

CLIENT ALERT

# Jarkesy Deep-Sixes Administrative Hearing Procedures in the *Total* Case and Likely Future FERC Enforcement Cases Under the Natural Gas Act

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## AUTHORS

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On September 19, 2024, the Federal Energy Regulatory Commission (“FERC” or the “Commission”) issued an order terminating the hearing procedures in *Total Gas & Power North America, Inc.* and holding the proceeding in abeyance until further notice.<sup>1</sup> The Commission’s Termination and Abeyance Order comes in the wake of the U.S. Supreme Court’s decision in *Securities and Exchange Commission v. Jarkesy*, which has triggered a review of administrative proceedings tried before an Administrative Law Judge (“ALJ”). As a result of *Jarkesy*, how FERC will approach certain pending and future enforcement cases under the Natural Gas Act (“NGA”), including *Total*, remains uncertain for the time being.

In 2016, the Commission issued an Order to Show Cause and Notice of Proposed Penalty (“Show Cause Order”) to TotalEnergies Gas & Power North America, Inc. (formerly known as Total Gas & Power North America, Inc.) (“Total”).<sup>2</sup> The Show Cause Order directed Total to show cause why it should not be found to have manipulated natural gas prices, in

<sup>1</sup> *Total Gas & Power N. Am., Inc.*, 188 FERC ¶ 61,197 (2024) (hereinafter the “Termination and Abeyance Order”).

<sup>2</sup> *Total Gas & Power N. Am., Inc.*, 155 FERC ¶ 61,105 (2016).

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violation of the NGA and FERC's regulations, and why it should not be assessed a \$213,600,000 civil penalty as well as \$9.18 million in disgorgement.<sup>3</sup>

Since then, the litigation in *Total* has been lengthy and extensive, and includes the Commission's order establishing a hearing before an ALJ and *Total* filing for a preliminary injunction in the United States District Court for the Southern District of Texas.<sup>4</sup> On October 19, 2023, the United States District Court for the Southern District of Texas stayed both the proceedings before the ALJ and in the Southern District of Texas pending the resolution of *Securities and Exchange Commission v. Jarkesy*, No. 22-859 in the Supreme Court. The Court's decision in *Jarkesy* was expected to have broad implications on administrative adjudications, including the proceeding in *Total*.

On June 27, 2024, the Supreme Court issued its decision in *Jarkesy*.<sup>5</sup> The Supreme Court held that the Seventh Amendment entitles respondents to a jury trial when the U.S. Securities and Exchange Commission (the "SEC") seeks civil penalties for securities fraud in an administrative enforcement proceeding. The Court ruled that the Seventh Amendment's guarantee of a right to a jury trial applies to all claims that are "legal in nature." Because the SEC's antifraud provisions replicate common law fraud, and the remedy of civil penalties is legal in nature, respondents are entitled to a jury trial for claims brought by the SEC alleging securities fraud and seeking civil penalties.<sup>6</sup>

In light of the *Jarkesy* decision, the Commission announced in the Termination and Abeyance Order that it was terminating the hearing procedures before the ALJ, and that it will not impose penalties against Total for the conduct alleged in the Show Cause Order on the basis of an administrative enforcement proceeding before an ALJ.<sup>7</sup> The Termination and Abeyance Order will take effect upon an order from the United States District Court for the Southern District of Texas confirming its effectiveness in light of the stay.<sup>8</sup>

Although the Commission stated that it expects to issue a future order in the *Total* docket, it is unclear at this point what further action will be taken. According to a joint status report submitted to the Southern District of Texas, the parties are engaged in ongoing discussions about what the Termination and Abeyance Order means for the litigation in that court on a going-forward basis.<sup>9</sup>

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<sup>3</sup> The Commission also directed two Total traders to show cause why they should not be found to have manipulated natural gas prices and be assessed individual civil penalties.

<sup>4</sup> Plaintiffs' Motion for Preliminary Injunction, *TotalEnergies Gas & Power N.A., Inc. v. FERC*, No. 4:22-cv-04318 (S.D. Tex., filed Dec. 16, 2022).

<sup>5</sup> *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024).

<sup>6</sup> For an overview of the *Jarkesy* case and its implications, see *The Jarkesy Decision and the Future of Administrative Proceedings*, Willkie Farr & Gallagher LLP Client Alert (July 1, 2024), available at [https://www.willkie.com/-/media/files/publications/2024/07/the\\_jarkesy\\_decision\\_and\\_the\\_future\\_of\\_administrative\\_proceedings.pdf](https://www.willkie.com/-/media/files/publications/2024/07/the_jarkesy_decision_and_the_future_of_administrative_proceedings.pdf).

<sup>7</sup> Termination and Abeyance Order at P 5.

<sup>8</sup> *Id.* P 7.

