

FERC'S AUTHORITY TO IMPOSE MONETARY REMEDIES FOR FEDERAL POWER ACT AND NATURAL GAS ACT VIOLATIONS: AN ANALYSIS

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INTRODUCTION

The Federal Energy Regulatory Commission (FERC or the Commission) finds itself today exercising a role that is quite different from the one envisioned by Congress when the Commission was first established. Its predecessor, the Federal Power Commission (FPC), was established in the 1920s to license hydroelectric projects,¹ and later given substantial authority under the Federal Power Act (FPA) and Natural Gas Act (NGA) to regulate rates, a role that it continues to play today.² Since the late 1980s, however, FERC has assumed the role of a market overseer, trying to advance competitive markets rather than examining costs of individual regulated entities as the principal means of ensuring that rates for jurisdictional service remain just and reasonable.³ Because the promotion

1. The Federal Water Power Act of 1920 (FWPA), Pub. L. No. 66-280, 41 Stat. 1063 (1920), which established the FPC, was enacted to provide "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so." *First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 180 (1946). When Congress subsequently enacted the Public Utility Act of 1935, 49 Stat. 803 (1935), the provisions of the FWPA were designated as Part I of the Federal Power Act.

2. Parts II and III of the FPA, which give FERC its authority to regulate wholesale sales of electricity in interstate commerce and electric transmission in interstate commerce (with certain exceptions for government-owned utilities), were adopted in the Public Utility Act, *supra* note 1, which amended the FWPA, and re-designated the provisions of the FWPA as Part I of the FPA. The Natural Gas Act, 52 Stat. 821 (1938), gave the FPC similar ratemaking authority over sellers and transporters of natural gas, plus additional certification authority over transportation facilities.

3. The introductory sections of Order No. 888, Order No. 2000, and the Commission's more recent Notice of Proposed Rulemaking on standard market design provide a good overview of FERC's increased reliance on competition to discipline prices in electricity markets. *See generally* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,639-52 (1996); Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 30,995-31,003 (2000); Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, FERC Stats. & Regs. ¶ 32,563 at 34,280-88 (2002). Discussions of changes in the regulation of natural gas

of competitive markets has received only piecemeal attention and approval from Congress, particularly with respect to the regulation of electricity markets, the Commission has had to rely substantially on its original statutory authority to effect its desired changes.⁴ In many ways, that original statutory authority is an awkward fit with the Commission's increasing reliance on competitive markets to regulate rates.

The problems faced by the Commission in performing its market oversight duties under its existing statutory authority are highlighted by the limitations in FERC's remedial authority for violations of the FPA and NGA. As the Commission increased its reliance on competitive markets to discipline prices, it also increased its reliance on market rules to ensure that market participants behave in a manner consistent with competitive outcomes.⁵ However, unlike other agencies that play a similar market oversight role—particularly the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC)—the express remedies available to the Commission under both the FPA and NGA are quite limited. These express statutory remedies are tailored primarily to the Commission's ratemaking responsibilities, not to its market oversight responsibilities. Unlike the statutes administered by the SEC and CFTC, the FPA and NGA contain limited civil and criminal penalty authority. Furthermore, with the exception of the limited monetary remedies provided for in §§ 205(e) and 206(b) of the FPA and § 4(e) of the NGA, neither statute has any express provisions for monetary remedies. In addition, neither statute permits private parties to sue in court for statutory violations.⁶

markets are provided in Order Nos. 644 and 636. *See* Amendments to Blanket Sales Certificates, Order No. 644, FERC Stats. & Regs. ¶ 31,153 at 30,791-92 (2003) (discussing changes in the regulation of natural gas markets); *see also* Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol, Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,394-98 (1992) (discussing additional changes in the regulation of natural gas markets).

4. *E.g.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,669 (explaining the Commission's reliance on §§ 205 and 206 of the FPA to order jurisdictional utilities to provide open access transmission, rather than the open access transmission provisions in §§ 210, 211, and 212 of the FPA).

5. The Commission recently adopted a series of "Market Behavior Rules," directed primarily at market manipulation, to govern the conduct of jurisdictional sellers in competitive markets. *See, e.g.*, Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 F.E.R.C. ¶ 61,218 (2003), *order on reh'g*, 107 F.E.R.C. ¶ 61,175 (2004); Amendments to Blanket Sales Certificates, Order No. 644, FERC Stats. & Regs. ¶ 31,153 (2003), *order denying reh'g*, 107 F.E.R.C. ¶ 61,174 (2004).

