Ripeness in the Administrative Context: *Total Gas & Power of North America, Inc. v. FERC*

*Zachary Sterling**

INTRODUCTION

Due process is a chief concern in administrative law actions because the Fifth Amendment to the United States Constitution protects citizens from deprivations of life, liberty, or property without due process of law.[1] As these proceedings exist outside of the judicial branch, such procedural concerns are carefully analyzed.[2] However, there are many reasons potential litigants may prefer an administrative resolution rather than pursuing one in the judicial track. Administrative law serves multiple purposes including defining the authority and structure of administrative agencies, specifying the procedural formalities employed by agencies, determining the validity of agency decisions, and defining the role of reviewing courts and other governmental entities in relation to administrative agencies.[3] Costs are comparatively lower in administrative tribunals compared to costs involved in the judicial system.[4] Administrative actors and adjudicators may be more specialized to the topic under examination.[5] Regardless, administrative adjudications relieve courts from dealing with agency matters and clears their dockets, which is indeed welcome in the arguably over-burdened American legal system.

Conversely, some protest administrative rulings and adjudications, challenging the authority of individual agencies to decide disputes or levy punishments. Such was the circumstance when the Fifth Circuit Court of Appeals heard *Total Gas & Power*

---

* Articles Editor, KY. J. OF EQUINE, AGRIC. & NAT. RESOURCES L., 2018-2019; B.A. 2014, University of Illinois at Chicago; M.A. 2017, Patterson School; M.B.A. expected May 2019, University of Kentucky; J.D. expected May 2019, University of Kentucky.

[1] U.S. CONST. amend. V, § 1.

[2] *See generally* 5 U.S.C. § 706 (2017).

[3] STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 3 (Aspen Pub., 5th ed. 2002).

[4] Buras v. Board of Trustees, 367 So.2d 849, 853 (La. 1979).

[5] BREYER, *supra* note 3, at 166–67.

N. Am., Inc. v. FERC (hereinafter "*TGPNA*").[6] The plaintiff, Total Gas & Power North America, Inc., (Total) contended that the defendant, the Federal Energy Regulatory Commission, (FERC) did not have the authority to adjudicate claims or impose penalties on parties violating the Natural Gas Act.[7] The FERC is an administrative agency in the eyes of the law because it is an "authority of the Government of the United States, whether or not it is within or subject to review by another agency."[8] FERC, with power from its statute of origin, is given authority to enforce the acts providing for its existence: the Federal Power Act,[9] the Natural Gas Policy Act of 1978,[10] and the Natural Gas Act (NGA).[11]

As an alternative option for pursuing legally binding conflict resolutions, administrative decisions face particular difficulties that may be alien to standard judicial settings. In *TGPNA*, the court found itself unable to adjudicate the dispute brought by Total against FERC because it was limited by the ripeness doctrine, which states "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[12] However, the significant history of litigation provided within the case, as well as other case law, indicates that when and if the claim by Total does become ripe, the court is likely to find FERC acting within the scope of its duties outlined in the statute that created it.[13]

This Note proceeds as follows: Part I provides a brief summary of the facts of *TPGNA*. Part II more formally discusses the background of FERC and its historical operation, as well as the Natural Gas Act. Part III will delve into the issues of due process within administrative law proceedings. Part IV analyzes the process, authority, and effects of adjudication and rulemaking

---

[6] Total Gas & Power N. Am., Inc. v. FERC, 859 F.3d 325 (5th Cir. 2017).

[7] *Id.* at 327.

[8] Administrative Procedure Act § 1, 5 U.S.C. § 551(1) (2011).

[9] 16 U.S.C. §§ 791a–823d (2018).

[10] 15 U.S.C. §§ 3301–3423 (2018).

[11] 15 U.S.C. § 717u (2018).

[12] Texas v. United States, 523 U.S. 296, 300 (1998) (internal quotation marks omitted) (quoting CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE JURISDICTION AND RELATED MATTERS § 3532 (3d ed. 1984)).

[13] *See generally* Total Gas & Power N. Am., Inc. v. FERC, 859 F.3d 325 (5th Cir. 2017).

within administrative agencies like FERC. Part V considers the ripeness doctrine and its applicability to administrative proceedings. Lastly, Part VI lays out the benefits and consequences of the Circuit Court's ruling.

