UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FEDERAL ENERGY REGULATORY COMMISSION,	)	**Civil Action No. 2:16-cv-732**
	)	
	)	**Judge George C. Smith**
Plaintiff,	)	**Magistrate Judge Jolson**
	)	
-v.-	)	
	)	
COALTRAIN ENERGY, L.P., et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANT COALTRAIN ENERGY, L.P.'S REPLY
IN SUPPORT OF MOTION TO DISMISS

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Personal jurisdiction and venue are both lacking in this District because FERC has not alleged any fact that could establish that any "act or transaction constituting the violation" occurred in this District. 16 U.S.C. § 825p.

FERC alleges personal jurisdiction based solely on the Federal Power Act's ("FPA") nationwide service of process clause, which permits personal jurisdiction in any District so long as the defendant has "minimum contacts to the United States." *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1990). The problem for FERC is that the FPA makes clear FERC can only rely on this clause "*in such cases*" where the FPA's venue requirements are met. 16 U.S.C. § 825p (emphasis added). Thus, FERC cannot use Coaltrain's minimum contacts with the United States to establish personal jurisdiction in this District unless and until FERC convinces this Court that venue is proper.

FERC has not properly alleged venue because no Defendant is an inhabitant of this District, *see* Compl. ¶¶ 9–13, and no "act or transaction constituting the violation occurred" here. 16 U.S.C. § 825p. FERC argues that venue is proper in this District because Coaltrain's transmission reservations were placed on paths that either (1) "started or ended at places within this District," or (2) "entered, exited, or crossed through this District." Compl. ¶ 15(3), (4). Neither allegation states an "act or transaction" in this District. As FERC does not dispute, all of Coaltrain's transactions were settled financially; none involved the physical transmission of any electricity.

The Court should dismiss the Complaint for improper venue because FERC "reasonably could have foreseen" that its venue arguments lacked merit, and because such obvious forum shopping should be "discouraged." *Stanifer v. Brannan*, 564 F.3d 455, 458–460 (6th Cir. 2009).

In the alternative, the Court should transfer this action to the District of Delaware for the "convenience of the parties and witnesses" and "the interest of justice." 28 U.S.C. § 1404(a). That District has a far closer relation to the conduct in dispute. *Jamhour v. Scottsdale Ins. Co.*, 211 F. Supp. 2d 941, 945 (S.D. Ohio 2002). All but one of the Defendants reside in Delaware (none reside in Ohio), a majority of the UTCs were executed in Delaware (none were executed in Ohio), and Delaware will be more convenient for the majority of the witnesses.

FERC alleges that Coaltrain committed fraud in its Up-to-Congestion ("UTC") transactions because Coaltrain supposedly considered Marginal Loss Surplus Allocation ("MLSA") too much—what FERC dresses up as the "sole or primary purpose" of obtaining MLSA. FERC Br. 3. That claim fails for several reasons.

Section 222 of the FPA makes it unlawful to "use or employ . . . any manipulative or deceptive device or contrivance" in connection with the purchase or sale of electricity or transmission subject to FERC's jurisdiction. 16 U.S.C. § 824v. Congress instructed that this phrase in the FPA "means the same thing that it means in . . . section 10(b)" of the Exchange Act. *FERC v. City Power Mkt'g, L.L.C.*, No. 15-1428, 2016 WL 4250233, at *11 (D.D.C. Aug. 10, 2016). The Supreme Court has interpreted section 10(b) to require (1) a false statement; (2) a fraudulent omission where there is a "duty to speak"; or (3) price manipulation. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). FERC admits Coaltrain made no false statements, *see* FERC Br. 37–38, and FERC has not, as a matter of law, adequately pled a fraudulent omission or price manipulation.

FERC alleges that Coaltrain's "conduct" was "deceptive" because Coaltrain "implicitly represent[ed]" to PJM that it was transacting for "arbitrage" purposes when its true objective was to transact for the "sole or primary purpose of collecting MLSA." *Id.* at 35, 56. This claim fails as a matter of law because FERC never alleges that Coaltrain had any legal obligation to disclose its transacting purposes before executing a UTC transaction. *See Chiarella v. United States*, 445 U.S. 222, 232 (1980) ("*The element required to make silence fraudulent [is] a duty to disclose*." (emphasis added)).

FERC never alleges that Coaltrain transacted with any intent to manipulate the market price of electricity. Rather, FERC's theory is that Coaltrain disrupted the allocation of MLSA by placing transactions that allowed it to obtain MLSA that might have been paid to others. FERC Br. 32. Allegedly affecting the allocation of a credit, however, is fundamentally different from manipulating electricity prices. The FPA—like SEC section 10(b)—requires FERC to allege the latter. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477 (1977); Coaltrain MTD 32. Conduct that causes other alleged harms is not within the ambit of the statute.

FERC attempts to overcome these statutory limitations on its authority by arguing that its Anti-Manipulation Rule grants FERC broader powers. FERC is mistaken. By clear, unambiguous Congressional command, FERC's anti-manipulation authority under FPA section 222 is limited to the Supreme Court's interpretation of the scope of section 10(b) of the Exchange Act. FERC has no power to "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014).

It is unconstitutional to apply FERC's new definition of market manipulation to Coaltrain because Coaltrain had no prior notice of it before the transactions were made. Due Process requires prior notice specific and unambiguous enough to "give [a] person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). FERC's first public statement that considering MLSA in a UTC transaction could be unlawful came in 2015, *five years* after Coaltrain completed these transactions.

FERC's attempt to prohibit transactions made for the "sole or primary purpose" of MLSA violates Due Process for the independent reason that this standard is unconstitutionally vague. FERC admits that it is legal to "*consider*" MLSA in a transacting decision. FERC Br. 43 (emphasis added). FERC's argument that considering MLSA "too much" makes transactions fraudulent, FERC Br. 3, 43, fails as a matter of law. FERC's *sui generis* standard—announced long after the conduct in 2010—never identifies any principled basis upon which to differentiate how much "consideration" of MLSA turns a legal transaction into a fraudulent one. FERC's 'we-know-it-when-we-see-it' definition of manipulation violates Due Process because it does not allow citizens to "understand what conduct is prohibited." *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016).

FERC's comparison to the defendants in *Chen* and *City Power* fails based upon FERC's own description of the alleged conduct. FERC has alleged that the defendants in *Chen* and *City Power* engaged in risk-free "round-trip" trades or "wash" transactions. In marked contrast, FERC admits that Coaltrain's transactions carried risk. *See* Compl., Ex. 1 ¶ 74. Therefore, FERC cannot plausibly characterize Coaltrain's risk-bearing UTCs as "functionally identical" to *Chen*'s and *City Power*'s allegedly risk-free transactions.

FERC only has jurisdiction to pursue a manipulation claim against conduct "in connection with" the "transmission" or wholesale "sale[s]" of "electric energy in interstate commerce." 16 U.S.C. §§ 824(a) 824v(a) (emphasis added). UTCs do not fall within that regulatory ambit because they are *financially* settled; they do not require the physical transmission or sale of electricity in interstate commerce.

FERC's claim under section 35.41(b) should be dismissed because FERC is not seeking any penalty for the alleged violation. With no penalty assessed for this alleged violation, FERC lacks authority to bring the claim and this Court lacks jurisdiction to hear it.

FERC promulgated section 35.41(b) pursuant to its authority under FPA section 206, which relates to FERC's authority to fix rates. *See* 16 U.S.C. § 824e. The statute does not authorize FERC to regulate false or misleading statements. Thus, any claims based on that purported authority should be dismissed.

Even if FERC had authority to regulate false statements generally, it does not have the specific statutory authority to penalize alleged false statements that arise in discovery disputes, such as this one. Congress addressed FERC's investigative authority in other more specific statutory provisions, which do not give FERC the power to impose penalties. *See* 16 U.S.C. §§ 825(b), 825f(b), (c). Those specific delegations of investigative authority govern the general delegation of authority to set rates in FPA section 206. *See RadLAX Gateway Hotel v. Amalgamated Bank*, 132 S. Ct. 2065, 2070–71 (2012).

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I. INTRODUCTION.

FERC's case fails as a matter of law, and nothing in its opposition brief saves its Complaint from dismissal.

FERC Brought This Action In The Wrong Venue. Nothing about this case bears a cognizable relation to this District. This case should be dismissed because none of the relevant conduct occurred in this District and none of the Defendants reside here. *Infra* Part III.A.

