UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Energy Transfer Partners, L.P., *et al.*) Docket No. IN06-3-002

MOTION OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LIMITED INTERVENTION

Pursuant to Rules 209, 210, and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.209, 385.210, and 385.214, the Interstate Natural Gas Association of America ("INGAA") moves to intervene in this proceeding. Although the Commission did not provide for intervention in this investigation proceeding instituted pursuant to Rule 209, the Commission's "Order to Show Cause and Notice of Proposed Penalties," 120 FERC ¶ 61,086 (2007) ("*Show Cause Order*"), and the "Expedited Request for Rehearing and Request for Stay" ("Rehearing Request") filed by Energy Transfer Partners, L.P., *et al.* ("ETP") in response to the *Show Cause Order*, present a legal issue of first impression that warrants the Commission's consideration of the interstate pipeline industry's views. The issue concerns the availability of *de novo* review in the federal district courts of the Commission's civil penalty orders under new section 22 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717t-1. It is INGAA's position that, properly read, the NGA requires that after the Commission exercises its authority to assess a civil penalty under section 22 for an alleged NGA violation, section 24 guarantees the person *de novo* review of the penalty assessment in federal district court. As discussed below, INGAA's interstate natural gas pipeline members have a direct interest, and seek intervention to address only that issue. INGAA takes no position on other legal issues presented, or on any issues of fact covered by the *Show Cause Order*.

I. INTERVENTION

In accordance with Rule 214(b), INGAA's interest in this proceeding is based on the following considerations. INGAA is a national, non-profit trade association that represents the interstate natural gas pipeline industry operating in the United States, as well as comparable pipeline companies in Canada and Mexico. INGAA's United States members transport virtually all of the natural gas sold in interstate commerce, and are regulated by the Commission pursuant to the NGA, 15 U.S.C. §§ 717-717w. As noted above, the Commission's Show Cause Order and ETP's Rehearing Request present an issue of first impression concerning the availability of federal district court review of the Commission's civil penalty orders issued pursuant to NGA section 22. As companies regulated by the Commission under the NGA, INGAA's members may be subject to such civil penalty orders in the future, and therefore have a direct interest in the question of the availability of *de novo* district court review.

Although no time limitation was established for intervention (*cf*. Rule 214(d)), and although the Commission's regulations provide that no person may participate or intervene as a matter of right in investigation proceedings, *see* 18 CFR § 1b.11, INGAA submits that there is good cause for granting this motion for limited intervention. As the principal subjects of the Commission's regulation under the NGA, INGAA members' views and interests cannot be adequately represented by other parties. The Commission has previously granted intervention by third parties in investigation proceedings where, as here, the third party's interest is affected. *See Williams Gas Pipelines Central, Inc*., 94 FERC ¶ 61,285 at 62,026 (2001) (granting intervention by Missouri Public Service Commission to clarify terms of stipulation and consent agreement). Because INGAA seeks to intervene for the sole purpose of presenting its view on a discrete legal question that does not depend on any factual development or other procedures, INGAA's

intervention would not delay or defer any established procedural schedule or otherwise disrupt the Commission's proceeding. We note in this regard that the Commission twice granted ETP's motion to extend the deadline for its answer to the Show Cause Order until October 15, and tolled the statutory rehearing deadline under NGA § 19(b). Consideration of INGAA's legal argument, which parallels one of the arguments already presented by ETP in its pending Rehearing Request, should not unduly delay the Commission's consideration of the jurisdictional arguments. Moreover, INGAA's intervention for the sole purpose of addressing the question of district court review of NGA penalties is not the sort of participation that would cripple the Commission's decisions in investigations or its ability to prosecute and settle investigations. *Cf. Fact-Finding Investigation into Possible Manipulation of Elec. & Natural Gas Prices, Order Denying Interventions*, 103 FERC ¶ 61,019 at P 15 (2003).

Finally, there is no apparent prejudice to ETP or the other potential intervenors. We are authorized to represent that ETP does not object to INGAA's limited intervention.

In short, INGAA submits that its intervention for the purpose of presenting the regulated interstate pipeline industry's view on an important jurisdictional issue will be in the public interest.