PART I: FACTUAL BACKGROUND OF *TOTAL GAS & POWER N. AM., INC. V. FERC*

Plaintiff-Appellant Total is a French subsidiary of one of the world's largest oil and gas companies, Total S.A., and trades in the North American natural gas markets.[14] FERC initiated a formal investigation into Total and two of its trading managers in response to a tip it received from a former Total employee, who indicated the company manipulated natural gas prices.[15] The investigation centered on allegations that Total traders accumulated a large quantity of physical and financial natural gas products, then traded monthly, physical fixed-price natural gas in high volumes during a strategic period to drive up prices to benefit its own natural gas holdings.[16] Such conduct violated the NGA's prohibition on manipulation of natural gas markets.[17] After investigating for more than three years, the FERC's enforcement division notified Total of its intention to recommend that the agency begin enforcement proceedings for NGA violations and that it would determine appropriate civil penalties.[18] In response, Total filed a declaratory judgment action in federal district court, in which it asked the court to declare that federal district courts alone maintain the authority to adjudicate alleged violations exclusively under the NGA, which it argued did not extend such adjudicative power to FERC.[19]

Within the NGA, "The District Courts of the United States … shall have exclusive jurisdiction of violations of this Act [15 USCS §§ 717 et seq.]"[20] Total explained that it did not "seek to

---

[14] *Id.* at 330.

[15] Order to Show Cause & Notice of Proposed Penalty at 14, Total Gas & Power N. Am., Inc. v. FERC, 859 F.3d 325 (5th Cir. 2017) (No. IN12-17-000), 2016 WL 1723518.

[16] *Id.*

[17] *Id.* at 331; 15 U.S.C. § 717c-1 (2018).

[18] *Total Gas*, 859 F.3d at 330.

[19] *Id.* at 330–31.

[20] *Id.* at 331.

prevent FERC from conducting an investigation or exercising its lawful authority," but rather it wanted to maintain "Total's right to have any violation 'adjudicated in the first instance by a federal district court.'"[21]

In FERC's proceedings, the agency issued an order to show cause directing Total to provide information to support a conclusion that it was not violating the NGA.[22] In addition to the order to show cause, the order provided a synopsis of both the violation adjudication and penalty imposition processes.[23] Total filed an answer opposing the imposition of penalties and asked FERC to dismiss the claims, at which time FERC filed a motion to dismiss Total's claims on the grounds of ripeness in district court.[24] Shortly thereafter, Total moved for summary judgment.[25] Without any advancement in the FERC proceedings, the district court ruled on the combatting matters concurrently, reaching a more advantageous result for FERC, granting its dismissal and denying Total's motion as moot.[26] Employing the district court's discretionary authority to hear declaratory actions, Total's unrelenting belief in its claims persisted.[27]

Total moved for reconsideration of the prior judgment, responding to various arguments in the court's order.[28] Total also sought to amend its complaint and requested a declaration that it did not violate the NGA in an attempt to ease the district court's concern that the dispute would not be resolved given Total's request for relief.[29] The district court denied both of these requests.[30] Total appealed each of the district court's orders.[31] The FERC proceeding moved along without delay amid the unsettled appeal.[32] In response to Total's request for summary disposition,

---

[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Total Gas*, 859 F.3d at 331.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 331–32.
[28] *Id.*
[29] *Total Gas*, 859 F.3d at 331-32.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 332.

the enforcement division filed its opposition.[33] Notwithstanding the Office of Enforcement's petitions, as of 2018 FERC has yet to have an Administrative Law Judge hear the case or move forward with any further action on these motions, for that matter.[34]

PART II: FERC AND THE NGA

Understanding the history of the Federal Power Commission (FPC) is critical to understanding the current role of FERC because of the catastrophic events underlying the restructuring of the FPC into FERC and its influence on administrative powers.[35] Formed in 1920, Congress created the FPC to systemize the federal government's hydroelectric projects.[36] Surprisingly, however, the commission was small and only employed the Executive Secretary, although it operated under the administrative partnership of the Secretary of War, Interior, and Agriculture.[37] Such a poorly organized operation resulted in contradictory mandates that inhibited the production of consistent energy policy.[38] After ten years in operation, Congress instituted a bi-partisan commission of five members to lead the FPC and allocated sufficient funds to hire FPC staff indefinitely.[39]

Further legislation and judicial decisions enhanced the FPC's objective.[40] Among them, the Federal Power Act of 1935 and the Natural Gas Act of 1938, which vested momentous power in the FPC: the regulation of the sale and transportation of electricity and natural gas.[41] Additionally, *Phillips Petroleum Co. v. Wisconsin* deemed the FPC as the proper jurisdiction of facilities that produced natural gas sold in interstate commerce.[42] Likewise, *City of Colton v. SoCal Edison* found that the FPC possessed jurisdiction of commercial utility power sales in interstate

---

[33] *Id.* at 332.
[34] *Total Gas*, 859 F.3d at 332.
[35] *Students Corner: History of FERC*, FERC, https://www.ferc.gov/students/ferc/history.asp [https://perma.cc/Q967-QW8M].
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id. See also Total Gas*, 859 F.3d at 327.
[42] Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 681 (1954).