FERC's Attempt To Penalize Coaltrain For Market Manipulation Exceeds Its Statutory Authority And Violates Due Process. FERC is attempting to hold Coaltrain liable under a legal standard that was *never* articulated at the time of Coaltrain's transactions, and is still not the law today. FERC argues Coaltrain committed fraud because it allegedly considered Marginal Loss Surplus Allocation ("MLSA") "too much"—FERC tries to dress up its Goldilocks standard by claiming the "sole or primary purpose" for making Up-to-Congestion ("UTC") transactions cannot be considering an economic factor inherent in the transactions. *See*, *e.g.*, Compl. ¶ 59; FERC's Opposition to Mot. to Dismiss 2 (ECF No. 31) ("FERC Br."). This allegation boils down to a claim that Coaltrain considered this lawful credit "too much" in its transacting decisions—nothing more than a subjective, after-the-fact assessment of FERC and its Enforcement Staff. But even taking FERC's allegation on its face, it fails as a matter of law for three independent reasons.

First, this standard is inconsistent with the definition of fraud Congress prescribed in section 222 of the Federal Power Act ("FPA"), which is interpreted *in pari materia* with section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"). 16 U.S.C. § 824v. Those statutes require (1) a false statement, (2) a fraudulent omission when there is a duty to speak, or (3) price manipulation to establish fraud. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976); Coaltrain Mot. to Dismiss 27–28 (ECF No. 25) ("Coaltrain MTD"). FERC does not allege any of those things—to the contrary: FERC admits Coaltrain did not make false statements when placing its UTCs, *see* FERC Br. 37–38; FERC concedes that Coaltrain had no legal obligation to disclose its transacting purposes; and FERC does not allege that Coaltrain intended to manipulate the market price of electricity. *Infra* Part III.B.1.

Second, the focus of the anti-manipulation rule is *mens rea*—did the actor intend to commit fraud. Even if FERC could reconcile its standard with the text of the FPA—it cannot—FERC never gave any notice that transacting for the "sole or primary purpose" of MLSA was unlawful *before* Coaltrain executed its UTCs in 2010. *Infra* Part III.B.2. Thus, FERC cannot plausibly claim Coaltrain intentionally committed fraud in placing such transactions. *See*, *e.g.*, *Valenzuela-Gallardo v. Lynch*, 818 F.3d 808, 821–22 (9th Cir. 2016) (agency cannot demonstrate intent to violate law if it has not provided notice of prohibited "actus reus"). FERC points to *other* UTC cases FERC is prosecuting, but the conduct in those cases is different in important, material ways from the conduct alleged here. FERC cannot rely on the alleged scienter of defendants in those other cases to establish Coaltrain's intent.

And FERC cannot penalize Coaltrain for violating a legal standard FERC only announced *after* Coaltrain executed its UTCs. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). FERC's contrary position violates Due Process.

Finally, apart from missing the real focus on the anti-manipulation law, FERC's "sole or primary purpose" standard is unconstitutionally vague. FERC concedes—as it must—that it is legal to "*consider*" MLSA as a factor in a transacting decision. FERC Br. 43 (emphasis added). According to FERC, the transaction becomes fraudulent only if MLSA is the "sole or primary purpose" of the transaction. *Id*. at 2. But FERC identifies no principle by which to decide *ex ante* how much a market participant can "consider" MLSA before committing fraud. The test

FERC purports would be simply whether FERC thinks the market participant considered MLSA "too much," an entirely subjective assessment made in hindsight. This type of 'we-know-it-when-we-see-it' standard is fundamentally irreconcilable with Due Process. *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016).

FERC Lacks The Statutory Authority To Penalize Coaltrain For Alleged False Statements. The legal standard FERC proposes in its second claim for relief, under 18 C.F.R. § 35.41(b), exceeds Congressionally-imposed boundaries on its authority. If FERC believes—as it alleges here—that a party has failed to produce all responsive documents in an investigation, FERC may issue a subpoena for the information, and go to federal court to enforce it. 16 U.S.C. §§ 825(b), 825f. FERC previously admitted that it does not have the power to impose penalties in an internal proceeding for such alleged discovery violations. That it claims now that Congress conferred that power without saying so defies both language and logic. *Infra* Part III.C.

FERC Cannot Deprive Coaltrain Of Its Rights Under The Federal Rules Of Civil Procedure. Finally, FERC argues that if the Complaint is not dismissed, the Court should strip Coaltrain of the ability to defend itself pursuant to the rights conferred by the Federal Rules of Civil Procedure. FERC Br. 10–16. This argument is baseless, and has been rejected by both courts to consider it. *Infra* Part III.D. Congress declared that FERC may bring an "*action*" in federal court to enforce its penalty orders. 16 U.S.C. § 823b(d)(3)(B) (emphasis added). Congress further declared that the Federal Rules "govern the procedure in *all civil actions*" in federal district court, unless "Rule 81" declares otherwise. Fed. R. Civ. P. 1 (emphasis added). "Rule 1 contains no exception" for FERC penalty enforcement actions, and nothing in the FPA suggests that Congress intended for any other procedures to apply. *FERC v. City Power Mkt'g, L.L.C.*, No. 15-1428, 2016 WL 4250233, at *11 (D.D.C. Aug. 10, 2016).

II. LEGAL STANDARD.

A. Federal Rule of Civil Procedure 12(b) Controls The Analysis.

The parties agree the Rule 12(b) standard applies to this Motion to Dismiss. *See* FERC Br. 10. FERC's argument that the Court should deny Coaltrain discovery and other rights under the Federal Rules is not only wrong, but also beside the point now. The parties agreed to brief this issue *after* Motions to Dismiss. *See* Joint Status Report (filed in chambers Sept. 30, 2016). Nonetheless, because FERC has prematurely briefed the issue, Coaltrain responds at the end of this reply.

B. FERC's Legal Arguments Are Not Entitled To Deference.

On this Motion to Dismiss, the Court accepts FERC's factual allegations in the Complaint as true, but only to the extent they are "plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Denton v. Hernandez*, 504 U.S. 25, 32 (1992) ("factual contentions [that] are clearly baseless"—*e.g.*, those "describing fantastic or delusional scenarios" should not be accepted under Rule 12(b)(6)). Separately, the parties agree that FERC's factual findings in the Penalty Order—including its determinations of intent and credibility—are not entitled to deference. FERC Br. 9, 13. Those findings are treated merely as allegations. Coaltrain MTD 15–17.

FERC's legal arguments should not receive deference either. The FPA states that this Court "shall . . . review de novo *the law* and the facts involved." 16 U.S.C. § 823b(d)(3) (emphasis added). Congress's explicit direction that the courts shall "review de novo the law" makes FERC's legal arguments in the Complaint and Penalty Order regarding the meaning of statutes, regulations, and agency precedents merely that—arguments not entitled to deference. As FERC admits, "'[A] de novo determination requires fresh consideration'" of the legal issues. FERC Br. 14 (quoting *Victoria's Secret Stores v. Artco Equip. Co., Inc.*, 194 F. Supp. 2d 704, 716 (S.D. Ohio 2002)). FERC's contention that the Court should review only the evidence FERC compiled (without allowing Coaltrain discovery) *and* defer to FERC's interpretation of the law renders the statutory requirement for de novo review meaningless.

Despite Congress's clear instructions, FERC insists it is entitled to deference on the merits issues.[1] Specifically, FERC seeks *Chevron* deference on its interpretation of (a) FPA section 222's definition of fraud, and (b) FERC's purported authority under FPA section 206 to regulate alleged false statements. FERC Br. 16–17, 46. FERC also seeks *Auer* deference on its interpretation of its own rules and orders which, it says, corroborate its construction of these statutes. *Id.*

FERC's claim would render Congress's express instruction for "de novo" adjudication in this action a nullity. 16 U.S.C. § 823b(d)(3). "*De novo* review" is *not* "deferential." *See Met. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115–16 (2008). Arguing otherwise, FERC cites *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), which addressed a statute instructing the court to review an agency record and reach a "correct decision." *Id.* at 390–91. The Supreme Court held that the statute permitted the court to grant *Chevron* deference to the agency's "regulation" (*i.e.*, an interpretation of law), while still examining the agency's "factual determinations" and applications of law to fact "*de novo*." *Id.* at 391. But Congress's instructions in this action are different. FPA section 31(d)(3) instructs the Court to review "*the*

[1] Importantly, FERC does *not* request deference on its interpretations of the FPA's provisions addressing personal jurisdiction, venue, or the procedures that apply in this district court action, nor could FERC plausibly do so. *See infra* Parts III.A & D. Even assuming Congress had not eliminated deference by designating this as a "de novo" action, the "key rationale motivating Chevron deference" is that "the agency has expertise that the court does not." *Shweika v. Dep't of Homeland Sec.*, 723 F.3d 710, 718 (6th Cir. 2013). But federal agencies—including FERC—have no expertise in defining the boundaries of a federal court's jurisdiction or the procedures that apply in a district court action. *See id.* (refusing to defer to agency on scope of federal court's "subject-matter jurisdiction").

law" de novo in this action, not merely "applications of the law to facts." 16 U.S.C. § 823b(d)(3) (emphasis added). *Haggar* recognized that Congress could "direct the court *not to pay deference to the agency's views*" by enacting a statute instructing courts to "determine the issue *de novo*." 526 U.S. at 391 (emphasis added). That is precisely what Congress has required in FPA section 31(d)(3) by requiring de novo review of the law. In such a case, "*Chevron* deference [is] inappropriate." *Id.* at 391.