II. BACKGROUND SUMMARY

A. The Statute

New NGA section 22, enacted as section 214 of the Energy Policy Act of 2005, Pub. L. 109-58, § 314(b)(1)(B), 119 Stat. 594, 690-91, provides as follows:

15 U.S.C. § 717t-1. Civil penalty authority

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

> than $1,000,000 per day per violation for as long as the violation continues.
> (b) Notice
> The penalty shall be assessed by the Commission after notice and opportunity for public hearing.
> (c) Amount
> In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation.

The pre-existing statutory provision addressing violations of the NGA and Commission regulations thereunder -- i.e., former NGA section 22 -- was not changed by EPAct 2005, except insofar as it was redesignated NGA section 24. NGA section 24 provides as follows:

> **15 U.S.C. § 717u. Jurisdiction of offenses; enforcement of liabilities and duties**
>
> The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of title 28 [i.e., in the Supreme Court and courts of appeals]. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

B. The Commission's Policy Statement on Civil Penalties

In its *Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006) ("*Civil Penalty Policy Statement*"), the Commission observed that EPAct 2005's civil penalty authority grant under NGA section 22 did not specify the process by which a penalty is to be assessed. The Commission then proceeded to set out

procedures that it would follow, including (1) notice of an alleged violation and proposed penalty; (2) a hearing order, if the violation or proposed penalty is contested, and if the record is insufficient to assess a penalty under the statutory standards; (3) an initial decision (if the matter is assigned to an ALJ), with findings on the violation allegation and a penalty recommendation; (4) penalty assessment by the Commission (if a paper hearing was ordered) or review of the ALJ penalty recommendation; (5) rehearing pursuant to NGA section 19(a); (6) appeal in the United States circuit courts pursuant to NGA § 19(b), and, if the person does not pay, (7) a collection action in a federal district court. *Id.* at P 7.

Without discussing or otherwise referencing the district courts' exclusive jurisdiction over NGA violations under section 24, the Commission stated that "[t]he NGA civil penalty process does not include the possibility for the person to receive a *de novo* review in district court, because there is no statutory provision permitting *de novo* review . . . ." *Id*. at P 6 (citing *Consolo v. FMC*, 383 U.S. 607, 619 n.17 (1966) and *Chandler v. Roudebush*, 425 U.S. 840, 862 (1976), for the proposition that, in the absence of specific statutory authorization, a *de novo* review is generally not to be presumed). The Commission also stated its view that the principal difference between the process for civil penalties under the NGA and the civil penalty provisions of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §§ 3301 et seq., and the Federal Power Act ("FPA"), 16 U.S.C. §§ 791a-823c, is that Congress did not establish an option for *de novo* review in district court of the Commission's decision regarding an NGA penalty. *Civil Penalty Policy Statement* at P 8.

C. The Commission's ETP Order

In the *Show Cause Order* in this proceeding, the Commission directs ETP to show cause why, *inter alia*, they should not pay civil penalties assessed by the Commission pursuant to NGA

§ 22. The Commission states that its order constitutes notice under its *Civil Penalty Policy Statement* and its regulation (*see* 18 C.F.R. §385.213). Further, the Commission states that upon receipt of the answer, "the Commission has many options of how to proceed." *Show Cause Order* at P 3 n.3. With respect to both the alleged manipulation under the NGA and alleged violations of the NGPA, the Commission asserts that it may request briefs, set specified issues for a trial-type hearing before an ALJ, or issue an order on the merits. *Id.* According to the Commission, only with respect to penalties imposed on the NGPA issues, however, would ETP have a right to have that order reviewed in a United States district court. *Id.*

Implicitly, the Commission's position is that any NGA-based civil penalty order would be subject to review only in the federal courts of appeal pursuant to NGA section 19, and subject to the deferential "arbitrary/capricious/substantial evidence" review standards under § 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A) and (E). By contrast, Commission penalty orders under the NGPA and FPA would be subject to a non-deferential *de novo* review in federal district court, followed by appellate review in the courts of appeals. *See* 28 U.S.C. §§ 1291-92. As to the difference, *see, e.g., DOE v. U.S.*, 821 F.2d 694, 697-98 (D.C. Cir. 1987) ("De novo means here, as it ordinarily does, a fresh, independent determination of 'the matter' at stake; the court's inquiry is not limited to or constricted by the administrative record, nor is any deference due the agency's conclusion.") and *FERC. v. MacDonald,* 862 F. Supp. 667, 672 (D.N.H. 1994) (in applying *de novo* standard in action under FPA section 31 to enforce a civil penalty assessment, court gives no deference to Commission's decision but rather makes independent determination)(citing *DOE, supra,* 821 F.2d at 697-98).