commerce.[43] The expansion of the FPC's jurisdiction resulted in utter disarray ranging from clerical issues to operations—such that insurmountable natural gas permit applications accumulated and incessant brownouts occurred in the 1960s, followed by oil conflicts like the Organization of Petroleum Exporting Countries embargo left the country faced with an energy crisis the FPC—even in all its new-found power—could not cure.[44] Instead, this chaos induced the reorganization of the FPC.[45]

This reorganization produced FERC in 1977, and its responsibilities continued to expand.[46] Although FERC received greater authority over energy in the 1992 Energy Policies Act, from the end of the 1970s to the early 1990s, deregulation was continuous.[56] These regulatory changes opened access in natural gas pipelines, unbundled sales services from transportation services, and exposed the markets to more competition, and served as a means of expansion within the energy market.[47] The enactment of the Energy Policy Act in 2005 marked the creation of the first significant energy law in over a decade.[48] This act allotted the Commission new responsibilities and the authority to carry out those responsibilities.[49] Pertinent to this case, the Commission was granted the power to implement penalties in an attempt to deter market manipulators.[50]

The legal issue in *TGPNA* pertains to the authority vested in FERC to resolve and issue penalties for infringements of the NGA.[51] Before 2005, the NGA had given FERC "limited enforcement powers."[52] Following the industry-shaping 2005 legislation, however, FERC issued a policy statement interpreting the newly granted authority in 2006.[53] FERC asserted that Congress did not establish a *de novo* judicial review process and its

---

[43] Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 210 (1964).
[44] *Students Corner*, *supra* note 35.
[45] *Id.*
[46] *Id.*
[56] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Students Corner*, *supra* note 35.
[50] *Id.*
[51] *Total Gas*, 859 F.3d at 325, 327.
[52] *Id.*
[53] *Id.* at 328.

authorization from the NGA to assess penalties under the Act through a hearing—without parties present or with an administrative law judge (ALJ).[54] Following this detailed policy statement, FERC implemented "a comprehensive procedure for assessing civil penalties under the NGA."[55]

FERC's enforcement procedure was codified and outlined in the text of the case:

1. FERC's Office of Enforcement, its main investigation arm, reviews allegations of potential NGA violations to determine the need for further investigation.
2. After an investigation is opened, the Office of Enforcement uses standard discovery methods such as document review, interviews, and internal investigations. At any point, Enforcement may terminate an investigation for cause.
3. If Enforcement finds a violation, "it sends the alleged violator the factual and legal conclusions of its investigation and its proposed penalty, to which the alleged violator may confidentially respond."
4. If Enforcement still thinks that there has been a violation after this communication, it attempts to negotiate a settlement with the alleged violator. This step marks the end of the investigation and the beginning of the enforcement component.
5. If settlement discussions do not produce a viable settlement between FERC and the alleged violator, Enforcement submits a recommendation to initiate enforcement proceedings against the alleged violator to the five commissioners of FERC.
6. If the commissioners deem it appropriate, they issue "an order to show cause to the alleged violator, including the amount of Enforcement's proposed penalty" and a statement of the facts that constitute the violation. This order does not mean there has been a finding of an NGA violation, but rather "triggers the procedural rules"

---

[54] *Id.*
[55] *Id.*

governing FERC hearings. The Enforcement staff involved in the investigation is not allowed to further advise on the matter.

7. The alleged violator may file an answer to the order, allowing it to argue that it did not violate the NGA or that the penalty "should not be assessed or should be reduced."
8. FERC reviews the answer. If unpersuaded, FERC "determines what type of procedure is necessary to adjudicate the violation" (i.e., hearing without parties or ALJ review).
9. FERC may then proceed to a paper hearing, meaning it only reviews the paper record. The ALJ review involves an initial decision, sent back to FERC, to be delineated and reviewed before considering the final penalty.
10. "FERC issues a final order in which it may adjudicate an NGA violation and assess a civil penalty."
11. If the violator does not prevail, it has 30 days to request a hearing with FERC.
12. If the violator is unsatisfied with the hearing, it may then appeal to a federal Court of Appeals.
13. If the violator opts not to pay the penalty, FERC may pursue an enforcement action in the federal district courts.[56]

This case is exemplary of the Commission following its protocol when adjudicating these offenses, although FERC has stopped around step nine. Since the issuing of this policy statement, FERC has not strayed from this protocol in any recorded cases.