Moreover, even if Congress had not required a "de novo" assessment of the law, FERC's interpretations of its statutory authority would not be entitled to deference unless the gating test for *Chevron* deference was met (*i.e.*, an ambiguity in the statute exists)—it is not. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).

III. LAW AND ARGUMENT.

A. The Complaint Should Be Dismissed Because Personal Jurisdiction And Venue Are Improper In This District.

Personal jurisdiction and venue are both lacking in this District because FERC has not alleged any fact that could establish that any "act or transaction constituting the violation" occurred here. 16 U.S.C. § 825p. Coaltrain's transactions were all settled financially; none involved the physical transmission of any electricity in this District.

1. The Court Lacks Personal Jurisdiction Over Coaltrain.

FERC alleges personal jurisdiction based solely on the FPA's nationwide service of process clause, which permits personal jurisdiction in any District so long as the defendant has "minimum contacts to the United States." *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1990). The problem for FERC is that the FPA makes clear FERC can only rely on this clause "*in such cases*" where the FPA's venue requirements are met. 16 U.S.C. § 825p (emphasis added).

Courts interpreting the Clayton Act's and Exchange Act's jurisdictional provisions—which share a common structure with the FPA's—have split. The Ninth, Third, and Seventh Circuits have stated that the personal jurisdiction requirements in those statutes are "independent" from venue. Coaltrain MTD 20–21. But those courts ignore the key statutory phrase "*in such cases*" that links personal jurisdiction to satisfaction of the statute's venue requirements. Coaltrain thus urges this Court to adopt the Second and D.C. Circuit's interpretations, which properly acknowledge that linkage. *GTE New Media Servs. Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1351 (D.C. Cir. 2000); *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 424 (2d Cir. 2005).

FERC has no explanation for why the crucial statutory text linking jurisdiction and venue should be ignored. Instead, FERC distracts from it by citing authorities—including the Sixth Circuit's decision in *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430 (6th Cir. 2012)—which merely hold that statutes with nationwide service of process clauses permit personal jurisdiction based on minimum contacts with the United States. FERC Br. 21–22. That point is not disputed or relevant. The real question is whether the FPA limits FERC's ability to rely on that clause "in such cases" to those instances where venue is proper. Venue was not contested in the cases FERC cites, so none of them address this question. By contrast, the Second and D.C. Circuits expressly addressed the question and held that the phrase "in such cases" conditions personal jurisdiction upon proper venue. *GTE*, 199 F.3d at 1351; *Daniel*, 428 at 424.

FERC tries to distinguish the Second and D.C. Circuit precedents because the Clayton Act has narrower venue requirements than the FPA. FERC Br. 20. Again, that is just distraction. The critical point is not what venue requirements applied, but whether they were met. Both statutes have a common *structure*: They only permit personal jurisdiction based on minimum contacts with the United States "in such cases" that venue is proper. Coaltrain MTD 18–21 & n.5. FERC cannot use Coaltrain's minimum contacts with the United States to establish personal jurisdiction in this District unless and until FERC convinces this Court that venue is proper here.[2]

2. Venue Is Improper In This District Because No "Act Or Transaction Constituting The Violation" Occurred In Ohio.

FERC has not properly alleged venue because no Defendant is an inhabitant of this District, *see* Compl. ¶¶ 9–13, and no "act or transaction constituting the violation occurred" here. 16 U.S.C. § 825p. FERC's Complaint alleged five "acts or transactions" that supposedly occurred in this District. *Id.* ¶ 15. In its opposing brief, FERC abandons three of those arguments.[3]

[2] FERC contends—in a footnote—that Coaltrain and the Individual Defendants waived their challenge to personal jurisdiction because counsel entered appearances using the Court's standard appearance form. FERC Br. 18, n.11. This argument does not merit this Court's attention. First, "arguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived." *Calvert v. Wilson*, 288 F.3d 823, 837 (6th Cir. 2002). Second, the argument is baseless. Defendants' first filing in this action stated that they were making a "Limited Appearance," subject to objections on personal jurisdiction. Thus, FERC had "reasonable" notice from the start that personal jurisdiction was in dispute. *King v. Taylor*, 694 F.3d 650 (6th Cir. 2012). And it is well-established that "Defendants . . . [d]o not waive their personal jurisdiction defense by filing a general notice of appearance" if they "move[] to dismiss for lack of personal jurisdiction." *Miami Valley Fair Housing Ctr., Inc. v. Steiner & Assocs., Inc.*, No. 3:08-cv-150, 2012 WL 5830252, at *3 (S.D. Ohio Nov. 16, 2012); *Mattson v. Troyer*, No. 5:15-cv-358, 2016 WL 5338061, at *3 (N.D. Ohio Sept. 23, 2016) (same). All Defendants moved to dismiss on personal jurisdiction grounds. By contrast, in the case FERC cites, the parties who waived personal jurisdiction filed a motion to enforce a settlement agreement and submitted initial disclosures. *Gerber v. Riordan*, 649 F.3d 514, 519–20 (6th Cir. 2011). Nothing in the Court's standard appearance form waived Coaltrain's jurisdictional arguments.

[3] FERC's Complaint alleged that Coaltrain's UTCs "had the potential to affect the wholesale price of electricity" in this District, Compl. ¶ 15(2), and "harmed" market participants located in this District, *id.* ¶ 15(5). But these are merely allegations that Coaltrain's transactions had effects

That leaves FERC with only two allegations to support venue in this District: Coaltrain's transmission reservations were placed on paths that either (1) "started or ended at places within this District," or (2) "entered, exited, or crossed through this District." Compl. ¶ 15(3), (4). Neither allegation states an "act or transaction" in this District. As FERC does not dispute, all of Coaltrain's transactions were settled financially; none involved the physical transmission of any electricity. Indeed, FERC itself describes the transactions as a "financial instrument," Compl. ¶ 29, and thus no electricity flowed through this District as a result of these transactions. Compl. ¶ 28 ("no generation is dispatched, no load is served, and obligations are met through cash settlement").

FERC rests its opposing jurisdictional argument on another FPA market manipulation action, *FERC v. Barclays Bank, PLC*, 105 F. Supp. 3d 1121, 1134-36 (E.D. Cal. 2015). *Barclays*, however, involves entirely different types of transactions. In *Barclays*, the district court held venue was proper in the Eastern District of California, even though the disputed transactions were executed in New York, because those transactions were "physical products" and swap contracts. *Id.* at 1125–26. Those transactions were *not* UTCs—a crucial distinction.

FERC alleges Barclays committed manipulation in the "day-ahead fixed-price physical market," in which "traders bought and sold electricity for *physical* delivery the following day at fixed prices." *Id.* (emphasis added). As part of its transactions, Barclays took "physical positions" in California's energy market—Barclays took "title" to physical electricity in the State, and

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or potential effects in this District. Allegations of effects, much less "potential effects," do not constitute an "act or transaction" within this District. Coaltrain MTD 21–24; *Premium Plus Partners, LP v. Davis*, No. 04 C 1851, 2005 WL 711591 (N.D. Ill. Mar. 28, 2005). FERC appears to recognize this and concedes that these allegations "are not the basis for venue." FERC Br. 25. FERC also abandons its attempt to justify venue in this District because Coaltrain allegedly defrauded PJM. Compl. ¶ 15(1). As noted, neither Coaltrain nor PJM were present in Ohio when the alleged fraud occurred. Coaltrain MTD 22.

accepted the obligation to deliver or accept physical electricity in that State. *Id.* at 1128, 1135. Therefore, that court found that Barclays' transactions had "involvement with the physical transfer of electricity" in California, even though Barclays had argued that it "flattened" its positions on a daily basis to avoid any actual delivery obligations. *Id.*

Unlike Barclays' transactions, Coaltrain's financial UTCs by definition do not result in physical transfer of electricity. Compl. ¶ 28 ("[V]irtual products carry no obligation to buy or sell physical power"). Indeed, there is no way in which Coaltrain's financial UTCs *can* result in the physical transfer of electricity. Coaltrain's reservation of transmission does not alter the fundamentally financial nature of the UTC transactions at issue in this case. And even if FERC could establish that an Ohio market participant was "excluded" from the transmission system by Coaltrain—a baseless claim—that would merely amount to an alleged *effect* of Coaltrain's conduct, not an "act or transaction" in this District, which is what the FPA requires. 28 U.S.C. § 1406.