<sup>9</sup> Joint Status Report, *TotalEnergies Gas & Power N.A., Inc. v. FERC*, No. 4:22-cv-04318 (S.D. Tex., filed Sept. 20, 2024).

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The Commission's termination of ALJ hearing procedures in *Total*, one of its largest pending enforcement cases, showcases the *Jarkesy* decision's impact on FERC's enforcement process. The Commission explained that it is examining *Jarkesy*'s effect on its existing enforcement procedures and will address its approach to enforcement cases in light of the decision.<sup>10</sup>

The Commission has long taken the position that enforcement actions under the NGA must be tried before an ALJ.<sup>11</sup> Following the passage of the Energy Policy Act of 2005 ("EPAAct 2005"), which amended the Federal Power Act ("FPA"), NGA, and Natural Gas Policy Act ("NGPA") to give the Commission enhanced civil penalty authority, the Commission issued the 2005 Policy Statement on Enforcement to provide guidance on its enforcement process going forward. In the 2005 Policy Statement on Enforcement, the Commission acknowledged that "[w]hile procedures for issuing civil penalties are in place under the FPA, EPAAct 2005 is silent with respect to procedures under the NGA. When we issue civil penalty notices under the NGA, we intend to provide companies with hearing procedures before an administrative law judge."<sup>12</sup>

The Commission reaffirmed this position in its Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties issued a year later in 2006.<sup>13</sup> The Commission explained:

EPAAct 2005's grant of civil penalty authority under the NGA did not specify the process by which a penalty is to be assessed. The only statutory guidance given is that the 'penalty shall be assessed by the Commission after notice and opportunity for public hearing.' In the [2005] Policy Statement on Enforcement, the Commission noted this and stated its intent to provide an administrative process for penalty assessment.<sup>14</sup>

The Commission stated that its process for assessing civil penalties under the NGA will consist, generally, of either paper hearing procedures or it will refer the matter to an ALJ, depending on the circumstances.<sup>15</sup>

After *Jarkesy*, the Commission must now revise its customary practice of relying on the administrative process to assess civil penalties for fraud and manipulation actions, and other actions that are "legal in nature" resembling common law causes of action, under the NGA.

However, the underlying statutory text of the NGA may throw a wrench into the Commission's ability to revise its enforcement procedures in response to *Jarkesy*'s requirement that respondents receive a jury trial. As the Commission pointed out in

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<sup>10</sup> Termination and Abeyance Order at P 6.

<sup>11</sup> See *Policy Statement on Enforcement*, 113 FERC ¶ 61,068 (2005) (hereinafter, "2005 Policy Statement on Enforcement").

<sup>12</sup> *Id.* P 16.

<sup>13</sup> Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties, 117 FERC ¶ 61,317 (2006) (hereinafter, "Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties").

<sup>14</sup> *Id.* P 6.

<sup>15</sup> *Id.* P 7.

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its Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties, the NGA is silent on the process by which a penalty must be assessed, and the Commission has taken the position that “[t]he NGA civil penalty process does not include the possibility for [a respondent] to receive a *de novo* review in district court, because there is no statutory provision permitting *de novo* review.”<sup>16</sup> Accordingly, the Commission will likely need a statutory fix from the U.S. Congress that allows it to bring an enforcement action under the NGA in federal district court to comply with *Jarkesy*’s directive.

Importantly, unlike the NGA, both the FPA and NGPA provide for an avenue of *de novo* court review for Commission actions assessing civil penalties. Such statutory allowances arguably permit FERC to adapt its enforcement procedures to *Jarkesy* for actions brought under the FPA and NGPA that are “legal in nature” without requiring intervention from Congress. FERC may assert that under the FPA the respondent can opt for a process that ultimately allows for the exercise of its Seventh Amendment right.

But this is not a foregone conclusion. Under the FPA, after the Commission issues a show cause order, respondents have the choice to proceed with an administrative hearing before an ALJ or to receive an immediate penalty assessment from FERC that can be reviewed *de novo* in federal district court.<sup>17</sup> Courts have characterized the show cause process at FERC as adjudicative in nature, which could be viewed as invading the province of the jury.<sup>18</sup> Certainly the Commission’s issuance of an immediate penalty assessment is premised on the determination of a violation, and the subject of the assessment is penalized and suffers reputational harm. If the Commission seeks a legislative fix on the NGA, it may well decide that the FPA should be clarified as well.

As the Commission evaluates the decision’s effect on not only other pending enforcement cases but also all enforcement actions going forward, the ramifications of *Jarkesy* are considerable and may usher in a marked departure from FERC’s customary approach to enforcement.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* P 5.

<sup>18</sup> See *FERC v. Powhatan Energy Fund, LLC*, 949 F.3d 891, 902 (4th Cir. 2021) (“On balance, the procedures mandated by FERC’s Show Cause Process more closely resemble an adjudicative ‘proceeding’ than a prosecutor’s charging decision.”).

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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