III. ARGUMENT

THE FEDERAL DISTRICT COURTS HAVE EXCLUSIVE JURISDICTION UNDER NGA SECTION 24 TO REVIEW COMMISSION CIVIL PENALTY ASSESSMENTS UNDER NGA SECTION 22

A. Summary of INGAA Position

Under the newly enacted civil penalty provision in section 22 of the NGA, any person who violates the NGA or rules promulgated by the Commission thereunder is subject to a fine of up to $1 million per day. The penalty is to be assessed by the Commission after notice and opportunity for public hearing, taking several statutory criteria into consideration. 15 U.S.C. § 717t-1. After pursuing whatever procedures may be lawful for the Commission to determine if the NGA has been violated, the Commission may assess a penalty for any violations found. To enforce payment of the penalty ordered, the Commission must initiate an action under NGA section 24 in federal district court to enforce payment of the penalty – i.e., "to enforce any liability . . . created by . . . any violation of this chapter or any rule or regulation . . . thereunder." 15 U.S.C. § 717u. This is the route that must be followed under the NGA's statutory scheme because "[t]he District Courts . . . shall have exclusive jurisdiction of violations of this chapter or the rules or regulation . . . thereunder . . . ." *Id.* While NGA section 24 does not employ the term "*de novo*," the district courts' "exclusive jurisdiction" over violations of the NGA and suits to enforce liability thereunder provide them with all the authority necessary to carry out a *de novo* review in fact. The Commission, or the penalized party, then would have the right to review of the final district court decision in the courts of appeals and the Supreme Court in the normal course. *See* 28 U.S.C. §§ 1254 (Supreme Court), 1291 and 1292 (courts of appeals). This statutory interpretation of the proper procedure to be used in the review of agency assessments of civil penalties, *de novo* review, has been found to be particularly appropriate where the agency

acts as both prosecutor and judge. *See NRC v. Radiation Tech., Inc.*, 519 F. Supp. 1266, 1286 (D. N.J. 1981) ("*RTI*").

B. The Plain Language of NGA Section 24 Requires that Civil Penalty Liability Must Be Adjudicated in Federal District Court

In concluding that the "NGA civil penalty process does not include the possibility for the person to receive a *de novo* review in district court, because there is no statutory provision permitting *de novo* review. . . ," *Civil Penalty Policy Statement* at P 7, the Commission overlooks NGA section 24. While NGA section 22 does not address district court review of penalty assessments for violations of the NGA, section 24 does:

> The District Courts of the United States [. . .] shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

Thus, under the statutory scheme, the Commission has jurisdiction under NGA section 22 to assess civil penalties for violations of the NGA, while section 24 gives federal district courts "exclusive jurisdiction" over actions to enforce liabilities for violations created by the Commission's assessments under section 22. It is of no particular moment that section 24 does not specify that the review is "*de novo*" because the district courts' "exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder" effectively confers *de novo* review powers.

The Commission's reliance on *Consolo v. FMC* and *Chandler v. Roudebush* for the proposition that *de novo* review should not be "presumed" absent a specific statutory authorization is misplaced because NGA section 24 is that authorization. The *Chandler* decision is particularly instructive on this point. There, the issue was whether a statute that vests jurisdiction over federal employee civil rights claims on the district courts requires *de novo*

review. The district court, affirmed by the court of appeals, held *de novo* review was not required where the record developed by the administrative agency on the same claim was sufficient. 825 U.S. at 843. The Supreme Court reversed, holding that (notwithstanding that Congress had not specified "*de novo*" in the statute) the Congressional grant of jurisdiction to the district courts required *de novo* review. *Id.* at 864. In so holding, the Court observed that "Congress was aware of the fact that federal employees would have the benefit of 'appropriate procedures for an impartial [agency] adjudication of the complain[t],' and yet chose to give employees who had been through those procedures the right to file a *de novo* 'civil action' equivalent to that enjoyed by private-sector employees." *Id.* at 863 (footnotes omitted).

The *Chandler* Court also rejected the respondent's reliance on *Consolo* in a discussion that is apt here. Pointing to the *Consolo* Court's admonition that "in the absence of specific statutory authorization, a *de novo* review is generally not to be presumed," the *Chandler* Court observed that "[h]ere, by contrast, there is a 'specific statutory authorization' of a district court 'civil action,' which both the plain language of the statute and the legislative history reveal to be a trial *de novo*." *Id.* at 862. The reasoning applies here: since NGA section 24 confers "exclusive jurisdiction" over violations of the NGA and suits to enforce liability therefore on the district courts, there is no need to "presume" a *de novo* standard.