3. This Case Should Be Dismissed.

The Court should dismiss the Complaint for improper venue. 28 U.S.C. § 1406(a). When a plaintiff has failed to meet the statutory venue requirements, dismissal—rather than transfer—is appropriate if the "plaintiff reasonably could have foreseen that the forum in which the suit was filed was improper," and where "similar conduct should be discouraged." *Stanifer v. Brannan*, 564 F.3d 455, 458–460 (6th Cir. 2009) (C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3827 at 605 (3d ed 1998)). That is precisely the case here. FERC alleges no facts that could establish an "act or transaction" in this District, so FERC should have known there was only a "slight probability" its venue allegations would withstand judicial scrutiny. *Id.* at 459. FERC also surely knew that other Districts, namely Delaware, bear a far closer relation to this case. This obvious forum shopping should be "discouraged" by dismissing the case. *Id.* Dismissal "substantially benefits" the "public" by encouraging "better compliance" with personal jurisdiction and venue laws, *id.*, and such compliance should be demanded from government actors responsible for acting in the public interest. FERC had no apparent reason to file suit in this District, other than to impose inconvenience and unnecessary costs on the Defendants. Its gaming tactics should not be rewarded.

4. If The Court Does Not Dismiss, Transfer To The District Of Delaware Is Warranted.

Even if FERC could satisfy the FPA's venue requirements—which it cannot—this Court should transfer this action to the District of Delaware "[f]or the convenience of parties and witnesses" and the "interest of justice" because Delaware has a far closer relation to the conduct in dispute. 28 U.S.C. § 1404(a); *Jamhour v. Scottsdale Ins. Co*., 211 F. Supp. 2d 941, 945 (S.D. Ohio 2002). All but one of the Defendants reside in Delaware (none reside in Ohio), a majority of the UTCs were executed in Delaware (none were executed in Ohio), and Delaware will be more convenient for the majority of the witnesses. Coaltrain MTD 24–26.

FERC presents no convincing reasons to oppose transfer, and FERC admits that its choice of forum is entitled to less weight than if it were a plaintiff who resides in this District. FERC Br. 27; *Kay v. Nat'l City Mortg. Co.*, 494 F. Supp. 2d 845, 850 (S.D. Ohio 2007).

FERC does argue that Ohio would be convenient for one hypothetical witness because, if a trial occurs, FERC may call a witness from a "Columbus-based utilit[y]" to testify about how Coaltrain's UTCs allegedly impacted the market. FERC Br. 28–29. Surely, FERC cannot oppose transfer based on the testimony of this hypothetical witness while it simultaneously argues that *no* witness testimony should occur. *See* FERC Br. 10–16. And little weight should be given to this single hypothetical witness, when many other actual witnesses have no contacts with Ohio. None of the likely witnesses in this case—Defendants, representatives of PJM and its market monitor, FERC investigators, and market participants in the other 12 states in PJM's coverage area—reside in Ohio, and many reside in Delaware. Coaltrain MTD 25.

Finally, FERC's reliance on "weighted" court statistics is a red herring. FERC Br. 28-30. Those very statistics show that judges of this District have *over 400 more pending cases on their docket* than the District of Delaware. FERC Br. 28–29 & Appx. B. FERC's arguments does not negate the significantly larger caseload overall in this District and the significantly more direct relationship of Delaware to the case.

B. <u>FERC Fails To State A Claim For Market Manipulation</u>.

FERC alleges that Coaltrain committed fraud because it made UTC transactions for the "sole or primary purpose" of obtaining MLSA. *See* FERC Br. 3. FERC's claim fails because (1) the alleged standard of liability does not meet the statutory definition of market manipulation; (2) FERC never gave "fair notice" of its new manipulation standard before Coaltrain's transactions were made; and (3) FERC's standard is unconstitutionally vague.

1. FERC Has Not Alleged Deception Or Manipulation As Those Terms Are Defined Under The FPA.

FPA section 222 makes it unlawful to "use or employ . . . *any manipulative or deceptive device or contrivance*" in the purchase, sale or transmission of electricity subject to FERC's jurisdiction. 16 U.S.C. § 824v (emphasis added). Congress instructed that this phrase in the FPA "means the same thing that it means in . . . section 10(b)" of the Exchange Act. *City Power*, 2016 WL 4250233, at *11. The Supreme Court has interpreted section 10(b) to require (1) a false statement; (2) a fraudulent omission where there is a "duty to speak"; or (3) price manipulation. *Ernst & Ernst*, 425 U.S. at 199; Coaltrain MTD 27–28. FERC admits Coaltrain made no false statements, *see* FERC Br. 37–38, and FERC has not, as a matter of law, adequately pled a fraudulent omission or price manipulation.

a. FERC Does Not Properly Allege That Coaltrain Made A Fraudulent Omission.

FERC claims that Coaltrain's "conduct" was "deceptive" because Coaltrain allegedly "trade[d] UTCs for the sole or primary purpose of collecting MLSA" when it "knew" this was "impermissible." *Id.* 35, 56. Although FERC resists the label, *see id.*, this is a claim based upon a fraudulent omission theory because it turns upon whether Coaltrain had a duty to disclose the "purpose" of its transacting. In particular, FERC's claim of deception depends on three allegations: (a) arbitrage is the only legitimate purpose of a UTC; (b) "traders implicitly represent that they are seeking arbitrage when they submit UTC[s]"; and (c) Coaltrain made an "implicit misrepresentation" when it failed to disclose that it was transacting for the "sole or primary" purpose of obtaining MLSA. *Id.* at 35–37. FERC's claim fails as a matter of law.

An implicit misrepresentation in the form of silence is fraudulent *only if* the defendant has a duty to speak. *Chiarella v. United States*, 445 U.S. 222, 232 (1980) ("*The element required to make silence fraudulent [is] a duty to disclose*." (emphasis added)).

FERC alleges no duty to speak. In its entire 365-paragraph Penalty Order and its brief to this Court, FERC identifies no statute, regulation, tariff, or agency precedent that requires market participants to disclose transacting purposes to PJM.

FERC argues a duty to disclose is not necessary because FERC's Anti-Manipulation Rule makes it illegal for market participants to transact for any "purpose" that is "different" from what the agency "presume[s]" to be legitimate. FERC Br. 34. FERC's self-aggrandizement, however, lacks any statutory footing. Because of the express language of FPA section 222, FERC can declare (or presume) that a purpose is illegal only if it would be illegal under section 10(b) of the Exchange Act. *See infra* Part III.B.1.c. Coaltrain's alleged purpose does not meet that standard.

Moreover, FERC misstates what its Anti-Manipulation Rule says. FERC's own order promulgating the Rule clarifies that "*[a]bsent a tariff requirement or Commission directive mandating disclosure, there is no violation of the Final Rule simply because an entity chooses not to disclose all non-public information in its possession.*" *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047 at P 36 (2006) (emphasis added). FERC cannot overcome binding Supreme Court precedent and this express limitation imposed by its own Rule. FERC has thus failed to allege a fraudulent omission as a matter of law.

b. FERC Does Not Allege That Coaltrain Attempted To Manipulate Electricity Prices.

FERC never alleges that Coaltrain transacted with any intent to manipulate the market price of electricity. Rather FERC's theory is that Coaltrain disrupted the allocation of MLSA by placing transactions that allowed it to obtain MLSA that might have been paid to others. FERC Br. 32. Allegedly affecting the allocation of a credit, however, is not manipulating electricity prices. The FPA—like SEC section 10(b)—requires FERC to allege the latter. Under both statutes, "Congress meant to prohibit [a] full range of ingenious devices," but only those "used to *manipulate securities prices*." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477 (1977) (emphasis added); Coaltrain MTD 32. Conduct that causes other alleged harms is not within the ambit of the statute. *See Chiarella*, 445 U.S. at 232 ("[N]ot every instance of financial unfairness constitutes fraudulent activity under § 10(b).").

FERC tries to avoid this outcome by blurring the distinction between electricity prices and MLSA, claiming that both are part of the "rate." FERC Br. 39. But, the premise of FERC's case is that it is fraudulent to transact for the "sole or primary" purpose of MLSA because this credit is *not* part of the "underlying economic value"—*i.e.*, the market price. FERC Br. 36. FERC simply cannot have it both ways. FERC has not alleged that Coaltrain intended to manipulate electricity prices, in a manner which would bring this claim under section 10(b) or the FPA. Thus, FERC's claim fails as a matter of law.

c. FERC Cannot Penalize Conduct That Does Not Involve The Required Elements Of Deception Or Manipulation Set Forth In The FPA.

FERC attempts to overcome these statutory limitations on its authority by arguing that its Anti-Manipulation Rule grants it broader powers than what section 10(b) provides. FERC says the Rule empowers it to prohibit any conduct that impairs a "well-functioning market," even if the conduct does not involve any of the three predicates, outlined above, that the Supreme Court has required under section 10(b). *Id*. at 42–43. FERC arrogates for itself the option to follow the Supreme Court's section 10(b) precedents on a "case-by-case basis," depending on whether FERC thinks they are "appropriate" to apply to "specific energy industry facts." *Id.* at 45.

