v. Cinderella*, 404 F.2d 1308; *United States v. Litton Ind., Inc.*, 462 F.2d 14 (9th Cir. 1972); *Kennecott v. FTC*, 467 F.2d 67; *Withrow v. Larkin*, 421 U.S. 35).

[155] *Id.* at 709-710. *See also, Blinder, Robinson & Co. v. Securities and Exchange Commission*, 837 F.2d 1099, 1106 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 869 (1988). "'It is also very typical for members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. *This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law*.'" *Id.* (quoting *Withrow v. Larkin*, 421 U.S. at 56).

[156] *Mathews*, 424 U.S. at 335 (citation omitted).

[157] *Id.* at 349. The *Mathews* court held, "The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" *Id.* at 348-49 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (Frankfurter, J., concurring) (1950)). The Supreme Court further stated that "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' . . . to insure that they are given a meaningful opportunity to present their case." *Id.* at 349 (quoting *Goldberg v. Kelly*, 397 U.S. at 268-69 (footnote omitted), *superseded by statute as recognized in State of W. VA. Ex rel K.M. v. W. Va. Dept. of Health and Human Res.*, 575 S.E.2d 393 (W. Va. 2002)).

83. While we agree with ETP that the private interest affected is substantial, we find that the Commission's due process procedures meet the *Mathews* three-part balancing test. We find that there is little risk that the Commission will erroneously deprive ETP of its interests through the procedures used. Here, as opposed to the facts found in *Mathews*, the Commission is attempting to provide ETP with the additional due process administrative procedures, allowable by law, to ensure the protection of its rights. For example, though not required, the Commission, in the Order to Show Cause, provided ETP with 30 days to respond to the Commission's preliminary findings and notice of proposed NGA and NGPA civil penalties. Further, although not required by the language of NGPA section 504, the Commission will consider whether due process considerations or the need to obtain more information in order for us to make an informed decision in assessing any potential penalties requires us to conduct a trial-like ALJ hearing regarding the proposed NGPA civil penalties. While ETP claims that it should be afforded *de novo* review in federal district court on the proposed NGA civil penalties, we find that Congress did not draft NGA section 22 to allow for such review.

84. Further, ETP cites the *Lockyer* court's application of the *Mathews* test to support its assertion that we should apply the *Mathews* test in this instance to find that ETP should be allowed to adjudicate its potential civil penalty liability in a federal district court. In *Lockyer*, entities were appealing a Commission decision to provide an expedited review process that they claimed deprived them of the opportunity to be heard within the meaning of the FPA. The court denied their petition for review, stating that its "holding is consistent with the settled administrative law rules that the Commission has wide discretion to select its own procedures and that the Commission's decision not to hold a formal evidentiary hearing is a 'virtually unreviewable' exercise of discretion."[158] When the *Lockyer* court applied the *Mathews* test, it held that additional due process procedures were not required in order to meet the three-part balancing test.[159] Thus, the *Lockyer* decision supports the Commission's view that we have wide discretion to select

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[158] *Lockyer*, 329 F.3d at 713 (quoting *Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1173, *reprinted as amended*, 2001 U.S. App. LEXIS 28368 (9th Cir. 2001), *order amending opinion and reh'g denied*, 282 F.3d 609 (9th Cir. 2002)).

[159] *Id.* at 708-09. The court cites multiple examples where the *Mathews* test was applied in favor of the Commission's decisions regarding due process and agency adjudication. *See City of Seattle v. FERC*, 923 F.2d 713, 715 (9th Cir. 1991) (holding that an evidentiary hearing is not required where FERC can decide as a matter of law); *Pacific Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1386 (9th Cir. 1984) (holding that a full trial-type hearing is not required where there has been no showing that material facts are in dispute); *Sierra Ass'n for Env't v. FERC*, 744 F.2d 661, 664 (9th Cir. 1984) (holding that a trial-type hearing was not required when a party participated in notice-and-comment procedures and failed to point to specific disputed facts).

our own procedures[160] and that our decision to potentially provide ETP with an additional opportunity to be heard at a trial-like evidentiary hearing meets the requirements of the *Mathews* balancing test.

