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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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9 FEDERAL ENERGY REGULATORY
10 COMMISSION,
11 Plaintiff,
12 v.
13 ETRACOM LLC, and MICHAEL
14 ROSENBERG,
15 Defendant.
16

No. 2:16-cv-01945-SB

**ORDER REGARDING SCOPE
OF REVIEW**

17 The parties dispute the scope of review and the applicable procedural rules
18 in this matter. The Court ordered simultaneous briefing regarding the scope of the
19 Court's de novo review pursuant to the Federal Power Act. ECF No. 19. For the
20 reasons discussed herein, the Court holds that the Federal Rules of Civil Procedure
21 (FRCP) apply to this action brought pursuant to Federal Power Act § 31(d)(3), 16
22 U.S.C. § 823b(d)(3).

23 **Background**

24 A preliminary statement of the facts is as follows. ETRACOM LLC
25 (ETRACOM) is a financial trading firm founded and principally owned by
26 Michael Rosenberg (Rosenberg), which trades financial products in the wholesale
27 energy market operated by the California independent System Operator
28 Corporation (CAISO). The Federal Energy Regulatory Commission (FERC or "the

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1 Commission”) began an investigation in to an allegedly fraudulent scheme
2 perpetrated by Respondents in 2011. During the investigation FERC’s Office of
3 Enforcement (Enforcement) obtained and reviewed thousands of pages of
4 documents, analyzed hundreds of thousands of electricity trades, and took sworn
5 testimony of Rosenberg and an ETRACOM contractor. Ultimately, Enforcement
6 determined that Respondents engaged in an unlawful scheme to manipulate the
7 CAISO market. On December 16, 2015, FERC issued an Order to Show Cause,
8 thus initiating an administrative proceeding. Five days later, Enforcement filed
9 with FERC the documents produced by ETRACOM and third parties during the
10 investigation, as well as non-public CAISO market data and Enforcement’s
11 analyses of ETRACOM’s trades.

12 Pursuant to the Commission’s Order to Show Cause, Respondents were
13 given two options for contesting Enforcement’s findings: Option 1, a formal
14 public hearing on the record before an ALJ, and Option 2, a streamlined
15 proceeding under which if FERC concludes that a penalty is appropriate, the
16 Commission must consider the seriousness of the violation and the efforts of
17 Respondents to remedy the violation in a timely manner. Respondents elected for
18 Option 2. Subsequently, Respondents requested discovery and asked FERC to
19 require CAISO to disclose information regarding relevant market design flaws and
20 software pricing/modeling errors. The Commission denied the motion because
21 Respondents rejected the opportunity for a formal ALJ proceeding under Option 1.

22 Based on the administrative record and the parties’ submissions, FERC
23 issued an 82-page Order Assessing Civil Penalties against Respondents on
24 June 17, 2016. Accordingly, FERC assessed civil penalties of \$2.4 million against
25 ETRACOM and of \$100,000 against Rosenberg. ETRACOM was also ordered to
26 disgorge unjust profits of \$315,072 plus applicable interest. Because Respondents
27 have yet to pay the civil penalties assessed, FERC instituted this action in the
28 District Court for the Eastern District of California on August 17, 2016. ECF

1 No. 1. Respondents answered the Complaint on October 17, 2016. ECF No. 16.
2 FERC then filed a Motion to Affirm Civil Penalties Assessed by FERC on
3 December 1, 2016. ECF No. 17. The parties, however, disputed this Court’s scope
4 of review. ECF No. 15. The Court ordered briefing regarding the scope of review
5 and applicable procedural rules. ECF No. 19. FERC contends that this Court’s
6 review is limited to the administrative record, and the Court must review the
7 administrative record “de novo,” i.e., as standing in the shoes of the Commission.
8 Respondents contend that the FRCP apply to this action, that they are entitled to
9 discovery, and that this Court reviews the entire record non-deferentially.