FERC is wrong as a matter of law. An agency's views about what is "appropriate" are subordinate to Congress's. FERC has no power to "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). Congress made clear that the terms "manipulative or deceptive device or contrivance" are to be defined "*as those terms are used*" in section 10(b). 16 U.S.C. § 824v (emphasis added). FERC's anti-manipulation authority under the FPA is therefore limited to the Supreme Court's interpretation of the scope of section 10(b). Because FERC has not alleged fraud under section 10(b), its claim should be dismissed.

2. FERC Never Gave "Fair Notice" Of Its New Manipulation Standard.

Before Coaltrain executed its UTCs in 2010, FERC never informed the public of its stance that transacting for the "sole or primary purpose" of MLSA was unlawful. FERC's attempt to retroactively hold Coaltrain liable for violating this standard violates Due Process. *See Grayned*, 408 U.S. at 108; Coaltrain MTD 36–37.

FERC's first public statement that considering MLSA in a UTC transaction could be unlawful came in 2015, *five years* after Coaltrain's transactions were executed. To establish notice, FERC must point to a statute, rule, or precedent that articulated the relevant standard with "ascertainable certainty" *before* the disputed transactions occurred. *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). FERC cannot do so.

FERC's reference to the *Black Oak* orders does not resuscitate its claim. By its own admission, FERC's *Black Oak* orders in 2008 only make a "passing mention" of the incentives MLSA creates. Compl., Exh. 1 ¶ 200. And nothing in those orders stands for the proposition that a market participant cannot or should not consider all economic variables associated with a proposed UTC transaction, including MLSA. To the contrary, FERC has stated that it expects market participants to consider "*all*" factors affecting the "profitability of one's virtual trades." *See* Stipulation and Consent Agreement, *MISO Virtual and FTR Trading*, 146 FERC ¶ 61,072 at P 9 (2014) (emphasis added); *Deutsche Bank Energy Trading, LLC*, 142 FERC ¶ 61,056 (2013).

Thus, there was nothing in 2010 from which a reasonable market participant could deduce that FERC would deem Coaltrain's transactions to be unlawful. As FERC admits, the focus of *Black Oak* was on how MLSA would be distributed, "not on how market participants trade UTCs or the ways in which a market participant might manipulate" MLSA distribution. *Houlian Chen*, 151 FERC ¶ 61,179 at P 122 (2015). FERC already determined that "paid for" transmission would receive an allocation of MLSA, so UTC transactions involving paid transmission would receive an allocation.[4]

Notwithstanding its prior silence on this point, FERC protests that it "consistently" articulated its "sole or primary purpose" standard since 2015, in its recent decisions in *City Power* and *Chen*. FERC Br. 34. But that is not how fair notice works. To penalize Coaltrain for violating the standard, FERC must have articulated it with "ascertainable certainty" *before* Coaltrain acted. *Gen. Elec.*, 53 F.3d at 1329. Due Process does not allow FERC to rewrite the definition of fraud retroactively. *Id.*

3. FERC's As-Yet Undefined Manipulation Standard Is Unconstitutionally Vague.

Faced with the fact that Coaltrain's transactions were economic when considering all elements that comprise the resulting settlement, including the cost of transmission and credits for transmission, FERC pivots again—admitting that MLSA is valuable, but alleging that "too much" consideration of MLSA is fraud. That standard is unconstitutionally vague.

FERC admits it is legal to "*consider*" MLSA in a transacting decision. FERC Br. 43 (emphasis added). Of course FERC must because it has long been held that all lawful taxes, tariffs, and credits may be considered in evaluating a transaction. Coaltrain MTD 33 (citing *Sacks v. Comm'r*, 69 F.3d 982, 991 (9th Cir. 1995); *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978)). Indeed, FERC has stated in published orders that it is appropriate—and

[4] FERC cites to a footnote in a brief filed by a group of financial marketers to support its position. FERC Br. 32–33. FERC's characterization of that footnote is misleading for at least three reasons. First, that footnote addresses a different type of transaction called a "virtual transaction"—the only transactions at issue in the context of that pleading—*not* UTCs. Second, the footnote is not addressing the effects of MLSA credits on virtual transactions generally, as FERC claims; rather, it is contrasting two particular MLSA allocation methods for those virtual transactions: a fixed allocation versus a variable percentage of the surplus. Third, the footnote plainly acknowledges that market participants *will* consider MLSA credits in deciding whether to transact.

necessary—for market participants to consider costs and credits in transacting decisions. *See, e.g.*, *Deutsche Bank Energy Trading, LLC*, 140 FERC ¶ 61,178, App. A at 34 (2012) (company's conduct was fraudulent because it "did not attempt to ascertain the publicly available transmission charges and . . . charges for its physical transactions until after starting them").

Moreover, FERC is well aware that tax credits actually impact physical energy market prices, yet has never suggested that bids that take tax credits into consideration constitute manipulation. For example, FERC approved a lowered bid floor in the California wholesale electricity market to *negative* $130 Megawatt hours (MWH) to reflect the increasing level of negative prices produced by the production tax credit and state renewable mandates. *Cal. Indep. Sys. Operator Corp.*, 145 FERC ¶ 61,254 at PP 22, 46 (2013) (approving lowering of bid floor to negative $130 MWH and noting concerns regarding effects on conventional generators but declining to initiate technical conference). There is no cognizable distinction between FERC's decisions affirming the validity of offers that contemplate tax credits—even where the tax credit is necessary to make the overall transaction economic—and Coaltrain's UTC bids that allegedly considered MLSA.

Given that MLSA lawfully may be "considered," FERC tries to paint a distinction between permissive and illegal consideration of MLSA in UTC transactions by alleging Coaltrain considered MLSA "too much"—*i.e.*, consideration of MLSA becomes fraudulent when it is supposedly the "sole or primary purpose" for the transaction. FERC Br. 3, 43. What does "sole or primary" mean where—as here—the total economics of the transactions are positive—

FERC never says. FERC never identifies any principled basis upon which to distinguish permissible "consideration" of MLSA from fraud.[5]

The question for determining if manipulation has occurred or not properly focuses on the *mens rea* of the actor—was the transaction intended for fraudulent or legitimate purposes. Coaltrain MTD 32; *Santa Fe Indus., Inc. v. Green*, 430 U.S. at 477; *Sacks v. Comm'r*, 69 F.3d at 991. Making a profit by considering all the economic factors inherent in a transaction does not satisfy the legal requirements for alleging manipulation.

FERC's allegation that Coaltrain transacted for the "sole or primary purpose" of MLSA is misdirection. FERC wants the Court to ignore that its standard amounts to nothing more than the allegation that Coaltrain considered MLSA *too much* in the opinion of FERC and its Enforcement Staff. This is an entirely subjective determination. FERC fails to articulate any measurable, objective criteria by which to separate lawful consideration of MLSA from allegedly fraudulent transactions. And, of course, FERC makes this determination in hindsight. FERC did not even announce the standard until *five years* after Coaltrain's UTC transactions were made.

[5] In its Penalty Order and Complaint, FERC argued that price risk was the key evidence of a transaction's purpose, and that Coaltrain's transactions were "fraudulent" because their price risks were too "small." Compl. ¶¶ 70, 84; *id.* Ex. 1 ¶ 235. FERC retreats from that position in its brief, *see* FERC Br. 48—almost certainly because there is no basis in authority to define when a risk is "too small." Coaltrain MTD 34–37. If FERC had a clear standard that informed market participants what was permissible and what was not, there would be no need for the repeated shifts in FERC's explanations of why the transactions here were illegal.

FERC also argues that Coaltrain's transactions were fraudulent because they were "money-losers." FERC Br. 47. But that allegation is irreconcilable with FERC own statements. FERC's Penalty Order states that Coaltrain turned a profit on the UTC price spreads on 33% of its transaction paths (13 out of 40) *before* accounting for MLSA. Compl., Ex. 1 ¶ 74. FERC never explains how transactions that turned a profit *before* MLSA can plausibly be described as "money-losers." Where a complaint contradicts itself on a factual allegation, the plaintiff cannot choose which one to argue, and the Court need not and should not accept the chosen allegation as true. *See*, *e.g.*, *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 551 (6th Cir. 2008) (inconsistencies in plaintiff's factual allegations demonstrates a failure to state a claim as a matter of law).

Even today, market participants have no practicable way to foresee whether FERC will deem their consideration of MLSA permissible or fraudulent in FERC's after-the-fact analysis of their transactions. This 'we-know-it-when-we-see-it' definition of manipulation does not allow citizens to "understand what conduct is prohibited" with any degree of confidence or certainty, and therefore violates Due Process. *McDonnell*, 136 S. Ct. at 2373.