85. Despite ETP's assertions, Congress clearly envisioned circumstances in which the Commission would both "prosecute" violations and adjudicate penalty assessments, such as under FPA section 31(a). Under that provision, the Commission issues such orders as are necessary to require compliance with a license, permit, or exemption. If the person is in violation of a final compliance order under section 31(a), section 31(d) does not provide the option of choosing review in district court. In that instance, the Commission will hold a hearing before an ALJ under section 31(d)(2)(A) and then assess the penalty. The person can appeal the Commission's assessment order under section 31(d)(2)(A) to the U.S. court of appeals, but a *de novo* review in district court is not available.

86. Likewise, other federal agencies conduct proceedings in the same manner without running afoul of due process requirements. Indeed, the *Air Products* court noted that "FERC, as does many other agencies, combines the functions of investigator, prosecutor and judge."[161] In *Withrow v. Larkin*, a physicians' examining board was statutorily empowered to license physicians, and also to define and forbid acts of misconduct, warn and reprimand and suspend medical licenses, and to institute criminal action.[162] The examining board began an investigation of Dr. Larkin, who sought an injunction against enforcement of the board's action and the district court issued a preliminary injunction. The district court framed the constitutional issue as "whether for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his right to procedural due process."[163] The Supreme Court held that:

> [t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring

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[160] *See, e.g.*, *Vermont Yankee*, 435 U.S. at 524 (Supreme Court held that "[a]gencies are free to grant additional procedural rights in the exercise of their discretion . . . .").

[161] *Air Products*, 650 F.2d at 709.

[162] *Withrow v. Larkin*, 421 U.S. at 37.

[163] *Id.* at 46.

> investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.[164]

The *Withrow* opinion discussed a wide range of cases, both state and federal, in which claims of denial of due process on the basis of non-separation of functions had been alleged.[165] The court observed that to assume that one agency could not develop facts and make a decision would undermine the usefulness of administrative agencies, especially in complex subject areas.[166]

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[164] *Id.* at 47.

[165] *See e.g.*, *Richardson v. Perales*, 402 U.S. 389 (1971); *Pangburn v. CAB*, 311 F.2d 349, 356 (1st Cir. 1962) ("a combination in investigative and judicial functions within an agency does not violate due process"); *Intercontinental Indus. v. Am. Stock Exch.*, 452 F.2d 935, 942-43 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972) (no due process violation when the SEC's Committee on Securities first conducted a hearing and then sat with the Board of Governors while the entire Board considered whether or not to file a delisting application. The court found that the "principle is well established . . . that due process is not violated when an administrative agency exercises both investigative and judicial functions"); *FTC v. Cinderella*, 404 F.2d at 1315 (citing Davis Administrative Law, § 13.10, at 242 (2d ed. 1959) (The Federal Trade Commission's practice of reviewing the recommendations of subordinate investigative employees of the Commission and then making the decision to initiate a complaint is clearly within the exception to APA section 554(d)); *Skelly Oil Co. v. FPC*, 375 F.2d 6, 17-18 (10th Cir. 1967), *modified on other grounds sub nom. Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (no basis for disqualification of two commissioners arises "from the fact or assumption that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue. Nothing in the record disturbs the assumption that the two commissioners are 'men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances'") (citations omitted); *SEC v. R. A. Holman & Co.*, 323 F.2d 284, *cert. denied*, 375 U.S. 943 (1963) (citing *Nat'l Lawyers Guild v. Brownell*, 225 F.2d 552, 555 (1955), *cert. denied*, 351 U.S. 927 (1956)) ("'We cannot assume in advance of a hearing that a responsible executive official of the Government will fail to carry out his manifest duty. Our conclusion on the point is that the plaintiffs must await the event rather than attempt to anticipate it'"); *Koelling v. Bd. of Trustees*, 146 N.W. 2d 284, 295 (Iowa 1966) (administrative tribunal acting as both prosecutor and judge has never been held to deny constitutional rights) (citation omitted).

[166] *Richardson v. Perales*, 402 U.S. 389, 410 (1971).

87. Finally, we disagree with ETP's assertion that the Commission has pre-judged this case. As noted by Chairman Joseph Kelliher, in a July 26, 2007 statement, "This morning we issued show cause orders that make *preliminary findings* these companies have manipulated natural gas markets."[167] Further, Chairman Kelliher stated, "the Commission is not making final conclusions in these show cause orders. Rather, they represent our belief, based on the existing record, that these companies may have manipulated markets and therefore violated the law. Both companies will have the opportunity to rebut the preliminary conclusions set forth in the show cause orders."[168] The ultimate decision in this proceeding will be made by the Commissioners after consideration of all the facts and circumstances.