6. *See* Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951) ("[T]he prescription of the [FPA] is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce."); *see also* Hendricks v. Dynegy Power Mktg., Inc., 160 F. Supp. 2d 1155, 1160 (S.D. Cal. 2001) ("[T]here is no private right of action under the Federal Power Act to seek a 'just and reasonable' rate.").

Because of the limitations in the express remedial authority under the FPA and NGA, the Commission relies on its general enforcement authority under § 309 of the FPA and § 16 of the NGA—neither of which expressly permits monetary remedies—to support the imposition of monetary remedies for most violations of the FPA or NGA.⁷ The monetary remedies imposed by the Commission pursuant to §§ 309 and 16 are partly remedial and partly punitive. The Commission uses such remedies to provide a measure of damages to entities that have been injured as a result of such violations, to deter violations of the FPA and NGA, and to punish entities that have violated the strictures of the FPA or NGA.⁸

The Commission's use of its general authority under §§ 309 and 16 to impose monetary remedies has given rise to a number of thorny and unanswered questions in the context of the Commission's enforcement of rules governing competitive markets. For instance, a central clearinghouse operates single-price auction markets for electricity where numerous sellers and buyers transact without being directly matched with one another.⁹ In

7. The monetary remedies fashioned by FERC pursuant to §§ 309 and 16 are applicable to almost all violations of the FPA and NGA, including violations of rate schedules filed pursuant to § 205 of the FPA and § 4 of the NGA, violations of certificates of public convenience and necessity issued pursuant to § 7 of the NGA, and violations of the filing requirements in §§ 205 and 4. As explained in more detail *infra*, the monetary remedies fashioned pursuant to §§ 309 and 16 do not apply to violations of the requirement—set forth in §§ 205(a) and 205(b) of the FPA, and §§ 4(a) and 4(b) of the NGA—that rates for jurisdictional service be just, reasonable, and non-discriminatory. The Commission's remedial authority for unjust, unreasonable, or discriminatory rates is specifically defined (and constrained) by §§ 205 and 206 of the FPA, and §§ 4 and 5 of the NGA. *See* *Consol. Edison Co. of New York v. FERC*, 347 F.3d 964, 969-70 (D.C. Cir. 2004) (upholding FERC decision not to retroactively re-price transactions that occurred prior to New York ISO tariff filing on the ground that changes in rates may only be effected through the processes set forth in §§ 205 and 206 of the FPA, and that those processes do not allow for retroactive adjustments in rates, even if they are unjust and unreasonable); *see also* *Verizon Telephone Co., et al. v. FCC*, 269 F.3d 1098, 1107 (D.C. Cir. 2001) (holding that the “rule against retroactive ratemaking is premised on the implicit understanding that an established rate is not made illegal if it is later found to be impermissible or unreasonable”).

8. The authority under §§ 309 and 16 has been used by the Commission for quite some time to impose monetary remedies for violations of cost-of-service tariffs and violations of the filing requirements of the FPA and NGA. *See, e.g.*, *East Tennessee Natural Gas Co. v. FERC*, 631 F.2d 794 (D.C. Cir. 1980); *Washington Water Power Co.*, 83 F.E.R.C. ¶ 61,282 (1998); *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 F.E.R.C. ¶ 61,139 at 61,979, *clarified*, 65 F.E.R.C. ¶ 61,081 (1993); *Central Maine Power Co.*, 56 F.E.R.C. ¶ 61,200 at 61,817-18, *reh'g denied*, 57 F.E.R.C. ¶ 61,083 (1991); *Central Vermont Public Service Corp.*, 54 F.E.R.C. ¶ 61,153 at 61,484-85 (1991); *Delmarva Power and Light Co.*, 24 F.E.R.C. ¶ 61,308 (1983). The imposition of restitutionary remedies for violations of cost-of-service tariffs has been designed to provide a measure of damages to third parties that have been harmed by tariff violations, while the use of such remedies for violations of the filing requirements is intended primarily as both a punishment and a deterrent.