The decision in *RTI*, *supra*, 519 F. Supp. 1266, is also helpful here. There the NRC, through the Attorney General, brought a collection action in federal district court to enforce a civil penalty after an NRC adjudication. Notwithstanding the absence of the term "*de novo*" in the statutory provisions analogous to NGA sections 22 and 24 for civil penalty assessments and collection actions (i.e., 42 U.S.C. § 2282), the court ruled that *de novo* review was nevertheless required. 519 F. Supp. at 1279-86. (The case is discussed further at pages 13-14, below.)

Finally, while the Commission notes that NGA section 24 does "provide" for "collection actions in district court," *see Civil Penalty Policy Statement*, 117 FERC at P 6 n.20, it clearly does more than that. Section 24 confers "exclusive jurisdiction of violations" of the NGA and all suits to enforce liability for such violations, including penalties assessed under section 22 "for violat[ions] of this chapter."

C. *De Novo* Review of the Commission's NGA Penalty Assessments Is Consistent with the Civil Penalty Provisions of the Other Statutes Administered by the Commission, and with the Congressional Treatment of Administrative Penalty Assessments Generally

In considering the Commission's conclusion in the *Civil Penalty Policy Statement* that the statutory process under the NGA does not provide a *de novo* review option (e.g., P 8), the question naturally arises as to why Congress would treat review of civil penalties under the NGA differently than review of the civil penalties under the other two major statutes that the Commission administers -- the NGPA and the FPA. As to those, the Commission agrees that *de novo* review *is* available. *See Policy Statement* at PP 5 and 9-10, discussing civil penalty assessments under FPA section 31(d), under which the person against whom a penalty is assessed under either Part I or II of the FPA must be given a choice between (1) an administrative hearing before the Commission, followed by judicial review in the courts of appeals, or (2) an action in federal district court, instituted by the Commission, in which the court shall have authority "to review *de novo* the law and the facts involved," and shall have "jurisdiction to enter a judgment enforcing, modifying, and enforcing as modified, or setting aside in whole or in part," such assessment. *See* 16 U.S.C. § 823b(d)(1)-(3).[1] *See also* P 12,

[1] FPA section 31 creates an explicit exception to this *de novo* review election procedure in the case of civil penalties for non-compliance with licensing orders. See 16 U.S.C. §§ 823b(a) and (d)(1). By contrast, there is no such explicit exception to support the Commission's reading of the NGA civil penalty provisions as foreclosing *de novo* review.

discussing *de novo* review of Commission penalty assessments pursuant to NGPA § 504(b)(6), 15 U.S.C. § 3414(b)(6)(F).

The question why Congress would single out NGA civil penalties for lesser judicial scrutiny (consistent with the Commission's reading of the statute) is particularly significant in light of the fact that the new NGA penalties and enhanced penalties under the NGPA and FPA increased potential penalties exponentially to $1 million per day. As the Commission explained, the NGPA and FPA civil penalty provisions afford the opportunity for *de novo* review in district court. *See Civil Penalty Policy Statement* at PP 5, 10, 12 (discussing *de novo* review provisions under FPA and NGPA). Although not definitive, the legislative history of the EPAct 2005 supports the proposition that it was intended to adopt an approach consistent with the existing FPA and NGPA procedures. *See generally* ETP Rehearing Request at 29-33. Moreover, if Congress wanted to single out NGA civil penalties for a different approach with respect to the *de novo* review question, presumably it would have said so in clear terms. *See United States v. J. B. Williams Co., Inc.*, 498 F.2d 414, 425 (2nd Cir. 1974) ("[I]f in authorizing a civil suit by the chief law officer of the Government, a procedure which had always been thought to entail a right of jury trial, Congress had wished to withhold it [. . .], Congress would have said so in unmistakable terms and not left this as a secret to be discovered many years later.")(Friendly, J.).

