APPENDIX

APPENDIX A

REVISED July 10, 2017

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TOTAL GAS & POWER NORTH AMERICA, INCORPORATED; AARON TRENT HALL; THERESE NGUYEN TRAN, Plaintiffs-Appellants v. FEDERAL ENERGY REGULATORY COMMISSION; ACTING CHAIRMAN CHERYL A. LAFLEUR, In her official capacity; COMMISSIONER COLETTE D. HONORABLE, In her official capacity; CHIEF ALJ CARMEN A. CINTRON, In her official capacity, Defendants-Appellees	No. 16-20642

Appeal from the United States District Court
for the Southern District of Texas

Before KING, JOLLY, and PRADO, Circuit Judges.

KING, Circuit Judge:

We are presented with a challenge to the authority of the Federal Energy Regulatory Commission to adjudicate violations of the Natural Gas Act and to impose civil penalties on violators. TOTAL Gas & Power North America, Inc., a company that trades in North American natural gas markets, and two of its trading managers brought this declaratory judgment action against the Commission arguing that the Commission was precluded from adjudicating violations or imposing civil penalties because the Natural Gas Act vests authority for those activities exclusively in federal district courts. The district court granted the Commission's motion to dismiss. Because we conclude that the claims are not ripe, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case involves the process that Defendant–Appellee the Federal Energy Regulatory Commission (FERC) uses for adjudicating violations of the Natural Gas Act (NGA), 15 U.S.C. § 717 *et seq.*, and imposing civil penalties on the violators. For context, we first review the statutory and regulatory scheme that guides FERC's process for adjudicating NGA violations and imposing penalties, and then we discuss the facts of this case.

A. Statutory Backdrop

FERC is an independent regulatory commission comprised of five commissioners, each appointed by the President, who serve five-year terms. 42 U.S.C. § 7171(b)(1). FERC primarily administers three statutes: the Federal Power Act (FPA), 16 U.S.C. § 791a *et seq.*; the Natural Gas Policy Act of 1978 (NGPA), 15

U.S.C. § 3301 *et seq.*; and the NGA. The NGA, the statute at issue in this appeal, was enacted in 1938. Natural Gas Act of 1938, Pub. L. No. 75688, 52 Stat. 821. It grants FERC the authority to regulate the interstate transport and sale of natural gas by, for example, setting pipeline rates and establishing the conditions for transportation facilities. 15 U.S.C. §§ 717, 717c, 717f. In the Energy Policy Act of 2005 (EPACT 2005), Congress amended the NGA to prohibit manipulation in natural gas markets by market participants. Pub. L. No. 109-58, 119 Stat. 594, 691 (codified at 15 U.S.C. § 717c-1).

EPACT 2005 also made changes to how the NGA was enforced. Prior to 2005, the NGA provided FERC with limited enforcement powers. *See* JAMES H. MCGREW, AM. BAR ASS'N, BASIC PRACTICE SERIES, FERC: FEDERAL ENERGY REGULATORY COMMISSION 239–41 (2d ed. 2009). The pre-2005 NGA (like the current NGA) permitted FERC to "investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated [the NGA]." 15 U.S.C. § 717m. In addition, it authorized FERC to conduct hearings and to establish the procedural rules governing those hearings. *Id.* § 717n. However, if the investigation yielded a finding of a violation, FERC had limited options available to punish violators. Under the pre-2005 NGA, FERC was limited to seeking injunctive relief and criminal penalties against violators in federal district court.[1] *Id.* §§ 717s, 717t.

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[1] As an historical matter, FERC often imposed a variety of other penalties against NGA violators, such as disgorgement of

Congress significantly enhanced FERC's enforcement powers under the NGA in EPACT 2005. MCGREW, *supra*, at 239–45. Section 22 added, for the first time, civil monetary penalties (capped at $1 million per day per violation) to those remedies available against NGA violators.[2] Pub. L. No. 109-58, 119 Stat. 594, 691 (codified at 15 U.S.C. § 717t-1). Section 22 provides:

> **(a) In general**
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> Any person that violates this chapter, or any rule, regulation, restriction, condition, or order made or imposed by the

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profits, imposition of compliance plans, and suspension or revocation of operating certificate or market-based rate authority, *see Revised Policy Statement on Enforcement* ¶ 6, 123 FERC 61,156, 62,008 (2008) [hereinafter 2008 *Revised Policy*], but these remedies sometimes encountered legal difficulties because they are not expressly provided for in the NGA, *see Laclede Gas Co. v. FERC*, 997 F.2d 936, 945–48 (D.C. Cir. 1993); *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986).

[2] In addition to adding civil penalty authority under the NGA, EPACT 2005 also enhanced FERC's preexisting civil penalty authority under the FPA and the NGPA. 119 Stat. 691, 980 (codified at 15 U.S.C. § 3414(b)(6)(A); 16 U.S.C. § 825o-1(b)). But the procedures for imposing civil penalties under these statutes differ from those under the NGA. Under the FPA, the alleged violator may opt to participate in a hearing regarding the proposed civil penalty on the record before an administrative law judge (ALJ), with any resulting penalty being subject to review in a federal court of appeals for substantial evidence. 16 U.S.C. § 823b(d)(2). Alternatively, the alleged violator may choose to forego a hearing and for FERC to immediately assess the proposed penalty and then seek de novo review in federal district court. *Id*. § 823b(d)(3). Similarly, the NGPA explicitly grants a federal district court authority to review de novo any civil penalty assessed by FERC under the NGPA if the violator does not pay the penalty within 60 days. 15 U.S.C. § 3414(b)(6)(F).

> Commission under authority of this chapter, shall be subject to a civil penalty of not more than $ 1,000,000 per day per violation for as long as the violation continues.
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> **(b) Notice**
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> The penalty shall be assessed by the Commission after notice and opportunity for public hearing.
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> **(c) Amount**
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> In 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.

15 U.S.C. § 717t-1.

B. Regulatory Backdrop

Following the passage of EPACT 2005, FERC issued a 2006 policy statement interpreting its new civil penalty authority. *Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC 61,317 (2006) [hereinafter *2006 Policy*]. Crucially, FERC explained that, for civil penalties assessed under the NGA, "unlike the FPA and NGPA, Congress did not establish a *de novo* court review." *Id.* ¶ 8, 117 FERC at 62,533. Accordingly, FERC interpreted the NGA to permit FERC itself to assess penalties under the NGA through either "a paper hearing or a hearing before an ALJ." *Id.* ¶ 2, 117 FERC at 62,533. FERC has established a comprehensive procedure for assessing civil penalties under the NGA. We

provide an overview in order to situate the facts of this case within that procedure.

(1) FERC's Office of Enforcement, the FERC division in charge of investigating alleged violations, reviews referrals and tips of potential NGA violations by natural gas companies and market participants to determine whether there is a substantial basis for opening an investigation. *2008 Revised Policy* ¶¶ 23–26, 123 FERC at 62,012; *see* 18 C.F.R. § 1b.3.

(2) After opening an investigation, Enforcement employs conventional discovery methods such as reviewing documents, conducting interviews and depositions, and communicating with the subject of the investigation. *2008 Revised Policy* ¶ 28, 123 FERC at 62,013; *see* 18 C.F.R. § 1b.3. Enforcement can terminate an investigation at any point during this process. *2008 Revised Policy* ¶ 31, 123 FERC at 62,013.

(3) If Enforcement concludes that a violation has occurred, it sends the alleged violator the factual and legal conclusions of its investigation and its proposed penalty, to which the alleged violator may confidentially respond. *Id.* ¶ 32; *see* 18 C.F.R. § 1b.19. In some cases, this response has prompted Enforcement to terminate the investigation. *2008 Revised Policy* ¶ 32, 123 FERC at 62,013.

(4) If Enforcement continues to believe that a violation has occurred, it attempts to engage in settlement discussions with the alleged violator. *Id.* ¶¶ 33–34, 123 FERC at 62,013–14. This step concludes the investigation stage of the process and commences the enforcement stage.

(5) If these settlement discussions are unavailing, Enforcement submits to the commissioners of FERC

its recommendation to initiate an enforcement proceeding and impose a civil penalty against the alleged violator, together with any response from the alleged violator. *Id.* ¶ 35, 123 FERC at 62,014. The alleged violator is usually notified of this recommendation in advance. *Id.*

(6) If FERC deems it appropriate, it issues an order to show cause to the alleged violator, which includes the amount of Enforcement's proposed penalty and a statement of the material facts constituting the violation. *Id.* ¶ 36, 123 FERC at 62,014; *2006 Policy* ¶ 7, 117 FERC at 62,533. In issuing this order, FERC does *not* make a finding that there has been a NGA violation. *2008 Revised Policy* ¶ 37, 123 FERC at 62,014. Rather, issuing an order to show cause merely triggers the procedural rules that FERC has promulgated to govern its hearings. *Id.*; *see* 18 C.F.R. §§ 385.101–2202. One such rule dictates that when an order to show cause is issued, the Enforcement staff who were involved in the investigation are designated as "non-decisional" and are not permitted to further advise FERC commissioners on the matter. *2008 Revised Policy* ¶ 37, 123 FERC at 62,014; *see* 18 C.F.R. §§ 385.2201, 385.2202.

(7) The alleged violator may file an answer to the order to show cause, which may include arguments on why it did not violate the NGA and why the proposed penalty should not be assessed or should be reduced. *2006 Policy* ¶ 7, 117 FERC at 62,533.

(8) FERC reviews the alleged violator's answer, together with Enforcement's recommendation. *Id.*

(9) If FERC is unpersuaded by the alleged violator's answer, it determines what type of procedure is

necessary to adjudicate the violation and assess the penalty. *Id.* It may choose to assess a penalty based on the record before it, conduct a "paper hearing" based on the parties' written submissions, or schedule a hearing before an ALJ. *Id.*

(10) If it proceeds to a paper hearing, FERC reviews solely the paper record. *Id.* If the matter is heard before an ALJ, the ALJ issues an initial decision in which it determines whether a NGA violation occurred and recommends a penalty amount. *Id.*; 18 C.F.R. § 385.708(b)(1). After the ALJ issues its initial decision, either party may file with FERC exceptions to the decision, which identify alleged factual or legal errors made by the ALJ. 18 C.F.R. § 385.711. The other party may then file an opposition to these exceptions. *Id.* Either party may also request oral argument on the matter before FERC. *Id.* FERC may also require briefs and oral argument before issuing its final order. *Id.* § 385.712. FERC then considers the ALJ's decision, together with any filings or oral arguments by the parties. *2006 Policy* ¶ 7, 117 FERC at 62,533. In a 2008 policy statement, FERC outlined the five broad factors it considers in setting the amount of a penalty. *2008 Revised Policy* ¶¶ 54–71, 123 FERC at 62,017–21. These factors are (a) seriousness of the offense, (b) the violator's commitment to compliance, (c) whether the company self-reported the violation, (d) the extent of the violator's cooperation in the investigation, and (e) the extent to which the violator relied on guidance from FERC staff in committing the violation. *Id.*

(11) FERC issues a final order in which it may adjudicate a NGA violation and assess a civil penalty. *2006 Policy* ¶ 7, 117 FERC at 62,533.

(12) If the alleged violator does not prevail, it may request a rehearing before FERC within 30 days. *Id.*; *see* 15 U.S.C. § 717r.

(13) If rehearing is unavailing, the alleged violator may then appeal to a federal court of appeals, which then reviews FERC's factual findings for substantial evidence. *2006 Policy* ¶ 7, 117 FERC at 62,533; *see* 15 U.S.C. § 717r.

(14) If the penalty is not paid, FERC may institute an enforcement action in a federal district court. *2006 Policy* ¶ 7, 117 FERC at 62,533.

C. Facts and Proceedings

Plaintiff–Appellant TOTAL Gas & Power North America, Inc. (TGPNA) is the North American subsidiary of the France-based TOTAL S.A., one of the world's largest oil and gas companies. TGPNA trades in the North American natural gas markets. In July 2012, FERC initiated a formal investigation into TGPNA and two of its trading managers, Aaron Hall and Therese Tran (TGPNA together with its trading managers, Total) based on a tip it received from a former TGPNA employee alleging that the company had been manipulating prices in the natural gas markets.[3]

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[3] The details of Total's alleged NGA violations are largely irrelevant to this appeal. The crux of the investigation centered on allegations that TGPNA traders in the southwestern United States accumulated a large quantity of physical and financial natural gas products and then traded monthly physical fixed price natural gas in high volumes during the strategic "bidweek" period in order to drive up index prices in a way that would benefit its own natural gas holdings. *See Order to Show Cause and*

Order to Show Cause and Notice of Proposed Penalty, 155 FERC 61,105, app. A, 2016 WL 1723518, at *14 (2016). In November 2015, after more than three years of investigation, Enforcement notified Total of its intention to recommend that FERC initiate enforcement proceedings against it for violations of the NGA and assess corresponding civil penalties.

After receiving the notice, Total filed this declaratory judgment action in federal district court on January 27, 2016. Total sought a declaration that FERC lacked the authority to adjudicate violations of the NGA and assess corresponding civil penalties through in-house administrative proceedings because the NGA vested such authority exclusively in federal district courts. Total based this argument on Section 24 of the NGA, which provides: "The District Courts of the United States . . . shall have exclusive jurisdiction of violations of [the NGA] . . . , 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, [the NGA] . . . ." 15 U.S.C. § 717u. In addition, Total sought a declaration that adjudication of a NGA violation and imposition of a civil penalty through an in-house FERC administrative proceeding would violate, in relevant part, the Appointments Clause, the Fifth Amendment's Due Process Clause, and the Seventh Amendment's guarantee of a jury trial. Total conceded that it did not "seek to stop FERC from conducting an investigation or otherwise exercising its lawful authority" under the NGA, but rather simply sought to

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Notice of Proposed Penalty, 2016 WL 1723518, at *4–6. This conduct was alleged to violate the NGA's prohibition on manipulation in the natural gas markets. *See* 15 U.S.C. § 717c-1.

preserve Total's right to have any violation "adjudicated in the first instance by a federal district court."

The proceedings before FERC and the district court proceeded on parallel, independent tracks. In the FERC proceeding, FERC issued an order to show cause on April 28, directing Total to respond and explain why it should not be found to have violated the NGA by manipulating prices and why it should not have to disgorge $9 million in alleged unjust profits and be assessed over $216 million in civil penalties. *Order to Show Cause and Notice of Proposed Penalty*, 155 FERC 61,105, 2016 WL 1723518, at *1–2. The order to show cause also included an overview of the rest of the process for adjudicating a violation and imposing a penalty, which mirrors Steps 8–14 above. *Id.* On July 12, Total filed a 201-page answer raising numerous factual and legal arguments, including the same jurisdictional challenge to FERC's authority that Total had raised in its declaratory action. *Answer in Opposition to Order to Show Cause and Notice of Proposed Penalty*, *Total Gas & Power N. Am., Inc.*, No. IN12-17-000 (July 12, 2016). Total's answer opposed the imposition of any penalty and urged that FERC summarily dismiss the claims without a hearing. *Id.*

Back in district court, while the administrative proceeding was still pending, FERC moved to dismiss Total's claims under Federal Rule of Civil Procedure 12(b)(1) for, in relevant part, lack of subject matter jurisdiction due to lack of ripeness. Days later, Total moved for summary judgment. On July 15, before any further progress in the FERC proceeding, the district court ruled on these dueling motions simultaneously, granting FERC's motion to dismiss and denying To-

tal's motion for summary judgment as moot. The district court provided three alternative grounds for dismissing Total's declaratory action. First, the district court concluded that the case was not justiciable because (a) the relief requested would not completely resolve the dispute, since the merits of the market manipulation allegations against Total would remain unresolved even if the district court ruled in Total's favor, and (b) the case was not yet ripe because FERC had not issued a final order. Second, on the merits, the district court disagreed with Total's interpretation of the NGA's jurisdictional dictates, instead concluding that the NGA permitted FERC to adjudicate NGA violations and assess civil penalties through an in-house administrative proceeding; therefore, no action by the district court to interfere with the FERC proceedings was warranted. Finally, the district court stated that, even if Total was right on the merits and the action was justiciable, the district court nevertheless declined to exercise its discretion to entertain the declaratory action.

Total moved for reconsideration of the district court's judgment, offering responses to several points in the court's order that were raised by the district court *sua sponte* (because subject matter jurisdiction was at issue). Total also sought leave to amend its complaint to add a request for a declaration that it did not violate the NGA in order to alleviate the district court's concern that its requested relief would not fully resolve the dispute. The district court denied Total's motion for reconsideration and also denied it leave to amend the complaint, finding that amendment would be futile in the light of the district court's

two alternative bases for dismissal. Total timely appeals all the district court's orders.

While this appeal was pending, the FERC proceeding has continued apace. Most recently, on September 23, 2016, Enforcement filed a reply to Total's answer to the order to show cause. *Enforcement Staff's Reply to Respondents' Answer to Order to Show Cause and Notice of Proposed Penalties and Opposition to Respondents' Motion for Summary Disposition*, *Total Gas & Power N. Am., Inc.*, No. IN12-17-000 (Sept. 23, 2016). Enforcement's reply opposed Total's request for summary disposition of the matter and requested three rulings. First, it requested that FERC set the matter for a hearing before an ALJ to resolve certain disputes of material fact. *Id.* at 4. Second, it requested that FERC decide certain undisputed facts without a hearing. *Id.* Third, it urged FERC to reject Total's legal and jurisdictional challenges to the proceeding in their entirety. *Id.* To date, however, FERC has not ordered the matter to be heard before an ALJ nor has it taken any other action on these pending motions.[4] *See* FERC Docket No. IN12-17-000. The proceeding is thus stalled at Step 8 of the process we outlined above.

II. STANDARDS OF REVIEW

We review de novo a district court's rulings on a motion to dismiss and a motion for summary judgment, applying the same standard as the district court. *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of*

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[4] The most recent filings reflected on the docket are Total's motion for leave to respond to Enforcement's reply (January 17), Enforcement's answer to this motion (January 27), and Enforcement's motion to supplement its reply (February 23). To date, no orders have been issued on these pending motions.

Workers' Comp., 851 F.3d 507, 513 (5th Cir. 2017); *EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 481 (5th Cir. 2014). We may affirm the district court's rulings on any basis supported by the record. *Taylor v. City of Shreveport*, 798 F.3d 276, 279 (5th Cir. 2015); *Simbaki, Ltd.*, 767 F.3d at 481. We also review ripeness issues de novo and the plaintiff bears the burden of proof. *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 714 (5th Cir 2012).

III. RIPENESS

Total brings its claims in the form of a declaratory judgment action. Under the Declaratory Judgment Act, any federal court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). When considering a declaratory judgment action, a district court must first determine whether the action is justiciable, which frequently boils down to a question of ripeness. *See Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000). "[A] declaratory judgment action, like any other action, must be ripe in order to be justiciable." *Id.* at 896. If the action is not ripe, the court must dismiss it. *Id.* at 895. Accordingly, we first consider whether this declaratory judgment action is ripe. Because we conclude it is not, we end our analysis and do not reach the merits of Total's claims.[5]

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[5] Because we affirm the district court's dismissal on this basis, we do not resolve Total's argument regarding the district court's alternative bases for denial: its interpretation of NGA Section 24 and its exercise of discretion to decline to hear the declaratory

A. Ripeness and Declaratory Judgment Actions

The ripeness requirement originates from Article III of the United States Constitution, which provides that federal courts have jurisdiction over "cases" or "controversies." U.S. Const. art. III, § 2; *see Choice Inc.*, 691 F.3d at 714–15. "[R]ipeness . . . determine[s] *when* . . . litigation may occur. Specifically, the ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur, from those cases that are appropriate for federal court action." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 n.12 (5th Cir. 2008) (second alteration and first omission in original) (quoting ERWIN CHEMERINSKEY, FEDERAL JURISDICTION § 2.4.1 (5th ed. 2007) (emphasis added)). "The ripeness doctrine's 'basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Choice Inc.*, 691 F.3d at 715 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). In determining whether a case is ripe, we rely on two "key considerations": "the fitness of the issues for judicial resolution and the hardship to the parties of withholding court consideration." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987) (quoting *Abbott Labs.*, 387 U.S. at 149).

Although a declaratory judgment action is often brought before injury has occurred, it is nevertheless subject to the ripeness requirement. *United Transp.*

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judgment action. Nor do we resolve Total's challenge to the district court's denial of leave to amend the complaint because the basis on which Total sought to amend related to one of the district court's alternative bases for dismissal—that the requested relief would not completely resolve the parties' dispute.

Union v. Foster, 205 F.3d 851, 857 (5th Cir. 2000). "A declaratory judgment action is ripe for adjudication only where an 'actual controversy' exists." *Orix Credit All.,* 212 F.3d at 896 (quoting 28 U.S.C. § 2201(a)). Whether an actual controversy exists must be determined on a case-by-case basis, but, "[a]s a general rule, [one] exists where 'a substantial controversy of sufficient immediacy and reality [exists] between parties having adverse legal interests.'" *Id.* (third alteration in original) (quoting *Middle S. Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir. 1986)).

To determine whether Total's claims are ripe, it is necessary to outline its arguments. First, Total contends that, although FERC is statutorily authorized to conduct the 14-step procedure we set out above, it may not issue a final order adjudicating a NGA violation or imposing a civil monetary penalty. Rather, Total urges, FERC is permitted through these procedures only to *recommend* a finding of a NGA violation and *propose* a penalty; only a federal district court has the power to adjudicate a violation and impose a penalty. Total thus objects not to the FERC's process but to the potential *outcome* of this process. For this argument, Total relies on Section 24 of the NGA, entitled "Jurisdiction of offenses; enforcement of liabilities and duties." 15 U.S.C. § 717u. Section 24, which was included in the original NGA enacted in 1938, provides:

> The District Courts of the United States . . . shall have exclusive jurisdiction of violations of [the NGA] 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,

> [the NGA] 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, [the NGA] or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant . . . .

Id. According to Total, Section 24's grant of "exclusive jurisdiction of [NGA] violations" to federal district courts precludes FERC from conclusively adjudicating such violations, along with the corresponding civil penalties, through in-house administrative proceedings. If it wishes to impose civil penalties under the NGA, Total asserts, FERC must instead bring an action in federal district court.

In addition to this jurisdictional claim, Total asks for a declaration that FERC's proceedings violate various constitutional rights. First, Total claims that allowing an ALJ to preside over a hearing that resulted in a "binding" order would violate the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, because the manner in which FERC appoints ALJs does not comport with the Appointment Clause's requirements for the appointment of "inferior officers." Second, Total argues that such a proceeding would deprive it of its Seventh Amendment right to a jury trial in an Article III tribunal. U.S. Const. amend. VII. Third, Total alleges that such a proceeding would also violate the Fifth Amendment's Due Process Clause's guarantee of an impartial tribunal because Enforcement staff who assisted in the investigatory stage are permitted to advise the ALJ and FERC commissioner during the enforcement stage.