4. FERC Cannot Conflate Coaltrain's Transactions With The Alleged Conduct In *Chen* And *City Power.*

FERC attempts to bolster its allegations against Coaltrain by claiming that Coaltrain's transactions were "nearly identical" and "functionally identical" to those of other market participants FERC has accused of engaging in allegedly manipulative UTC transactions, the defendants in *Chen* and *City Power*. FERC Br. 56–57, 60. But this comparison fails based upon FERC's own description of the alleged conduct.

FERC has alleged that the defendants in *Chen* and *City Power* engaged in risk-free "round-trip" trades or "wash" transactions—*i.e.*, "transactions which are (i) prearranged to cancel each other out; and (ii) involve no economic risk." *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 53 (2003); Coaltrain MTD 36–37. In marked contrast, FERC does not allege that Coaltrain submitted round-trip or wash transactions. *See*, *e.g.*, Compl., Ex. 1 ¶ 102. Indeed, FERC admits that Coaltrain's transactions carried risk. *See id.* ¶ 74; Coaltrain MTD 36. As a matter of law, Coaltrain's risk-bearing UTCs are not "functionally identical" to *Chen*'s and *City Power*'s allegedly risk-free transactions.

In fact, in its Penalty Order in *Chen*, FERC declined to penalize transactions that carried "some price spread risk," even though FERC alleged that the defendant executed those transactions as part of a "strategy designed to capture increased volumes of MLSA." *Chen*, 151

FERC ¶ 61,179, at P 42, 47. Despite this proper distinction it recognized in *Chen* between risk-free and risk-bearing transactions, FERC is asserting that transactions by Coaltrain which FERC admits had "some price spread risk" are fraudulent in this action. FERC should not be permitted to take facially inconsistent litigating positions, and this Court should reject its disparate treatment of similar transactions.

5. FERC Does Not Have Jurisdiction Over UTC Transactions.

Finally, FERC's manipulation claim fails for the independent reason that FERC has not alleged that Coaltrain made any transaction subject to FERC's jurisdiction. FERC only has the statutory authority to penalize manipulation "in connection with" the interstate purchase, sale, or transmission of electricity. 16 U.S.C. §§ 824(a), 824v(a). UTCs do not fall within that regulatory ambit because they are *financially* settled; they do not require the physical transmission or sale of electricity in interstate commerce. Coaltrain MTD 39–40.

FERC argues otherwise, claiming that Coaltrain's UTCs "directly affected the price of wholesale electricity or its transmission." FERC Br. 61–62. But FERC fails to identify any specific instance in which any of Coaltrain's UTCs affected market prices. FERC asserts only that Coaltrain's UTC transactions "*may have* affected the day-ahead price" of electricity. *Id.* at 40 (emphasis added). Thus, FERC's attempt to assert jurisdiction based on the alleged price effects of Coaltrain's transactions fails for a lack of particularity. *See* Fed. R. Civ. P. 9(b).

FERC also argues that Coaltrain's transmission reservations for its financial UTCs affected the interstate transmission of physical electricity. To the contrary, PJM's tariff requirement that market participants reserve transmission was merely an administrative requirement—that's how PJM tracked Coaltrain's financial liability for transmission charges. PJM is not the FERC: A lot of things that PJM does are not within FERC's jurisdiction. The transmission reservation to which FERC points had absolutely no impact on the physical transfer of electricity in Ohio or anywhere else. Coaltrain MTD 39; Compl. ¶¶ 30, 57. Therefore, FERC has failed to plausibly allege any impact on interstate transmission, and FERC has no jurisdiction over these transactions.

C. FERC Fails To State A Claim That Coaltrain Made False Statements In Violation Of Section 35.41(b).

FERC's claim under section 35.41(b) should also be dismissed. FERC did not impose a penalty for this alleged violation, and FERC lacks statutory authority to sanction it in any event.

1. This Claim Is Not Justiciable Because FERC Is Not Seeking A Penalty.

FERC's Penalty Order imposed no penalty for a violation of section 35.41(b). *See* Compl., Ex. 1 ¶¶ 325, 331 n.851. Indeed, FERC's opposition acknowledges this is not a separate claim—but merely a basis for enhancing the penalty FERC wants for the alleged act of manipulation. Because FERC seeks no relief, it has not presented a case or controversy as required by Article III of the Constitution. Coaltrain MTD 47.

FERC insists that it did "assess penalties" under section 35.41(b) because it considered obstruction as a factor that increased Coaltrain's culpability score under FERC's Penalty Guidelines for the manipulation claim. FERC Br. 70. But FERC cannot substitute its mere reference to section 35.41(b) when calculating Coaltrain's manipulation penalty with the actual imposition of a penalty for a section 35.41(b) violation. At least three reasons make this clear.

First, FERC *did not apply the Penalty Guidelines*. FERC merely noted that the penalty it imposed on Coaltrain for manipulation was within the Penalty Guidelines range. Compl., Ex. 1 ¶ 326. Because FERC did not use the Guidelines to calculate Coaltrain's manipulation penalty, FERC cannot claim that section 35.41(b) was necessary to any penalty enhancement.

Second, even if FERC had used the Guidelines, they only contain an enhancement for "obstruction of justice," not for a section 35.41(b) violation. *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216 at § 1C2.3(c)(1)(e) (2010). More important, FERC does not need to bring a separate section 35.41(b) claim in federal court in order to allege obstruction in an administrative investigation.

Third, FERC cannot conflate a section 35.41(b) violation with obstruction because obstruction, as defined in the Guidelines, requires a showing of intent, but a section 35.41(b) violation (according to FERC) does not. *Id.* FERC's second claim for relief should be dismissed because it presents no case or controversy.

2. Congress Did Not Grant False Statement Authority To FERC.

In connection with EPAct 2005, a FERC Commissioner and FERC staff member stated that FERC did not have authority to penalize false statements in investigations. They asked that Congress grant FERC such authority. Coaltrain MTD 41–46. Alas, EPAct 2005 contained no such grant of authority.

Recognizing this, FERC argues that Congress silently slipped such authority into FPA Section 206—but FERC's argument strains credulity. FERC points to language in FPA section 206 authorizing FERC to remedy any "practice . . . affecting [a] rate," 16 U.S.C. § 824e(a), as conferring the authority to regulate a matter not specifically addressed by statute. But, as noted below, section 206 is not that broad, and the argument is emblematic of FERC's overreaching.

In *California Independent System Operator Corp. v. FERC*, 372 F.3d 395 (D.C. Cir. 2004), the D.C. Circuit vacated a FERC order replacing the governing board of a public benefit corporation, finding that FPA section 206 did not confer the authority for such action as FERC claimed. The Court made clear, and FERC disregards, the strict limits on the universe of practices "directly affecting" wholesale rates:

> [S]ection 206's empowering of the Commission to assess the justness and reasonableness of practices affecting rates of electric utilities *is limited to those methods or ways of doing things on the part of the utility that directly affect the rate or are closely related to the rate, not all those remote things beyond the rate structure that might in some sense indirectly or ultimately do so*.

Id. at 403 (emphasis added). The D.C. Circuit noted that these limitations were necessary to prevent FERC from seizing jurisdiction over anything and everything remotely related to regulated utilities: "FERC apparently would have us hold that . . . there is . . . an infinitude of acceptable definitions for what constitutes a 'practice' to give it the authority to regulate anything done by or connected with a regulated utility, as any act or aspect of such an entity's corporate existence could affect, in some sense, the rates." *Id.* at 401.

In *FERC v. EPSA*, the Supreme Court expressly accepted the D.C. Circuit's narrow construction of FPA Section 206, stating "[W]e now approve [] a common-sense construction of the FPA's language, limiting FERC's 'affecting' jurisdiction to rules or practices that 'directly affect the [wholesale] rate.'" 136 S. Ct. 760, 774 (2016) (quoting *Cal. Indep. Sys. Operator Corp.*, 372 F.3d at 403 (emphasis in original)).

The practice in that case, paying consumers for commitments not to purchase electricity, did directly affect rates, "with room to spare." *Id*. This "wholesale demand response" and the rules determining how it operates were "all about reducing wholesale rates." *Id.* The contrast between this practice and FERC's claim here, that any "dishonesty" is a "practice" directly affecting rates, FERC Br. 65, is instructive. Policing the honesty of statements to FERC during after-the-fact investigations is not a regulation of rates. Its relationship to rates is at best remote, which explains why FERC offers no judicial or statutory authority upholding this asserted authority against a challenge.[6]

Indeed, FERC's Penalty Order concedes that the purported false statements here do not themselves *directly* affect wholesale rates; rather, such statements only affect FERC's ability to regulate wholesale rates. *See* FERC Br. 65–66 ("As the Commission explained, '[f]alse and misleading statements directly affect the Commission's ability to fulfill its statutory mandate to ensure just and reasonable rates.'" (citing Compl., Ex. 1 ¶ 275)). FERC's unsupported *ipse dixit* pronouncement that any dishonesty in dealings with the Commission constitutes a practice that directly affects wholesale rates is illogical. That is especially so because the alleged false statements in this case had nothing to do with jurisdictional rates—they were statements about whether certain documents existed. FERC cannot sustain 18 C.F.R. § 35.41(b). Because neither FPA section 206—nor any other statute—confers upon FERC the authority to penalize false and misleading statements, this claim should be dismissed.