9. Single-price auction markets for electricity are operated primarily by Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) in the Northeast and California. In these markets, the independent clearinghouse that operates the market (usually the RTO or ISO) conducts an auction for energy contracts of a particular

this context, market manipulation or other market rule violations can result in multiple buyers paying higher prices than they would have had to pay in the absence of the violation. Requiring that the wrongdoer pay damages to buyers in the market would mean compensating each buyer for the difference between the amount it paid and the amount that it would have had to pay in the absence of the violation. This would be the primary remedy that would make those buyers whole. It does not appear, however, that the Commission has the authority to impose a remedy for FPA or NGA violations that is akin to other types of legal damages, where the amount paid by the wrongdoer is measured by the harm caused by the relevant violation. As explained in detail, *infra*, the Commission's authority appears to extend only to requiring a wrongdoer to provide restitution of profits obtained through the violation—a remedy that would not make the buyers in the single-price auction market whole.¹⁰

Other issues involve the scope of the duties imposed by market rules adopted by the Commission. For instance, given the increased interrelationship between parties in competitive markets, it is important that market participants know which entities are entitled to bring an action before the Commission for violations of the FPA or NGA. FERC, however, has not provided any clarification as to whether market participants with "standing" to bring an action at the Commission include any party affected by the violation or only those entities that actually transacted with the wrongdoer.

These questions have given rise to significant uncertainty on the part of jurisdictional utilities and other market participants regarding the risks associated with selling and buying in competitive wholesale electric and

time duration (usually one hour, but sometimes longer). The clearinghouse takes buy bids—from buyers seeking to purchase a defined amount of electricity—and sell bids, which are submitted by sellers offering a defined amount of energy at a price chosen by the seller. The clearinghouse stacks the sell bids by price from lowest to highest and then picks the sell bids—beginning with the lowest bid and moving on to the next most expensive bids—until all of the buy bids are satisfied. The highest-priced sell bid picked in the auction to serve demand sets the price for all the sellers picked. Energy is then delivered by the entities submitting sell bids to one or more central delivery points on the transmission grid, where it is delivered to the buyers.

10. See Order No. 644, FERC Stats. & Regs. ¶ 31,153 at 30,813 (2003) (highlighting FERC Commissioner William Massey's concern that the "disgorgement of unjust profits" remedy is insufficient, and that "the appropriate remedy may be that the manipulating seller makes the market whole"); see also Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 F.E.R.C. ¶ 61,218 at 62,172 (2003). A related issue is whether FERC has the authority to order sellers into a single-price auction market—even those that have not committed any statutory violation—to pay restitution if the price they receive is set as a result of a third party's violation of a tariff requirement or other market rule imposed by FERC. See *Consol. Edison Co. of New York*, 347 F.3d at 970 (noting NYISO's argument that rebilling single-price auction markets for past tariff violations "would . . . be neither equitable nor unpredictable," but holding that NYISO waived that argument).

natural gas markets. Uncertainties about the extent of the Commission's authority to order monetary remedies for violations of the FPA and NGA have also clouded efforts in Congress to modernize the two statutes.

The purpose of this Article is to attempt to bring clarity to these questions by defining the scope of the Commission's existing authority under § 309 of the FPA and § 16 of the NGA to impose monetary remedies—that is, payments from a jurisdictional entity to a third party to redress harm caused to that third party—for violations of the two statutes.¹¹ The Article is primarily meant to be descriptive rather than normative, defining the relevant analytical framework and describing the law as it currently exists.

The Article begins by providing an overview of the remedial authority granted to the Commission under the FPA and NGA, and explaining why the Commission relies significantly on its implied authority to impose monetary remedies for statutory violations. The Article then proceeds to address four questions that are central to defining the scope of the Commission's implied authority to order monetary remedies under §§ 309 and 16.

The first question is whether the Commission's power to remedy statutory violations should be narrowly interpreted to encompass only restitution for unjust enrichment or whether the Commission's powers can be more broadly interpreted to encompass remedies that make whole a party seeking monetary relief. This Article concludes that although there are cases that might be used to support a broad interpretation of the Commission's remedial authority, the better view is that the Commission's authority extends only to ordering restitution of monies unjustly received as a result of the violation.