B. Our Decision in Energy Transfer Partners, L.P. v. FERC

We have recognized that "applying the ripeness doctrine in the declaratory judgment context presents a unique challenge." *Orix Credit All.,* 212 F.3d at 896. Fortunately, here, we do not write on a blank slate. In *Energy Transfer Partners, L.P. v. FERC*, we addressed the issue of ripeness in the context of a party raising an identical argument to the primary one that Total raises here: Section 24 of the NGA grants district courts exclusive jurisdiction over adjudication of NGA violations and imposition of civil penalties, precluding any such adjudication by FERC. 567 F.3d 134, 138–39 (5th Cir. 2009). In that case, similar to here, FERC issued to Energy Transfer Partners, L.P. (ETP) an order to show cause that raised allegations of market manipulation in violation of the NGA and proposed a civil penalty of $82 million. *Id.* at 136. ETP filed an answer asserting that it had not violated the NGA and requesting summary disposition of the matter, again, just as Total did here. *Id.* at 137. However, the FERC case against ETP progressed beyond Total's case. After reviewing ETP's answer, FERC denied ETP's request for summary disposition and instead issued an order scheduling the matter for a hearing before an ALJ to resolve genuine issues of material fact—a step that FERC has not taken in this case. *Id.* ETP requested a rehearing on this order and a stay in the meantime, which FERC denied. *Id.* ETP then filed a petition for review of the order denying rehearing—along with the order to show cause—in this court. *Id.*

On appeal, just as Total argues now, ETP argued that Section 24 of the NGA vested exclusive jurisdiction in a federal district court to determine de novo if

ETP had violated the NGA and impose civil penalties for violations, thereby prohibiting FERC from doing so through a proceeding before an ALJ. *Id.* at 138–39. But ETP conceded that FERC was permitted to make some sort of initial recommendation on a proposed civil penalty prior to district court proceedings. *Id.* at 138. At the time we considered ETP's petition, just as now, the matter had not yet been heard by an ALJ nor had FERC issued a final order. *Id.* at 141.

We concluded in *Energy Transfer Partners* that ETP's petition for review was not ripe and accordingly dismissed it. *Id.* at 141–44, 146. We acknowledged that the NGA "is far from clear" on the question whether FERC could assess a civil penalty through a hearing before an ALJ rather than a proceeding in district court. *Id.* at 146. However, we declined to decide this question because its resolution must await "when and if [FERC] determines that the NGA has been violated and assesses a penalty." *Id.* Because FERC had made no such determination—rather, it had merely scheduled the allegations against ETP for a hearing before an ALJ—the proper construction of the NGA's requirements for civil penalty assessment was not ripe for resolution. *Id.*

C. Ripeness of Total's claims

Our decision in *Energy Transfer Partners* controls our resolution of Total's appeal and dictates that we dismiss it for lack of ripeness. Our ripeness analysis in this case fits squarely under our ripeness analysis in *Energy Transfer Partners*. Total makes an identical argument to that made by ETP— only with the addition of related constitutional arguments that are similarly predicated on uncertain future events—and the

underlying FERC proceeding against Total has made even *less* progress than that against ETP had made at the time of our decision in that case. Accordingly, as in *Energy Transfer Partners*, we must decline to address the merits of Total's arguments regarding the NGA. If and when FERC conclusively determines that Total has violated the NGA and imposes civil penalties against it, Total can raise all the arguments it now raises to challenge FERC's jurisdiction, but with the benefit of an actual, concrete controversy for this court to review rather than mere speculations about future hypothetical events.

To begin with, Total's argument relating to the district court's jurisdiction under Section 24 of the NGA is identical to that raised by ETP. We first emphasize that Total, similar to ETP, does not object to any of the actions that FERC has already taken in this matter. To the contrary, Total explicitly concedes that FERC has the authority to conduct a proceeding regarding the alleged violation and to propose a penalty *prior* to any action being brought in the district court. Indeed, in its brief on appeal, Total concedes that "[t]he NGA does not bar FERC from first holding an abbreviated in-house 'public hearing' . . . *before* proceeding to district court . . . ." (Emphasis added.) Instead, just as ETP, Total objects only to future actions that FERC *may* take, namely, conclusively adjudicating NGA violations and imposing civil penalties against Total.

We emphasize that FERC taking these future actions is only a possibility. As in *Energy Transfer Partners*, FERC has not made any conclusive determination that Total violated the NGA, nor has it assessed

a civil penalty against Total. Indeed, the FERC proceedings in this case fall short of even those in *Energy Transfer Partners* because, to date, FERC has not scheduled the matter for a hearing. Rather, FERC has simply initiated enforcement proceedings against Total by issuing an order to show cause, to which Total has responded with a 201-page answer raising a plethora of factual and legal challenges to the allegations in the order to show cause. In other words, this matter is currently stalled at Step 8 in the civil penalty assessment process outlined above. And by issuing an order to show cause, FERC does *not* make a finding that there has been a NGA violation. *See Energy Transfer Partners*, 567 F.3d at 141; *2008 Revised Policy* ¶ 37, 123 FERC at 62,014. Rather, in order to adjudicate a NGA violation and assess a corresponding civil penalty, FERC must complete steps 8 through 11 above: First, it must consider Total's answer. Second, if it is unpersuaded by the arguments in Total's answer, it must determine what type of proceeding is necessary to adjudicate the matter. Third, if it sets the matter for a hearing before the ALJ, FERC must review the ALJ's initial decision, together with any exceptions (and answers to exceptions) filed by the parties. It may also request additional briefing or oral argument. If (in FERC's judgment) only a paper hearing is required, FERC reviews the record. Fourth, FERC issues a final order regarding the violation and the penalty, taking into account the five factors outlined above. Only upon completion of this final step does FERC conclusively adjudicate a violation and impose a penalty.

Moreover, FERC can terminate a proceeding at any point during these steps without a finding of a violation. Indeed, as the *Energy Transfer Partners* court noted, other alleged violations against ETP had been heard by an ALJ and dismissed by the ALJ prior to our decision in that case. It is possible that something in Total's 201-page answer will compel FERC to drop the enforcement action. If not, it is also possible that the ALJ rules in Total's favor or, if not, that FERC rejects the ALJ's initial order. We discuss these hypotheticals not to express judgment on the merits of the allegations against Total but rather to underscore the point that, just as in *Energy Transfer Partners*, Total's arguments are limited to future actions that FERC *may* take, not actions that FERC has already taken or those that it definitely *will* take in the future. And if these various decisions are all resolved against Total and FERC issues a final order finding a NGA violation and assessing a civil penalty, Total is free to bring an action for a declaration of FERC's jurisdiction at that time.

Our holding in *Energy Transfer Partners* also proves fatal to Total's claims regarding constitutional violations. In addition to its jurisdictional argument, Total requests a declaration that FERC's administrative process for adjudicating NGA violations and assessing civil penalties violates the Appointments Clause, the Fifth Amendment's Due Process Clause, and the Seventh Amendment's guarantee of a jury trial. The Appointments Clause argument relates to the manner in which FERC appoints its ALJs, and the Fifth and Seventh Amendments arguments relate to certain procedures that FERC has established for conducting hearings. But each of these arguments is

predicated on the assumption that FERC will ultimately schedule a hearing before an ALJ and issue a final order assessing civil penalties against Total. Total does not contend that any of the actions that FERC has already taken violate these constitutional rights; it does not, for instance, claim that FERC's proceedings to date have deprived it of due process. Rather, Total claims that actions FERC could potentially take in the future may violate these rights. As we just discussed, whether FERC ultimately takes actions that Total claims would violate its constitutional rights rests on a series of contingencies and is not a certainty. Again, Total is free to bring these claims if and when FERC issues a final adverse order.

Total's arguments to the contrary are unavailing. First, Total attempts to distinguish *Energy Transfer Partners* based on the nature of the action. Total brings this challenge as a declaratory judgment action, purporting to rely on the district court's "exclusive" jurisdiction over NGA violations under Section 24 of the NGA. In contrast, *Energy Transfer Partners* was brought as a petition for review under Section 19(b) of the NGA, which affords appellate review to any party "aggrieved" by a FERC "order." 15 U.S.C. § 717r(b); *see Energy Transfer Partners*, 567 F.3d at 137, 139. According to Total, this distinction renders *Energy Transfer Partners* wholly inapplicable because, unlike a Section 19(b) petition for review, a declaratory action need not await a final agency action in order to be ripe. We disagree. It is true that, unlike in *Energy Transfer Partners*, Total is not seeking review of a FERC action under Section 19(b) but rather is seeking a declaration of its right to have the action heard in federal district court. Whether a petition for

review under Section 19(b) is ripe requires consideration of whether the party has been sufficiently "aggrieved" by FERC's action.[6] *Energy Transfer Partners*, 567 F.3d at 139; *see* 15 U.S.C. § 717r(b) (affording appellate review only to parties "aggrieved by an order issued by [FERC]"). This ripeness analysis is not identical to the analysis for declaratory judgment actions that we outlined above, which requires consideration of whether an actual controversy with sufficient immediacy and reality exists. *Compare Energy Transfer Partners*, 567 F.3d at 139–40 (outlining ripeness analysis for Section 19(b) petitions), *with Orix Credit All.*, 212 F.3d at 896 (outlining ripeness analysis for declaratory actions).

Yet this difference does not avoid the crux of *Energy Transfer Partners*' holding: A challenge to FERC's authority to impose civil penalties under the NGA is not ripe until "when and if [FERC] determines that the NGA has been violated and assesses a penalty." *Energy Transfer Partners*, 567 F.3d at 146. We do not discern, and Total does not offer, any principled

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[6] We have "distilled four factors" to consider in analyzing whether a FERC order is ripe for review under Section 19(b):

> (1) whether the issues presented are purely legal; (2) whether the challenged [FERC] action constitutes "final agency action," within the meaning of Section 10 of the Administrative Procedure Act; (3) whether the challenged [FERC] action has or will have a direct and immediate impact upon the petitioners; and (4) whether resolution of the issues will foster, rather than impede, effective enforcement and administration by [FERC].

Energy Transfer Partners, L.P., 567 F.3d at 139–40 (quoting *Pennzoil Co. v. FERC*, 645 F.2d 360, 398 (5th Cir. 1981)).

way to limit *Energy Transfer Partners*' reasoning to petitions for review under Section 19(b). To the contrary, the language of *Energy Transfer Partners* extends to any such challenge, regardless of the form in which it is brought. And, as discussed above, it is undisputed that FERC has not determined whether Total violated the NGA, nor has it imposed a penalty. Thus, under the holding of *Energy Transfer Partners*, Total's request for a declaratory judgment is not ripe.

Total counters that if it is forced to await final FERC resolution to bring its claims, it will suffer significant harm in the meantime. Total asserts that it is already being injured by the FERC proceedings and this "tangible harm" renders the dispute ripe. According to Total, it is "incurr[ing] significant expense defending against" the order to show cause. In support of this argument, Total cites caselaw for the proposition that "[t]he concrete costs of an additional proceeding is a cognizable Article III injury," (quoting *Sea–Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998)), and "the 'hardship' of being forced to defend in an 'ultra vires proceeding' is a present injury ripe for adjudication," (quoting *Stolt–Nielsen SA v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 n.2 (2010)). Total urges that it requires relief *now*, as opposed to in the future, to "spare [it] the additional unnecessary expense [it] will continue to suffer" as a result of FERC's ongoing enforcement action.

This argument is refuted by one simple fact: Total, as discussed above, concedes that FERC is authorized to conduct a proceeding regarding the alleged violation and penalty *prior* to any action being brought in the district court. This means that it is undisputed that, under either party's interpretation of the NGA,

Total would have to undergo a proceeding conducted by FERC *prior* to any district court proceeding. Therefore, Total is not being forced to undergo an "additional" proceeding nor is it being subjected to an "ultra vires" proceeding. Even under Total's proposed interpretation of the NGA, Total would be forced to undergo some burden and expense in FERC proceedings prior to any proceedings in district court.

Total nevertheless argues that if the FERC proceeding involves the possibility of a future definitive finding of a NGA violation and imposition of a penalty, as FERC argues it does, Total will be forced to expend "substantial *incremental* burden and expense" to defend itself, compared to a proceeding that can result only in a FERC order that recommends finding a violation and proposes a penalty. Total also posits that, if the FERC proceedings could not result in a binding outcome, the proceedings would be "abbreviated," thereby further reducing Total's expense. According to Total, this incremental burden and expense renders its claims ripe.

We reject this argument. Total offers only speculation to the effect that, if its interpretation of the statute prevailed, FERC would significantly "abbreviate[]" the proceedings.[7] To the contrary, the NGA affords FERC wide latitude to dictate the terms of the civil penalty process, requiring only that it involve

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[7] The likelihood of "abbreviated" proceedings in this matter is further reduced by the fact that Total filed a 201-page answer to the order to show cause, raising a plethora of legal and factual challenges to the allegations of NGA violations, which FERC must now consider and resolve. *Answer in Opposition to Order to Show Cause and Notice of Proposed Penalty, Total Gas & Power N. Am., Inc.*, No. IN12-17-000 (July 12, 2016).

"notice and opportunity for public hearing." 15 U.S.C. § 717t-1(b). And, although it may be true that Total will put more effort into defending itself in the FERC proceeding if a possible outcome is a definitive finding of liability and binding imposition of a penalty (in comparison to simply a recommendation), we rejected this same argument for ripeness made in *Energy Transfer Partners*. ETP contended that the litigation expenses of participating in the FERC proceedings weighed in favor of finding ripeness. *Energy Transfer Partners, L.P.*, 567 F.3d at 141–42. In rejecting this argument, we explained that, according to the Supreme Court, "the expense and annoyance of litigation," though "substantial[,] . . . is part of the social burden of living under government," and thus cannot constitute sufficient hardship for ripeness. *Id.* Similarly here, the fact that Total may incur some expense in participating in proceedings before FERC—even if it is more than it would be if those proceedings were reviewed de novo—does not render its declaratory action ripe.[8]

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[8] We additionally note that Total's own argument undercuts its assertion regarding the expense and burden of FERC proceedings. In another section of its brief, Total complains that FERC's proceeding will not afford it enough process. It claims that FERC interprets Section 22 to permit FERC to adjudicate a violation and impose a penalty through merely a paper hearing without the participation of an ALJ. Total further describes the FERC proceedings as "abbreviated"; indeed, a component of its argument is that Congress simply could not have intended for such a short, informal proceeding to result in the imposition of a penalty totaling in the hundreds of millions. This description of the FERC process undermines Total's claims of unduly burdensome proceedings.

In sum, Total does not object to any actions FERC has already taken. Rather, Total seeks to preemptively challenge a FERC order that may never be issued. All of Total's arguments are predicated on future events and are brought before FERC has even scheduled the matter for a hearing—let alone issued an order finding a NGA violation and imposing a civil penalty. Yet in *Energy Transfer Partners*, we held that any challenge to FERC's authority to adjudicate NGA violations and impose a civil penalty must await a final determination of a violation and imposition of a penalty by FERC. *Id.* at 146. Total's suit is thus not ripe and the district court did not err in dismissing it on justiciability grounds.

IV. CONCLUSION

Because all of Total's claims are unripe, the district court's order dismissing them is AFFIRMED.

E. GRADY JOLLY, Circuit Judge, concurring:

I concur in the result reached by the panel majority and agree that Total's claims are due to be dismissed as not yet ripe.

I write separately because of my concerns with the majority's reliance on *Energy Transfer Partners, L.P. ("ETP") v. FERC*, 567 F.3d 134 (5th Cir. 2009). I am not convinced that case necessarily controls our analysis. The difference between that case and the posture of this case is fundamentally different. There, ETP filed an interlocutory petition for appellate court review pursuant to § 19 of the NGA, 15 U.S.C. § 717r. *ETP*, 567 F.3d at 139-40. The court "analyze[d] whether this petition for review should proceed under § 19(b) of the NGA and the precedents construing and applying that statute." *Id.* at 139. The question presented by a § 19(b) petition—the question of "ripeness of agency action for judicial review"—is analyzed under the factors distilled from *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). *See ETP*, 567 F.3d at 139-140.

By contrast, the issue here arises from a declaratory judgment action. The question in this declaratory judgment action is whether there is a "case or controversy" sufficient to establish Article III jurisdiction. *See Orix Credit All.*, 212 F.3d at 896. Indeed, the panel majority properly acknowledges that *ETP* involved a distinct inquiry, *see supra* at 20 ("This ripeness analysis [in *ETP*] is not identical to the analysis for declaratory judgment actions that we outlined above."), but would nevertheless shoehorn this case into *ETP*'s holding.

Because the *ETP* court applied a different standard from the standard that must be applied to this case, I would not rely on that case so much, but would instead simply ask whether there is "a substantial controversy of sufficient immediacy and reality . . . between parties having adverse legal interests[?]" *Orix*, 212 F.3d at 896 (citations and quotations omitted).

I would respond "no" to this question and conclude that the case is not ripe for review. As the majority notes, "FERC is authorized to conduct a proceeding regarding the alleged violation and penalty prior to any action being brought in the district court." *Supra* at 21. FERC is, under the statute, given broad authority to "assess" a penalty "after notice and opportunity for public hearing." NGA § 22, 15 U.S.C. § 717t-1; *see also* NGA § 15, 15 U.S.C. § 717n. Even assuming that Total is correct in its argument that it is entitled to *de novo* review of the penalty assessment in district court, no penalty can be said to have been "assessed" until the conclusion of all FERC proceedings. *See* NGA § 22 ("The penalty shall be assessed by the Commission *after* notice and opportunity for public hearing.") (emphasis added). After the "assessment," Total may choose to either (1) challenge the finding through an NGA § 19 petition, or (2) wait for FERC to bring an action for enforcement pursuant to NGA § 24, 15 U.S.C. § 717u, and then raise its arguments that it is entitled to *de novo* adjudication in the district court now that FERC has "assessed" the "proposed" penalty.

In other words, even assuming that Total is correct on the merits of this case, it still does not have standing because the FERC proceedings up to this point are not *ultra-vires.* Total cites no authority for the proposition that subjecting a party to an arguably

inefficient though not *ultra-vires* proceeding may constitute an injury sufficient to give rise to an Article III case or controversy. *Cf. Sea–Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998); *Stolt–Nielsen SA v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 n.2 (2010).

Accordingly, I concur in the judgment reached by the majority.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

TOTAL GAS & POWER NORTH AMERICA, INC., AARON TRENT HALL, and THERESE NGUYEN TRAN, Plaintiffs, v. FEDERAL ENERGY REGULATORY COMMISSION, and CHAIRMAN NORMAN C. BAY, COMMISSIONER CHERYL A. LAFLEUR, COMMISSIONER TONY CLARK, COMMISSIONER COLETTE D. HONORABLE, and ACTING CHIEF ADMINISTRATIVE LAW JUDGE CARMEN A. CINTRON, in their official capacities, Defendants.	Civil Action No. 4:16-1250

MEMORANDUM AND ORDER

This declaratory judgment action is before the Court on the Motion to Alter or Amend Judgment or for Leave to File Second Amended Complaint ("Reconsideration Motion") [Doc. # 73] filed by Plaintiffs Total Gas & Power North America, Inc. ("Total"), Aaron Trent Hall ("Hall"), and Therese Nguyen Tran ("Tran") (collectively, "Plaintiffs"). Defendants Federal Energy Regulatory Commission ("FERC"), its Commissioners, and its Acting Chief Administrative Law Judge (collectively, "Defendants")[1] filed a Response ("Reconsideration Response") [Doc. # 76], to which Plaintiffs replied ("Reconsideration Reply") [Doc. # 77]. Plaintiffs seek reconsideration of the Court's holdings in the Memorandum and Order issued on July 15, 2016 ("Opinion") [Doc. # 68] that this controversy is not justiciable, that this Court lacks subject matter jurisdiction under the Natural Gas Act ("NGA"),[2] and that the Court, in its discretion, declines to entertain the declaratory judgment action.

After carefully considering the parties' briefing, oral argument, all matters of record, and the applicable legal authorities, the Court **denies** Plaintiffs' Reconsideration Motion.

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[1] Chairman Norman C. Bay, Commissioners Cheryl A. LaFleur, Tony Clark, and Colette D. Honorable, and Acting Chief Administrative Law Judge Carmen A. Cintron, in their official capacities.

[2] Natural Gas Act of 1938 ("NGA"), 15 U.S.C. § 717 *et seq*.

I. LEGAL STANDARD

Rule 59(e) permits a litigant to file a motion to alter or amend a judgment.[3] Reconsideration of a judgment is an "extraordinary remedy that should be used sparingly."[4] A motion for reconsideration "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment."[5] Instead, Rule 59(e) serves the narrow purpose of allowing a party to bring errors or newly discovered evidence to the Court's attention.[6] A litigant seeking relief under Rule 59(e) "must clearly establish either a manifest error of law or fact or must present newly discovered evidence."[7] A Rule 59(e) motion "cannot be used to argue a case under a new legal theory."[8] Moreover, "an unexcused fail-

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[3] FED. R. CIV. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.").

[4] *Waites v. Lee County, Miss*., 498 F. App'x 401, 404 (5th Cir. Nov. 26, 2012) (quoting *Templet v. Hydrochem, Inc*., 367 F.3d 473, 479 (5th Cir. 2004)).

[5] *In re Deepwater Horizon*, 785 F.3d 986, 992 (5th Cir. 2015) (quoting *Templet v. HydroChem Inc*., 367 F.3d 473, 479 (5th Cir. 2004)).

[6] *See In re Rodriguez*, 695 F.3d 360, 371 (5th Cir. 2012) (citing *In re Transtexas Gas Corp*., 303 F.3d 571, 581 (5th Cir. 2002)).

[7] *Balakrishnan v. Bd. of Supervisors of La. State Univ. & Agr. & Mech. Coll*., 452 F. App'x 495, 499 (5th Cir. 2011) (citing *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005) (quotation marks and citation omitted)).

[8] *Id*. (citing *Ross*, 426 F.3d at 763).

ure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration."[9]

II. ANALYSIS

The Court assumes familiarity with the Opinion issued in this case on July 15, 2016, which explains the relevant facts and terminology. The Court first examines Plaintiffs' arguments in favor of altering or amending the Opinion. The Court concludes that these arguments lack merit. The Court then evaluates Plaintiffs' request to file a second amended complaint and holds that the proposed amendment would be futile.

Preliminarily, the Court rejects Plaintiffs' objection that the Court relied on arguments not asserted by Defendants. The Court is bound to scrutinize its subject matter jurisdiction, even if the issue must be raised *sua sponte*.[10] Plaintiffs bear the burden of establishing subject matter jurisdiction.[11] Plaintiffs

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[9] *Templet*, 367 F.3d at 479 (citing *Russ v. Int'l Paper Co*., 943 F.2d 589, 593 (5th Cir. 1991)); *see also Tate v. Starks*, 444 F. App'x 720, 729 (5th Cir. 2011).

[10] *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230–31 (1990) ("Although neither side raises the issue here, we are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction . . . ." (citations omitted)).

[11] *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 487 (5th Cir. 2014); *Gilbert v. Donahoe*, 751 F.3d 303, 307 (5th Cir. 2014).

have failed to do so. Further, Plaintiffs' additional arguments raised in their Reconsideration Motion are unavailing. As explained below, Plaintiffs have not met their burden under Rule 59(e) to demonstrate that the Court committed a "manifest error of law" in the Opinion.

A. Justiciability

1. The Court Did Not Misapply *Calderon v. Ashmus*

Plaintiffs argue that if the Court renders declaratory judgment in their favor on interpretation of NGA § 24,[12] the "exclusive jurisdiction" provision, then the "entire controversy" will be resolved in this Court.[13] Plaintiffs contend that *Calderon v. Ashmus* does not bar this suit.[14] The Court is unpersuaded. Plaintiffs' Amended Complaint[15] raises only jurisdictional and procedural issues regarding FERC's determination of claims of NGA violations by Plaintiffs Total, Hall, and Nguyen. Plaintiffs seek a ruling on *where* and *how* the merits will be litigated, but not on the merits themselves.[16] Under *Calderon*, these issues are not the

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[12] 15 U.S.C. § 717u.