3. FERC Has No Statutory Authority To Use Section 35.41(b) To Punish Alleged Discovery Violations.

Finally, this claim should be dismissed for the independent reason that FERC does not have the statutory authority under Section 206 to penalize alleged false statements that arise in discovery disputes, such as this one. Congress addressed FERC's investigative and penalty authority in *other* more specific statutory provisions. *See* Coaltrain MTD 50 (citing 16 U.S.C. §§ 825(b), 825f(b), (c)). Those provisions establish that, if FERC believes a party has failed to

[6] Instead, FERC cites to its own orders, or cases in which no party challenged FERC's authority to regulate false statements. *See, e.g.*, *Kourouma v. FERC*, 723 F.3d 274, 279 (D.C. Cir. 2013) (rejecting argument that section 35.41(b) was unconstitutionally vague but not considering FERC's authority); *City Power*, 2016 WL 4250233, at *18 (rejecting argument that FERC failed to state a claim that defendant violated section 35.41(b), but not addressing FERC's authority).

produce all documents requested in a Staff investigation, FERC may subpoena the information and seek a district court order to enforce it. 16 U.S.C. § 825f(c). FERC has no other statutory remedy to address an alleged failure to produce documents. FERC cannot rely on its general rate-setting authority under section 206 to create one because Congress already specifically addressed the matter in other statutes, and "the specific governs the general." *RadLAX Gateway Hotel v. Amalgamated Bank*, 132 S. Ct. 2065, 2070–71 (2012).

FERC's only response is to argue that it is "important" for FERC to wield this authority, and that FERC has "put the market on notice" that it intends to do so. FERC Br. 71. This argument, again, is indicative of FERC's overreaching, reflecting the notion that FERC's judgment regarding the scope of its own power should control. No matter how important FERC thinks its authority is, and no matter how much notice it gave to the market, FERC cannot exceed the limits of its statutory authority. *Util. Air*, 134 S. Ct. at 2449. FERC's claim under 35.41(b) should be dismissed.

D. <u>This Is A Standard Civil Action</u>.

FERC's petition to enforce a civil penalty is treated as "an ordinary civil action governed by the Federal Rules of Civil Procedure that culminates, if necessary, in a jury trial." *FERC v. Maxim Power Corp.*, No. 15-30113, 2016 WL 4126378, at *6 (D. Mass. July 21, 2016). Rule 1 states that the Federal Rules "govern the procedure in *all civil actions* and proceedings in the United States district courts," unless otherwise specified. Fed. R. Civ. P. 1 (emphasis added). Because there is no specific exemption for FERC penalty proceedings, the Federal Rules apply. *City Power*, 2016 WL 4250233, at *1. FERC's argument that Coaltrain has "waived" its rights under the Rules is flatly inconsistent with the FPA and the Federal Rules, and has been squarely rejected by both courts to consider it.

1. The Federal Rules Require Plenary Adjudication In This Court.

The FPA creates "two pathways" by which a FERC civil penalty order can be reviewed, which courts describe as "Option 1" and "Option 2." *Id.* at *8. The statute expressly gives the defendant the right to "*elect*" whether Option 1 or Option 2 applies. 16 U.S.C. § 823b(d) (emphasis added).

If a defendant elects Option 1, the statute provides that "an ALJ conducts a hearing . . ., [FERC] assesses a penalty, and review is available in a federal court of appeals" pursuant to the Administrative Procedure Act ("APA"). *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1263 (D.C. Cir. 1996); 16 U.S.C. § 823b(d)(2).

By contrast, Option 2 provides for district court adjudication of a civil action. If the defendant elects this option, the statute instructs FERC to "promptly assess[] a penalty without a hearing." *Clifton Power*, 88 F.3d at 1263–64; 16 U.S.C. § 823b(d)(3)(A). If the defendant does not pay the penalty, the statute directs FERC to "institute an *action* in the appropriate district court," in which the district court "review[s] de novo the law and the facts involved." 16 U.S.C. § 823b(d)(3)(B) (emphasis added).

In deciding what procedures apply to this "*action*," "Federal Rule of Civil Procedure 1 is the logical place to start." *City Power*, 2016 WL 4250233, at *8. Rule 1 states that the Federal Rules "govern the procedure in *all civil actions* and proceedings in the United States district courts, except as stated in Rule 81." Fed. R. Civ. P. 1 (emphasis added). "Rule 1 contains no exception" for FERC penalty enforcement actions. *City Power*, 2016 WL 4250233, at *8.

Nor has Congress specified that any other procedures should apply. The Supreme Court requires a "clear expression" of congressional intent before it will interpret a federal statute to authorize departure from the Federal Rules. *Califano v. Yamanski*, 442 U.S. 682, 700 (1979). There is "no clear expression of such intent" in the FPA. *City Power*, 2016 WL 4250233, at *8.

In fact, the instruction for FERC to "institute an action" requires just the opposite. The use of the term "action" is a clear expression that the Federal Rules apply, and that judicial review is *not* confined to the agency record. As the Supreme Court held in an analogous setting—interpreting a statute that required federal employees to "file a civil action" to challenge adverse employment decisions—the term "*civil action*" requires the opportunity for a "trial de novo" in district court, and *does not limit the district court's review merely to "the administrative record*." *Chandler v. Roudebush*, 425 U.S. 840, 842–43 (1976) (emphasis added). Therefore, this action is governed by the Federal Rules.

2. FERC Ignores The Plain Text Of The FPA And Federal Rules.

FERC's contrary position fixates on the statutory phrase "de novo" in isolation. *See* 16 U.S.C. § 823b(d)(3)(B) (directing the Court to "review de novo the law and the facts involved" in this action). "De novo" can refer either to (a) review of a decision "based only on the record below," or (2) "review based on the record below *plus* any additional evidence received by the reviewing court." *Perry v. Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990) (emphasis added). FERC argues that the term "de novo" therefore provides the Court discretion to decide whether the Federal Rules apply.

There is a fundamental problem with this argument: It ignores the rest of the statute. Congress designated this matter as an "action," and the Federal Rules govern "all civil actions" in district court, unless Congress expressly states otherwise. There is no reason to delve into the perceived ambiguities in the term "de novo" because Congress's use of the word "action" settles the matter: The Federal Rules apply.

Moreover, FERC's position injects an unacceptable degree of "uncertainty and unfairness" into the process. *Maxim Power*, 2016 WL 4126378, at *6. FERC admits that the

FPA does not *require* this Court to deny defendants their rights under the Federal Rules, or to limit review to the administrative record. FERC's position is that the FPA allows the court to "determine for itself" on an *ad hoc* basis whether to "allow additional factual development." FERC Br. 11. If that were true, a "penalized party" would be forced to decide between Option 1 (an administrative route) and Option 2 (a district court action) before "know[ing] what procedures"—if any—the district court will provide. *Id.* at *8. Congress could not have intended to confront defendants with the "unfairness" of such uncertain options in seeking independent review of FERC's penalties. *Id.* at *6.

3. Coaltrain Did Not Waive Any Rights By Electing A *De Novo* Action.

FERC claims that Coaltrain "knowingly and voluntarily" waived its rights to "additional discovery and a live hearing" by electing a de novo district court action under Option 2 rather than an administrative proceeding under Option 1. FERC Br. 13. FERC's argument—yet again—derives from an attempt to rewrite the statute—an unavailing effort that is repudiated by basic principles of Due Process, precedents from other courts, and even FERC's stated position in this matter.

FERC's Claim Of Waiver Is Inconsistent With The Statute. The FPA expressly gives defendants the right to "elect" whether to defend their case in an administrative context (Option 1) or a district court action (Option 2). 16 U.S.C. § 823b(d). A defendant who elects Option 2 does not waive anything—the "most natural" interpretation of the statute is that "both Options allow defendants to *fully* develop their factual defenses, just in different settings." *City Power*, 2016 WL 4250233, at *9 (emphasis added). That is confirmed by the statutory text governing the procedures under Option 2. Once a defendant elects Option 2, the statute directs FERC to "promptly" assess the penalty, 16 U.S.C. § 823b(d)(3)—*i.e.*, to do so "without a hearing."

Clifton Power, 88 F.3d at 1263–64. This indicates that "due process and factfinding take place at the district court." *Maxim Power*, 2016 WL 4126378, at *11.