3. Future Agency Civil Penalty Adjudication Procedures

88. The Commission has conducted this proceeding in accordance with its governing statutes and applicable precedent, and has provided ETP with all the due process required. Notwithstanding the foregoing, in order to eliminate any perception of unfairness or prejudgment, we will exercise our discretion to extend greater protections, beyond what is required under the APA and our regulations, in this and future cases in which civil penalties under the FPA, NGPA, and NGA are proposed. With respect to this particular case, effective as of the date of this order, the Commission will make non-decisional all Office of Enforcement investigative staff that are assigned to participate in the remainder of this proceeding. A notice will be issued in this docket designating such non-decisional staff. Further, we direct such non-decisional staff in the Office of

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[167] FERC July 26, 2007 Market Manipulation Show Cause Orders, IN07-26-000 and IN06-3-003, Statement of Joseph T. Kelliher, at 1 (July 26, 2007) (emphasis added).

[168] *Id.* Further, Chairman Kelliher stated, "our investigation suggests that [ETP] earned $40 million in profits by manipulating prices of certain FERC jurisdictional physical gas sales downward in order to benefit positions in financial products, as well as other FERC jurisdictional physical products. Again, it's a preliminary finding of the investigation" and ETP has "an opportunity to respond. Within 30 days they have an opportunity to respond and to dispute our facts, our interpretation of the facts, and offer alternative theories." OnPoint, *Energy Markets: FERC's Kelliher discusses Amaranth, Energy Transfer Partners market manipulation cases Filings Against Energy Companies May Point to a Big Shift*, E&E TV (July 31, 2007), *available at* http://www.eenews.net/tv/transcript/654. Chairman Kelliher further stated, "[w]e are not taking final action today. We're not making a final decision on guilt." *Dallas-based Energy Transfer Partners under federal investigation*, Pegasus News Wire, July 26, 2007, *available at* http://www.pegasusnews.com/news/2007/jul/26/dallas-based-energy-transfer-partners-under-federa/.

Enforcement to file a brief in the Docket No. IN06-3 public record, within 60 days of the date of this order, that (1) identifies specific issues, if any, it recommends the Commission set for a trial-type evidentiary hearing before an administrative law judge that arose under the NGA or the NGPA in the underlying investigation, and for each such issue, if any, staff shall provide an explanation in support of its recommendation; (2) identifies specific issues, if any, it recommends the Commission resolve by order on the merits without a trial-type evidentiary hearing before an administrative law judge, and for each such issue specified, if any, staff shall provide a complete legal and factual basis for its recommendation; and (3) contains a response to ETP's pending application for a subpoena. If it chooses, ETP may file a response to staff's brief within 20 days of the date of such brief. Upon review of these filings, and other filings in this docket, the Commission will issue a further order in this proceeding.

89. To provide additional due process in all future civil penalty cases under the FPA, NGPA, and NGA, at the time Office of Enforcement investigative staff completes its investigation, it will transmit to the Commission a report with recommended findings and conclusions of fact and law and the Commission will attach the report to a show cause order to respond to the recommended findings. The Commission will not make any findings, preliminary or otherwise, at least until it has considered the response. In addition, at the point Office of Enforcement investigative staff submits a report to the Commission, designated Office of Enforcement investigative staff will become non-decisional employees for purposes of participating in the remainder of that enforcement proceeding, including any hearing or other procedures used by the Commission to resolve the proceeding.[169]

90. We believe these steps, although not required as a matter of law, will provide additional due process and eliminate any perception of unfairness or prejudgment, while allowing the Commission to benefit from the expertise of its Office of Enforcement staff and have the ability to timely pursue enforcement actions.

4. Request for Stay

91. ETP states that, under the Commission's rules, a request for rehearing does not act as a stay of the underlying order unless the Commission specifically orders a stay. ETP contends that the Commission should issue a stay of the Order to Show Cause until the jurisdictional issues have been resolved. It asserts that when the Commission acts on stay requests:

[169] We note that the Commission will also consider additional due process recommendations that we received at our November 16, 2007 Conference on Enforcement in Docket No. AD07-13.