[13] Recon. Reply [Doc. # 77], at 3.

[14] 523 U.S. 740 (1998).

[15] The Court addresses separately the Second Amended Complaint that Plaintiffs contend will cure the jurisdictional defect under *Calderon*. *See infra* Section II.D.

[16] *See* Amended Complaint [Doc. # 25], at 2, ¶ 3 ("This lawsuit is brought to prevent FERC from violating Plaintiffs' constitutional and statutory rights to a fair hearing *when* they defend themselves against FERC's allegations. Plaintiffs do not seek to

proper subject of a declaratory judgment because they merely "govern[] certain aspects of . . . pending or future suits."[17]

The *Calderon* defect in Plaintiffs' claims further underscores the Court's previous conclusion that

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stop FERC from conducting an investigation or otherwise exercising its lawful authority." (emphasis added)). The Court addresses Plaintiffs' proposed Second Amended Complaint in Section II.D, *infra*.

[17] 523 U.S. at 747. The Fifth Circuit's ruling in *In re El Paso Refinery, LP*, 302 F.3d 343, 349 n.4 (5th Cir. 2002), is inapposite. In that case, the court rendered declaratory judgment on the meaning of a contract relevant to the parties' dispute. The appellants raised an "entire controversy" argument with regard to the court's *exercise of discretion* to entertain the declaratory judgment action. *Id.* ("Texaco argues that the bankruptcy court *abused its discretion* in not dismissing RHC's declaratory action, because this case will not resolve the entire controversy between the parties." (emphasis added)). The Fifth Circuit neither addressed whether the limited scope of the declaratory relief created a *jurisdictional* issue, nor cited *Calderon*. Instead, the Fifth Circuit cited a section of a treatise relating to the discretion of a court to hear a declaratory judgment action. *See id.* (citing CHARLES WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. § 2759 (3d ed. 1998)). The Court notes that the current edition of this section also does not cite *Calderon*. *See* THE LATE CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. § 2759 (4th ed. 2016); *see also id.*, n.6 (citing *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383 (5th Cir. 2003), for the proposition that "[t]he Declaratory Judgment Act confers discretion on the courts rather than an absolute right on a litigant"). *In re El Paso Refinery* therefore is not probative regarding the application of *Calderon* to this case.

Plaintiffs' requested declaratory judgment is a request for an advisory opinion.[18] FERC has not initiated a federal court proceeding against Plaintiffs on the merits of the charges of NGA violations or for enforcement of a civil penalty order. Nor does Plaintiffs' requested judgment immediately obligate FERC to litigate in this Court.[19] Plaintiffs' claims merely seek rulings on whether this Court would have exclusive jurisdiction at a later point in the civil penalty dispute and on challenges to anticipated administrative procedures. These rulings would, at best, result in a free-standing final judgment on jurisdiction or anticipatory rulings on constitutional and statutory questions.[20] Such rulings would be incompatible with the classification of jurisdictional and procedural questions as interlocutory issues. *Calderon* prevents this result by restricting use of the Declaratory Judgment Act to issues that resolve a full controversy.

2. Plaintiffs' Claims Are Not Ripe

Plaintiffs argue that the Amended Complaint's request for a declaration on the meaning of NGA § 24 is ripe because the challenged administrative proceeding is underway.[21] The Court held that the claim regarding NGA § 24 was not ripe because the relief

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[18] *See* Opinion [Doc. # 68], at 20–21.

[19] The Court applies its jurisdictional analysis to the proposed Second Amended Complaint below. *See infra* Section II.D.

[20] *See* 28 U.S.C. § 2201 ("Any such declaration shall have the force and effect of a *final judgment* or decree and shall be reviewable as such." (emphasis added)).

[21] Plaintiffs do not seek reconsideration of the Court's conclusions that their constitutional and Administrative Procedure Act

Plaintiffs request is largely anticipatory, and success in this suit would not legally require FERC to alter its administrative procedures.[22] Plaintiffs explain they are incurring significant litigation expenses. Plaintiffs contend a declaratory judgment adopting their interpretation of NGA § 24 would encourage FERC to shorten the administrative proceeding and would assist Plaintiffs in formulating responses in that proceeding.[23] Even crediting this argument, Fifth Circuit precedent is clear that a court does not have jurisdiction merely to render a declaratory judgment in order to simplify or avoid future litigation.[24]

("APA") claims are speculative and contingent upon acts Defendants have not taken. *See* Opinion [Doc. # 68], at 21–22.

[22] *See* Opinion [Doc. # 68], at 20–21 ("Plaintiffs concede there is no legal basis for this Court to require FERC to alter these intervening procedures *even if* FERC must eventually prosecute its case *de novo* in a district court. Plaintiffs fundamentally seek an advisory opinion on the validity of an order the Commission has not yet issued and may never issue." (footnotes omitted)).

[23] *See* Recon. Motion [Doc. # 73], at 8–10.

[24] For example, in *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662 (5th Cir. 1967), the Fifth Circuit considered and categorically rejected similar arguments regarding a preemptive declaratory judgment. In that case, the plaintiff in district court was aware that its antitrust lawsuit against defendants might give rise to a subsequent suit for malicious prosecution. Along with its direct claims, the plaintiff requested a declaration that it had probable cause to file the suit. *Id.*, at 665. The Fifth Circuit held that the district court was without jurisdiction because "[n]o cause of action for malicious prosecution comes into existence until the termination of the particular judicial proceeding which is the gravamen of the malicious prosecution action." *Id.* The Fifth Circuit therefore rejected the argument that jurisdiction existed for a declaratory judgement on the probable cause question even

Fundamentally, Plaintiffs seek an advance ruling on a jurisdictional defense and other procedural matters that, in their view, will bolster their position in the agency proceedings.[25] This Court does not have jurisdiction to decide issues for that purpose.

B. Jurisdiction

Plaintiffs continue to ignore the applicability of the *Thunder Basin*[26] framework. As the Supreme Court reaffirmed in *Elgin*,[27] the Court's task is merely to determine whether there is a "fairly discernible intent" to assign jurisdiction to the agency by examining the statute's text, structure, and purpose.[28] To avoid their burden of establishing subject matter jurisdiction under the NGA, Plaintiffs posit that NGA § 24

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though "if it be decided that probable cause existed, the long and complex litigation would come to an end and this Court would be relieved of the burden of considering the other phases of the appeal." *Id.*, at 666. This result is consistent with the *Calderon* court's disapproval of using the Declaratory Judgment Act to resolve procedural issues to inform future litigation. *See* 523 U.S. at 748 ("Any risk associated with resolving the question in habeas, rather than a pre-emptive suit, is no different from risks associated with choices commonly faced by litigants.").

[25] *See, e.g.*, Recon. Motion [Doc. # 73], at 9 ("Plaintiffs' current and future responses to the current proceeding are dictated by the fact that FERC purports to be the judge of its own allegations."); *id.* ("[T]here is a world of difference to Plaintiffs between a hearing merely to 'investigate' facts . . ., on one hand, and authority both to prosecute *and* adjudicate those violations in-house.").

[26] *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

[27] *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2132–33 (2012); *see also Free Enter. Fund v. PCAOB*, 561 U.S. 477, 489 (2010).

[28] *See* Opinion [Doc. # 68], at 23–26.

creates district court jurisdiction over proceedings imposing civil penalties under the NGA and then argue the burden falls on Defendants to show a repeal of that provision. On reconsideration, Plaintiffs again fail to establish their starting premise because they rely on conclusory assertions regarding the NGA that lack basis in precedent and historical practice.

1. Statutes with Comparable Jurisdictional Provisions

Plaintiffs object to the Court's reliance on the absence of precedent supporting their interpretation of NGA § 24 because, according to Plaintiffs, there have been "few opportunities for courts to address the question presented here."[29] This argument is unavailing. Plaintiffs overlook the existing precedent regarding this genre of jurisdictional provisions, which precedent explains that these provisions had a purpose different from that urged by Plaintiffs. As explained in the Court's Opinion, these statutes govern the relationship between federal and state courts.[30]

Plaintiffs rely heavily on the presence in the Securities Exchange Act of 1934 of both an "exclusive jurisdiction" provision, § 27(a),[31] and a provision authorizing imposition of civil penalties in administrative proceedings, § 21B.[32] Plaintiffs cite no authority that expresses the view that Exchange Act § 21B makes an

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[29] Recon. Motion [Doc. # 73], at 11.

[30] *See* Opinion [Doc. # 68], at 28–29 n.94.

[31] 15 U.S.C. § 78aa(a).

[32] 15 U.S.C. § 78u-2.

exception to the district courts' "exclusive jurisdiction" under § 27 and the Court has found none.[33] As exemplified by *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*,[34] the case law interpreting Exchange Act § 27 addresses the relationship between state and federal courts.[35] The Second Circuit's decision in *Touche Ross & Co. v. SEC*,[36] cited by Plaintiffs, is not to the contrary. The Second Circuit merely rejected an argument based on the Exchange Act § 27 as irrelevant and its observations regarding district court jurisdiction are *dicta*.[37] Even read broadly, *Touche Ross* is not

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[33] *See* Recon. Motion [Doc. # 73], at 11–13.

[34] 578 U.S. __, 136 S. Ct. 1562, 1573 (2016).

[35] *See, e.g.*, *NASDAQ OMX Grp., Inc. v. UBS Sec., LLC*, 770 F.3d 1010, 1030 (2d Cir. 2014) ("Far from threatening the federal-state balance envisioned by Congress in this area, the exercise of federal jurisdiction here comports with Congress's expressed preference for alleged violations of the Exchange Act, and of rules and regulations promulgated thereunder, to be litigated in a federal forum. *See* 15 U.S.C. § 78aa(a) (providing federal courts with 'exclusive jurisdiction of violations of [Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [Exchange Act] or the rules and regulations thereunder')."); *Piambino v. Bailey*, 610 F.3d 1306 (5th Cir. 1980) ("The state and federal courts have concurrent jurisdiction to decide cases arising under the Securities Act of 1933, and no case originally brought in a state court of competent jurisdiction under that Act may be removed to a federal court. 15 U.S.C. § 77v. Under the Securities Exchange Act of 1934, the federal district courts have exclusive jurisdiction to decide cases arising under that act. 15 U.S.C. § 78aa.").

[36] 570 F.2d 609 (2d Cir. 1979).

[37] *Id.*, at 579–80 (upholding challenged rule based on broad authority of the Securities and Exchange Commission ("SEC") to

probative of whether "exclusive jurisdiction of violations" applies to agency efforts to address violations through means other than injunctive relief.[38] Tellingly, Plaintiffs do not rely on *Touche Ross* directly, but rather on descriptions of the decision in individual opinions issued in a highly divided decision by the D.C. Circuit.[39] The Exchange Act provides insufficient support for the broad reading of NGA § 24 Plaintiffs advance in this action.

2. History of the NGA

Plaintiffs state, "before 2005, FERC complied with the . . . criminal penalty, injunctive relief, and exclusive jurisdiction provisions of the NGA (§§ 20, [21], and 24) by ceding jurisdiction over penalties for violations to federal district courts."[40] Plaintiffs cite no pre-2005 district court cases under the NGA where FERC

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adopt rules and regulations necessary for carrying out the agency's designated functions).

[38] Decided in 1979, *Touche Ross* predates the enactment of the civil penalty provisions in the Exchange Act by over a decade.[38] Therefore, the *Touche Ross* court only contrasted the challenged SEC rule, which concerned professional conduct in SEC proceedings, with district courts' jurisdiction over actions "to enjoin what the Commission believes to be violations" of the Securities Act of 1933 and the Exchange Act of 1934. *Id.*, at 579. The Exchange Act's express allocation to district courts of authority to issue *injunctive relief* is consistent with NGA §§ 20(a) and 24 because NGA § 24 and Exchange Act § 27 both expressly refer to actions for injunctive relief.

[39] *See* Recon. Motion [Doc. # 73], at 12 (citing *Checkosky v. SEC*, 23 F.3d 452, 456 (D.C. Cir. 1994) (Opinion of Silberman, J.) (citing 1988 version of Exchange Act); *id.*, at 493 (Opinion of Reynolds, D.J.)).

[40] Recon. Motion [Doc. # 73], at 13.

(or its predecessor, the Federal Power Commission ("FPC")) sought "penalties for violations," and the Court is unaware of any. This dearth of examples likely is because the Commission did not have authority to seek civil penalties under the NGA prior to 2005.[41]

In contrast, the NGA specifically delineates district court jurisdiction over actions for injunctive relief and criminal prosecutions.[42] There is no similarly specific statement regarding jurisdiction over civil penalties. Further, the Commission has a longstanding practice of finding and remedying violations of the NGA through administrative proceedings.

Plaintiffs' attempts to distinguish the Commission's historical practice of finding violations of pre-2005 provisions of the NGA are unavailing. In support of their interpretation of NGA § 22 (the provision added to the NGA in 2005 by the EPAct[43] authorizing

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[41] *See* Opinion [Doc. # 68], at 33 (discussing *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249 (5th Cir. 1986)). FERC has never argued that NGA § 22, 15 U.S.C. § 717t-1, altered the allocation of jurisdiction over injunctive relief and criminal prosecutions under NGA §§ 20 and 21, respectively. Historical practice under the FPA and the NGPA is not dispositive because those statutes contain materially different civil penalty provisions enacted decades apart from the NGA civil penalty provision.

[42] *See* Opinion [Doc. # 68], at 31 n.102 (explaining that "district court involvement under the pre-2005 NGA was narrowly tailored").

[43] Energy Policy Act of 2005 ("EPAct"), Pub. L. No. 109-58, 119 Stat. 594, 685–93, §§ 311–318.

civil penalties[44]) and § 24, Plaintiffs argued that, historically, only district courts had the power to find violations and therefore the Commission lacks jurisdiction to make the predicate finding of a violation necessary to assess a civil penalty under NGA § 22. In disagreeing, the Court found instructive Fifth Circuit cases affirming Commission findings of violations of the NGA provisions governing ratemaking (NGA § 4), abandonment (NGA § 7(b)), and certification of certain activities (NGA § 7(c)).[45] To distinguish these Fifth Circuit cases, Plaintiffs assert that "[i]t would make no sense for parties to challenge FERC's authority to adjudicate a statutory violation in situations where proof of such a violation is neither necessary nor sufficient to the lawfulness of FERC's adjudication."[46] As explained below, this contention ignores the fact that the Commission in these cases was not merely reviewing proposed new rates, determining whether to approve abandonment, or issuing a certificate of public convenience. In each instance, the Commission acted expressly to remedy retrospectively violations of NGA provisions and FERC's procedures governing those issues. The Court therefore determined that there was a "fairly discernible intent" to expand the Commission's "toolbox" by adding authority to assess civil penalties. The Court declines to reconsider its interpretation of those cases for the following reasons.

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[44] 15 U.S.C. § 717t-1, enacted by EPAct, § 314(b)(1)(B), 119 Stat. at 691.

[45] *See* Opinion [Doc. # 68], at 32–33 & nn. 103–05.

[46] Recon. Motion [Doc. # 73], at 16.

Ratemaking.— Plaintiffs contend that the Commission has broad authority to order refund payments under the portion of NGA § 4(e). Plaintiffs quote language authorizing the Commission "to hold 'a hearing concerning the lawfulness of' any 'rate' charged by the company and '*to order such natural-gas company to refund*, with interest, the portion of' the 'increased rates or charges *by its decision* found not justified.'"[47] Nothing in NGA § 4, including § 4(e) explicitly grants the Commission jurisdiction to find the existence of a violation of the NGA.

In *Transcontinental Gas Pipe Line v. FERC*, the Fifth Circuit determined that the Commission had acted within its "equitable powers."[48] The Commission denied a natural gas company an opportunity to recoup certain losses the company had incurred *because* the company had *violated* the NGA. The Fifth Circuit held the denial was an appropriate remedy based on the Commission's findings that the company had vio-

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[47] Reconsideration Motion [Doc. # 68], at 14 (quoting NGA § 4(e), 15 U.S.C. § 717c(e)) (emphasis added by Plaintiffs)). Plaintiffs take the quoted language out of context. NGA § 4(e) authorizes the Commission to hold a hearing "concerning the lawfulness" of a "new schedule" of rates. By statute, however, the Commission may only suspend the new schedule for five months. The language on which Plaintiffs rely concerns *only* implementation of such a new schedule if the Commission has not concluded the hearing at the end of five months. The Commission exercised this authority in *Transcontinental Gas Pipe Line* only to the extent the natural gas company had already sought to recoup its losses via implementation of the pass-through while the hearing was pending. *See* 998 F.2d at 1317.

[48] 998 F.2d 1313, 1320 (5th Cir. 1993).

lated NGA §§ 4(b), 4(d), and 7. Under Plaintiffs' interpretation of NGA § 24, the language of NGA § 4 would not be sufficient to create an exception to the "exclusive jurisdiction" provision in NGA § 24. Applying Plaintiffs' interpretation, the Commission should have had to resort to a district court for an adjudication of the underlying violations before it could base a remedy on them. *Transcontinental Gas Pipe Line* is therefore evidence that NGA § 24 has not been interpreted as broadly as Plaintiffs contend.

Abandonment.— Plaintiffs argue that the Commission order affirmed in *Mesa Petroleum v. FPC*[49] is distinguishable because it was based on the Commission's "adjudicatory jurisdiction" over abandonment of natural gas facilities. NGA § 7(b) only explicitly authorizes the Commission to grant "permission and approval . . . after a due hearing." NGA § 7(b) only expressly references findings regarding the depletion of natural gas "to the extent that the continuance of service is unwarranted" and regarding whether "present or future public convenience or necessity permit such abandonment." Nothing in NGA § 7(b) explicitly authorizes the Commission to find that a "violation" occurred. Under Plaintiffs' view of "exclusive jurisdiction" under NGA § 24, therefore, the language of NGA § 7(b) would not support a "carve out" for the issue of whether the abandonment prior to the institution of an NGA § 7(b) proceeding violates the NGA and warrants retroactive relief. Nevertheless, the Fifth Cir-

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[49] 441 F.2d 182 (5th Cir. 1971)

cuit has affirmed Commission orders imposing remedies for that violation in *Mesa Petroleum* and *Coastal Oil & Gas*.[50]

Certification.— Plaintiffs argue that NGA § 7(c) provides authority to adjudicate because it "authorizes FERC to hold a hearing to grant or deny natural gas companies certificates to engage in certain activities related to the sale of natural gas."[51] Plaintiffs rely on the Commission's power under NGA § 7(e) "to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." Nowhere, however, do NGA § 7(c) or § 7(e) explicitly state that the Commission has jurisdiction to remedy violations of the terms of the certificate. Such a violation appears to be within

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[50] In *Mesa Petroleum*, the natural gas company abandoned sale of natural gas under certain contracts *prior* to filing an application with the Commission under NGA § 7(b). *See* 441 F.2d at 184. The Commission ultimately found the abandonment improper and imposed a refund order dating back to the date of the abandonment. The Fifth Circuit affirmed the refund order primarily relying on the Commission's broad remedial authority under NGA § 16. The Commission also noted that NGA § 7(b) had been interpreted to imply certain remedial authority. Similarly, in *Coastal Oil & Gas Corp. v. FERC*, the Commission affirmed an ALJ's finding "that Coastal had violated § 7(b) of the Natural Gas Act by selling the gas intrastate without first obtaining authorization from FERC to abandon interstate service." 782 F.2d 1249, 1251 (5th Cir. 1986). The Fifth Circuit explained that the Commission had authority to impose equitable remedies to rectify the violation.

[51] Recon. Motion [Doc. # 73], at 15.

Plaintiffs' interpretation of NGA § 24's term "exclusive jurisdiction of violations of this chapter, or the rules, regulations, and *orders* thereunder." In *Cox v. FERC*,[52] however, the Fifth Circuit affirmed the Commission's finding that certain parties had "sold uncertificated 20% gas in interstate commerce in violation of the Natural Gas Act" and remedy of "return[ing] diverted gas in kind to the interstate market." Plaintiffs maintain that the Commission was acting within its certification authority when it reopened a certification hearing to impose this remedy. Plaintiffs fail to explain how, if their expansive interpretation of NGA § 24 is correct, remedying a violation or compelling compliance with NGA § 7(c) or the terms of a certificate issued thereunder is within the Commission's jurisdiction.

Conclusion on Historical Practice.— In sum, Congress did not expressly create an exception to NGA § 24's "exclusive jurisdiction" language in NGA §§ 4 and 7. Nevertheless, the Fifth Circuit repeatedly has affirmed Commission findings that natural gas companies "violated" the NGA. The Court of Appeals has approved equitable remedies to rectify those violations. There is no indication that the courts perceived NGA § 24 to have any bearing on the scope of the Commission's authority to find these violations. The Commission's historical practice and the Courts of Appeals' endorsement directly contradicts Plaintiffs' argument that NGA § 24 requires Congress explicitly to grant authority to the Commission to determine the existence of "violations" of the NGA.

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[52] 581 F.2d 449 (5th Cir. 1978).

Additionally, Plaintiffs' interpretation of NGA § 24 would create an inefficient procedure for remedying violations of NGA §§ 4 and 7. It is clear that the Commission may now assess civil penalties for violations of these sections of the NGA. Even though the Commission has established authority to determine the existence of violations of these provisions and to impose appropriate equitable remedies, Plaintiffs request that this Court hold that the Commission would be required to institute a separate proceeding in district court to assess civil penalties for the same violations. It is unlikely that Congress intended such a counterintuitive outcome. Rather, it is "fairly discernible" that NGA § 22 should be read as an expansion of the Commission's remedial authority within the administrative process. The text, structure, and purpose of the NGA, read as a whole, demonstrate a "fairly discernible intent" to enhance, not avoid, the administrative process.

3. Other Arguments Regarding Text, Structure, and Purpose of the NGA

Plaintiffs object to certain portions of the Court's interpretation of the text, structure, and purpose of the NGA.[53] The Court finds these objections unpersuasive.

Lack of Express Authority to Adjudicate.— Plaintiffs contend that the Court's comparison of NGA § 22 to Federal Deposit Insurance Act ("FDIA") § 8(*i*)[54]

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[53] Plaintiffs do not move for reconsideration of the Court's application of the *Thunder Basin* factors to their constitutional and APA claims.

[54] 12 U.S.C. § 1818(*i*).

was error because the FDIA does not contain an "exclusive jurisdiction" provision. This argument misconstrues the purpose of the comparison to the FDIA's civil penalty provision. A fundamental premise of Plaintiffs' interpretation of the NGA is that the phrase in NGA § 22 that "[t]he penalty shall be assessed by the Commission after notice and opportunity for public hearing" does not grant the Commission jurisdiction to determine whether the respondent violated the NGA. Plaintiffs claim the dispute at bar presents the question:

> whether Congress, when it newly provided for 'civil' penalties without specifying the forum for adjudication after the agency has assessed a proposed penalty under NGA § 22, intended to repeal NGA § 24's categorical command of exclusive federal court jurisdiction of NGA violations.[55]

Although a finding of a violation is a predicate to imposition of a penalty under FDIA § 8(*i*), that provision, like NGA § 22, simply states that the penalty will be "assessed" by the agency.[56] In the FDIA, authority to "assess" includes jurisdiction to "adjudicate."[57] Plaintiffs' suggest that the Court must determine "the forum for adjudication after the agency has assessed a proposed penalty under NGA § 22."[58] As in the FDIA,

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[55] Recon. Reply [Doc. # 77], at 6–7.