In any event, INGAA submits that pre-existing NGA section 24 is the answer: Since that provision already conferred exclusive jurisdiction on the district courts over suits to enforce liability for violations of the NGA, nothing more was required to harmonize the judicial review of Commission penalty assessments under the three statutes. Parties aggrieved by final orders of the Commission may appeal directly to the courts of appeals under NGA section 19(b), FPA section 313(b), 16 U.S.C. § 825*l*(b), and NGPA section 506(b), 15 U.S.C. § 3416(b), subject to

the deferential "arbitrary and capricious/substantial evidence" standard of review, while penalty assessments are provided *de novo* review in the district courts, followed by the normal appellate review pursuant to 28 U.S.C. §§ 1291 and 1292.

Moreover, interpreting the NGA, and section 24 in particular, as providing a right to *de novo* review of Commission penalty assessments is consistent with the long-standing approach that Congress has taken generally with respect to penalties. Under the general jurisdictional provision of 28 U.S.C. § 1331, federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." More specifically, 28 U.S.C. § 1355(a) provides that "the district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title."

Even without NGA section 24, these general statutory provisions in the federal code show the historical preference for *de novo* district court review of penalties. "From the earliest history of the government, the jurisdiction over actions to recover penalties and forfeitures has been placed in the district court." *Lees v. United States*, 150 U.S. 476, 478-79 (1893). As ETP points out in its Rehearing Request, civil penalty actions not only are subject to judicial review, but have been held to require jury trials at the defendant's option. *See* ETP Rehearing Request at 14, citing *Tull v. United States*, 481 U.S. 412 (1987). In *Tull,* the Court explained that "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Id.* at

422. The issue in *Tull* was whether the petitioner was constitutionally entitled to a trial by jury on both liability for, and the amount of, a penalty in an action brought by the Government (the Attorney General on behalf of the EPA) seeking civil penalties and other relief under the Clean Air Act penalty provision, 33 U.S.C. § 1319 (1986). With respect to liability for the penalties, the Court held that, because the nature of the relief authorized under the penalty statute (i.e., punitive) was traditionally available only in a court of law, the petitioner was entitled to a jury trial on demand. 481 U.S. at 424-25. As to assessment of the penalty, the Court held that while no jury trial was required,

> [s]ince Congress itself may fix the civil penalties, it may delegate that determination to trial judges. In this case, highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by judges.

Finally, the *RTI* case provides substantial support for *de novo* review of NGA penalties in district court. There the NRC, through the Attorney General, brought a collection action in federal district court to enforce a civil penalty after an NRC adjudication. The court addressed two questions: (1) whether the district court or the circuit court of appeals had jurisdiction over the action; and (2) the appropriate standard of review. 519 F. Supp. at 1268. The court held that it rather than the court of appeals had jurisdiction in the first instance. *Id.* at 1275. The court rejected the NRC's position that the "substantial evidence" test limited the scope of the district court's review, and determined instead that a *de novo* trial was required. *Id.* at 1285-86. Among other grounds, the court based its decision on a review of the judicial review provisions for other agencies' civil penalty assessments. *See id.* ("The judiciary's function in collection actions brought by these agencies is not limited to a review of the administrative record as supported by substantial evidence. Rather, trial *de novo* is the usually employed course of action.") The *RTI*

case, which is discussed in greater detail in ETP's Rehearing Request at 18-21, appears to be substantially on all fours with the situation here.

In summary, the plain language of NGA section 24 gives the federal district courts "exclusive jurisdiction" over Commission penalty assessments for NGA violations under section 22. Because that jurisdiction is exclusive, it is not significant that the statute does not use the term "*de novo*." Contrary to the Commission's reading of the statutory scheme, which would foreclose *de novo* review of NGA penalty assessments only, INGAA's reading is consistent with the statutory scheme for review of penalty assessments under the NGPA and the FPA, where the right to *de novo* review is recognized. Furthermore, since section 24 already conferred exclusive jurisdiction over NGA violations and actions to enforce liability for violations on the district courts, there was no reason for Congress to revisit the judicial review provisions when it enacted new civil penalty authority under the NGA. Finally, *de novo* district court review for NGA civil penalties is consistent with the specialized treatment that Congress has accorded review of administrative penalty assessments in other contexts, as well as judicial precedent.

CONCLUSION

INGAA respectfully requests that the Commission grant its Motion to Intervene and consider INGAA's argument that the NGA should be read to require *de novo* review of NGA civil penalty assessments in the United States district courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 31st day of October, 2007, a copy of the foregoing Motion of the Interstate Natural Gas Association of America for Limited Intervention was served upon the following:

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