The second question is whether there are discretionary limitations on the Commission's authority to order monetary remedies for tariff or other statutory violations. This Article concludes that there are a series of factors that directly affect the Commission's discretion to order monetary remedies. These factors include whether a regulated entity violated any statutory provision or otherwise acted in contravention of its legal obligations, whether the statutory requirement violated by the regulated entity was clear, whether the regulated entity was actually enriched by its violation, whether customers were harmed by the violation, and whether customers of the seller waived their rights to enforce a statutory violation against that regulated entity.

11. This Article is concerned solely with the scope of the Commission's remedial authority under the FPA and NGA. Other limitations on the Commission's remedial authority, such as due process and other constitutional limitations, and limitations imposed by the Administrative Procedure Act, are beyond the scope of this Article.

The third issue involves the identification of those entities eligible to receive monies from regulated entities that commit a statutory violation. This issue is relevant primarily in the context of enforcing the “Market Behavior Rules” that FERC has imposed on market-based rate sellers, and is similar in many respects to questions of duty of care and proximate cause in tort law. The new Market Behavior Rules are intended to prohibit market manipulation and other anticompetitive behavior, and are written broadly enough to suggest that sellers have a duty to all other market participants, and that other market participants may therefore seek redress at FERC from a seller irrespective of whether they are in contractual privity with the seller. This Article takes the view, however, that standing to obtain monetary payments from a seller for violations of these or other statutory requirements should generally be limited to entities that have purchased jurisdictional service from, or are competitors of, that seller.

The fourth issue involves the effect that an expansion of the Commission’s civil penalty authority might have on its ability to order disgorgement of unjustly received profits. An expansion of FERC’s civil penalty authority has been on the Commission’s legislative wish list for some time, and Congress is likely to grant such an expansion if it manages to pass an energy bill with an electricity title. This Article concludes that an expansion of FERC’s penalty authority would not impact the Commission’s power to order restitution for tariff or other statutory violations pursuant to §§ 309 and 16.

I. OVERVIEW: FERC’S AUTHORITY TO ORDER REMEDIAL MONETARY PAYMENTS

The express authority under the FPA and NGA to impose monetary remedies is quite limited, and is suited primarily to the Commission’s duties as a ratemaking body. The Commission’s primary refund authority is the power pursuant to §§ 205(e) and 206(a) and (b) of the FPA, and § 4 of the NGA, to order jurisdictional sellers to refund the difference between the rates charged and the just, reasonable, or non-discriminatory rate. Section 205(e) of the FPA and § 4(e) of the NGA permit the Commission to hold hearings on rate changes to determine whether they are unjust, unreasonable, or unduly discriminatory. If the filed rate is subsequently determined to be unjust, unreasonable, or unduly discriminatory, §§ 205(e) and 4(e) permit the Commission to order refunds equal to the difference between the filed rate and the just and reasonable rate.¹² Section 206(b) of

12. See 16 U.S.C. § 824d(e) (2000) (allowing the Commission to establish a hearing concerning the lawfulness of a filed rate change with or without a complaint); see also 15 U.S.C. § 717c(e) (2000) (allowing the Commission to hold hearings regarding a new schedule of rates). Note that § 205(e) of the FPA applies only to rate changes, and not to

the FPA (which has no analogue in the NGA) permits the Commission to establish a refund effective period after the initiation of an investigation or complaint regarding the justness, reasonableness, or discriminatory effect of a filed rate. If the filed rate is subsequently determined to be unjust, unreasonable, or unduly discriminatory, the Commission is permitted to order refunds for sales made during the refund period equal to the difference between the filed rate and the just, reasonable, or non-discriminatory rate.¹³ These provisions are directed to the Commission's ratemaking duties and do not apply in the context of statutory violations other than violations of the requirement in the FPA and NGA that rates be just, reasonable, and not unduly discriminatory.¹⁴