[56] FDIA § 8(*i*)(2)(A), 12 U.S.C. § 1818(*i*)(2)(A).

[57] *See* Opinion [Doc. # 68], at 34 n.109.

[58] Recon. Reply [Doc. # 77], at 6.

there is no indication in the NGA that the forum for adjudication is anything other than the forum in which the penalty is assessed. Plaintiffs have presented no authority supporting a narrower interpretation of the term "assess."[59]

NGA §§ 14 and 16.— Plaintiffs characterize the Court's analysis of NGA §§ 14[60] and 16[61] as a holding that "FERC's authority to 'administer the entire process for assessment of civil penalties' could be inferred from its general investigatory and regulatory authority under NGA §§ 14 and 16."[62] This improperly oversimplifies the Court's ruling. Instead, these provisions show that the NGA contained a framework for administrative investigation, determination, and remediation of violations. The Court found a "fairly discernible intent" to *add* the civil penalty process to an existing administrative structure by granting the Commission authority to "assess" penalties for violations of the statute the Commission has administered broadly for decades since its enactment.[63] There is no basis to alter this conclusion.

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[59] *See* Opinion [Doc. # 68], at 34 n.109.

[60] 15 U.S.C. § 717m (authorizing FERC to undertake investigations "in order to *determine* whether any person *has violated* or is about to violate any provisions of this chapter" (emphasis added)).

[61] 15 U.S.C. § 717*o* ("The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of [the NGA].").

[62] Recon. Motion [Doc. # 73], at 19.

[63] *See* Opinion [Doc. # 68], at 35–36.

Relevance of the Addition of NGA § 20(d).— Plaintiffs contest the Court's reasoning that the addition of NGA § 20(d)[64] through the EPAct is evidence that Congress was aware of the district court's jurisdiction but chose not to invoke it for NGA § 22. Plaintiffs maintain that NGA § 20(d) "used the existing framework to expand the district courts' injunctive authority," but "there was no existing NGA civil penalty framework into which Congress might incorporate the civil penalty portion of the 2005 amendments."[65] This argument ignores the structure of comparable provisions in the Exchange Act.[66]

When Congress created district court jurisdiction to impose civil penalties for violations of the Exchange Act, it did so by amending Exchange Act § 21(d),[67] which is functionally identical to NGA § 20. Both Exchange Act § 21(d) and NGA § 20 authorize injunctive relief to enjoin acts and practices that constitute violations of the Act[68] and to prohibit certain persons

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[64] 15 U.S.C. § 717s(d) ("In any proceedings under subsection (a) of this section [§ 717s(a)], the court may prohibit . . . any individual who is engaged or has engaged in practices constituting a violation of section 717c-1 . . . from— (1) acting as an officer . . . of a natural gas company . . . ."); *see* Opinion [Doc. # 68], at 35 & n.111.

[65] Recon. Motion [Doc. # 73], at 20.

[66] 15 U.S.C. § 78u(d).

[67] *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, §§ 201–202, 104 Stat. 931, 936–38.

[68] *Compare* Exchange Act § 20(d)(1), 15 U.S.C. § 78u(d)(1) ("Whenever it shall appear to the Commission [SEC] that any person is engaged or about to engage in any acts or practices

from serving as officers and directors.[69] Had Congress intended to assign the NGA civil penalty process to the district courts as in the Exchange Act, Congress could have done so by amending NGA § 20. Contrary to Plaintiffs' assertion, NGA § 20 provided an "existing framework" for district court jurisdiction, and Congress could have added NGA civil penalties within

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which constitute or will constitute a violation of the [Exchange Act]" the Commission may bring an action in "the proper district court of the United States . . . to enjoin such acts . . . ."), *with* NGA § 20, 15 U.S.C. § 717s(a) ("Whenever it shall appear to the Commission [FERC] that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the [NGA]" the Commission may bring an action in "the proper district court of the United States . . . to enjoin such acts . . . .").

[69] *Compare* Exchange Act § 21(d)(2), 15 U.S.C. § 78u(d)(2) ("In any proceeding under paragraph (1) of this subsection [§ 78u(d)(1)], the court may prohibit . . . any person who violated section 78j(b) . . . from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78l of this title or that is required to file reports pursuant to section 78o(d) of this title . . . ."), *with* NGA § 20(d), 15 U.S.C. § 717s(d) ("In any proceedings under subsection (a) of this section [§ 717s(a)], the court may prohibit . . . any individual who is engaged or has engaged in practices constituting a violation of section 717c-1 . . . from— (1) acting as an officer . . . of a natural gas company . . . ."). The similarity between the Exchange Act and the NGA in this regard is evidenced by the connection of NGA § 4A, 15 U.S.C. § 717c-1, to Exchange Act 10(b), 15 U.S.C. § 78j(b). *See* 15 U.S.C. § 717c-1 ("It shall be unlawful for any entity . . . to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in *section 78j(b) of this title* [15 U.S.C. § 78j(b)] . . . ." (emphasis added)).

that structure, parallel to the addition of civil penalties provisions to the Exchange Act. Congress, however, did *not* do so. For NGA civil penalties, Congress created a stand-alone provision. The similarity between NGA § 20(d) and Exchange Act § 21(d)(2) and the *dis*similarity between NGA § 22 and Exchange Act § 21(d)(3) are strong evidence that, in 2005, Congress did not intend NGA § 22 civil penalties to be added to district courts' jurisdiction.

Venue.— Plaintiffs argue that it was unnecessary for Congress to identify permissible venues for civil penalty actions because "NGA § 24 *already* specifies venue for enforcement actions." Plaintiffs apparently refer to NGA § 24's sentence on venue for actions to "enforce any liability or duty created" by the NGA, as the other § 24 venue provision pertains specifically to criminal prosecutions.[70] The Exchange Act is again informative. If a defendant fails to pay a civil penalty that has been determined by a district court in an action by the SEC, the SEC may refer the matter to the Attorney General, who may bring a separate suit to enforce the court's order.[71] This suit to collect is considered an action "to enforce a liability or duty" for purposes of Exchange Act § 27's jurisdiction and

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[70] *See* Opinion [Doc. # 68], at 36 & n.114.

[71] Exchange Act § 21(d)(3)(C)(ii), 15 U.S.C. § 78u(d)(3)(C)(ii) ("If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.").

venue provisions.[72] This is consistent with the Court's holding that an "enforcement action" under the NGA would be to collect a civil penalty previously assessed by the Commission in a final order, not the adjudication of the amount of the penalty itself. There is no venue provision in the NGA to govern the latter, which is the type of civil penalty proceeding Plaintiffs argue Congress intended to create.[73]

Type of Proceeding.— Plaintiffs contend that the Court erred in relying on the absence in the NGA of any description of the district court proceeding that would occur under Plaintiffs' interpretation of NGA § 24. Plaintiffs suggest that civil penalties under the NGA would be imposed using procedures analogous to those specified by the FPA. The FPA contains detailed provisions creating two alternative tracks for assessment and collection of civil penalties. None of these procedures are described in the NGA. The Court previously considered and rejected the argument that it should imply the FPA procedures into the NGA.[74] Nor

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[72] 15 U.S.C. § 78u(d)(3)(C)(iv) ("For purposes of section 78aa of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this chapter.").

[73] *See* Opinion [Doc. # 68], at 37 ("Defendants have argued persuasively that, after issuance of a final penalty order, FERC may seek judicial enforcement in the district courts through an action 'brought to enforce' a 'liability' under the NGA, but no liability can exist until after a violation has been found by the Commission." (footnote omitted)).

[74] *See* Opinion [Doc. # 68], at 38–39 n.119. Plaintiffs argue in a footnote that "it would be remarkable if Plaintiffs could be found liable for the hefty penalties authorized by NGA § 22 if their only opportunity to litigate the facts was a hearing at which FERC

does the FPA support Plaintiffs' contention that the default forum under the NGA is the district courts.[75]

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proposes its penalty." Recon. Motion [Doc. # 73], at 22 n.5. Plaintiffs do not, however, contend that the administrative procedures offer insufficient process as a constitutional matter. Plaintiffs' argument here appears unrelated to their constitutional claims, nor has it been independently invoked in support of the constitutional avoidance argument. To the extent that Plaintiffs argue that "Congress would have at least directed a hearing 'on the record' under NGA § 22 if it meant to carve out an exception to NGA § 24's grant of exclusive jurisdiction to federal district courts," the Court notes that this silence equally could be read as indication that Congress did not understand NGA § 22 to be related to NGA § 24 at all. Indeed, NGA § 16(e) requires the Commission to keep "appropriate records" of any hearing before the Commission.

[75] Plaintiffs continue to mischaracterize the structure of the civil penalties provision of the Federal Power Act ("FPA"). *See, e.g.*, Recon. Reply [Doc. # 77], at 7, 11. Under the FPA, the default procedure for assessment of civil penalties is through the administrative process. A respondent must expressly *opt out* of that procedure in favor of a proceeding in a district court. *See* 16 U.S.C. § 823b(d)(2) ("In the case of the violation of a final order issued under subsection (a) of this section, or *unless* an election is made within 30 calendar days after receipt of notice under paragraph (1) to have paragraph (3) apply with respect to such penalty, the Commission shall assess the penalty . . . ."). Further, unlike Plaintiffs' interpretation of NGA §§ 22 and 24, the FPA does *not* authorize *two* hearings regarding the same violation. The absence in the NGA of the choice between the default of an administrative proceeding and the alternative of a district court proceeding is not evidence that Congress intended to assign the NGA civil penalty process exclusively to the district courts. If anything, the NGA's structure implies the inverse: that Congress decided not to permit respondents to opt out of the administrative process under the NGA.

Purpose.— Plaintiffs contend that the purposes of the EPAct "make[] it all the more implausible that Congress would sharply deviate from decades of law and practice governing FERC enforcement actions without so much as a discussion of the change."[76] Plaintiffs again rely on their faulty premise of "historical practice." There is no evidence of the "decades of law and practice" they reference.[77]

Constitutional Avoidance.— Plaintiffs argue that the Court should favor their interpretation of NGA § 24 because it avoids the constitutional issues that form the basis of their claims for declaratory relief under the Appointments Clause and the Fifth and Seventh Amendments.[78] Plaintiffs continue to rely on speculative assertions about the alleged lack of fairness of the FERC proceedings and Plaintiffs' request for a jury trial. Tellingly, Plaintiffs do not here address the Court's conclusion that these claims were unripe.[79]

Application of the canon of constitutional avoidance is premature. Typically, the canon comes into play when constitutional issues arise that are *currently* justiciable. Plaintiffs' constitutional claims may be addressed *if* the procedural violations Plaintiffs anticipate occur in the FERC proceeding and *if* Plaintiffs are unsuccessful on the merits.

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[76] Recon. Motion [Doc. # 73], at 22.

[77] *See supra* notes 40–42 and accompanying text.

[78] Recon. Motion [Doc. # 73], at 17.

[79] *See* Opinion [Doc. # 68], at 21–22.

Further, Plaintiffs' identification of *potential* defects in certain aspects of FERC's procedures is not a reason to interpret NGA §§ 22 and 24 to eliminate the agency's jurisdiction entirely. Plaintiffs do not argue that the purported Appointments Clause and Fifth Amendment defects arise directly out of the grant of FERC jurisdiction; rather, they complain of specific procedures the Commission has implemented in the exercise of that jurisdiction. Similarly, as explained in the Opinion, even Plaintiffs' interpretation of NGA § 24 does not guarantee them a jury trial.[80] NGA § 24 is not the source of the purported constitutional infirmities. The dramatic restructuring of the civil penalty process Plaintiffs' interpretation of NGA § 24 would require is an overbroad and premature solution to discrete potential procedural issues.

***Conclusion on* Thunder Basin *Analysis.*—** Plaintiffs have not established grounds for alteration of the Court's conclusions in its Opinion that it lacks jurisdiction over the claims asserted.

C. Discretionary Analysis Applicable to Action Seeking Solely Declaratory Relief

Plaintiffs argue that the Court's holding that it would exercise its discretion to decline to hear their declaratory judgment action was not a true alternative holding.[81] Not only is this contention contrary to the Court's statements reiterated several times, but it is contrary to law. The Supreme Court held in *Wycoff* that an agency should be afforded an opportunity to

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[80] *See id.*, at 22 & n.70.

[81] Recon. Motion [Doc. # 73], at 23.

evaluate its jurisdiction, subject to review by the appropriate court of appeals.[82] Further, the *Trejo* factors[83] counsel against this Court preempting the Commission's decision on its own jurisdiction where the same jurisdictional question has been presented to and is currently pending before that tribunal. Plaintiffs cite no cases in which the Declaratory Judgment Act was successfully employed to deprive an agency of authority while an adjudicatory proceeding was pending, much less a case in which a court abused its discretion by declining to do so.

It is inappropriate for the Court to insert itself prematurely into the dispute between FERC and Plaintiffs. If, as Plaintiffs contend, FERC's case is so

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[82] *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237 (1952); *see also* Opinion [Doc. # 68], at 51–52. Plaintiffs contend that *Wycoff* only applies if the Court lacks jurisdiction under NGA § 24. Plaintiffs acknowledge that the Supreme Court "held that the DJA procedure could not be used to 'preempt and prejudge' the question whether the plaintiff engaged in intrastate commerce, because that issue was 'committed for initial decision to an administrative body.'" Recon. Motion [Doc. # 73], at 24. That question, however, related to the agency's *jurisdiction*, not the merits of the underlying (inchoate) administrative dispute. *See Wycoff*, 344 U.S. at 239 (explaining that declaratory plaintiff sought to prevent regulation by state agency through a declaration that it was outside its declaration by virtue of being engaged in *inter*state commerce). *Wycoff* is therefore direct support for this Court's holding that it should exercise its discretion to permit the Commission to rule on issues affecting its jurisdiction in the first instance.

[83] *See St. Paul Insurance Co. v. Trejo*, 39 F.3d 585, 590–91 (5th Cir. 1994).

weak that no one but FERC itself would believe it,[84] the "substantial evidence" review in a court of appeals should be protection from overreach by the agency.[85] In contrast, Plaintiffs' proposed court involvement in pending administrative processes will exacerbate the complexity of those proceedings. The Court, for these reasons, and those in the Opinion, continues to exercise its discretion to decline to entertain Plaintiffs' declaratory judgment action.

D. Motion for Leave to Amend

Plaintiffs request leave to amend their Complaint again to attempt to cure the justiciability defect under *Calderon*.[86] Plaintiffs propose to add a request for a

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[84] *See* Recon. Motion [Doc. # 73], at 5 n.1 (suggesting that FERC should "drop[] its enforcement action because it knows it would be unable to convince an audience outside FERC that the action has merit").

[85] Even the authorities on which Plaintiffs rely support the view that Plaintiffs' challenges should be evaluated through the existing administrative process. *See, e.g.*, *Touche Ross*, 609 F.2d at 575 ("[A]llegations of agency bias or prejudgment based on ex parte communications are insufficient for injunctive relief and cannot be reviewed until the agency has made an adverse determination and an appeal has been taken raising these claims on the record as a whole . . . . Until the [SEC] has acted and actual bias has been demonstrated, the orderly administrative procedures of the agency should not be interrupted by judicial intervention."); *id.*, at 582 n.21 (noting potential statutory argument that SEC might lack jurisdiction over one respondent in the case and recommending that the SEC "might want to consider" the argument in the *administrative proceeding*).

[86] In their Response to the Motion to Dismiss, Plaintiffs did not request leave to amend in the event that the Court granted the Motion to Dismiss.

declaration that they did not violate the market manipulation provisions of the NGA. According to Plaintiffs, the addition of this claim will bring the entire dispute to this Court. For the following reasons, the Court denies Plaintiffs leave to amend.

Plaintiffs contend that they did not have the opportunity to address *Calderon* because Defendants did not raise that case in their briefing. *Calderon* addresses an issue of subject matter jurisdiction, which the Court must police *sua sponte*. In *Calderon*, the Supreme Court raised the subject matter jurisdiction issue even though it was not among the questions on which certiorari was granted.[87] Further, the Court deems Plaintiffs to have been on notice of *Calderon* because its holding was restated in *MedImmune*, a case Plaintiffs repeatedly cited.

Plaintiffs' request to amend is, in any event, futile in light of the Court's other rulings. Nothing in Federal Rule of Civil Procedure 15 requires a court to exercise its discretion to permit amendment to cure a jurisdictional defect where independent grounds exist for dismissal.

Further, even if this Court had subject matter jurisdiction over Plaintiffs' claims, the Court concludes it is inappropriate to rule on declaratory judgment

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[87] *See* 523 U.S. at 745 ("We granted certiorari on both the Eleventh Amendment and the First Amendment issues, 522 U.S. 1011 (1997), but in keeping with our precedents, have decided that we must first address whether this action for a declaratory judgment is the sort of 'Article III' 'case or controversy' to which federal courts are limited." (citing *FW/PBS, Inc. v. Dallas*, 493 U. S. 215, 230–31 (1990))).

claims pursued by Plaintiffs in connection with their pending agency proceeding. Investigations under the NGA are often sensitive, complex, and lengthy.[88] FERC's procedures for these investigations depend on interaction between the respondent and the agency. If a respondent had the option of running into court for a declaratory judgment about agency procedures or the merits of the agency's enforcement staff's preliminary contentions, the parties would be entangled in two-front litigation. Congress provided FERC the discretion to decide whether and how to investigate and, if necessary, to prosecute an action for civil penalties. Plaintiffs' proposed second amendment to its Complaint is futile and leave to amend is denied.

III. CONCLUSION

Plaintiffs' interpretation of NGA § 24 may have a superficial appeal. However, once evaluated within the framework required by the Supreme Court's decisions in *Calderon*, *Thunder Basin*, *Free Enterprise Fund*, and *Elgin*, the jurisdictional infirmities of Plaintiffs' declaratory judgment action become apparent. Plaintiffs' Reconsideration Motion ignores this applicable framework. Furthermore, the Court exercises its discretion to decline to rule on Plaintiffs' declaratory judgment claims. In sum, Plaintiffs' attempt to read one phrase in NGA § 24 in isolation is rejected. The Court declines to alter or amend the Opinion. It is therefore

ORDERED that Plaintiffs Total Gas & Power North America, Inc., Aaron Trent Hall, and Therese Nguyen Tran's Motion to Alter or Amend Judgment or

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[88] *See* Opinion [Doc. # 68], at 8–9.

for Leave to File Second Amended Complaint [Doc. # 73] is **DENIED**.

SIGNED at Houston, Texas, this 14th day of **September, 2016**.

/s/
NANCY F. ATLAS
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TOTAL GAS & POWER NORTH AMERICA, INC., AARON TRENT HALL, and THERESE NGUYEN TRAN, Plaintiffs, v. FEDERAL ENERGY REGULATORY COMMISSION, and CHAIRMAN NORMAN C. BAY, COMMISSIONER CHERYL A. LAFLEUR, COMMISSIONER TONY CLARK, COMMISSIONER COLETTE D. HONORABLE, and ACTING CHIEF ADMINISTRATIVE LAW JUDGE CARMEN A. CINTRON, in their official capacities, Defendants.	CIVIL ACTION NO. 4:16-1250

MEMORANDUM AND ORDER

This declaratory judgment action is before the Court on the Motion to Dismiss [Doc. # 27] filed by Defendants Federal Energy Regulatory Commission ("FERC"), its Commissioners, and its Acting Chief Administrative Law Judge (collectively, "Defendants").[1] Plaintiffs Total Gas & Power North America, Inc. ("Total"), Aaron Trent Hall ("Hall"), and Therese Nguyen Tran ("Tran") (collectively, "Plaintiffs") have filed a Motion for Summary Judgment [Doc. # 49].[2] Essentially, Plaintiffs seek an immediate court ruling that Defendants lack authority to impose a civil penalty for violations of the Natural Gas Act or FERC's rules, regulations, or orders thereunder, and that such penalties must be determined after a jury trial in federal district court. Plaintiffs also ask for declarations on several constitutional claims. Plaintiffs do not seek injunctive relief. Defendants argue that this controversy is not ripe, this Court lacks jurisdiction, and Plaintiffs must litigate the merits before the agency, with a right to judicial review in the court of appeals.

The motions are ripe for determination. After carefully considering the parties' briefing, oral argument, all matters of record, and the applicable legal authorities, the Court **grants** Defendants' Motion to

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[1] Chairman Norman C. Bay, Commissioners Cheryl A. LaFleur, Tony Clark, and Colette D. Honorable, and Acting Chief Administrative Law Judge Carmen A. Cintron, in their official capacities.

[2] The Court heard oral argument on the motions on June 24, 2016. *See* Hearing Minutes and Order [Doc. # 64].

Dismiss and **denies** Plaintiffs' Motion for Summary Judgment **as moot**.

I. BACKGROUND

This declaratory judgment action relates to an ongoing FERC administrative process in which Plaintiffs are respondents. The following factual and procedural background is undisputed.[3] FERC alleges that Plaintiffs engaged in an illegal scheme to manipulate natural gas markets from 2009 to 2012. Plaintiff Total, a Delaware corporation headquartered in Houston, Texas, is a subsidiary of Total S.A., a French oil and gas company. Plaintiff Total trades and markets Total S.A.'s production assets in the United States. Plaintiffs Hall and Tran were employed by Plaintiff Total in Houston as traders between 2009 and 2012. They are alleged to have engaged "in a cross-market manipulation scheme involving physical trading in one market for the purpose of benefiting related positions in another market" on at least 38 separate occasions.[4] The exact details of this scheme are not pertinent to the suit before this Court and no party requests a ruling on the veracity of the allegations against Plaintiffs.

Following an investigation from 2012 to 2015, FERC Commissioners issued an Order to Show Cause

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[3] This background is drawn from Plaintiffs' Amended Complaint [Doc. # 25] and the Order to Show Cause issued by Defendant FERC, *Total Gas & Power North America, Inc., et al.*, 155 FERC ¶ 61,105 (2016) ("Order to Show Cause").

[4] Order to Show Cause, *supra* note 3, Appendix A, Enforcement Staff Report and Recommendation, at 1–2.

alleging that civil monetary penalties should be imposed on Plaintiffs for the civil violations alleged in the pending administrative proceedings.[5] While different units within FERC were evaluating the results of the investigation, Plaintiffs filed this declaratory action through which they challenge the legitimacy of the administrative proceeding on various constitutional and statutory grounds. Defendants moved to dismiss this action for lack of jurisdiction. Shortly thereafter, Plaintiffs moved for summary judgment on all claims.[6] For the alternative reasons below, the Court concludes Defendants' Motion should be granted and will dismiss this case without prejudice to Plaintiffs' claims.

II. LEGAL STANDARD

A. Motion to Dismiss

Defendants move to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. "A case is properly dismissed for lack of subject matter juris-

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[5] The FERC administrative process is described in detail in Section III.A.1, *infra*.