PART III: WHETHER AND HOW MUCH DUE PROCESS IS DUE

The guiding doctrine of administrative law comes from the Administrative Procedure Act (APA).[57] Enacted in 1946, the APA is the federal statute governing the way federal administrative agencies may propose, establish, and adjudicate regulations.[58] To

[56] *Id.* at 329–330.
[57] 5 U.S.C. §§ 551–59, 701–06 (2012).
[58] *See id.*

protect citizens from unregulated agency action, the APA also grants judicial oversight over all agency actions.[59] The APA requires agencies to keep the public informed of their organization, procedures, and rules; provide public participation in the rulemaking process; establish uniform standards of formal rulemaking and adjudication; and define the scope of judicial review.[60]

A pertinent issue to the case discussed in this Note is the amount of discretion agency actions receive from the federal judiciary upon review. In order to set aside agency actions that were not subject to formal, trial-like procedures, the APA requires a court to conclude the regulation is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."[61] Congress may further limit the scope of judicial review of agency actions by including such language in the organic statute.[62] The statutory deference for agency actions is especially favorable for agencies (FERC in this instance), and the standard is a high burden to place upon a plaintiff. In *TGPNA*, FERC's procedures were not in dispute and thus, most likely were not arbitrary and capricious.[63]

Total has been concerned with FERC's authority to adjudicate NGA violations and impose civil penalties if its proceeding found a violation because Total argues that such allowances could contravene the Due Process Clause of the Fifth Amendment and the right to a jury trial under the Seventh Amendment.[64] While this analysis is speculative considering the Fifth Circuit's dismissal due to lack of ripeness and the Supreme Court deciding not to hear the case, due process considerations will undoubtedly be litigated because of the appellate reasoning engaged in by Total.[65] Determining whether process is due, and if so how much, is a layered inquiry that first asks if there is a deprivation of property or liberty.

---

[59] *Id.* at § 706.
[60] *Id.* at § 552.
[61] *Id.* at § 706(2)(A).
[62] *Id.* at § 702.
[63] *See* Total Gas, 859 F.3d at 325, 329.
[64] *Id.* at 331.
[65] *See id.* at 333.

Total claims the fines it must pay deprives it of property.[66] The U.S. Supreme Court has repeatedly addressed the definition of property in its many tangible and intangible forms under the Due Process Clause. In the case of *Board of Regents v. Roth*, when a teacher did not receive a renewed employment contract at the end of his one-year term and was denied a hearing, he claimed he had a property interest in continued employment and to be free of stigma surrounding the action, which the court rejected.[67] *Roth* can be compared to *Perry v. Sindermann*, in which the court found a property interest in tenure existed where a university's own policies bolstered a ten-year college instructor's anticipation of its reward—enough to at least grant him a hearing.[68] In this case, because Total would have to pay a monetary penalty, a deprivation of property is clearly of concern.

Once a property interest is established, the Supreme Court has also frequently addressed just how much process a person is entitled to receive in administrative adjudications. For example, *Matthews v. Eldridge* explains that the amount of due process owed depends on the circumstances of the situation.[69] In *Matthews*, the respondent challenged the constitutional validity of the procedures established and utilized by the Secretary of Health, Education, and Welfare, to determine whether there was a continuous disability sufficient to entitle the individual to Social Security Disability Benefits.[70] The court set a three-part test to determine how much process is due to a potential defendant.[71] The amount of process due depends on: (1) the potential effect on the interest of the individual, (2) the likelihood of accurate results from current and additional procedures, and (3) the government's interest, including fiscal burdens of additional procedures.[72] The rationale of the Due Process Clause is to ensure both parties have an opportunity to share their truth, not necessarily to award full hearings simply because a property interest is present.

---

[66] *See id.* at 330.
[67] Board of Regents v. Roth, 408 U.S. 564, 578–79 (1972).
[68] Perry v. Sindermann, 408 U.S. 593, 602 (1972).
[69] Matthews v. Eldridge, 424 U.S. 319, 334 (1976).
[70] *Id.* at 325.
[71] *Id.* at 334–35.
[72] *Id.* at 335.

The amount of process granted could range from an informal conversation to a full adjudicatory hearing.[73] In the case of *Goldberg v. Kelly*, the defendant's welfare benefits were cut off without prior notice or a hearing, which the court held violated due process because welfare benefits had a special status as need-based services.[74] Likewise, because of the special interests at hand, Total will likely maintain its alleged wrongs are only properly adjudicated within the district courts. Because the claim by Total amounted to a deprivation of property (this is clearly the case as Total would have to pay a fine), it was entitled to a hearing, and it received one.[75] Therefore, the validity of FERC's authority to adjudicate disputes regarding violations of the NGA must be considered.

PART IV: AUTHORITY AND EFFECTS OF ADMINISTRATIVE ADJUDICATION

In evaluating Total's case, it's important to understand how FERC derives its jurisdiction to interpret, adjudicate, and penalize matters according to the NGA. Total's concerns are evidenced by its quick rush to the district court to seek a resolution. However, upon judicial review of an agency's adjudication, courts have granted substantial deference to the findings of an administrative agency.[76] In *Universal Camera Corp. v. NLRB*, the Supreme Court enunciated the "substantial evidence rule" as the standard of review, which is now codified within the APA.[77] The substantial evidence rule requires that the decision be based on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[78]

Additionally, as demonstrated in *Skidmore v. Swift*, when an agency interprets a statute, courts will grant deference to that reading.[79] Under *Skidmore*, rulings, interpretations, and opinions

---

[73] Goss v. Lopez, 419 U.S. 565, 579 (1975). *See also* Goldberg v. Kelly, 397 U.S. 254 (1970).