The FPA and NGA also contain several limited civil and criminal penalty provisions. Section 315 of the FPA permits the Commission to impose civil forfeitures of amounts up to \$1,000 for willful violations of any provision of the FPA other than §§ 211, 212, 213, and 214, which are the open access transmission provisions added to the FPA by the Energy Policy Act of 1992.¹⁵ Section 316A of the FPA permits the Commission to impose civil penalties up to \$10,000 per day for violations of §§ 211, 212, 213, and 214 of the FPA.¹⁶ Section 316 of the FPA and § 21 of the NGA provide for criminal penalties that permit the use of imprisonment and the imposition of monetary sanctions for willful and knowing violations of the FPA and NGA.¹⁷ Under both statutes, the criminal monetary penalties are capped at \$5,000, and the Commission is authorized to further impose penalties of up to \$500 for each day that a violation occurs.¹⁸ Given their limited scope, these express penalty provisions are not widely used by the Commission to address violations of the FPA and NGA. Furthermore,

initially-filed rates. *See Middle South Energy, Inc. v. FERC*, 747 F.2d 763, 771-72 (D.C. Cir. 1984) (stating that § 205 of the Federal Power Act does not give the Commission the power to suspend initial rates; to address the justness and reasonableness of initial rates, FERC must proceed pursuant to § 206).

13. *See* 16 U.S.C. § 824e(b) (2000) (setting forth the potential lengths of refund periods). Section 206 permits the Commission to review and order refunds for initial rates that are found to be unjust and unreasonable. *See Middle South Energy*, 747 F.2d at 771-72 (explaining that, to address the justness and reasonableness of initial rates, FERC must proceed pursuant to § 206).

14. As explained in *supra* note 7, the remedies set forth in §§ 205 and 206 of the FPA, and §§ 4 and 5 of the NGA are the exclusive monetary remedies that may be imposed for violations of the requirement in both the FPA and NGA that rates be just, reasonable, and non-discriminatory. *See Consol. Edison Co. of New York*, 347 F.3d at 969-70 (upholding the FERC decision not to retroactively reprice transactions that occurred prior to New York ISO tariff filing on the ground that changes in rates may only be effected through the processes set forth in §§ 205 and 206 of the FPA, and that those processes do not allow for retroactive adjustments in rates, even if they are unjust and unreasonable).

15. *See* 16 U.S.C. § 825n (2000) (explaining the forfeiture power).

16. *See* 16 U.S.C. § 825o-1 (2000) (outlining potential civil penalties).

17. *See* 15 U.S.C. § 717t (2000) (stating the potential criminal penalties for violations of the Act); 16 U.S.C. § 825o(a) (2000).

18. 15 U.S.C. § 717t.

these provisions are punitive in nature, and are not designed to provide any measure of monetary relief to parties harmed by a violation of the FPA or NGA.

Because of the limited express remedial and penalty authority set forth in the FPA and NGA, the Commission's remedy of choice for violations of the FPA or NGA other than violations of the requirement that rates be just, reasonable, and non-discriminatory is to mandate that the entity that committed the violation pay restitution of the profits that it gained as a result of that violation. The authority for this remedy is § 309 of the FPA and § 16 of the NGA, which permit the Commission "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this [Act]."¹⁹ As noted above, this remedy serves both a remedial purpose, providing some measure of restitution to third parties harmed by a violation, and a punitive purpose, imposing a sanction for statutory violations that does not contravene the express limitations on the Commission's penalty authority in the FPA and NGA.²⁰

The Commission has traditionally used this remedy in the context of enforcing cost-of-service tariffs and the rate filing requirements of the FPA and NGA to order a wrongdoer to disgorge any profits or other unjustly-obtained monies acquired as a result of its tariff or filed rate violation.²¹ This use of §§ 309 and 16 has been approved in a number of appellate court decisions.²² Those decisions, however, do not expressly address three issues that have become particularly relevant in the context of the Commission's oversight of competitive markets: 1) limitations on the

19. 16 U.S.C. § 825h (2000); 15 U.S.C. § 717o (2000).

20. As explained in Part II, *infra*, §§ 309 and 16 must be coupled with a substantive provision of the FPA or NGA in order to confer authority on the Commission to order a restitutionary remedy. Those two provisions use "a broad generality of 'necessary and appropriate' that is not rooted in a function, [and] cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined." *Mobile Oil Corp. v. FPC*, 483 F.2d 1238, 1257 (D.C. Cir. 1973).

21. See *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 F.E.R.C. ¶ 61,139 at 61,979, *clarified*, 65 F.E.R.C. ¶ 61,081 (1993) (establishing time value remedy for non-compliance with filing requirements); *Carolina Power & Light Co.*, 87 F.E.R.C. ¶ 61,083 at 61,357 (1999) (holding the same); *Florida Power & Light Co.*, 98 F.E.R.C. ¶ 61,276 at 62,150-51 (2002) (holding the same).