[6] No discovery has taken place and no factual record has been developed in this case. Plaintiffs contend that their Motion for Summary Judgment presents legal questions susceptible of resolution without a record. *See* Motion for Summary Judgment [Doc. # 49], at 1 ("This case presents no material factual dispute.").

diction when the court lacks the statutory or constitutional power to adjudicate the case."[7] When there is a challenge to the court's subject matter jurisdiction, the party asserting jurisdiction bears the burden of establishing that jurisdiction exists.[8]

B. Declaratory Judgment

Plaintiffs bear the burden of establishing that the Court has jurisdiction to render declaratory judgment on their constitutional and statutory claims. The Declaratory Judgment Act, 28 U.S.C. § 2201, permits a district court "upon the filing of an appropriate pleading, [to] declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." In determining whether to handle a declaratory judgment action, a federal district court must determine (1) whether the declaratory action is justiciable, (2) whether the court has jurisdiction over the case, and (3) whether to exercise its discretion to entertain the action.[9]

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[7] *Smith v. Reg'l Transit Auth.*, 756 F.3d 340, 347 (5th Cir. 2014) (quoting *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494 (5th Cir. 2005)).

[8] *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 487 (5th Cir. 2014); *Gilbert v. Donahoe*, 751 F.3d 303, 307 (5th Cir. 2014).

[9] *See Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000); *see generally* 10B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2766 (3d ed. 2016). Many declaratory actions require the district court to determine whether a pending action in state court deprives it of "authority" because any declaratory relief would "be tantamount to issuing an injunction—providing the declaratory plaintiff an end run around the requirements of the Anti-Injunction Act." *See, e.g.*, *Travelers Ins.*

A declaratory judgment action is justiciable where "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[10] The declaratory relief requested should "completely resolve" the controversy.[11] A "declaratory judgment action, like any other action, must be ripe in order to be justiciable."[12] "Whether particular facts are sufficiently immediate to establish an actual controversy is a question that must be addressed on a case-by-case basis."[13] The Declaratory Judgment Act does not enlarge the district courts' original jurisdiction; the Act is "procedural only."[14] There must be an independent basis of jurisdiction for the Court to render declaratory judgment.[15] If the declaratory judgment dispute is justiciable, the Court has discretion whether to exercise its jurisdiction over the action.[16] In *St. Paul Insurance Co. v. Trejo*, the Fifth Circuit

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Co. v. La. Farm Bureau Fed'n, Inc., 996 F.2d 774, 776 (5th Cir. 1993). That inquiry is unnecessary here because the dispute at bar does not concern competing state and federal forums.

[10] *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 127 (2007).

[11] *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998).

[12] *Orix Credit Alliance*, 212 F.3d at 896.

[13] *Id.*

[14] *Skelly Oil Co. v. Phillips Petrol. Co.*, 339 U.S. 667, 671 (1950); *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 848 (2014) ("[T]he Declaratory Judgment Act does not 'extend' the 'jurisdiction' of the federal courts.").

[15] *Skelly Oil*, 339 U.S. at 671; *Harris County Texas v. MERSCORP Inc.*, 791 F.3d 545, 552 (5th Cir. 2015).

[16] *See Wilton v. Seven Falls Co*., 515 U.S. 277, 288 (1995).

articulated seven non-exclusive factors to assess whether to retain and resolve the action or to decline jurisdiction.[17] These factors serve three core values: proper allocation of decision-making, fairness of forum selection, and efficiency.[18]

III. ANALYSIS

Plaintiffs request a declaratory judgment that certain aspects of FERC's procedures for the imposition of civil penalties are unauthorized by statute, violate the Appointments Clause of Article II of the United States Constitution,[19] violate the Fifth and the Seventh Amendments to the United States Constitution, and do not comport with the Administrative Procedure Act ("APA").[20] The Court holds, first, that this dispute is not justiciable and, second, that this Court's jurisdiction over the case is precluded by the comprehensive statutory scheme for administrative decision-making and judicial review specified by the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. § 717 *et seq.* The Court, finally, in the alternative and in the exercise of its discretion, concludes that it will decline to entertain the declaratory claims asserted.

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[17] 39 F.3d 585, 590–91 (5th Cir. 1994); *see infra* Section III.D, at 49.

[18] *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 390–91 (5th Cir. 2003).

[19] U.S. CONST. art. II, § 2, cl. 2.

[20] 5 U.S.C. § 551 *et seq.*

A. The NGA and Plaintiffs' Claims

An overview of relevant provisions of the NGA provides useful context. This section also briefly outlines the declaratory relief Plaintiffs seek.

1. Overview of the NGA

This case requires interpretation of several provisions of the NGA as amended by §§ 311–318 of the Energy Policy Act of 2005 ("EPAct"), Pub. L. No.109-58, 119 Stat. 594, 685–93. The NGA is administered by Defendant FERC.[21] The ultimate authority within FERC is a commission comprising five commissioners (the "Commission") appointed by the President of the United States.[22] Plaintiffs are alleged to have violated NGA § 4A, 15 U.S.C. § 717c-1, a provision prohibiting manipulation of natural gas markets, and the FERC rule promulgated pursuant to this section, 18 C.F.R. § 1c.1. Section 4A was enacted in 2005 as § 315 of the EPAct, 119 Stat. at 691. Section 4A provides:

> It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in [15 U.S.C. § 78j(b)]) in contravention of such rules

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[21] FERC was previously known as the Federal Power Commission ("FPC").

[22] *See* 42 U.S.C. § 7171. The four sitting Commissioners, Chairman Norman C. Bay, and Commissioners Cheryl A. LaFleur, Tony Clark, and Colette D. Honorable, are named in their official capacities as Defendants .

> and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

A focus of Plaintiffs' claims is § 22 of the NGA, 15 U.S.C. § 717t-1, which also was enacted in 2005. *See* EPAct, § 314(b)(1)(B), 119 Stat. at 691. Section 22 provides for civil penalties for violations of the NGA itself or any Commission "rule, regulation, restriction, condition, or order" issued thereunder:

> **(a) In general**
>
> Any person that violates [the NGA], or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of [the NGA], shall be subject to a civil penalty of not more than $1,000,000 per day per violation for as long as the violation continues.
>
> **(b) Notice**
>
> The penalty shall be assessed by the Commission after notice and opportunity for public hearing.
>
> **(c) Amount**
>
> In 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.

The Commission has established an administrative process for proceedings that may result in imposition of civil penalties.[23] The process potentially comprises several stages: a pre-investigation stage; an investigatory phase; adversarial enforcement proceedings, which may include a hearing; and a final determination of whether civil penalties should be assessed. FERC may settle with a respondent or terminate a proceeding at any time. These stages are handled by different offices and personnel at FERC.

More specifically, FERC's Office of Enforcement staff ("Enforcement staff"), in the pre-investigation stage, may commence the administrative process based on referrals from other FERC divisions, referrals from the Commission, self- reporting by an entity or person, or tips from third parties.[24] Enforcement staff apparently initiated the pre-investigation in this case based on a tip received from a former Total employee.[25]

After reviewing available information, Enforcement staff may either terminate the matter or open

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[23] FERC's regulations include a helpful flowchart of the current process. *See Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317, Appendix, at 2 (2006) ("2006 Policy Statement").

[24] *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156, at 7 (2008) ("2008 Policy Statement").

[25] Order to Show Cause, *supra* note 3, Appendix A, Enforcement Staff Report and Recommendation, at 11–12.

an investigation.[26] The investigation includes traditional discovery methods, such as document production and depositions.[27] Enforcement staff may terminate the investigation unilaterally at any time, or may request settlement authority from the Commission.[28] In the case at bar, settlement discussions between Enforcement staff and Plaintiffs proved unsuccessful.[29]

If the case is not resolved during the investigation stage, Enforcement staff may recommend that the Commission institute enforcement proceedings. The Enforcement staff first provides its recommended findings of fact and conclusions of law to the respondent, who may submit a response.[30] The recommenda-

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[26] The Commission has provided Enforcement staff with a list of eleven factors to "determine whether there is a substantial basis for opening an investigation." *See* 2008 Policy Statement, *supra* note 24, at 9.

[27] *Id*., at 10–11; *see also* 18 C.F.R. §§ 1b.2–1b.6.

[28] 2008 Policy Statement, *supra* note 24, at 11–12.

[29] Order to Show Cause, *supra* note 3, Appendix A, Enforcement Staff Report and Recommendation, at 18.

[30] *See* 18 C.F.R. § 1b.19; *see also Submissions to the Commission upon Staff Intention to Seek an Order to Show Cause*, Docket No. RM08-10-000, 123 FERC ¶ 61,159 (2008). In this case, Enforcement staff provided Plaintiffs with the preliminary findings on February 10, 2015, to which Plaintiffs responded on June 5, 2015. Following the unsuccessful settlement discussions, Enforcement staff provided notice to Plaintiffs of its intention to recommend that the Commission institute enforcement proceedings on November 25, 2015, to which Plaintiffs responded on December 29, 2015. *See* Order to Show Cause, *supra* note 3, Appendix A, Enforcement Staff Report and Recommendation, at 18. Shortly thereafter, on January 27, 2016, Plaintiffs filed this declaratory action.

tions and any response are submitted to the Commission.[31] If the Commission determines the matter should be pursued, the Commission issues an "order to show cause and notice of proposed penalty," which order gives the respondent an opportunity to explain why it did not violate the NGA or FERC's regulations, rules, or orders, as the Enforcement staff contends, and why proposed civil penalties should not be assessed.[32] In this case, the Order to Show Cause directed that Plaintiffs "should address any matter, legal, factual, or procedural, that they would urge the Commission to consider in this matter."[33] The Enforcement staff may then submit a reply for the Commission and respondent's consideration. Upon the issuance of an order to show cause, involved Enforcement staff members are designated as "non-decisional" and may not advise the Commission on the disposition of

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[31] Enforcement staff submitted its recommendations in this case to the Commission on April 1, 2016. *See* Order to Show Cause, *supra* note 3, at 2.

[32] *See* 18 C.F.R. § 385.209(a)(1). The statement of issues in an order to show cause is "tentative." *See id.*, § 385.209(b).

[33] Order to Show Cause, *supra* note 3, at 4. The opportunity to address in the response procedural deficiencies of an order to show cause appears to be common FERC practice. *See, e.g.*, *BP America Inc.*, 144 FERC ¶ 61,100 at 4 (2013) ("In its answer, Respondent should address any matter, legal, factual or procedural, that it would urge the Commission to consider in this matter."); *Amaranth Advisors L.L.C.*, 120 FERC ¶ 61,085 at 76 (2007) ("In any answer, Respondents [are ordered] to address any matter, legal, factual or procedural, that they would urge in the Commission's consideration of this matter."); *see generally* 18 C.F.R. § 385.213(c)(2)(ii) (directing respondent to "[s]et forth every defense relied on" in its response to an order to show cause).

the matter.[34] The Commission issued the Order to Show Cause in this case on April 28, 2016. Plaintiffs filed a response on July 12, 2016.[35] Plaintiffs' Answer in the FERC proceeding asserts jurisdictional, constitutional, and APA claims identical to the prayers for relief in the Amended Complaint.[36] To date, Enforcement staff has not filed a reply.[37]

If the Commission is unpersuaded by the submissions to terminate the matter, the Commission will decide what form of hearing is necessary to determine whether the respondent violated the NGA and the amount of civil penalties, if any, to be assessed. The Commission may receive evidence by conducting a hearing based on written submissions[38] or may direct that a live evidentiary hearing be held before an administrative law judge ("ALJ").[39] Alternatively, the Commission may conclude that the existing record is sufficient and proceed directly to assessment of a penalty.[40]

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[34] *See* 2008 Policy Statement, *supra* note 24, at 11–12; *see also* 18 C.F.R. §§ 385.2201–.2202.

[35] *Answer in Opposition to Order to Show Cause and Notice of Proposed Penalty*, Docket No. IN12-17-000 (July 12, 2016).

[36] *Compare id.*, at 144–59, *with* Amended Complaint [Doc. # 25], at 48–50; *see also infra* note 51.

[37] *See Errata to Notice of Extension of Time*, Docket No. IN12-17-000 (May 10, 2016) (granting Enforcement staff up to 75 days to reply to Plaintiffs' response to the Order to Show Cause).

[38] 2006 Policy Statement, *supra* note 23, at 9.

[39] The powers and duties of the ALJ are described in 18 C.F.R. § 385.504.

[40] 2006 Policy Statement, *supra* note 23, at 9.

If the matter is referred to an ALJ, the ALJ determines whether any violations occurred, sets forth reasoning in an "initial decision," and, if appropriate, recommends a civil penalty.[41] The Commission has not yet decided what form of hearing will be ordered in this case.

If a hearing is held, the Commission considers the entire record and determines what remedies, including possibly a civil penalty, are warranted. Possible remedies include disgorgement of profits, compliance plans, and other non-monetary measures.[42] If warranted, the Commission issues an order assessing a penalty.[43]

The FERC administrative process permits a respondent to seek rehearing before the Commission.[44] If the respondent does so and is dissatisfied with the result, the respondent may seek review of the issues on which it sought rehearing in the appropriate United States court of appeals.[45] If the respondent fails

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[41] *See* 18 C.F.R. § 385.708 (describing the contents of and procedures associated with an "initial decision" by an ALJ presiding over a FERC proceeding).

[42] 2008 Policy Statement, *supra* note 24, at 14–17.

[43] 2006 Policy Statement, *supra* note 23, at 9; *see* 18 C.F.R. §§ 385.711–.713.

[44] *See* NGA § 19(a), 15 U.S.C. § 717r(a) ("Any person . . . aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person . . . is a party may apply for rehearing within thirty days after the issuance of such order.").

[45] NGA § 19(b), 15 U.S.C. § 717r(b), provides in pertinent part:

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in

to pay the civil penalty after the assessment order has become final, FERC may institute an action in a United States district court to collect the penalty.[46] FERC also may seek enforcement of its orders or remedies in a United States district court if the respondent fails to comply.[47]

2. The Amended Complaint

Plaintiffs contend that the Commission will overstep its statutory authority by issuing any order that determines that Plaintiffs violated the NGA or any rules, regulations, or orders thereunder. Plaintiffs rely primarily on a jurisdiction and venue provision,

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> such proceeding may obtain a review of such order in [a specified] court of appeals of the United States . . . . 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. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

[46] 2006 Policy Statement, *supra* note 23, at 9.

[47] *See* NGA § 24, 15 U.S.C. § 717u; *see also, e.g.*, NGA § 14, 15 U.S.C. § 717m(d) (To enforce a subpoena issued by the Commission against a person, "the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business . . . .").

§ 24 of the NGA, 15 U.S.C. § 717u,[48] that has remained unchanged since it was enacted in 1938 as part of the original NGA.

Plaintiffs argue that the Commission lacks authority to issue a final order adjudicating whether they violated the anti-manipulation law, NGA § 4A, because this Court has "exclusive jurisdiction of violations" of that statute pursuant to NGA § 24. Plaintiffs contend that nothing in the civil penalties provision, NGA § 22, enacted in 2005, explicitly authorizes the

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[48] Section 24 of the NGA provides in its entirety:

> The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district court wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

Commission to proceed further than "assessing" a penalty, which, Plaintiffs contend, means proposing a penalty, but not issuing a final order reviewable in the court of appeals under NGA § 19(b), 15 U.S.C. § 717r(b). According to Plaintiffs, the Commission must institute an action in a United States district court to obtain a final decision on whether a violation occurred, and only that district court can authorize the Commission to impose an enforceable penalty. Plaintiffs accordingly request in the Amended Complaint that this Court issue a declaratory judgment "that NGA Section 24 requires that any proceeding by FERC alleging that Plaintiffs violated the NGA or any rule, regulation, or order thereunder must be adjudicated in the appropriate federal district court, not before the agency."[49]

In their most recently filed memorandum of law and at oral argument, however, Plaintiffs have adjusted that position. They now concede that FERC has authority to hold some form of hearing before an ALJ,[50] but claim that the Commission lacks the authority under NGA § 22 to issue a final order assessing any penalties that may be proposed in their case. At oral argument, Plaintiffs noted that, as a practical matter, if the requested declaratory judgment were granted in their favor on their NGA § 24 jurisdictional argument, FERC would have incentive to streamline or truncate the existing administrative processes because many elements of that process would duplicate an eventual *de novo* trial in district court.

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[49] Amended Complaint [Doc. # 25], at 48, ¶ 117.

[50] *See* Reply in Support of Motion for Summary Judgment [Doc. # 60], at 1; *see* NGA § 22(b), 15 U.S.C. § 717t-1(b).

Plaintiffs also request a declaration that the current FERC administrative process violates the Appointments Clause, the Fifth and Seventh Amendments, and the APA.[51] At oral argument, Plaintiffs asserted that their constitutional and APA claims are

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[51] Plaintiffs' prayers for relief in the Amended Complaint [Doc. # 25] are:

(1) A declaration that "FERC's procedure for appointing its ALJs violates the Appointments Clause" and that "any proceeding by FERC alleging that Plaintiffs violated the NGA . . . must be adjudicated in the appropriate federal district court." *Id.*, at 48–49, ¶¶ 119–20.

(2) A declaration that, by "setting the matter for an administrative hearing before an ALJ, subject to de novo Commission review with only deferential review by a court of appeals, FERC's procedures violate Article III and deprive Plaintiffs of their Seventh Amendment right to a civil jury," so "any attempt by FERC to establish that Plaintiffs violated the NGA . . . must be adjudicated in federal district court where Plaintiffs are free to exercise their right to a jury trial." *Id.*, at 49, ¶¶ 122–23.

(3) A declaration that "the Commission's track record since 2005 shows an apparent bias against entities similarly situated with Plaintiffs, and in light of the massive penalties that the Commission claims the power to impose, allowing the Commission to set this matter for an administrative hearing before an ALJ would deprive Plaintiffs of a fair trial before an impartial adjudicator in violation of Plaintiffs' Fifth Amendment right to due process." *Id.*, at 49, ¶ 125.

(4) A declaration that, to cure any improper *ex parte* communications within FERC, the proceeding be "adjudicated in a federal district court where the right to a jury trial is preserved, or, in the alternative, that under Section 5(d) [of the APA], the Commission must prohibit Commission staff members who engaged in *ex parte* communications with the Enforcement Staff at the investigation stage from participating or advising in the Commission's review of ALJ findings or its assessment of a penalty." *Id.*, at 50, ¶¶ 128–29.

"moot" if the Court grants the declaratory relief sought regarding interpretation of NGA § 24.[52] Plaintiffs seek no injunctive relief.

There are three threshold questions before the Court: (1) whether the action presents a justiciable controversy ripe for declaratory judgment; (2) whether the NGA establishes a comprehensive scheme for administrative adjudication and judicial review that precludes this Court from exercising jurisdiction over this action; and (3) whether the Court should exercise its discretion to entertain this declaratory judgment action. For the reasons explained below, the Court holds that the dispute is not justiciable, that jurisdiction is lacking under the NGA, and that, in any event, in its discretion, the Court declines to entertain this action.

B. Justiciability

Plaintiffs bear the burden of establishing justiciability.[53] They have failed to carry that burden because their claims would not completely resolve the controversy and because their claims are not ripe.

1. The *ETP* Decision

The parties dispute whether the Fifth Circuit's decision in *Energy Transfer Partners, L.P. v. FERC*

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[52] *See also* Motion for Summary Judgment [Doc. # 49], at 23 ("To the extent the Court wishes to avoid these constitutional issues, Plaintiffs submit that this case can be decided in their favor on statutory grounds . . . .").

[53] *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 95 (1993) ("[A] party seeking a declaratory judgment has the burden of establishing the existence of an actual case or controversy.").

("*ETP*"),[54] controls this case. In *ETP*, the entities subjected to a FERC market manipulation investigation sought Fifth Circuit review after the Commission issued an order to show cause alleging violations of the NGA.[55] The Fifth Circuit concluded that the agency action was not final for the purposes of appellate jurisdiction.[56] Defendants contend that the petitioners in *ETP*, the respondents in the agency proceeding, raised arguments substantively identical to the NGA § 24 argument Plaintiffs assert here and thus *ETP* mandates the conclusion that this declaratory action is unripe.[57] Plaintiffs counter that *ETP* is distinguishable because that case involved an "appeal" from a FERC order to show cause.

The Court agrees with Plaintiffs that the *ETP* ripeness analysis under *Abbott Laboratories* is not dispositive here. The respective procedural postures of the court proceedings are materially different. The question of a court of appeals' jurisdiction over a petition for review of an agency's administrative action is materially different from the issue of whether a district court has exclusive original jurisdiction over a de-

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[54] 567 F.3d 134 (5th Cir. 2009)

[55] *Id.*, at 136.

[56] *Id.*, at 139–44 (applying test derived from *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977)). The Fifth Circuit also held that the challenge to FERC's jurisdiction was not an issue within the collateral order doctrine. *Id.*, at 144–45 (applying *Cohen v. Beneficial Indus. Loan Corp*, 337 U.S. 541 (1949)).

[57] *See id.*, at 138 ("ETP asserts . . . that it is entitled to a de novo proceeding in a federal district court by virtue of [NGA] § 24 . . . .").

claratory judgment claim challenging the agency's authority to issue orders finding an NGA violation and assessing civil penalties.

The Court next addresses the issue of the jurisprudential effect of the inability of the requested declaratory relief to resolve completely the parties' disputes and then examines whether Plaintiffs' claims meet basic Article III ripeness requirements. As discussed below, Plaintiffs' claims fail in both respects.

2. Lack of Complete Resolution

Plaintiffs' request for a declaration adopting their interpretation of NGA § 24 prematurely raises an affirmative jurisdictional defense that does not resolve the entire controversy between the parties and thus the claim is not justiciable. Plaintiffs' other bases for declaratory relief similarly amount to non-justiciable anticipatory defenses that may be raised in the administrative process if applicable.[58] Success on Plaintiffs' arguments might affect the process for evaluating FERC's allegations, but would not resolve the merits of those allegations.

In *Calderon v. Ashmus*, the Supreme Court held that a declaratory judgment action was not justiciable in federal court because the claim asserted did not "completely resolve" the parties' dispute.[59] The *Calde-*

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[58] For instance, Plaintiffs challenge the appointment process for ALJs, the alleged lack of an impartial adjudicator, and the existence of alleged improper communications within FERC.

[59] 523 U.S. 740 (1998). The plaintiff, on behalf of a class of inmates, sought a declaratory judgment on the length of the filing period applicable in his state for a federal habeas action. The

ron court explained that Article III's "case or controversy" requirement was not met because the plaintiff's suit

> does not merely allow the resolution of a 'case or controversy' in an alternative format, . . . but rather attempts to gain a litigation advantage by obtaining an advance ruling on an affirmative defense. . . . Any judgment in this action thus would not resolve the entire case or controversy as to any [class member], but would merely determine a collateral legal issue governing certain aspects of their pending or future suits.[60]

Complete resolution of the parties' dispute at bar requires adjudication of issues not before this Court, namely, whether civil penalties should be assessed against Plaintiffs for alleged violations of the NGA's

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plaintiff had neither exhausted remedies available in state court nor filed a federal habeas action. *Id.*, at 746.

[60] *Id.*, at 747; *see also MedImmune*, 549 U.S. at 127 n.4 ("*Calderon* . . . holds that a litigant may not use a declaratory-judgment action to obtain piecemeal adjudication of defenses that *would not finally and conclusively resolve* the underlying controversy." (emphasis in original)); *Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1381–82 (10th Cir. 2011); *Jenkins v. United States*, 386 F.3d 415, 418 (2d Cir. 2004); *see generally Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 246 (1952) ("[W]hen the request is not for ultimate determination of rights but for preliminary findings and conclusions intended to fortify the litigant against future regulation, it would be a rare case in which the relief should be granted.").

prohibition on marketmanipulation.[61] Even if the Court were to grant the full extent of the declaratory relief Plaintiffs seek here, the question of whether Plaintiffs violated NGA § 4A would remain.[62] *Calderon* requires dismissal of all of Plaintiffs' claims.