[74] *Goldberg*, 397 U.S. at 263–65.

[75] *Total Gas*, 859 F.3d at 335.

[76] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[77] *See id.*

[78] *Id.* at 462.

[79] Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

of the administrator "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[80] The weight given to such agency decisions will depend on the thoroughness of consideration, the validity of the agency's reasoning, consistency with other decisions, and other persuasive evidence.[81] This policy of deferential treatment is critical to the case against FERC because the agency interpreted the Energy Power Act of 2005 when it determined it has jurisdiction to adjudicate claims of NGA violations and impose penalties.[82]

Another case with historical application to administrative agencies' interpretation of statutes is *Chevron v. NRDC*.[83] In *Chevron*, the court laid out a test to determine the validity and accuracy of an agency's statutory interpretation when it is relevant to its operation.[84] The test asks whether the statute was reasonably ambiguous, and if so, whether the agency's reasonable interpretation was a permissible construction of the statute.[85] The scope of the test does not give deference to interpretations of the constitution, another agency's organic statute, or of the APA.[86]

If a statute is clear and unambiguous, but an agency exceeds the bounds of a statute, then the agency's interpretation is not entitled to such deference.[87] This maxim is laid out in *MCI Telecommunications v. AT&T*, wherein Justice Antonin Scalia explained that when a statute vests authority in an agency with unequivocal terms, an agency's attempt to overstep—regardless of any internal rationale—will not be given judicial deference.[88] Further, deference is granted only if the agency was delegated authority to regulate the area in the first place.[89] For example, in *United States v. Mead Corp.*, the court analyzed the applicability of deference by asking if Congress generally delegated rule-making authority to the agency in question and whether the agency's

---

[80] *Id.* at 140.
[81] *Id.*
[82] *Total Gas*, 859 F.3d at 325, 328.
[83] Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).
[84] *Id.* at 842–43.
[85] *Id.* at 843.
[86] *Id.* at 863–64.
[87] MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 229 (1994).
[88] *Id.* at 231; *contra* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 185-86 (2000) (Congress silent on the issue but authority was inferred not to be delegated).
[89] United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).).

interpretation was promulgated in the exercise of that authority.[90] The *Chevron* deference test applies to situations in which the delegation of such authority is apparent, and the agency implements the authority.[102] In sum, when Congress delegates such interpretive authority, the agency likely has such authority.[103]

These aspects are more subject to litigation than other points raised by Total. Closer readings of the NGA and Energy Policy Act will determine whether FERC has the authority to interpret its jurisdiction from its organic act. This could prove to be a difficult decision for the court, especially because some considerations regarding such authority weigh against each another within this type of fact pattern. Currently, FERC is using its authority in a manner consistent with its understanding of the power granted by the organic statute as manifested in a FERC policy memo. Based on the aforementioned case law, when an agency has adjudicatory authority, courts give deference to its statutory interpretations. In light of FERC's current practice, in conjunction with the court's historical approach, a reviewing court will likely decide *de novo* if FERC has the adjudicatory ability to resolve the present disputed claims. However, such considerations turn on whether an actual controversy exists.

PART V: RIPENESS AND DECLARATORY JUDGMENTS

The Fifth Circuit quashed the appeal by concluding that Total's claims were "mere speculations about future hypothetical events," telling Total to come back to court when FERC concludes it has violated the NGA and imposes civil penalties.[91] The issue plaguing FERC's ability to adjudicate disputes over violations of the NGA rests in the ongoing controversy, which would cease to exist if the federal district and circuit courts issued declarations regarding FERC's authority to adjudicate violations. In *Total*, the court conceded that "a declaratory judgment action is often

[90] *Id.* at 245
[102] *Id.* at 226-27.
[103] *Id.*
[91] *Total Gas*, 859 F.3d at 325, 335.

brought before injury has occurred."[92] In order for a declaratory judgment to be proper, however, it still must meet the ripeness requirement.[93] "A declaratory judgment action is ripe for adjudication only where an 'actual controversy' exists."[94] The term, "actual controversy" is not readily defined, especially within the legal context; therefore, a case-by-case analysis is proper in most circumstances. Generally, though, an "actual controversy" exists where "a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests."[95]

The ripeness requirement originates in Article III of the United States Constitution, which provides the federal courts with jurisdiction over cases and controversies.[96] "The ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur."[97] This doctrine is meant to make courts more efficient; such that, it prevents ill use of judicial involvement by avoiding inauspicious disputes.[98] The Fifth Circuit effectuated its reliance on two key considerations when assessing ripeness: (1) the fitness of the issues for judicial resolution, and (2) the hardship to the parties of withholding court consideration.[99] The court in *TGPNA* did not address what would satisfy the considerations, but moved on to its previous decisions, *United Transportation Union v. Foster* and *Energy Transfer Partners, L.P. v. FERC*, where it previously wrestled this complex issue.[100] Had the court reexamined its original reasoning in these two "key considerations," a different outcome would have likely been reached. For instance, in considering the "hardship of the parties" prong, the court should have (and maybe would have) recognized that if judicial review is withheld, then such an outcome effectively undermines the credibility of FERC to perform the legal duties it was entrusted.