10 **Analysis**

11 The FPA governs this action. FPA § 31(d) provides two pathways by which
12 a civil penalty may be imposed. The default Option 1 provides that once FERC
13 provides notice of its proposed penalty,

14 the Commission shall assess the penalty, by order, after a
15 determination of violation has been made on the record after an
16 opportunity for an agency hearing pursuant to [5 U.S.C. § 554] before
17 an administrative law judge Such assessment order shall include
18 the administrative law judge’s findings and the basis for such
19 assessment Any person against whom a penalty is assessed under
20 this paragraph may . . . institute an action in the United States court of
21 appeals for the appropriate judicial circuit for judicial review of such
22 order in accordance with chapter 7 of title 5. The court shall have
23 jurisdiction to enter a judgment affirming, modifying, or setting aside
24 in whole or in [p]art, the order of the Commission, or the court may
25 remand the proceeding to the Commission for such further action as
26 the court may direct.

27 16 U.S.C. § 823b(d)(1). Option 1 “describes a traditional form of judicial review
28 of agency action, based on the record developed in an agency proceeding, which is
familiar to administrative law.” FERC v. City Power Marketing, LLC, No. 15-
1428(JDB), 2016 WL 4250233 (Aug. 10, 2016 D.D.C.). Alternatively, Option 2
provides an expedited process for assessing civil penalties:

1 (A) In the case of any civil penalty with respect to which the
2 procedures of this paragraph have been elected, the Commission shall
3 promptly assess such penalty, by order, after the date of the receipt of
4 the notice . . . of the proposed penalty.

5 (B) If the civil penalty has not been paid within 60 calendar day . . . ,
6 the Commission shall institute an action in the appropriate district
7 court of the United States for an order affirming the assessment of the
8 civil penalty. The court shall have authority to review de novo the law
9 and the facts involved, and shall have jurisdiction to enter a judgment
10 enforcing, modifying, and enforcing as so modified, or setting aside
11 in whole or in [p]art such assessment.

12 16 U.S.C. § 823b(d)(3). “FERC has consistently interpreted Option 2 as not
13 requiring any procedural protections prior to the penalty assessment, but it
14 exercises its discretion to provide certain protections to avoid the perception of
15 unfairness.” FERC v. Maxim Power Corp., No. 15-30113-MGM, 2016 WL
16 4126378 (D. Mass. July 21, 2016). Respondents contend that they are entitled to
17 discovery pursuant to the FRCP under Option 2.

18 **Federal Rule of Civil Procedure 1**

19 The Court begins its analysis with Fed. R. Civ. P. 1, which provides that the
20 FRCP “govern the procedure in all civil actions and proceedings in the United
21 States district courts, except as stated in Rule 81.” It is undisputed that Rule 81 is
22 inapplicable to this case. Because Congress authorized the promulgation of the
23 FRCP, they “apply by their own force to all litigants before the court,” and apply
24 with “full force” to the United States Government. *Mattingly v. United States*, 939
25 F.2d 816, 818 (9th Cir. 1991). The Court can only decline to apply the FRCP “if
26 the Rule in question transgresses the terms of the Rules Enabling Act or the
27 Constitution.” *United States v. Orr Water Ditch Co.*, 391 F.3d 1077, 1082 (9th
28 Cir. 2004). The only exception to the universal application of the FRCP is where
Congress has allowed for summary proceedings “expressly authorized by statute.”
SEC v. McCarthy, 322 F.3d 650, 655 (9th Cir. 2003). For this exception to apply,

1 there must be a “clear expression of congressional intent to exempt actions” from
2 the FRCP. *Califano v. Yamasaki*, 442 U.S., 682, 700 (1979).

3 The FPA does not explicitly make the FRCP inapplicable to a proceeding in
4 a United States district court under FPA § 31(d)(3). Rather, FPA § 31(d)(3)
5 provides that where, as here, Respondent does not pay the assessed civil penalty
6 within 60 days of assessment, the Commission shall institute a civil action in the
7 appropriate district court. As the Ninth Circuit has noted, “[t]he word ‘action’ in
8 its usual legal sense means ‘a suit brought in a court; a formal complaint within
9 the jurisdiction of a court of law,’ and ‘includes all the formal proceedings in a
10 court of justice attendant upon the demand of a right . . . in such court.” *Cann v.*
11 *Carpenters’ Pension Trust Fund for N. Cal.*, 989 F.2d 313, 316 (9th Cir. 1993)
12 (quoting *Black’s Law Dictionary* 26 (5th ed. 1983)). The Court finds no clear
13 expression of congressional intent to exempt actions pursuant to FPA § 31(d)(3),
14 Option 2, from the application of the FRCP. Accordingly, the FRCP apply by their
15 own force to this matter.