3. Ripeness

"A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical."[63] While the parties at bar are in an adversarial posture, the issues Plaintiffs seek to address through their claims are largely anticipatory. Indeed, the Amended Complaint is nearly devoid of allegations specific to the parties' dispute and focuses instead on FERC's procedures in the abstract. Plaintiffs raise hypothetical challenges based on an alleged pattern of past FERC practices in other, unrelated cases.[64]

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[61] *See Columbian Fin. Corp.*, 650 F.3d at 1381 ("It [is] not proper to limit the declaratory-judgment action to only one issue, however important, in [the] controversy." (citing *Calderon*, 523 U.S. at 746)).

[62] *See* Amended Complaint [Doc. # 25], at 2, ¶ 3 ("Plaintiffs do not seek to stop FERC from conducting an investigation or otherwise exercising its lawful authority. Plaintiffs are simply asking the Court to issue a declaratory judgment to protect Plaintiffs' statutory and constitutional rights to have the underlying questions . . . adjudicated in the first instance by a federal district court . . . .").

[63] *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008) (quoting *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003)).

[64] *See Renne v. Geary*, 501 U.S. 312, 320 (1991) ("Respondents' generalized claim that petitioners have deleted party endorsements from candidate statements in past elections does not demonstrate a live controversy.").

Interpretation of the "Exclusivity" Language in NGA § 24.— To the extent Plaintiffs argue that they only seek a declaration regarding the Commission's eventual authority—or lack thereof—to issue a final order, the dispute plainly is not ripe. FERC may abandon the civil penalty process at any of several remaining steps, and the Commission might decline to issue an order of penalty assessment.[65] Plaintiffs concede there is no legal basis for this Court to require FERC to alter these intervening procedures *even if* FERC must eventually prosecute its case *de novo* in a district court.[66] Plaintiffs fundamentally seek an advi-

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[65] *See, e.g.*, *ETP*, 567 F.3d at 141 ("We note that after FERC's allegations that ETP had violated the [Natural Gas Policy Act ("NGPA")] were heard by an ALJ, the ALJ dismissed the primary undue-discrimination claim pending against ETP. FERC then reached a settlement with ETP regarding the NGPA issues. ETP may similarly prevail on the merits in the administrative action regarding the NGA, thereby mooting its judicial challenge."). Generally, the courts do not "pessimistically assume[] an adverse ruling" by the agency. *Rhodes v. United States*, 574 F.2d 1179, 1181–82 (5th Cir. 1978).

[66] Plaintiffs' argument that the declaratory judgment sought here will encourage FERC to change how it structures the remainder of the process is speculative and outside this Court's purview.

sory opinion on the validity of an order the Commission has not yet issued and may never issue.[67] The Court cannot render such an opinion.[68]

Constitutional and APA Claims.— Plaintiffs' constitutional and APA claims also are not ripe. The Seventh Amendment claim may be mooted if FERC terminates the civil penalty proceeding at any time prior to the issuance of the final order assessing civil

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[67] At oral argument, counsel for Plaintiffs suggested that *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), permits jurisdiction because the declaratory judgment vehicle inherently contemplates that the natural plaintiff can always elect not to bring suit. *See also* Response to Motion to Dismiss [Doc. # 35], at 19–20 (discussing *MedImmune*). *MedImmune* arose in the context of a patent licensing dispute, circumstances materially different from those here. 549 U.S. at 123–24. The Supreme Court has long recognized the importance of declaratory relief to potentially infringing manufacturers who would otherwise be paralyzed by a patent-holder's refusal to sue. *See Cardinal Chem. Co.*, 508 U.S. at 95–96, ("[A] patent owner engages in a *danse macabre*, brandishing a Damoclean threat with a sheathed sword. . . . Before the [Declaratory Judgment] Act, competitors victimized by that tactic were rendered helpless and immobile so long as the patent owner refused to grasp the nettle and sue." (quoting *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 734–35 (Fed. Cir. 1988))). Plaintiffs, however, have not brought the inverse of the natural action here. The inverse of the natural action would be a declaration that they did not violate the market manipulation statute and rules thereunder. Plaintiffs' claims are predicated on whether FERC's administrative proceedings will involve certain procedures.

[68] *See, e.g.*, *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) ("[A] federal court [lacks] the power to render advisory opinions." (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1968))).

penalties. An ALJ may never be appointed if the Commission elects a hearing on written submissions or no hearing at all.[69] Plaintiffs request an advisory opinion, not on their dispute, but on the validity of an entire administrative structure based on non-specific allegations. This remedy is beyond the province of this Court.

Plaintiffs contend that lack of ripeness of the constitutional claims is irrelevant because a favorable judgment on the interpretation of the exclusive jurisdiction provision in NGA § 24 will moot the rest of their claims. The Court is unpersuaded. For example, the claim regarding interpretation of NGA § 24 requests a declaration that the violation be "adjudicated in the appropriate federal district court," but victory on that issue does not resolve the Seventh Amendment request for a jury trial.[70] And Plaintiffs' request for "*de novo* review" of any FERC penalty assessment raises a range of issues. It is unclear, for instance,

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[69] Plaintiffs do not allege that FERC to date has deprived them of due process. Instead, the Amended Complaint engages in a general discussion of FERC practices and procedures.

[70] *Compare* Amended Complaint [Doc. # 25], at 48, ¶ 117 (requesting solely adjudication "in the appropriate federal district court, not before the agency"), *with id.*, at 49, ¶ 123 (requesting adjudication "in federal district court where Plaintiffs are *free to exercise their right to a jury trial*" (emphasis added)). The right to a jury in court under the Seventh Amendment claim may depend on whether the market manipulation allegations fall within the "public right" exception to the right to a jury trial, *see Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977), a completely different issue from the NGA § 24 statutory interpretation question. *See Tull v. United States*, 481 U.S. 412, 427 (1987) (rejecting Seventh Amendment challenge to provision of Clean Water Act that assigned calculation of civil penalties to district judge).

whether the Court would have jurisdiction to reopen the factual record developed in the agency proceeding, an issue that may impact the outcome of Plaintiffs' Appointments Clause, Fifth Amendment, and APA claims. Therefore, even assuming the NGA § 24 statutory interpretation question were ripe, which it is not, its existence would not cure the jurisdictional infirmities of Plaintiffs' constitutional claims.

4. Conclusion on Justiciability

In sum, Plaintiffs' claims for declaratory relief are not ripe and are not justiciable on several grounds. Plaintiffs' jurisdictional, constitutional, and APA claims are defenses to acts that FERC has not yet taken and depend on a factual record that has not yet been developed. The questioned administrative actions are not inevitable. Intervening events in those administrative proceedings may resolve the dispute without a ruling from this Court.

Because doctrines of justiciability and ripeness require case-by-case analysis and can be fluid, and in the interests of completeness and judicial economy given the desirability of prompt resolution of Plaintiffs' declaratory judgment claims, the Court next addresses its jurisdiction under *Thunder Basin Coal Co. v. Reich*.[71] The Court thereafter evaluates whether to exercise its discretion to decline to entertain the declaratory judgment action under *Wilton v. Seven Falls Co.*[72]

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[71] 510 U.S. 200 (1994).

[72] 515 U.S. 277, 286–87 (1995); *see infra* Section III.D.

C. Jurisdiction

Plaintiffs invoke NGA § 24 as the jurisdictional basis for this Court to render declaratory judgment restricting FERC's authority. The first sentence of NGA § 24 grants "exclusive jurisdiction" to district courts over (1) "violations" of the NGA and (2) actions "brought to enforce any liability or duty created by" or to "enjoin any violation of" the NGA.[73] Plaintiffs rely on the words "exclusive jurisdiction of violations." Defendants counter that the FERC administrative process coupled with judicial review in a United States court of appeals provides the sole avenue for Plaintiffs to press their statutory and constitutional claims. The Court concludes that it is fairly discernible that Congress intended for the claims Plaintiffs assert to be evaluated through the administrative process with judicial review in the court of appeals.

1. Legal Framework

A "statutory scheme of administrative and judicial review [may] provide[] the exclusive means of review" for statutory and constitutional challenges to that scheme.[74] The seminal case in this context is *Thunder Basin Coal Co. v. Reich*,[75] which sets out a two-step test for evaluating the exclusivity of a scheme for administrative adjudication followed by judicial review in an Article III court.

"If a special statutory review scheme exists . . . 'it is ordinarily supposed that Congress intended that

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[73] *See supra* note 48.

[74] *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2132–33 (2012).

[75] 510 U.S. 200 (1994).

procedure to be the exclusive means of obtaining judicial review in those cases to which it applies.'"[76] The first step of the *Thunder Basin* inquiry therefore examines whether "the 'statutory scheme' displays a 'fairly discernible' intent to limit [district court] jurisdiction" over the type of case to which statutory or constitutional challenges to an administrative process have been made.[77] In the first step of the *Thunder Basin* analysis, the Court must examine the statute's text, structure, and purpose.[78] "[W]e simply ask whether Congress's intent to preclude district court review of the administrative proceeding is 'fairly discernible in the statutory scheme.'"[79] In *Elgin v. Department of Treasury*, the Supreme Court contrasted the "fairly discernible" intent standard applicable to a scheme that "simply channels judicial review of a constitutional claim to a particular court," with a "heightened showing" required to demonstrate congressional intent to preclude entirely judicial review of a constitutional claim. In the latter case, Congress's "intent to do so must be clear."[80] In the second step of the *Thunder Basin* analysis, the Court evaluates whether the claims raised in the declaratory action are "not of the type Congress intended to be reviewed within [the]

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[76] *Jarkesy v. SEC*, 803 F.3d 9, 15 (D.C. Cir. 2015) (quoting *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979)).

[77] *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin*, 510 U.S. at 207).

[78] *See Elgin*, 132 S. Ct. at 2133.

[79] *Hill v. SEC*, Nos. 15-12831, 15-13738, __ F.3d __, 2016 WL 3361478, at *8 (11th Cir. June 17, 2016) (quoting *Thunder Basin*, 510 U.S. at 207).

[80] 132 S. Ct. at 2132 (quotation omitted).

statutory structure."[81] "To unsettle [the] presumption of initial administrative review—made apparent by the structure of the organic statute—requires a strong countervailing rationale."[82] District court jurisdiction will not be precluded (1) where "a finding of preclusion could foreclose all meaningful judicial review," (2) "if the suit is wholly collateral to a statute's review provisions," and (3) "if the claims are outside the agency's expertise."[83] These three considerations do not present a "strict mathematical formula." Instead, they provide "general guideposts" to determine whether the particular statutory or constitutional claims at issue "fall outside an overarching congressional design."[84] The *Thunder Basin* analysis applies to the NGA because it contains an exclusive statutory scheme for administrative adjudication coupled with judicial review. Specifically, NGA § 19(a) allows a party "aggrieved" by a Commission order to apply for a rehearing by the Commission. To the extent the party is unsuccessful on rehearing, NGA § 19(b) permits an appeal to the appropriate United States court of appeals.[85] Courts are unanimous that NGA § 19 precludes district court jurisdiction over challenges to FERC proceedings.[86] In

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[81] *Thunder Basin*, 510 U.S. at 212.

[82] *Jarkesy*, 803 F.3d at 17 (quoting *E. Bridge, LLC v. Chao*, 320 F.3d 84, 89 (1st Cir. 2003)).

[83] *Elgin*, 132 S. Ct. at 2136 (quotations omitted).

[84] *Jarkesy*, 803 F.3d at 17.

[85] *See supra* note 45 and accompanying text.

[86] *See, e.g.*, *Atlanta Gas Light Co. v. FPC*, 476 F.2d 142, 150 (5th Cir. 1973) (affirming district court dismissal of declaratory action because, under NGA § 19, "the [FPC] and, on review, the court of appeals were the proper forums"); *see also Am. Energy*

general, the NGA "does not foreclose all judicial review . . . , but merely directs that judicial review shall occur" in the United States courts of appeals.[87]

2. Applicability of the *Thunder Basin* Analysis

Plaintiffs do not squarely address the "fairly discernible" intent standard under *Thunder Basin*. Plaintiffs instead contend that the phrase "exclusive jurisdiction of violations" in NGA § 24 renders FERC's assessment of civil penalties an exception to the structure for judicial review in NGA § 19. Noting that a predicate to assessment of a civil penalty pursuant to NGA § 22 is the existence of a violation of the NGA or FERC's regulations, rules or orders, Plaintiffs contend that the Commission lacks authority to make such

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Corp. v. Rockies Express Pipeline LLC, 622 F.3d 602, 605 (6th Cir. 2010) ("Exclusive means exclusive, and the [NGA] nowhere permits an aggrieved party otherwise to pursue collateral review of a FERC certificate in state court or federal district court."); *Hunter v. FERC*, 348 F. App'x 592, 593 (D.C. Cir. 2009) ("Congress has vested exclusive jurisdiction in the courts of appeals to review FERC's orders, pursuant to [NGA § 19(b)] . . . ."); *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 261 (10th Cir. 1989) ("As the statutory language plainly states, the special judicial review provisions of § 19 are exclusive. The provisions of § 19 are nearly identical to the judicial review provisions of various other federal regulatory programs. In each case, these provisions have been interpreted to establish an exclusive scheme of review."); *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 957–58 (4th Cir. 1979) (NGA § 19(b) "vests exclusive jurisdiction to review all decisions of the Commission in the circuit court of appeals; there is no area of review, whether relating to final or preliminary orders, available in the district court." (citation omitted)).

[87] *See Elgin*, 132 S. Ct. at 2132.

findings. According to Plaintiffs, if Congress intended to empower the Commission to find violations and impose civil penalties when enacting NGA § 22 in 2005, Congress was required specifically to exclude authority to impose civil penalties from § 24's "exclusive jurisdiction" grant to the United States district courts. Plaintiffs contend Congress failed to do so and thus the district courts, and not FERC, have ultimate civil penalty authority. Plaintiffs conclude that the *Thunder Basin* analysis is unnecessary because it is identical with the merits of their claim.

Plaintiffs miss the mark. In effect, Plaintiffs seek to read § 24 in isolation and attempt to imbue that provision, which has been in the NGA since 1938, with far-reaching and unprecedented new meaning. While interpreted rarely, NGA § 24 and other examples of this genre of jurisdictional statutes[88] have some judicial history. Nothing in that precedent indicates that NGA § 24 was intended or understood to govern the

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[88] Although NGA § 24 is one of ten New Deal-era regulatory statutes that include similar language, Plaintiffs' counsel conceded at oral argument that no case law exists in which Plaintiffs' proffered interpretation has been adopted. *See* International Wheat Agreement Act of 1949, 7 U.S.C. § 1642(e); Securities Act of 1933, 15 U.S.C. § 77v; Trust Indenture Act of 1939, 15 U.S.C. § 77vvv(b); Securities Exchange Act of 1934, 15 U.S.C. § 78aa(a); Investment Company Act of 1940, 15 U.S.C. § 80a-43; Investment Advisers Act of 1940, 15 U.S.C. § 80b-14(a); Connally Hot Oil Act of 1935, 15 U.S.C. § 715j(c); Interstate Land Sales Full Disclosure Act of 1968, 15 U.S.C. § 1719; Federal Power Act of 1935, 16 U.S.C. § 825p; *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. __, 136 S. Ct. 1562, 1572 (2016) (explaining that these statutes should be interpreted consistently).

allocation of responsibilities for fact-finding or determination of remedies between the agency and the courts. In 1940, the Second Circuit explained in *Wright v. Securities and Exchange Commission* that identical "exclusive jurisdiction" language in the Securities Exchange Act of 1934[89] means merely "that all criminal or civil proceedings initiated in the courts for violations of the act must be brought in the courts designated by the section."[90] The court of appeals added that the "exclusive jurisdiction of violations" language was "not intended to repeal" the statutes authorizing agency proceedings followed by review in a United States court of appeals.[91] Congress is presumed to have been aware of this interpretation of language identical to NGA § 24 when Congress amended the NGA to add § 22 and the anti-manipulation provision in the EPAct, and did not alter the jurisdictional language in NGA § 24.[92] As further judicial background, it is noted that the only meaningful application of the phrase "exclusive jurisdiction" in § 24 and parallel New Deal-era statutes pertaining to other federal agencies[93] has addressed the allocation of authority

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[89] Securities Exchange Act § 27, 15 U.S.C. § 78aa(a).

[90] 112 F.2d 89, 95 (2d Cir. 1940).

[91] *Id.*

[92] *See, e.g.*, *Silva-Trevino v. Holder*, 742 F.3d 197, 202 (5th Cir. 2014) ("[W]here there exists a longstanding judicial construction, 'Congress is presumed to be aware of the interpretation . . . and to adopt that interpretation [if] it re-enacts that statute without change.'" (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978))).

[93] *See supra* note 88.

between state and federal courts.[94] It would therefore be extraordinary to repurpose NGA § 24 eight decades later to govern the relationship between federal courts and the agency.

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[94] *See Merrill Lynch*, 136 S. Ct. at 1573 (interpreting narrowly exclusive jurisdiction granted by Securities Exchange Act § 27, 15 U.S.C. § 78a, because "when a statute mandates, rather than permits, federal jurisdiction—thus depriving state courts of all ability to adjudicate certain claims—our reluctance to endorse 'broad readings,' if anything, grows stronger" (citation omitted)); *see also Pan Am. Petrol. Corp. v. Superior Court of Delaware*, 366 U.S. 656, 662–64 (1961) (holding that "exclusive jurisdiction" afforded by NGA § 24 only applied to cases where "it appears from the face of the complaint that determination of the suit depends upon a question of federal law"); *Enable Miss. River Transmission, LLC v. Nadel & Gussman, LLC*, Civ. A. No. 15-1502, 2016 WL 1064640, at *2 (W.D. La. Mar. 14, 2016) ("[T]he Supreme Court has stated that [NGA § 24] does not create jurisdiction, but provides federal exclusivity when federal law creates a cause of action *elsewhere* to enforce provisions of the NGA." (emphasis added) (citing *Pan American*, 366 U.S. at 664)). Similar jurisdictional provisions replace exclusive jurisdiction with *concurrent* jurisdiction for actions "brought to enforce" duties and liabilities created by the respective statute, which further indicates that these provisions address federalism concerns. *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77v ("The district courts of the United States . . . shall have jurisdiction of offenses and violations under this subchapter . . . and, *concurrent with State and Territorial courts*, . . . of all suits in equity and actions at law brought to enforce any liability or duty . . . ." (emphasis added)). Some of these cases concern the district courts' jurisdiction over actions "brought to enforce" duties or liabilities created by the respective act, but the phrase "exclusive jurisdiction" must be interpreted consistently within the same provision. *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("[I]dentical words used in different parts of the same act are intended to have the same meaning." (citation and quotation omitted)).

Despite Plaintiffs' lack of attention to *Thunder Basin* and its progeny, the text of NGA § 24 is not sufficiently clear to permit the Court to skip that analysis.[95]

3. First Step of *Thunder Basin* Analysis

Under *Thunder Basin*, allocation of authority between FERC and this District Court regarding determination of violations of the NGA and FERC rulings, as well as imposition of civil penalties, requires consideration of the statute's text, the statute's structure, which includes the text's context, and the statute's purpose.[96] The issue is whether there are fairly discernible indications of congressional intent in enacting the EPAct in 2005 to employ the existing scheme of FERC's regulatory oversight to phases involving adjudication of violations and imposition of civil penalties.

a. Text and Structure

FERC's Authority in the NGA Text and Structure Prior to the EPAct.— The text and structure of the pre-2005 NGA support a finding of congressional intent that FERC administer the entire process for assessment of civil penalties, including the predicate of finding a violation of the NGA. Since 1938, section 14 of the NGA, 15 U.S.C. § 717m, has authorized FERC to undertake investigations "in order to *determine* whether any person *has violated* or is about to violate

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[95] *See also ETP*, 567 F.3d at 146 ("[T]he NGA's statutory scheme is far from clear.").

[96] *See Elgin*, 132 S. Ct. at 2133.

any provisions of this chapter" (emphasis added). Further, section 16 of the NGA, 15 U.S.C. § 717*o*, provides:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of [the NGA].

Sections 14 and 16 have been read in combination to permit FERC "to fashion appropriate remedies for violations of its regulations."[97] The Supreme Court "has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred" and therefore "[s]urely the Commission's broad responsibilities . . . demand a generous construction of its statutory authority."[98]

The NGA also authorizes FERC to hold hearings and provides the Commission with broad authority to promulgate rules to govern those hearings, in furtherance of its decision-making goals.[99] These hearings relate to the Commission's authority under the NGA to make rules and issue orders or certificates.[100] The

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[97] *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 633 F. Supp. 2d 1151, 1166 (D. Nev. 2007).

[98] *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 776 & n.40 (1968) (citing, *inter alia*, NGA § 16).

[99] *See* NGA §§ 15, 16, 15 U.S.C. §§ 717n, 717o.

[100] *See, e.g.*, NGA § 3(e), 15 U.S.C. § 717b(e) (authority to approve or deny construction of LNG terminals); NGA § 4(e), 15 U.S.C. § 717c(e) (authority to determine lawfulness of a rate change); NGA § 5(a), 15 U.S.C. § 717d(a) (authority to investigate

NGA provides clear and comprehensive guidance for conducting agency hearings and providing appellate review.[101]

In contrast, district court involvement under the pre-2005 NGA was narrowly tailored to assisting FERC in performance of its functions, such as enforcement of subpoenas issued by the Commission, requests for emergency injunctive relief by the Commission, and providing a forum for criminal prosecutions and enforcement of duties and liabilities of regulated entities under the NGA once those liabilities have been found by the agency.[102] It was accepted that the

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and order decrease of certain rates "where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful or are not the lowest reasonable rates"); NGA § 14(b), 15 U.S.C. § 717m(b) (authority to determine the "adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company").

[101] *See* NGA §§ 15, 16, 19, 15 U.S.C. §§ 717n, 717*o*, 717r.

[102] *See* NGA § 14(d), 15 U.S.C. § 717m(d) (To enforce a subpoena against a person issued by the Commission under NGA § 14(c), "the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business . . . ."); NGA § 20, 15 U.S.C. § 717s(a) ("Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the [NGA]" the Commission may bring an action in "the proper district court of the United States . . . to enjoin such acts . . . ."); NGA § 24, 15 U.S.C. § 717u ("Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred."); *id*. ("The District Courts of the United States . . . shall have exclusive jurisdiction . . . 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

Commission had wide discretion whether to institute such actions.[103]

Well prior to Congress' addition of the civil penalty provision to the NGA in 2005, it was established that the Commission had authority to find the existence of violations of the NGA and FERC's rules, regulations, and orders.[104] For example, the Fifth Circuit repeatedly affirmed the Commission's power to impose various remedies such as disgorgement of profits obtained as a result of violations,[105] although, prior to

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chapter or any rule, regulation, or order thereunder."). Additionally, private parties who have obtained a certificate from FERC related to the construction of natural gas pipelines may institute eminent domain proceedings in district court. NGA § 8, 15 U.S.C. § 717g(h).

[103] *See Mesa Petrol. Co. v. FPC*, 441 F.2d 182, 189 (5th Cir. 1971) ("[I]t is of no consequence that there were other avenues which the Commission could have chosen for enforcement, such as an injunction or a criminal proceeding. . . . The Commission may resort to the courts only if in its discretion it believes the court's help would be necessary to achieve its purposes.").