---

[92] *Id.* at 333.

[93] *Id.*

[94] Orix Credit All., v. Wolfe, 212 F.3d 891, 896 (5th Cir. 2000).

[95] Middle S. Energy, Inc. v. City of New Orleans, 800 F.2d 488, 490 (5th Cir. 1986).

[96] U.S. CONST. art. III, § 2.

[97] Roark & Hardee LP v. City of Austin, 522 F.3d 533, 544 n.12 (5th Cir. 2008) (quoting ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.4.1 (5th ed. 2007)).

[98] *Id.* at 544.

[99] New Orleans Pub. Serv., Inc. v. Council of New Orleans, 833 F.2d 583, 586 (5th Cir. 1987) (quoting Abbot Labs. v. Gardner, 387 U.S. 136, 149 (1967)).

[100] *Total Gas*, 859 F.3d at 325, 333-35.

In determining if Total's claims were ripe, the court addressed the company's contention that FERC's ability to issue a final order concerning an NGA violation adjudication or impose a civil monetary penalty is unconstitutional because such conclusions should be made by the district court. [101] Total avowed, however, that FERC can recommend a finding of an NGA violation and propose a penalty.[102] The cornerstone of Total's claim rested within Section 24 of the NGA, entitled "Jurisdiction of offenses; enforcement of liabilities and duties."[103] Section 24 provides:

> The District Courts of the United States … shall have exclusive jurisdiction of violations of [the NGA] or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, [the NGA] or any rule, regulation, or order thereunder. … Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, [the NGA] or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant … .[104]

According to Total, "this precludes FERC from conclusively adjudicating such violations along with the corresponding civil penalties, through in-house administrative proceedings."[105] Total then asked, for a declaration that "FERC's proceedings violate various constitutional rights."[106] Total claimed that such constitutional rights include the guarantee of an impartial tribunal provided by the Due Process Clause because "Enforcement staff who assisted in the investigatory stage are permitted to advise the ALJ and FERC commissioners during the enforcement stage."[107]

---

[101] *Id.* at 334.
[102] *Id.*
[103] *Id.*; *see also* 15 U.S.C. § 717u (2005).
[104] *Id.*
[105] *Total Gas*, 859 F.3d at 334.
[106] *Id.*
[107] *Id.*

The Fifth Circuit duly recognized that it does not write on a blank slate regarding the ripeness doctrine's application to requests for declaratory relief.[108] The court relied heavily on its ruling in *Energy Transfer Partners, L.P. v. FERC,* in which it addressed the issues of ripeness in the context of a claim brought by a party based on an identical argument to that raised by Total.[109] The court in that case acknowledged that the NGA is not clear on the question of whether FERC could assess a civil penalty through a hearing before an ALJ rather than a proceeding in district court.[110] The court, however, declined to decide the question because its resolution must wait for FERC to decide that the NGA had been violated and assess a penalty.[111] The only difference between the cases is that in *Energy Transfer Partners*, FERC issued an order for an adjudicative hearing on the merits of the case.[112] Just as Total did in this case, Energy Transfer Partners (ETP) argued that the same section of the NGA vested exclusive jurisdiction in a federal district court to determine *de novo* if ETP had violated the NGA.[113] In *Energy Transfer Partners*, the court held that the petition for review was not ripe and dismissed it.[114] Likewise in *TGPNA*, because FERC had not taken any determinable action, Total's argument was even less supported than that of ETP, which led the court to deem the alleged controversy to be unripe.[115] Therefore, the court found its decision in *Energy Transfer Partners* fully applicable to Total's claims and dismissed the case.[116]

The court expressed clear hesitance to reverse itself. Through such a reversal, it could have issued a declaration finally addressing FERC's agency power of review. Within *Energy Transfer Partners*, the Fifth Circuit relied further on *Federal Trade Commission v. Standard Oil Company of California*[117] and

---

[108] *Id.*
[109] Energy Transfer Partners, L.P. v. FERC, 567 F.3d 134, 137–38 (5th Cir. 2009).
[110] *Id.* at 143.
[111] *Id.*
[112] *Id.* at 136.
[113] *Id.* at 138.
[114] *Id.* at 146.
[115] *Total Gas*, 859 F.3d at 325, 335, 339.
[116] *Id.* at 339.
[117] FTC v. Standard Oil Co., 449 U.S. 232, 233 (1980).