22. See *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1550-51 (D.C. Cir. 1985) (upholding FERC decision to require LNG facility to refund monies collected in violation of its tariff); *Transcon. Pipe Line Corp. v. FERC*, 998 F.2d 1313, 1322-24 (5th Cir. 1993) (upholding FERC ruling prohibiting pipeline that sold gas in violation of the NGA to pass through losses to its customers); *Southern Cal. Edison Co. v. FERC*, 805 F.2d 1068, 1071-72 (D.C. Cir. 1986) (upholding FERC decision to require public utility to refund to its customers overcharges resulting from its failure to pass through refunds received from its fuel suppliers, as required by utility's tariff); *East Tenn. Natural Gas Co. v. FERC*, 631 F.2d 794, 799-800 (D.C. Cir. 1980) (upholding FERC decision to require pipeline to refund to its customers overcharges resulting from pipeline's failure to pass through credits as required by its tariff).

measure of a monetary remedy; 2) limitations on the Commission's discretion to order a monetary remedy; and 3) limitations on the types of entities that may seek a monetary remedy for statutory violations. The following parts of this Article address those issues.

II. LIMITS ON THE MEASURE OF A MONETARY REMEDY

In the market structures that prevailed prior to the Commission's development of competitive electricity and natural gas markets, any analysis of the Commission's remedial authority would largely have ended with the question whether FERC had properly exercised its remedial discretion.²³ The nature of cost-based markets—particularly their emphasis on adherence to cost-based pricing formulas and on bilateral contracts—meant that the focus in most tariff compliance cases was whether the seller had overcharged the purchaser. There generally were no questions raised about the measure of any monetary payment to be made by the seller to the buyer.²⁴

Under the current competitive market structure, however, the question of how to measure monies owed by a seller that violates its filed tariff or other legal requirement is a significant question, and one that is largely unanswered. In the current competitive market structure, both markets and transactions within markets can have a significant impact on other markets and other transactions. Even in bilateral markets, like the electricity markets operated in the Pacific Northwest and the Southeast, the manner in which a given transaction or set of transactions are priced can influence the pricing of other transactions in those markets. In single-price auction markets like those operated by the Independent System Operators (ISOs) in California, New York, the Mid-Atlantic states, and New England, a single seller or group of sellers can have an even more pronounced impact on the prices received and paid by numerous other market participants. This increased interrelationship among market participants is significant to the

23. The limits on FERC's remedial discretion are analyzed in Part III, *infra*.

24. Like any generalization, this description has certain exceptions. Perhaps the best example involves the remedies imposed by the Commission for failure to comply with the prior notice and filing requirements in § 205 of the FPA. In the early 1990s, the Commission found itself forced to address widespread non-compliance with those requirements, and initially determined that jurisdictional utilities making cost-of-service sales without a filed tariff should be forced to pay restitution of all monies in excess of their variable operation and maintenance costs. *See* Me. Cent. Co., 56 F.E.R.C. ¶ 61,200 at 61,818 (1991). Subsequently, however, the Commission determined that such a restitutionary remedy was too severe, and had the potential to give customers an undeserved windfall. Thus, the Commission ultimately decided that public utilities making cost-of-service sales in violation of the FPA's prior notice and filing requirements should be forced to pay restitution of only the time value of the revenues collected. *See* Prior Notice and Filing Requirements Under Part II of the Federal Power Act, 64 F.E.R.C. ¶ 61,139 at 61,979.

question of how damages should be measured, particularly in light of the Commission's new Market Behavior Rules for market-based electricity and natural gas sellers, because misconduct on the part of a single seller can potentially cause significant damages to its counterparties, as well as third parties transacting in the market at the same time.