[104] *See generally, e.g.*, *Transcont'l Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313 (5th Cir. 1993); *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249 (5th Cir. 1986); *Cox v. FERC*, 581 F.2d 449 (5th Cir. 1978); *Mesa Petroleum*, 441 F.2d 182.

[105] *See Transcont'l Gas Pipe Line*, 998 F.2d at 1319, 1324 (affirming Commission's finding that natural gas company had violated NGA §§ 4(b), 4(d), and 7, imposition of refund order, and denial of company's request to recoup certain losses from illegal sales via a "passthrough" to its customers); *Coastal Oil & Gas*, 782 F.2d at 1253 (affirming Commission finding that natural gas company had violated NGA § 7 by diverting to intrastate market gas dedicated to interstate market and suggesting equitable remedies, such as "stripping [company] of profits in excess of what it would have made" by selling on interstate market); *Cox*, 581 F.2d at 451 (affirming order requiring company to "return diverted

the EPAct of 2005, the Commission lacked statutory authority to impose civil penalties for these violations.[106] The Court must presume that Congress was aware of these historical administrative practices.[107]

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gas in kind to the interstate market," which order notably required the company, "who violated the Act, to bear the burden of post-violation increases in the price of natural gas").

The other courts of appeals also consistently respected FERC's remedial authority with respect to "violations" of the NGA. *See Transcont'l Gas Pipe Line Corp. v. FERC*, 485 F.3d 1172, 1176 (D.C. Cir. 2007) ("[T]he [NGA] gives FERC broad power to remedy violations of the Act." (emphasis added) (citing *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984))); *R.R. Comm'n of Tex. v. FERC*, 874 F.2d 1338 (10th Cir. 1989) (affirming Commission order adopting an ALJ's findings that certain parties had violated the NGA); *Gulf Oil Corp. v. FPC*, 563 F.2d 588 (3d Cir. 1977) (affirming a "refund-recoupment order" as "an appropriate remedy for the *violation* by [a natural gas company] of [NGA §] 7(c) and of the terms of [the company's] certificate" (emphasis added)); *see generally* 2008 Policy Statement, *supra* note 24, at 14–17 (discussing FERC practice of using disgorgement of profits, compliance plans, and other non-monetary measures as remedies for violations).

[106] *See, e.g.*, *Coastal Oil & Gas*, 782 F.2d at 1253 ("It is well-settled that the Natural Gas Act does not give the Commission the authority to impose civil penalties."). It was recognized that the absence of a civil penalty authority was a gap in the Commission's enforcement powers. *See S. Union Gas Co. v. FERC*, 725 F.2d 99, 103 (10th Cir. 1984) (explaining that it was "understandable" that the Commission sought "some penalty or reparation" for an action it considered a "gross violation" of the NGA, but that it lacked statutory authority to do so).

[107] *See, e.g.*, *Silva-Trevino*, 742 F.3d at 202 ("[W]here there exists a longstanding judicial construction, 'Congress is presumed to be aware of the interpretation . . . and to adopt that interpretation [if] it re-enacts that statute without change.'" (quoting *Lorillard*, 434 U.S. at 580)).

Text of the EPAct.— When read in context of the other NGA sections that had been interpreted to authorize FERC to determine violations and fashion remedies, it is apparent that Congress likely perceived the text of NGA § 22 as sufficient to empower the Commission to determine the existence of violations prior to assessment of civil penalties.[108] Indeed, the text of the 2005 civil penalty enactment reflects congressional adoption of phrases common in civil penalty provisions in other statutes. These provisions assume that the power to adjudicate inheres in jurisdiction to "assess."[109] Section 22 is not unique in its

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[108] *See Gustafson*, 513 U.S. at 570 (Acts of Congress "should not be read as a series of unrelated and isolated provisions"); *Smith v. United States*, 508 U.S. 223, 233 (1993) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (quotation omitted)). For example, FERC had established authority to impose remedies for violations of NGA §§ 4 and 7. NGA § 4 does not explicitly reference adjudication of "violations." Instead, key language in NGA § 4(a) is phrased in the passive voice, similar to that of NGA § 4A. *Compare* 15 U.S.C. § 717c(a) ("[A]ny such rate or charge that is not just and reasonable *is declared to be unlawful*." (emphasis added)), *with* 15 U.S.C. § 717c-1 ("*It shall be unlawful* . . . to use or employ . . . any manipulative or deceptive device . . . ." (emphasis added)). Similarly, NGA § 7 concerns the authority of the Commission to regulate construction, extension, and abandonment of natural gas facilities through orders and certificates of public convenience, but does not explicitly address authority to adjudicate "violations." *See* 15 U.S.C. § 717f.

[109] For example, the Federal Deposit Insurance Act ("FDIA") contains a number of civil penalty provisions that are modeled on or cross-reference FDIA § 8(*i*), 12 U.S.C. § 1818(*i*). FDIA § 8(*i*)(2)(A) provides that any "insured depository institution

lack of an express reference to the authority to adjudicate.[110] Further, the 2005 EPAct included a provi-

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which, and any institution-affiliated party who" "violates" any of four categories of laws and agreements "shall forfeit and pay a civil penalty." Subparagraph (E) of that section then provides, "[a]ny penalty imposed . . . may be *assessed* and collected by the appropriate Federal banking agency by written notice" (emphasis added). Agency rehearing and judicial review are similar to NGA § 19. *See* FDIA § 8(h)(2), (*i*)(2)(H). If the agency brings a collection action in district court, "the validity and appropriateness of the penalty shall not be subject to review." FDIA § 8(*i*)(2)(I)(ii). Nowhere in this detailed subsection is there a specific statement that the banking agencies have authority to adjudicate the violation.

Plaintiffs' counsel suggested at oral argument that "assess," as used in NGA § 22, should be interpreted to mean "indict." Counsel cited no other statutes or cases employing that interpretation, and the Court is not aware of any. This contention is unpersuasive.

[110] For example, under Securities Exchange Act § 21B, 15 U.S.C. § 78u-2, the SEC is permitted to impose civil penalties in administrative proceedings instituted pursuant to Securities Exchange Act §§ 15(b)(4), 15(b)(6), 15D, 15B, 15C, 15E, and 17A, 15 U.S.C. §§ 78o(b)(4), 78o(b)(6), 78o-6, 78o-4, 78o-5, 78o-7, and 78q-1. Although § 15D, 15 U.S.C. § 78o-6, explicitly grants rulemaking authority, it does not include specific language authorizing an adjudication of a violation. Similarly, FDIA § 7(j)(16), 12 U.S.C. § 1817(j)(16) authorizes federal banking agencies to assess and collect civil money penalties from "[a]ny person who violates any provision of [FDIA § 7(j)]." Although FDIA § 7(j)(15) provides for district court jurisdiction to issue injunctive relief against ongoing or threatened violations, there is no explicit assignment of adjudicatory authority for past violations in the entire subsection. The Court does not rule on whether these statutes provide an adequate basis for the respective agencies to assess civil penalties. Their existence, however, illustrates that the language in NGA § 22 may simply be the result of common congressional

sion that explicitly augmented the district court's injunction authority when the Commission seeks to address market manipulation.[111] This amendment indicates that Congress was aware in 2005 of the district courts' role in the NGA enforcement scheme, yet did not explicitly assign the district courts a role in the civil penalty process.[112]

As the simple text of NGA § 22 provides, Congress appears to have intended to enlarge through the

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drafting practice and, therefore, should not be given the restricted meaning that Plaintiffs suggest.

[111] NGA § 20(d), 15 U.S.C. § 717s(d) ("In any proceedings under subsection (a) of this section [§ 717s(a)], the court may prohibit . . . any individual who is engaged or has engaged in practices constituting a violation of section 717c-1 . . . from— (1) acting as an officer . . . of a natural gas company . . . .").

[112] Plaintiffs argue that Congress impliedly assigned jurisdiction over civil penalty actions to district courts because it did not explicitly authorize FERC to adjudicate "violations." Plaintiffs have conceded that no authority directly supports their position that jurisdiction over civil penalty proceedings in connection with the NGA necessarily defaults to the district courts. The Supreme Court's ruling in *Lees v. United States*, 150 U.S. 476 (1893), is not to the contrary. Of venerable age, this case, commenced in 1888, relates to the relationship between "district courts" and "circuit courts" in the judicial system that preceded the Judiciary Act of 1891. Lees sheds no light on the allocation of civil penalty authority to administrative agencies a century later.

In contrast, the model Defendants contend Congress adopted is common in the modern administrative state. *See, e.g.*, *Atlas Roofing*, 430 U.S. at 450–51 ("Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred.").

EPAct amendments FERC's options to remedy violations of any provision of the NGA and the agency's rules, regulations, or orders through civil penalties. There is no indication in the EPAct that Congress intended in 2005 to alter the Commission's role as primary factfinder and reserve to the district courts an oversight or reviewer role.

Moreover, Congress's omission in the EPAct and the NGA of provisions regarding certain procedural issues that typically would arise in a civil penalty proceeding reinforces this interpretation of the NGA's text.

Venue.— Congress gave some indication of intent to preserve in FERC responsibility for finding violations and determining civil penalties because the NGA and the EPAct do not specify venue for civil penalty actions in any particular district court. On the other hand, allocation of the civil penalty process to FERC as part of the existing administrative process avoids the venue omission.[113] Notably, in comparison, there are in the 1938 NGA provisions for other agency proceedings that assign venue to certain district courts. The second and third sentences of NGA § 24 address venue for, respectively, criminal proceedings and actions "brought to enforce any liability or duty

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[113] If the hearing is administrative, § 15 of the NGA, 15 U.S.C. § 717n(f), authorizes the Commission to adopt "rules of practice and procedure" to govern hearings, which the Commission has interpreted to include the authority to set the "date, time, and location of [a] hearing." 18 C.F.R. § 385.502(b)(5) (describing contents of written notice of hearing).

created by" or to "enjoin any violation of" the NGA.[114] Although the criminal penalty provision, NGA § 21, 15 U.S.C. § 717t, lacks an internal venue provision, the second sentence in NGA § 24 expressly sites venue for "criminal proceeding[s]." The third sentence controls venue for civil actions in district court to "enforce" a "liability or duty created by," or to enjoin violations of the NGA, functions FERC has long performed with district courts' assistance.[115] Defendants have argued persuasively that, after issuance of a final penalty order, FERC may seek judicial enforcement in the district courts through an action "brought to enforce" a "liability" under the NGA,[116] but no liability can exist until after a violation has been found by the Commission.

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[114] Venue provisions in NGA § 24 are: (1) "Any criminal proceeding shall be brought in the district court wherein any act or transaction constituting the *violation* occurred"; and (2) "Any suit or action to *enforce* any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant . . . ." 15 U.S.C. § 717u (emphasis added). Nowhere do Plaintiffs contend that assessment of civil penalties falls within either of these venue categories.

[115] *See, e.g.*, *Miss. Power & Light Co. v. Fed. Power Comm'n*, 131 F.2d 148, 150 (5th Cir. 1942) ("The orders which the District Court is given exclusive jurisdiction to enforce or enjoin are definitive orders, establishing rights and duties, such as may be reviewed before the Circuit Court of Appeals or enforced under [FPA §§] 314 and 315, 16 U.S.C.A. § 825m and 825n." (interpreting FPA § 317, 15 U.S.C. § 825p, which is substantively identical to NGA § 24)).

[116] *See* Response to Motion for Summary Judgment [Doc. # 56], at 12.

The absence of express assignment of venue in district court for civil penalty proceedings for violations of the NGA and FERC rules, regulations, and orders is notable also because Congress included reference to venue in district courts in other statutes FERC enforces involving oil and gas industries, specifically, the Federal Power Act ("FPA") and Natural Gas Policy Act ("NGPA"). Indeed, under the FPA and the NGPA, Congress provided that proceedings would be filed in "the appropriate district court" with respect to "affirming the [Commission's] assessment of civil penalties" and evaluation of any substantive challenges thereto by the respondent.[117] Congress's failure to make any venue designation for civil penalty proceedings for violations of the NGA, including market manipulation, indicates Congress did not anticipate district court involvement beyond the task of enforcement.

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[117] NGPA § 504(b)(6)(F), 15 U.S.C. § 3414(b)(6)(F) ("If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (E), the Commission shall institute an action in the *appropriate district court* of the United States for an order affirming the assessment of the civil penalty." (emphasis added)); FPA § 31(d)(3), 16 U.S.C. § 823c(d)(3) ("If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (A), the Commission shall institute an action in the *appropriate district court* of the United States for an order affirming the assessment of the civil penalty." (emphasis added)). The respondent can then challenge the civil penalty order in that proceeding and thereby obtain review by the district court. *See infra* note 118 and accompanying text (discussing district courts' authority to enforce, modify, or set aside civil penalty order after review).

Type of Proceeding.— Congress notably did not include in the EPAct guidance for district courts regarding the procedures applicable in civil penalty proceedings. On the other hand, Congress' addition of civil penalty authority in § 22 to FERC's toolbox was a simple way to augment the agency's prior jurisdiction over violations and resulted in a cohesive administrative and judicial partnership entailing administrative assessment of these penalties. Moreover, in this manner, Congress ensured appellate judicial review through NGA § 19.

A comparison of the NGA to the FPA and NGPA also supports Defendants' position. These latter statutes grant the district court the authority to *review* the law and facts and to "enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part" the assessment of civil penalties.[118] The lack of any similar statutory language in the NGA as amended suggests that Congress intended in 2005 that FERC rely on the established administrative process.[119]

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[118] NGPA § 504(b)(6)(F), 15 U.S.C. § 3414(b)(6)(F); FPA § 31(d)(3), 16 U.S.C. § 823c(d)(3). This language authorizing review parallels NGA § 19, not NGA § 24. See 15 U.S.C. § 717r(b) (granting court of appeals exclusive jurisdiction "to affirm, modify, or set aside" a Commission order "in whole or in part").

[119] At oral argument, Plaintiffs' counsel clarified that Plaintiffs believe a declaratory judgment adopting their interpretation of NGA § 24 would lead FERC to adopt procedures similar to those for assessment of civil penalties under FPA § 31(d), 16 U.S.C. § 823c(d), which procedures permit a party to elect *de novo* review by a district court in lieu of agency adjudication. The civil penalty process in the FPA predates the EPAct by almost two decades. If Congress had intended for the FPA's process to apply

Standard of Review.— It is undisputed that NGA § 22 authorizes the Commission to conduct a hearing regarding the propriety and amount of civil penalties. Under existing FERC procedures, it cannot be doubted that the Commission may issue an order based on a hearing record. Any such order is channeled into the long-established rehearing and review procedures of NGA § 19(b), pursuant to which the court of appeals applies the "substantial evidence" standard to the Commission's order.

In contrast, attempting to implement Plaintiffs' proposed interpretation of § 24 and § 22 leads to a quandary. The NGA provides no guidance on how a district court is to evaluate the results of the agency hearing or conclusions concerning civil penalty proceedings. Congress provided no guidance as to whether it intended the district court to conduct *de novo* review as sought by Plaintiffs, adopt the substantial evidence standard, or deem the Commission's rulings *prima facie* evidence.[120]

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to NGA § 22, it could have simply copied and pasted the FPA's language into the EPAct. Indeed, as Plaintiffs noted, FPA § 31(c) is substantively identical to NGA § 22. Congress' decision not to include in the NGA the guidance to the district courts provided by FPA § 31c(d) is further evidence that Congress intended that the agency retain the authority to adjudicate civil penalties for violations. *See Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1296 (Fed. Cir. 2002) ("When Congress omits from a statute a provision found in similar statutes, the omission is typically thought deliberate." (citing *I.N.S. v. Phinpathya*, 464 U.S. 183, 190 (1984))).

[120] *See, e.g.*, 47 U.S.C. § 407 ("If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file [a suit] in the [appropriate] district court

Plaintiffs' request for *de novo* district court review would be legally remarkable and logistically inefficient after a full administrative hearing.[121] The absence of specific statutory directives regarding the results of the agency hearing required by NGA § 22 is a fair indication of congressional intent in 2005 to integrate the civil penalty process into the existing FERC administrative procedures with judicial review by a court of appeals.

Conclusion on Text and Structure.— Plaintiffs' requests for declarations require this Court to imply procedures, some based on civil penalty provisions in other statutes,[122] to resolve the legislative

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of the United States . . . . [O]n the trial of such suits the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated . . . ." (emphasis added)).

[121] The FPA and the NGPA each provide for *de novo* review of the facts and law involved, but the civil penalty process does not include an agency hearing. *See* NGPA § 504(b)(6)(E)–(F), 15 U.S.C. § 3414(b)(6)(E)–(F) (directing Commission to assess penalty without a hearing and, if respondent does not pay, to institute an action in United States district court in which *de novo* review is available); FPA § 31(d)(3)(A), 16 U.S.C. § 823c(d)(3)(A) (directing that, if respondent elects the FPA procedure involving district court review, "the Commission shall [first] promptly assess such penalty" without a hearing before bringing an action in district court). If a respondent elects an agency hearing under the FPA, then judicial review comprises only an appeal to a court of appeals, which court applies the substantial evidence standard. *See* FPA § 31(d)(2).

[122] For instance, regarding venue, Plaintiffs' statutory interpretation claims requests a declaration that the proceeding "must be adjudicated in the *appropriate* federal district court," *see* Amended Complaint [Doc. # 25], at 48, ¶ 117. This language

gaps. Those requests violate the canon of statutory interpretation that courts do not imply into statutes provisions Congress chose not to include.[123] The absence of statutory guidance for civil penalty proceedings in district court, particularly where the NGA carefully delineates all other judicial involvement in the statutory scheme, makes it "fairly discernible" that Congress likely intended the EPAct to strengthen the Commission's civil enforcement powers *within* the administrative process.

b. Purpose

Legislative history for the 2005 anti-manipulation and civil penalty provisions, NGA §§ 4A and 22, is virtually non-existent.[124] Nor is there any reference to NGA § 24's "exclusive jurisdiction" language in the

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tracks the venue provisions in the FPA and NGPA. *See supra* note 117.

[123] *Cox v. City of Dallas, Tex.*, 256 F.3d 281, 310 (5th Cir. 2001) ("Plaintiffs would, in essence, have us read another provision into the RCRA that compels Saitas to act beyond these statutory requirements. We cannot adopt their interpretation of the statute."); *see also Turtle Island Restoration Network*, 284 F.3d at 1296 ("When Congress omits from a statute a provision found in similar statutes, the omission is typically thought deliberate." (citing *Phinpathya*, 464 U.S. at 190)).

[124] The EPAct of 2005 comprised 530 sections that amended 19 different public laws. The vast legislative history is devoted exclusively to other issues. Plaintiffs rely on a single *post-enactment* statement by a senator. That statement is entitled to negligible weight. *See Barber v. Thomas*, 560 U.S. 474, 486 (2010) ("[T]he Court normally gives little weight to statements, such as those of the individual legislators, made after the bill in question has become law.").

text or legislative history of the EPAct.[125] Historical context, however, sheds some light on the new provisions' purposes. Criminal and civil proceedings involving manipulative trade practices in the oil and gas industries in the late 1990s and early 2000s revealed the absence of certain effective law enforcement tools.[126] Although the Commission had authority to obtain certain monetary remedies prior to 2005, such as disgorgement of profits and refund orders,[127] it was "well-settled that the Natural Gas Act [prior to the EPAct of 2005 did] not give the Commission the authority to impose civil penalties."[128] Congress' enactment of NGA § 22 appears intended to address the omission of civil penalty authority from FERC's otherwise broad remedial powers to strengthen FERC's regulation of the energy markets that had proved susceptible to abuse.[129]

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[125] The only reference to NGA § 24 is a directive to renumber it following the insertion of the civil penalty provision. *See* EPAct § 314(b)(1)(A), 119 Stat. at 691.

[126] There grew "concern that the FERC lacked adequate tools to deal with manipulation and deception in the energy markets. . . . Congress sought to meet this challenge by including provisions in the . . . EPAct . . . that granted additional enforcement power to the FERC and added to the array of and increased the existing civil and criminal penalties for manipulative and deceptive conduct." Allan Horwich, *Warnings to the Unwary: Multi-Jurisdictional Federal Enforcement of Manipulation and Deception in the Energy Markets After the Energy Policy Act of 2005*, 27 ENERGY L. J. 363, 367–69 (2006).

[127] *See supra* Section III.C.3.a.

[128] *See Coastal Oil & Gas*, 782 F.2d at 1253; *S. Union Gas Co.*, 725 F.2d at 103 (holding that Commission lacked authority to impose civil penalty for "gross violation" of the NGA).

[129] *Cf. S. Union Gas*, 725 F.2d at 103 ("[I]t is for Congress to provide civil penalties not for the Commission to create them.").

c. Conclusion on "Fairly Discernible" Intent

The first step of the *Thunder Basin* jurisdictional analysis, an examination of the text, structure, and purpose of the NGA as amended by the EPAct, reveals a fairly discernible congressional intent to build on existing FERC administrative procedures to implement the new civil penalty provisions. The Court is unpersuaded by Plaintiffs' novel effort to imbue NGA § 24 with meaning untethered to its longstanding purposes evidenced by appellate decisions or meaningful legislative indicators.

4. Second Step of *Thunder Basin* Analysis

The Court turns, in its *Thunder Basin* analysis, to the issue of whether the claims Plaintiffs assert are "of the type Congress intended to be reviewed within the statutory structure."[130] The Supreme Court instructs courts "to 'presume' that a claim is not confined to administrative channels 'if a finding of preclusion could foreclose all meaningful judicial review; if the suit is wholly collateral to a statute's review provisions; and if the claims are outside the agency's expertise.'"[131] Plaintiffs have offered no meaningful argument addressing these three factors specifically. In the interests of a complete record, the Court nevertheless addresses them.

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[130] *Free Enterprise Fund*, 561 U.S. at 489.

[131] *Tilton v. SEC*, No. 15-2103, __ F.3d __, 2016 WL 3084795, at *3 (2d Cir. June 1, 2016) (quoting *Free Enterprise Fund*, 561 U.S. at 489).

None of these three *Thunder Basin* factors weighs in favor of district court jurisdiction over this declaratory action. The Court finds instructive the rulings by four courts of appeals that applied these factors to similar challenges regarding Securities Exchange Act § 21B, 15 U.S.C. § 78u-2, the statute that empowers the SEC to impose civil penalties in administrative proceedings.[132] All four courts of appeals found district court jurisdiction precluded by the statutory scheme of SEC administrative adjudication followed by court of appeals' review.[133] As explained hereafter, the Court concludes that (1) "meaningful judicial review" is available for the claims under NGA § 19, (2) the claims are not "wholly collateral" to the NGA statutory review scheme, and (3) FERC's expertise may assist in resolution of Plaintiffs' claims.[134]

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[132] *Hill*, 2016 WL 3361478, at *3 (Appointments Clause and Seventh Amendment), *Tilton*, 2016 WL 3084795, at *2 (Appointments Clause); *Jarkesy*, 803 F.3d at 14 (Fifth Amendment, Seventh Amendment, and improper *ex parte* communications); *Bebo v. SEC*, 799 F.3d 765, 768 (7th Cir. 2015) (Fifth Amendment and Article II), *cert. denied* 136 S. Ct. 1500 (2016). Plaintiffs sought to distinguish the SEC scheme in the first step of *Thunder Basin* on the ground that the SEC's power to adjudicate violations was explicit in the statute. Because the Court concludes there is a "fairly discernible" intent in the NGA to assess civil penalties via FERC administrative procedures, *see supra* Section III.C.3.c, this quartet of cases constitutes highly persuasive authority for the second step of *Thunder Basin* analysis.