Abbott Laboratories v. Gardner,[118] two U.S. Supreme Court cases that addressed how administrative rulings affect proceedings in federal court regarding ripeness.[119] In *Standard Oil*, without directly addressing ripeness, the Supreme Court discussed important policy reasons to wait until the agency has had the chance to adjudicate.[120] The court in *Abbott* looked at four factors in its ripeness analysis of FERC orders: (1) whether the issues in the case are purely legal, (2) whether the challenged decision is a "final agency action" within the meaning of the APA, (3) whether it has or will have a "direct and immediate impact on the petitioners, and (3) whether resolution will foster effective enforcement and administration by the agency.[121]Within *Standard Oil*, the Supreme Court contrasted the regulations under consideration in *Abbott* with an agency's complaint alleging statutory violations.[122] The Court concluded that "[j]udicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise,"[123] explaining that review would "delay resolution of the ultimate question whether the Act was violated";[124] and that review should not be a "means of turning prosecutor into defendant before the adjudication concludes."[125]

The Fifth Circuit in *TGPNA* clearly erred in its failure to align its ruling with this language and considerations set forth in these two cases. Not only did the FERC proceeding concerning Total not give rise to the same concerns before the Supreme Court, but the Fifth Circuit's ruling in *Energy Transfer Partners* also falls short in a similar manner.[126] Regardless of whether FERC's input in these proceedings constitutes a "final agency decision," the other factors outweigh that consideration. The court's decision to refrain from deciding if FERC is correctly determining and penalizing

---

[118] Abbot Labs. v. Gardner, 387 U.S. 136 (1967).

[119] *Energy Transfer Partners, L.P.*, 567 F.3d at 139-40.

[120] *Standard Oil Co.*, 449 U.S. at 241.

[121] Energy Transfer Partners, L.P. v. FERC, 567 F.3d 134, 139–40 (5th Cir. 2009) (quoting Pennzoil Co. v. Fed. Energy Regulatory Comm'n, 645 F.2d 360, 368 (5th Cir. 1981)).

[122] *Standard Oil Co.*, 449 U.S. at 239–241.

[123] *Id.* at 242.

[124] *Id.*

[125] *Id.* at 243.

[126] See, e.g., *Energy Transfer Partners*, 567 F.3d at 141.

violations of the NGA, in turn, prevents the effective operation of an agency designed and specifically commissioned to make those decisions. The weight of the contravening factors in this situation should convince the court to issue a ruling. If the court were to rule on this issue under the tenor of the aforementioned cases, it is probable FERC would be justified in its power to adjudicate violations and levy penalties. The Supreme Court is inclined to give deference to agencies to make their own decisions, as judicial intervention could delay resolution of the ultimate questions asked by the agency and its investigation.[127]

As to the first factor in *Abbott*, the issues considered are here are purely legal. Without regard to who brought the motion for a declaratory judgment, the court has the discretion to make such a judgment if it follows the analysis laid out by the Supreme Court and in other previous cases. Neither party requested that the federal courts evaluate issues of fact.[128] FERC wanted these issues to be resolved by a paper review or an ALJ hearing, and nothing seemed to indicate that Total sought declaration on any factual finding.[129] The second *Abbott* factor does weigh in favor of a dismissal for lack of ripeness as there has been no "final agency action," because FERC's proceedings are still underway.[130] The third factor seems simple enough—the agency action does maintain a direct and immediate impact upon the petitioners.[131] The court's ruling will affect whether FERC can effectively adjudicate and penalize alleged violators of the NGA. That ability directly affects the future of Total. Finally, the resolution of the issues by the district court will undoubtedly foster rather than impede the effective enforcement and administration by the agency.[132] Of the four factors within the *Abbott* case, only the second factor cuts in favor of dismissal for lack of ripeness.[133] FERC was created to enforce the NGA and other energy acts designed to protect the market and environment.[134] In its decision to withhold

---

[127] *Standard Oil Co.*, 449 U.S. at 242.
[128] *See generally Total Gas*, 859 F.3d 325.
[129] *Id.* at 333.
[130] *Supra* note 136.
[131] *Id.*
[132] *Id.*
[133] *See Energy Transfer Partners*, 567 F.3d at 139–40.
[134] 15 U.S.C. § 717u (2005).

judgment on the process by which FERC adjudicates and evaluates these claims, the court inadvertently left FERC to navigate a dark space of uncertainty regarding its vested authority from the NGA itself.