16 **Legislative History Demonstrates FRCP Apply to Option 2 Proceedings**

17 Moreover, the legislative history of similar federal statutes demonstrates
18 congressional intent that the FRCP would apply to Option 2 proceedings under the
19 FPA. The Court is directed to “interpret similar language in the same way.” *Shirk*
20 *v. United States ex rel. Dept. of Interior*, 773 F.3d 999, 1004 (9th Cir. 2014).
21 Similar language in federal statutes is indicative of congressional intent for that
22 statutory language to share a common meaning. See *Northcross v. Bd. Of Ed. of*
23 *Memphis City Sch.*, 412 U.S. 427, 428 (1973).

24 Congress has enacted two-path adjudicatory options, such as at issue here,
25 in other contexts. For example, in 1978, Congress enacted the National Energy
26 Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 (1978) (NECPA), and
27 provided for the assessment of civil penalties under a two-path track. NECPA
28 § 423 (codified at 42 U.S.C. § 6303). The Option 2 language of the NECPA is

1 identical to that contained in FPA § 31(d)(3). NECPA § 432(d)(3). In so doing,
2 Congress recognized that, in assessing civil penalties under Option 2 of the
3 NECPA, the “Administrator would issue a penalty order on the basis of the
4 evidence before him but without a hearing and file a petition in district court
5 seeking a judgment assessing the civil penalty.” ECF No. 21-11. After penalty
6 assessment, “[t]he court will consider the violation and the amount of the
7 assessment as a de novo proceeding applying all the normal Federal Rules of
8 Procedure and Evidence.” Id.

9 Congress enacted the Powerplant and Industrial Fuel Use Act, Pub. L. No.
10 95-620, title VII, § 723, Nov. 9, 1978, 92 Stat. 3289, 3333 (codified at 42 U.S.C.
11 § 8433(d)) (PIFUA), in the same year that it enacted NECPA, with identical two-
12 path language for civil penalty assessment. The legislative history likewise
13 demonstrates that an Option 2 proceeding under the PIFUA involves a de novo
14 proceeding in which “all normal federal rules of procedure and evidence” apply.
15 ECF No. 21-12. The legislative history of the NECPA and PIFUA clearly
16 demonstrate that the FRCP are intended to apply to Option 2 proceedings under
17 those statutes. Because this Court must interpret similar language in a similar way,
18 the Court interprets FPA § 31(d)(3) to provide the procedural protections
19 contemplated by Congress when it enacted Option 2 of the NECPA and PIFUA.
20 Accordingly, the FRCP apply to this action under Option 2 of FPA § 31(d).

21 **Federal District Courts Consistently Apply FRCP to Option 2 Proceedings**

22 Other federal district courts to decide the issue have likewise held that there
23 is no clear expression of congressional intent in the FPA to depart from the FRCP
24 under Option 2 penalty assessment proceedings. See *Maxim Power Corp.*, 2016
25 WL 4126378; *City Power Marketing, LLC*, 2016 WL 4250233; *FERC v. Silkman*,
26 No. 1:16-cv-00205-JAW, 2017 WL 374697 (Jan. 26, 2017 D. Me.). Each of these
27 courts rejected the very arguments proffered by FERC in this case to hold that the
28 FRCP apply to an action brought pursuant to FPA § 31(d)(3). Those cases

1 proceeded as standard civil actions. While not binding authority, the reasoning set
2 forth by the Maxim Power Corp., City Power Marketing, and Silkman courts is
3 highly persuasive. For these reasons, the Court concludes that the FRCP apply to
4 this action.

5 Accordingly, **IT IS HEREBY ORDERED THAT:**

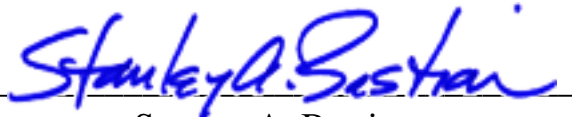
6 1. The Federal Rules of Civil Procedure shall govern this action.

7 2. Pursuant to 16 U.S.C. § 823b(d)(3), the Court shall review the penalty
8 order issued by the FERC de novo both as to the facts and the law.

9 3. The parties are encouraged to either stipulate to a discovery schedule or
10 request a discovery conference with the Court.

11 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order
12 and forward copies to counsel.

13 **DATED** this 7th day of March, 2017.

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16 Stanley A. Bastian
17 United States District Judge
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