[133] *See* Securities Exchange Act § 25, 15 U.S.C. § 78y.

[134] *See Elgin*, 132 S. Ct. at 2136.

a. Meaningful Judicial Review

The availability of meaningful judicial review is the most important *Thunder Basin* factor.[135] There is no contention that any of the issues raised by Plaintiffs cannot be addressed eventually by a United States court of appeals pursuant to NGA § 19.[136] This

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[135] *See Hill*, 2016 WL 3361478, at *8 ("We agree with the Second and Seventh Circuits that the first factor . . . is 'the most critical thread in the case law.'" (quoting *Bebo*, 799 F.3d at 774, and citing *Tilton*, 2016 WL 3084795, at *4)).

[136] The "substantial evidence" standard, as applied under the NGA, is not a rubber stamp of Commission decisions. The court of appeals must examine:

> (1) whether the Commission abused or exceeded its authority; (2) whether each of the essential elements of the order is supported by substantial evidence; and (3) whether the Commission has given reasoned consideration to each of the pertinent factors in balancing the needs of the industry with the relevant public interests.

Transcont'l Gas Pipe Line, 998 F.2d at 1320 (citing *Permian Basin Area Rate Cases*, 390 U.S. at 790–92). All of Plaintiffs' challenges appear cognizable through an NGA § 19 appeal under the first prong of this test. For example, in *Hunter v. FERC*, 348 F. App'x 592 (D.C. Cir. 2009), the D.C. Circuit held that the district court did not have subject matter jurisdiction over a declaratory judgment action by the respondent in the agency proceeding challenging FERC's jurisdiction. The respondent contended in his request for declaratory relief that FERC's assertion of jurisdiction impermissibly encroached on the CFTC's statutory exclusive jurisdiction over the alleged acts. *Id.*, at 592. Rejecting this use of declaratory judgment procedure, the D.C. Circuit held this jurisdictional question was only reviewable on a petition for review of a final order pursuant to NGA § 19. *See id.*, at 593. The respondent successfully pressed his challenge to FERC's jurisdiction in a subsequent NGA § 19 petition. *See Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013) (holding that "manipulation of natural

is sufficient under *Elgin*, where the Supreme Court "[saw] nothing extraordinary in a statutory scheme that vests reviewable factfinding authority in a non-Article III entity that has jurisdiction over an action but cannot finally decide the legal question to which the facts pertain."[137] This factor strongly disfavors jurisdiction over this declaratory action.[138]

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gas futures contracts falls within the CFTC's exclusive jurisdiction" and nothing in the EPAct permits FERC to regulate this particular futures market). Precedent therefore demonstrates that NGA § 19 will provide "meaningful judicial review" for Plaintiffs' claims. Indeed, Plaintiffs have asserted identical jurisdictional, constitutional, and APA challenges in their response to the Order to Show Cause in the administrative proceedings. *See supra* note 36 and accompanying text.

[137] *See* 132 S. Ct. at 2138. *Free Enterprise Fund* is distinguishable from this case. The plaintiffs in that dispute challenged the very existence and structure of the Public Company Accounting Oversight Board ("PCAOB"), a federal government entity subsidiary to the SEC. The Supreme Court held jurisdiction existed for this challenge, recognizing that not every PCAOB action would result in a "final order." To obtain judicial review of their claims pursuant to 15 U.S.C. § 78y, which is substantively identical NGA § 19, the Supreme Court concluded that the plaintiffs would have had to violate a PCAOB rule voluntarily so that the SEC eventually would issue a final order. 561 U.S. at 490. That Court rejected the contention that plaintiffs should have to "bet the farm" to challenge the authority of the agency. *Id.* At bar, however, a civil penalty proceeding that may culminate in a final, appealable order already is underway. *See, e.g.*, *Hill*, 2016 WL 3361478, at *10 ("Unlike the petitioners in *Free Enterprise Fund*, however, the respondents here need not bet the farm to test the constitutionality of the ALJs' appointment process. On the contrary, the respondents have already taken the actions that allegedly violated securities laws.").

[138] Plaintiffs discuss the expense of following the FERC procedures, including the potential deprivations of their constitutional

b. Wholly Collateral

Plaintiffs' claims are not "wholly collateral" to the NGA statutory scheme for administrative assessment of civil penalties.[139] In *Free Enterprise Fund v. PCAOB*, the plaintiffs challenged the agency's "existence," which the Supreme Court considered a "general challenge" that was "'collateral' to any . . . orders or rules from which review might be sought."[140] Here, Plaintiffs' claims are specific challenges to potential administrative procedures Plaintiffs fear they will face.[141] Plaintiffs' claims therefore are not collateral to those proceedings; the claims call into question the administrative procedures.[142] Plaintiffs' counsel explained at oral argument that a declaratory judgment

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and statutory rights. Those difficulties do not make subsequent judicial review less "meaningful." *See, e.g.*, *Hill*, 2016 WL 3361478, at *8 ("Enduring an unwanted administrative process, even at great cost, does not amount to an irreparable injury." (citing *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980)). Plaintiffs may seek a stay of any order imposing penalties pending judicial review pursuant to NGA § 19(b). *See Hill*, 2016 WL 3361478, at *9 (noting that either SEC or court of appeals could stay pending appeal any SEC order assessing civil penalties).

[139] *See Elgin*, 132 S. Ct. at 2139–40.

[140] 561 U.S. at 490. Specifically, the *Free Enterprise Fund* plaintiffs challenged the appointment process for the entire PCAOB. *See supra* note 137.

[141] For example, in contrast to *Free Enterprise Fund*, Plaintiffs merely challenge the method of appointment of ALJs, one of whom *may* conduct a hearing, the results of which are subject to review by the entire Commission.

[142] *See Jarkesy*, 803 F.3d at 23 (explaining that the *Free Enterprise Fund* plaintiffs' claim was "'collateral' to the SEC administrative-review scheme because [those plaintiffs] were not *in* that scheme at all").

adopting Plaintiffs' interpretation of NGA § 24 "hopefully" would encourage the agency to alter its procedures.[143] Suggesting that an agency change its processes during a particular administrative proceeding is not an issue "wholly collateral" for *Thunder Basin* purposes.[144]

c. Agency Expertise

Finally, FERC's expertise regarding natural gas pricing, gas market manipulation issues, and implementation of the NGA will assist courts' evaluation of

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[143] Specifically, Plaintiffs appear to hope the agency will truncate its process and defer to the district court's trial process.

[144] Some courts have suggested that the "wholly collateral" factor more narrowly focuses on the relationship between the claims in the declaratory action and the merits issues in the agency proceeding. *See, e.g.*, *Bebo*, 790 F.3d at 774. The Court agrees with the *Jarkesy* court, however, that challenges to the agency's procedures are not *wholly* collateral because they are "inextricably intertwined with the conduct of the very enforcement proceeding the statute grants the [agency] the power to institute and resolve as an initial matter." *Jarkesy*, 803 F.3d at 23. *Calderon* is instructive here. The "wholly collateral" claim in *Free Enterprise Fund* completely resolved the controversy in that case. *See supra* note 137. "Wholly" appears to be directed at preventing piecemeal litigation outside the administrative process on non-substantive issues that do not *resolve* a case. *See supra* Section III.B.2.

Even if the "wholly collateral" factor were interpreted more narrowly and Plaintiffs' issues met that formulation this factor, it would not outweigh the presence of meaningful judicial review for all of Plaintiffs' claims. *See Bebo*, 799 F.3d at 774 ("[T]he Supreme Court has never said that any of [the *Thunder Basin* factors] are sufficient conditions to bring suit in federal district court under § 1331.").

Plaintiffs' claims. The NGA regulates in a highly complex business arena.[145] There are various mechanisms for industry participants to voice concerns on issues that affect them.[146] The Commission, which administers the entire complex statute, as well as related laws applicable to the oil and gas industry, is in the best position to weigh competing interests and address contested factual matters. The Commission should interpret its governing statute in the first instance, and do so in light of specific facts determined after the detailed review contemplated by the legislative scheme.[147]

FERC's expertise is particularly relevant to Plaintiffs' Fifth Amendment and APA claims. Plaintiffs' Fifth Amendment claim, *inter alia*, accuses FERC of bias against private parties in civil penalty proceedings. No court can evaluate such a claim without development of a detailed factual record. Plaintiffs' other procedural claims will benefit from a full record regarding highly technical and complex matters, such

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[145] *See, e.g.*, 2008 Enforcement Statement, *supra* note 24, at 19.

[146] For example, the 2008 Policy Statement was the result of a conference with and comments by industry stakeholders. *See id*., at 2.

[147] Plaintiffs may raise their challenges within the administrative process without adversely affecting other rights under FERC regulations. The Commission has clarified that "a subject's good faith exercise of its rights under the relevant statutes and [FERC] regulations . . . will not cause the subject of an investigation to forego possible credit for exemplary cooperation." 2008 Enforcement Statement, *supra* note 24, at 8.

as the market manipulation allegations in this case.[148] Regarding Plaintiffs' Appointments Clause and Seventh Amendment claims, these constitutional questions may become moot if FERC abandons the charges against Plaintiffs.[149] Otherwise, Plaintiffs will have the opportunity to raise these two challenges without interrupting the pending administrative proceeding.[150] Thereafter, judicial review pursuant to NGA § 19 is available.

5. Conclusion on *Thunder Basin* Analysis

The NGA contains a comprehensive scheme for administrative adjudication followed by judicial review. The first step of the *Thunder Basin* analysis reveals a fairly discernible intent in the text, structure, and purpose of the NGA to place within that administrative process the determination of violations and, if appropriate, assessment of civil penalties. The second step of the *Thunder Basin* analysis establishes that Plaintiffs' challenges to FERC's administrative processes for assessment of civil penalties are not of a

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[148] These principles apply to Plaintiffs' arguments that FERC is acting as both prosecutor and judge. FERC's published procedures include mechanisms for walling off prosecutorial staff from adjudicatory staff. Indeed, FERC has published a *Notice of Designation of Commission Staff as Non-Decisional* in Plaintiffs' case before the Commission. *See* Appendix to Response to Motion for Summary Judgment [Doc. # 56-1], at 3.

[149] *See, e.g.*, *Hill*, 2016 WL 3361478, at *12.

[150] Therefore, even regarding these two claims, this factor does not outweigh the "meaningful judicial review" and "wholly collateral" factors. *See Bebo*, 799 F.3d at 774 ("[T]he Supreme Court has never said that any of [the *Thunder Basin* factors] are sufficient conditions to bring suit in federal district court under [28 U.S.C.] § 1331.").

type Congress intended to exclude from the scheme for judicial review established by NGA § 19. The claims may be reviewed by an Article III court through a petition for review if, as, and when Plaintiffs are subject to an "order or action" of the Commission.[151] Finally, the claims are not collateral and the claims' development will benefit from FERC's expertise.

D. Discretionary Analysis Applicable to Action Seeking Solely Declaratory Relief

Even if the controversy is justiciable and even if the Court has jurisdiction over Plaintiffs' claims, the Court has wide discretion regarding whether to decide Plaintiffs' declaratory judgment action.[152] The Court, after careful consideration, declines to entertain Plaintiffs' claims.

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[151] This conclusion is consistent with the general principle that an erroneous jurisdictional ruling by an agency—or district court—must await review on appeal from a subsequent final order or judgment. *See Hunter*, 348 F. App'x at 594 ("The jurisdictional determination in the administrative proceeding is not collateral but is a 'step toward' the decision on the merits." (citing *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 246 (1980))); *see also ETP*, 567 F.3d at 146 ("The proper construction of the NGA must await resolution when and if the Commission determines that the NGA has been violated and assesses a penalty").

[152] See, e.g., Wilton, 515 U.S. at 286–87 ("Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants. . . . The statute's textual commitment to discretion, and the breadth of leeway we have always understood it to suggest, distinguish the declaratory judgment context from other areas of the law in which concepts of discretion surface.").

The Fifth Circuit requires a district court to consider a non-exclusive list of seven factors, commonly known as the *Trejo* factors, in evaluating whether to hear a declaratory judgment suit.[153] The *Trejo* factors, devised in the context of a federal declaratory judgment suit and a state case, are:

> (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated;
>
> (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by defendant;
>
> (3) whether the plaintiff engaged in forum shopping in bringing suit;
>
> (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist;
>
> (5) whether the federal court is convenient forum for the parties and the witnesses;
>
> (6) whether retaining the lawsuit would serve the purposes of judicial economy; and
>
> (7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state

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[153] *Sherwin-Williams*, 343 F.3d at 388; *Trejo*, 39 F.3d at 590–91.

> suit between the same parties is pending.[154] These factors are sometimes grouped into three categories: allocation of decision- making authority between two jurisdictions, fairness to the parties, and efficiency.[155]

The case at bar involves the weighing of factors as applied to a proceeding before an administrative agency and a federal court, rather than the traditional pairing of a state and federal court. The *Trejo* factors therefore require adaptation.

Rather than concerns of federal comity vis-à-vis state decision-making, the balancing here focuses on the important goal of judicial deference to agency proceedings.[156] In summary, the Court finds that the first, second, third, fourth, and sixth

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[154] *Trejo*, 39 F.3d at 590–91.

[155] *Sherwin-Williams*, 343 F.3d at 390–91. Plaintiffs forego analysis of the *Trejo* factors in favor of addressing the three broad categories outlined in *Sherwin-Williams*. *See* Response to Motion to Dismiss [Doc. # 35], at 22–24. Under the first and second categories, Plaintiffs refer to their statutory interpretation argument as grounds for finding that decision-making authority was properly allocated to this Court and that FERC has unfairly engaged in forum-shopping by ignoring NGA § 24. The Court will review each factor in light of Plaintiffs' contentions.

[156] It is noted that, generally, public policy and deference to agency processes counsel in favor of permitting FERC to address its own jurisdiction in the first instance, and to address the merits of other claims, as needed. *See generally, e.g.*, *Distrigas of Mass. Corp. v. Boston Gas Co.*, 693 F.2d 1113 (1st Cir. 1982) (Breyer, J.) (invoking doctrine of primary jurisdiction to permit

Trejo factors weigh in favor of abstention, the fifth factor weighs modestly against abstention, and the seventh factor is inapplicable.

1. Pending Parallel Proceeding.— The principle that a declaratory action should not interfere with parallel proceedings applies to the relationship between federal administrative agencies and district courts. In *Public Service Commission of Utah v. Wycoff Co.*, the Supreme Court refused the plaintiff's request for a declaration that it was engaged in interstate commerce and therefore beyond the jurisdiction of the state agency.[157] The Supreme Court explained:

Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance.[158] Plaintiffs' threshold issue, pursuant to NGA § 24, is

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FERC to rule on the meaning of natural gas tariffs that were the subject of a private dispute).

[157] 344 U.S. 237, 244 (1952).

[158] *Id.*, at 246; *see also id.*, at 248 ("Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense . . . . ").

whether only a district court may make the final findings of a violation of the NGA and appropriateness of any civil penalties. On this statutory interpretation question, Plaintiffs may obtain judicial review after completion of the administrative process. This request for preemptive judicial consideration of the agency's jurisdiction contravenes *Wycoff*. The same reasoning applies to Plaintiffs' attempt to invalidate the Commission's procedures on constitutional bases or under the APA before any adverse findings have been made.

2. Anticipatory Lawsuit.— This declaratory action has some features of anticipatory litigation. Plaintiffs filed this case on January 27, 2016, shortly after FERC's Enforcement staff informed them of its decision to recommend that the Commission pursue civil penalties.[159] FERC has not yet commenced adjudicatory administrative proceedings, such as an ALJ hearing or a hearing on written submissions. Plaintiffs seek to avoid these administrative steps by coming to district court. Plaintiffs' claims are premature. Not only is there a possibility that Plaintiffs' response to the Order to Show Cause may persuade the agency to abandon the civil penalty process, but Plaintiffs' jurisdictional, constitutional, and APA claims can be addressed by a court of appeals on review of any final agency action.

3. Forum Shopping.— The essence of Plaintiffs' claims is that a district court forum would be

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[159] The suit was filed two months prior to the official communication of that recommendation to the Commission and three months before the Commission issued the Order to Show Cause. *See supra* notes 30–31.

more favorable than the agency process.[160] Plaintiffs express preferences for a jury and for other procedural and evidentiary rules that apply in district court. These preferences are tell-tale signs of forum shopping.[161]

4. Possible Inequities.— It would be inequitable for Plaintiffs to "gain precedence" in time and forum here by bypassing the established processes for consideration of the claims asserted. FERC's administrative adjudicatory process is not yet underway because FERC's procedures have afforded Plaintiffs repeated opportunities to respond to Enforcement staff findings and, now, the Commission's Order to Show Cause.[162] Plaintiffs have used the time intended for a response to the administrative charge to file a preemptive strike in district court requesting adjudication of jurisdictional and procedural issues prior to

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[160] *See generally* Amended Complaint [Doc. # 25], at 1–6, ¶¶ 1–12.

[161] *See, e.g.*, *Sherwin-Williams*, 343 F.3d at 397 (discussing *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983), as an example of impermissible "procedural fencing" because the declaratory plaintiff filed his action in Texas to obtain more favorable choice of law rules and substantive law).

[162] *Cf. Sherwin-Williams*, 343 F.3d at 397 n.7 ("Courts have found impermissible 'procedural fencing' when the declaratory judgment plaintiff brings the declaratory judgment action before the declaratory defendant is legally able to bring a state action."); *see also 909 Corp. v. Vill. of Bolingbrook Police Pension Fund*, 741 F. Supp. 1290, 1293 (S.D. Tex. 1990) (Hittner, J.) ("Application of the first-filed rule could penalize the [declaratory judgment defendant] for its attempt to make a good faith effort to settle out of court.").

the Commission fully considering these matters or assessing the merits of highly technical and complex charges and Plaintiffs' defenses.[163]

5. Convenience of the Forum.— There is no contention that this Court is an inconvenient forum for either party regarding the declaratory judgment rulings. This factor arguably weighs in favor of the Court's retention of this declaratory action.

6. Judicial Economy.— Judicial economy favors declining to entertain this case. At this juncture in this declaratory judgment action, the parties primarily dispute the Commission's authority to issue orders finding violations and assessing penalties. Plaintiffs do not challenge the agency's authority to hold some form of hearing and to propose penalties if warranted. It is possible that the dispute will be resolved before the Commission issues any final order. Further, there is no dispute that Plaintiffs' issues could be addressed by the court of appeals on review of a Commission final order pursuant to NGA § 19. If Plaintiffs were to prevail in this declaratory judgment action, an as yet undefined judicial proceeding would be required, possibly with factfinding by a jury. Not only would this Court's involvement at this time not save the parties expense, it likely would involve duplicative proceedings that increase the financial burden on all concerned.

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[163] Plaintiffs were directed to "address any matter, legal, factual, or procedural, that they would urge the Commission to consider in this matter" in their response to the April 28, 2016 Order to Show Cause, *supra* note 3, at 4. That response, filed on July 12, 2016, which includes identical jurisdictional, constitutional and APA claims, will not be ripe for review until the Enforcement staff files a reply. *See supra* notes 35–37 and accompanying text.

7. State Judicial Decree.— There is no state law issue in the current case. This factor is neutral in the *Trejo* analysis and the Court does not give it weight.

Conclusion on the* Trejo *Factors.— The *Trejo* factors weigh against this Court's entertaining this declaratory judgment action.

IV. CONCLUSION

Based on the foregoing analysis, the Court concludes that it cannot and should not entertain Plaintiffs' action for a declaratory judgment. At least three different justiciability or jurisdictional doctrines support dismissal of this action. Each of these doctrines revolves around the central theme that, absent extraordinary circumstances, Article III courts should not interfere with ongoing administrative proceedings. This principle is particularly relevant where the challenge is to agency processes still in their early stages.

The Court neither endorses nor criticizes FERC's current procedures. Plaintiffs' prayer to halt or change those procedures prior to the review available in the administrative scheme after issuance of a final agency order must be addressed to Congress.[164] It is therefore

ORDERED that Defendants Federal Energy Regulatory Commission, Chairman Norman C. Bay, Commissioners Cheryl A. LaFleur, Tony Clark, and

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[164] *See ETP*, 567 F.3d at 146 ("Congressional action to chart with clarity the desired course of proceedings [under the NGA] would not be unwelcome.").

Colette D. Honorable, and Acting Chief Administrative Law Judge Carmen A. Cintron's Motion to Dismiss the Amended Complaint [Doc. # 27] is **GRANTED**. It is further

ORDERED that Plaintiffs Total Gas & Power North America, Inc., Aaron Trent Hall, and Therese Nguyen Tran's Motion for Summary Judgment [Doc. # 49] is **DENIED as moot**.

A separate final order will be entered.

SIGNED at Houston, Texas, this **15th** day of **July, 2016**.

/s/

NANCY ATLAS

SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TOTAL GAS & POWER NORTH AMERICA, INCORPORATED; AARON TRENT HALL; THERESE NGUYEN TRAN, *Plaintiffs-Appellants* v. FEDERAL ENERGY REGULATORY COMMISSION; ACTING CHAIRMAN CHERYL A. LAFLEUR, In her official capacity; COMMISSIONER COLETTE D. HONORABLE, In her official capacity; CHIEF ALJ CARMEN A. CINTRON, In her official capacity, *Defendants-Appellees*	No. 16-20642

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., _____, _____ F.3d _____)

Before KING, JOLLY, and PRADO, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5Th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE **TEL. 504-310-7700**
CLERK **600 S. MAESTRI PLACE**
NEW ORLEANS, LA 70130

August 08, 2017

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 16-20642 TOTAL Gas & Power N Amer, Inc., et al v. FERC, et al

USDC No. 4:16-CV-1250

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/_____
Sabrina B. Short,
Deputy Clerk
504-310-7817

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20642

D.C. Docket No. 4:16-CV-1250

TOTAL GAS & POWER NORTH AMERICA, INCORPORATED; AARON TRENT HALL; THERESE NGUYEN TRAN,

Plaintiffs-Appellants

v.

FEDERAL ENERGY REGULATORY COMMISSION; ACTING CHAIRMAN CHERYL A. LAFLEUR, In her official capacity; COMMISSIONER COLETTE D. HONORABLE, In her official capacity; CHIEF ALJ CARMEN A. CINTRON, In her official capacity,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

Before KING, JOLLY, and PRADO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

E. GRADY JOLLY, Circuit Judge, concurring.

APPENDIX F

U.S. Const. art. II, § 2. (Appointments Clause)

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. III, § 1

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Natural Gas Act § 19, 15 U.S.C. § 717r

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days

after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, 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. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. 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. No objection to the order of the Commission

shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall

not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c)

of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title , the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

Natural Gas Act § 22, 15 U.S.C. § 717t-1

§ 717t-1. Civil penalty authority

(a) In general

Any person that violates this chapter, or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall be subject to a civil penalty of not more

than $ 1,000,000 per day per violation for as long as the violation continues.

(b) Notice

The penalty shall be assessed by the Commission after notice and opportunity for public hearing.

(c) Amount

In 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.

Natural Gas Act § 24, 15 U.S.C. § 717u

§ 717u. Jurisdiction of offenses; enforcement of liabilities and duties

The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments

and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.