FERC's Administrative Process Does Not Assure Defendants The Right To Discovery Or A Live Hearing, As FERC Well Knows. FERC argues otherwise, claiming that Coaltrain "waived" its rights under the Federal Rules by electing Option 2 because administrative procedures under Option 1 would have given Coaltrain the "*opportunity* to conduct additional discovery and a live hearing." FERC Br. 13 (emphasis added). That statement is highly misleading—a real irony.

In fact, Coaltrain had no guarantee to discovery or live testimony under Option 1. FERC's position—which FERC has stated in the Order to Show Cause in this case and other FPA enforcement actions—is that FERC has the power to summarily dispose of a case, without ever sending it to an ALJ, even if the defendant selects Option 1: "If Respondents elect an administrative hearing before an ALJ, the Commission will issue a hearing order *unless it is determined that the matter can be resolved in a summary disposition*." *Coaltrain Energy*, 154 FERC ¶ 61,002, at P 5 (2016) (emphasis added). Meaning, even if Coaltrain had elected Option 1, FERC's position is it could have summarily resolved this matter without ever sending the case to an ALJ. This Court should reject FERC's suggestion that Coaltrain would have been "guaranteed" the right to discovery and a live hearing under Option 1, FERC Br. 12 n.7, because FERC's own words prove that assurance to be untrue.

The "Abbreviated" Procedure FERC Provided To Coaltrain Was Not Authorized By Congress And Did Not Protect Coaltrain's Due Process Rights. FERC next contends that Coaltrain's rights were fully satisfied by the internal "abbreviated" procedure FERC has developed for defendants who select Option 2. FERC Br. 9. That claim fails for several reasons.

First, FERC's "abbreviated" process is not part of the adjudication framework Congress designed. As FERC admits, its abbreviated procedure is not contemplated and "*not required by the statute.*" *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 P 5(1) (2006) (emphasis added). Congress has never stated that FERC's "abbreviated" approach satisfies Due Process, and Congress never authorized FERC to use this extra-statutory process to impede access to or limit a defendant's rights in the district court action.

Second, the "abbreviated" approach did not satisfy Due Process. FERC now holds out its internal "abbreviated procedure" as a "contested public adjudication." FERC Br. 11. Whatever language FERC uses to describe that process cannot disguise its failure to provide Coaltrain with any discovery rights or a live hearing.[7] Although Coaltrain and the Individual Defendants could submit a brief and affidavits opposing the proposed penalty, they were not permitted to conduct discovery, cross-examine FERC's witnesses, or present their own live testimony to the Commission.

Moreover, the process by which "evidence" was presented to FERC did not include all the safeguards that attend proceedings in district court.[8] In effect, the process was not much different from a grand jury hearing. FERC Staff presented all the evidence that supported *its* case, but Coaltrain had no right to develop its own evidence. For example, none of the Defendants have ever had the ability to ask a single question—in requests for admission or deposition—of any witness against them. Defendants did not even have the right to pursue discovery of third parties (such as PJM or its market monitor) who may have exculpatory

[7] Indeed, FERC's claim that Coaltrain could have received "additional" discovery if it had elected Option 1 is not only wrong, it masks the fact that Coaltrain and the other Individual Defendants were afforded *no* discovery rights at all.

[8] *See, e.g.*, Todd Mullins and Chris McEachran, *Adjudication in FERC Enforcement Cases: "See You In Court?"*, 32 Energy L.J. 261 at 276 (2015).

evidence. All Coaltrain and the Individual Defendants could do was submit briefing and their own affidavits attesting to their innocence, which the Commission disregarded without even hearing from the Defendants in person.

Had Coaltrain been afforded the procedural rights to put on a full defense—as the Federal Rules provide in this Court—Coaltrain could have been "able to show that the factual landscape is meaningfully different from what FERC's Penalty Assessment Order indicates." *City Power*, 2016 WL 4250233, at *9. That is particularly true because "intent" is a required element of the market manipulation claim. Whether a defendant acted with intent is a "question of fact" that requires live testimony and credibility determinations by a disinterested decision-maker to resolve. *Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 194 (2d Cir. 1998). FERC in this case made determinations of intent—and specific findings of witness credibility—solely on the written record. It did so despite the fact that FERC is prohibited from resolving credibility determinations on a "written record"—without allowing live testimony and cross-examination—when "motive, intent, or credibility are at issue." *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997). This Court cannot rely on FERC's so-called "findings" when basic Due Process has been violated.

Affirming the $26 million in civil penalties and $4.2 million in disgorgement that FERC has assessed against Coaltrain (plus additional civil penalties against the Individual Defendants) based on such a one-sided written record would violate Coaltrain's Due Process rights. That constitutional guarantee requires that procedures be fair in light of (1) the private interest affected; (2) the risk of an erroneous deprivation of that interest through the procedures used; and (3) the burden of additional or substitute procedures on the government. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Coaltrain has a "strong," constitutionally-protected interest in not being subject to civil penalties, and a "full dress adjudication in district court" is no more burdensome for FERC than the Federal Rules require in any "civil action." *Maxim Power*, 2016 WL 4126378, at *10–11; *City Power*, 2016 WL 4250233, at *9.[9]

The Federal Courts Have Rejected FERC's Waiver Argument. For all these reasons, both courts to address FERC's "waiver" argument have rejected it. But FERC claims these courts failed to "address the significance" of the choices the statute provides to defendants under Options 1 and 2, and the consequences of a defendant's "waiver." FERC Br. 15. To the contrary, both courts expressly considered—and flatly rejected—FERC's "waiver" argument.

In *City Power*, the court directly recognized FERC's argument—raised again here—that the Defendants "turned down" the "guaranteed opportunity to have discovery and an evidentiary hearing" by selecting Option 2 over Option 1. 2016 WL 4250233, at *9 (citing Hr'g Tr. at 71–72). But the court rebuffed that claim: "[T]he Court does not see why the fact that discovery is available under Option 1 suggests that it is *not* available under Option 2. *There is no reason that Option 2 must provide defendants with fewer procedural protections*." *Id.* at *9 (emphasis added).

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[9] FERC next argues that it would be inefficient to allow Coaltrain to develop evidence in this action because that would effectively "re-do" the "abbreviated" approach FERC already provided. FERC Br. 11. FERC's argument is a red herring. As other courts have held, "the value of the agency proceeding"—to the extent FERC continues voluntarily to provide it—"is not erased by the availability of discovery and de novo adjudication in the district court." *City Power*, 2016 WL 4250233, at *9. For example, if the "abbreviated" hearing is as "fair and adversarial as FERC proclaims, presumably it sometimes leads FERC to decide not to assess a penalty at all (or to assess a much smaller one), obviating the need for judicial proceedings." *Id.*

In addition, there is nothing in the statute—and, indeed, FERC cites no authority—to support FERC's claim that Congress intended for Option 2 to provide defendants facing "smaller penalties" a "less expensive and more streamlined procedure" that does not allow fact development. FERC Br. 16. To the contrary, the statute allows defendants to "fully develop their defenses" under either Option 1 or Option 2. *City Power*, 2016 WL 4250233, at *9.

The court in *Maxim Power* agreed: FERC's claim that the defendant has no guarantee to rights under the Federal Rules in Option 2 is unreasonable because "*Congress cannot have intended for one of the procedural options to be so unappealing and unfair.*" 2016 WL 4126378, at *6 (emphasis added).[10]

In sum, Congress gave Coaltrain the right to defend this case under the Federal Rules when it elected Option 2. FERC cannot use an involuntary "abbreviated" procedure to circumvent Congress's decision or the rules of this Court.

* * *

If this case proceeds beyond the instant motion, then "FERC can move for summary judgment" on the basis of the agency record if it wishes. *City Power*, 2016 WL 4250233, at *20. But Coaltrain has the right to oppose summary judgment by pointing out the material facts that remain in dispute—including questions of subjective intent and "purpose." It also has the right to "gather . . . facts" necessary to present a full and fair defense under the Federal Rules. *Id.* Coaltrain should have the opportunity to fully avail itself of that critical right because Coaltrain did not commit manipulation.

[10] FERC argues that *FERC v. Silkman*, Nos. 13-13054, 13-13056, 2016 WL 1430009 (D. Mass. Apr. 11, 2016) supports its waiver theory. But it is difficult to understand why. The language FERC cites comes from a section of the court's order that addresses the question of whether a defendant who fails to raise an affirmative defense at FERC is estopped from raising that defense for the first time at the district court. That issue has no bearing on any alleged waiver of procedural rights.

IV. CONCLUSION.

This Court should GRANT the Motion to Dismiss and dismiss FERC's Complaint.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on November 7, 2016, a copy of the foregoing was filed electronically using the Court's Case Management/Electronic Case Filing System (CM/ECF). Notice of and access to this filing will be provided to all parties through CM/ECF.

s/ James A. King