In *Abbott*, the Supreme Court held that the regulations in question were definitive statements and had a "direct and immediate" effect on the day-to-day business of the complaining parties.[135] The Court determined the regulations rose to the status of law, in which it necessitated immediate compliance with the terms of the regulations.[136] The Court also found the alternative to compliance could be even more expensive and "may risk serious criminal and civil sanctions."[137] Thus, those regulations were ripe for review.[138]

There are some patent differences between the *Abbott* case and *TGPNA*, evidenced in part by the fact that FERC does not even go as far as to ask for a review of its findings.[139] These findings have not been made. The district court need only rule that FERC has the authority to do so. The implications are as important as they were in *Abbott*. FERC is dealing with violators of the NGA, which has a widespread effect on both the market and the population of the United States.[140] Non-compliance with FERC and its findings has severe consequences for the public.[141] To continue to signal that FERC may not be authorized to adjudicate and penalize claims of violations casts widespread doubt for regulated actors as to the likelihood that they could be penalized for violating the NGA. In addition to not comporting with the intent of the courts, refraining from judicial intervention is bad public policy.

The district courts have exclusive jurisdiction over claims of violations of the NGA, but within FERC's policy promulgation and even within the language of the NGA, the district courts are to enter the process when the alleged violator does not adhere to a

---

[135] *Abbot Labs.,* 387 U.S. at 152.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 148.

[139] *Total Gas*, 859 F.3d at 325, 335.

[140] *See generally* David Crump, *Natural Gas Price Escalation Clauses: A Legal and Economic Analysis*, 70 MINN. L. REV. 61 (1985).

[141] *Id.*

settlement or resolution decided by an ALJ.[142] Such jurisdiction is critical to the operation of FERC and by denying a definitive ruling, the courts disincentivize FERC to effectively police the Act that designated its parameters in the first place.

PART VI: EFFECTS OF THIS RULING

Striking down *TGPNA* due to ripeness is likely in the best interest of precedent for the ripeness doctrine, but broader public policy considerations should be examined. By remaining silent on FERC's ability to adjudicate claims of NGA violations, the judicial branch is signaling that the interests of FERC do not rise to the level at which the courts would issue a declaration that FERC may exercise the authority it believes itself to have.

While "following the ripeness" is a vital maxim to maintain, declaratory judgments have empirically greater leeway, considering *Energy Transfer Partners*.[143] The court should be willing to consider alternative avenues of adjudication to preserve the effectiveness of FERC and its investigations. The standards of review and due process requirements leave enough room for the court to act within its powers and grant a declaration. Leaving the issue undetermined only hampers the effectiveness of FERC proceedings and any claims it brings against potential violators of the acts it oversees. Even Total argued it would be harmed in the interim if relief was not granted or denied immediately.[144] The necessity of resolute policy is apparent on both sides of this dispute. By allowing the *Energy Transfer Partners* decision to control the outcome, the court is stifling meaningful discourse surrounding the ability of FERC to adjudicate these claims and levy penalties. Such uncertainty is bad for the natural gas industry and abhorrent to the judicial branch as a whole, regardless of the ripeness of the claims.

---

[142] 15 U.S.C. § 717u (2005).
[143] *Energy Transfer Partners, L.P.*, 567 F.3d at 134.
[144] *Total Gas*, 859 F.3d at 337.

CONCLUSION

FERC was probably granted the ability to enforce the NGA according to the language of the statute. Total is attempting to hamper the process with a poorly timed legal action. The district court should have been able to see through the rouse, and so certainly also should the Fifth Circuit. However, FERC is not currently so lucky. After multiple actions in the past ten years, no court has ruled as of yet on the ability of FERC to adjudicate its disputes and levy penalties where it sees fit. While the courts have not gone so far as to prevent FERC from continuing investigations and potentially even proposing violations and penalties, the lack of a definitive ruling paints a similar picture against FERC's ability to adjudicate such claims.

For FERC to effectively adjudicate NGA violations, the courts must either patently approve, or at least acquiesce, to its jurisdiction over NGA claims. The broader implication of this judicial silence is that potential violators still have a backdoor through which to escape prosecution for violations by merely claiming that FERC is operating beyond the scope of its authorization. Such violators could even use the threat of district court litigation to dissuade FERC from continuing its investigation if such litigation is strong enough to curb its desire to investigate.

The outcome is clear: refraining from issuing a declaratory judgment of this nature impairs public policy and does not comport with the language of precedent for the Fifth Circuit, nor does silence aid FERC's agency actions in any way.[145] Withholding a confirmation of authorization from FERC is a disincentive to the agency as a whole to zealously enforce the NGA. It allows violators an upper hand in negotiations and continues to prevent fruitful discourse surrounding compliance with the NGA in general. As this case approaches its conclusion, deference to agencies maintaining their ability to enforce the statutes which organically created them remains in the public's best interest.

---

[145] *Energy Transfer Partners*, 567 F.3d at 134.