> the Commission applies the standard set forth in the Administrative Procedure Act; that is, a stay will be granted if the Commission finds that "justice so requires." Under this standard, the Commission considers such factors as whether the moving party will suffer irreparable injury without a stay, whether issues of a stay would substantially harm other parties, and where the public interest lies.[170]

92. ETP claims it satisfies this standard. It asserts that the *Mathews* test shows that it has a significant stake in this proceeding, with proposed penalties of $97.5 million. It states that, unless the Commission grants a stay, its interests will be irreparably harmed because the Commission appears to have pre-judged the case. It contends that the harm will not be mitigated by a review in the U.S. court of appeals under NGA section 19. ETP suggests that the statute protects ETP from the outset by not requiring them to go through agency adjudication and instead allowing for *de novo* review in federal district court. ETP further states that no person will be harmed by granting its request for a stay and this will be in the public interest. It states that the Commission's determinations deprive it of the right to litigate its NGA and NGPA civil penalties, in the first instance, in the forum Congress intended for both the NGA and NGPA. According to ETP, the Commission should grant a stay because ETP has a right to adjudicate each of the allegations raised in the Order to Show Cause *de novo* in a federal district court. Finally, it suggests that a stay should be granted because it has a substantial likelihood of success on the merits.

Commission Determination

93. When acting on a request for stay, the Commission applies the standard set forth in APA section 705;[171] we will grant a stay if "justice so requires."[172] To determine whether justice requires a stay, the Commission considers: (1) whether the moving party will suffer irreparable harm without a stay; (2) whether the stay will substantially harm other parties; and (3) whether a stay is in the public interest.[173] The key element in the

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[170] *Id.* at 49-50 (quoting *Pub. Util. Dis. No. 1 of Pend. Oreille County, Wash.*, 117 FERC ¶ 61,205, at P 22 (2006) (citing 5 U.S.C. § 705 (2000); *Clifton Power Corp.*, 58 FERC ¶ 61,094 (1992))).

[171] 5 U.S.C. § 705 (2000).

[172] *Pub. Util. Dis. No. 1 of Pend. Oreille County, Wash.*, 117 FERC ¶ 61,205 at P 22 (citing 5 U.S.C. § 705 (2000); *Clifton Power Corp.*, 58 FERC ¶ 61,094).

[173] *See, e.g., Application of Federal Power Act Section 215 to Qualifying Small Power Production and Cogeneration Facilities,* 119 FERC ¶ 61,320, at P8 (2007); *CMS Midland, Inc.,* 56 FERC ¶ 61,177, at 25 (1991), *aff'd sub. nom., Michigan Coop. Group v. FERC,* 990 F.2d 1377 (D.C.Cir.), *cert. denied,* 510 U.S. 990 (1993).

inquiry is irreparable harm to the moving party. If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.[174] Despite ETP's claims of pre-judgment, we find that it has failed to demonstrate irreparable harm. Instead, ETP's due process rights are preserved through the Commission's adjudicatory proceedings and, in the case of the NGPA penalty issues, ETP will receive a *de novo* review in federal district court. Further, as discussed above, ETP is entitled to court review of any final NGA civil penalty assessment order through an appeal to the U.S. court of appeals. Additionally, we find that a stay in these proceedings would not be in the public interest. The Commission granted ETP an extension to file its 30-day response to the Order to Show Cause. ETP filed its response to the Order to Show Cause on October 9, 2007. Rather than permitting any further delay, the public interest is best served by allowing this matter to proceed at the Commission. Therefore, we deny ETP's request for a stay of the Order to Show Cause.

The Commission orders:

(A) The Commission hereby denies ETP's request for rehearing and stay, as described in the body of this order.

(B) The Commission hereby denies O'Connor and INGAA's motions to intervene, as discussed in the body of this order.

(C) The Commission hereby orders OE Investigative Staff to file a brief, in the public record of Docket No. IN06-3, as described in the body of this order.

(D) The Commission hereby clarifies certain aspects of our civil penalty adjudication procedures, as described in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[174] *Application of Federal Power Act Section 215 to Qualifying Small Power Production and Cogeneration Facilities,* 119 FERC ¶ 61,320, at P 8.