The question to be addressed in this section is whether it is within FERC's authority to measure the monetary remedy for a statutory violation by the buyer's harm rather than the seller's unjust enrichment. The analysis first provides an overview of the D.C. Circuit's decision in *Niagara Mohawk Power Corporation v. FPC*.²⁵ That decision is perhaps best known for Judge Harold Leventhal's formulation that "the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives."²⁶ Although it does not specifically address the issue of limits on the measure of a monetary remedy, *Niagara Mohawk* highlights the competing considerations that inform the analysis of the Commission's authority to impose legal damages, as opposed to restitutionary remedies. The analysis then proceeds to examine in more detail the arguments for and against reading the Commission's remedial authority to limit the measure of damages to a wrongdoer's unjust enrichment, rather than the harm caused to a third party. This Article concludes that the better view is that the Commission's remedial authority is limited to requiring jurisdictional utilities to forfeit their unjust enrichment resulting from statutory violations, and does not encompass measuring damages according to the harm inflicted on a third party.

A. Niagara Mohawk

Niagara Mohawk involved three hydroelectric projects that had been constructed by Niagara Mohawk Power Corporation (Niagara) prior to 1935, and a fourth hydroelectric project that was constructed by Niagara in 1941.²⁷ In contravention of § 23(b) of the FPA, which was inserted into the statute in 1935, Niagara operated these facilities for several decades without obtaining a license from the FPC.²⁸ In the early 1960s, Niagara finally asked the FPC to issue licenses for the four projects.²⁹

The FPC granted the licenses Niagara sought, but backdated the effective

25. 379 F.2d 153 (D.C. Cir. 1967).

26. *Id.* at 159.

27. *Id.* at 155.

28. *Id.*

29. *Id.*

dates for the licenses to the dates when Niagara should have sought each license under § 23(b). For three of the projects, that meant an effective date of 1949, while for the fourth project, the FPC's order meant an effective date of 1941.³⁰ This meant that Niagara had to pay the FPC all annual charges for each year from the effective date of each license to the year in which the FPC actually granted the license.³¹ The backdating of the licenses also meant that Niagara had to establish amortization reserves using certain revenues from the operation of the facilities.³² The FPC based its holding on the express prohibition in § 23(b) of the FPA on operating a hydroelectric facility on a navigable waterway without a license, the broad authority granted in § 309, and on a general policy developed under these FPA provisions that sought to prevent owners of hydroelectric facilities from reaping a windfall by delaying submissions of license applications.³³

The question on appeal was whether the FPC had the authority to backdate the licenses, and thus require Niagara to pay annual fees back to the effective dates of the licenses.³⁴ Writing for the court, Judge Leventhal began his analysis by stating the court's conclusion that "[t]he case presents no question of Congressional power, but only a question of construction of the scope of administrative discretion entrusted to respondent Commission under the Act," and that the "Commission's authority to establish effective dates of licenses earlier than the date of issuance, while not expressly set forth in the Act, is fairly implied, assuming reasonable exercise of the authority."³⁵ Using language that may well have an impact on the present-day issues regarding the Commission's remedial authority, Judge Leventhal further wrote:

[The] Act is not to be given a tight reading wherein every action of the Commission is justified only if referable to express statutory authorization. On the contrary, the Act is one that entrusts a broad subject-matter to administration by the Commission, subject to Congressional oversight, in the light of new and evolving problems and doctrines.³⁶

Judge Leventhal then provided the analysis on which these conclusions were based. He began by noting the broad grant of authority in § 309 of the FPA, and concluded:

30. *Id.* at 156.

31. *Niagara Mohawk Power Corp.*, 379 F.2d at 156-57.

32. *Id.*

33. *Id.*

34. *Id.* at 157.

35. *Id.* at 158.

36. *Niagara Mohawk Power Corp.*, 379 F.2d at 158.

While such . . . provisions do not have the same majesty and breadth in statutes as in a constitution, there is no dearth of decisions making clear that they are not restricted to procedural minutiae, and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.³⁷

Judge Leventhal observed that the FPC's backdating of Niagara's licenses was within the ambit of the substantive provisions in Part I of the FPA. He concluded that those provisions—particularly § 10(g), which permitted the FPC to attach to hydroelectric licenses such “conditions not inconsistent with the provisions of this Act as the commission may require”—granted to the FPC authorization “to issue licenses on conditions.”³⁸ Furthermore, he concluded that the “statutory authority to issue certificates or permits on conditions implies broad authority to take effective action to achieve regulation in the public interest.”³⁹

Judge Leventhal further justified the court's holding by issuing his well-known formulation that administrative agencies have broad discretion when it comes to determining remedies for violations of the statutes they administer: “[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.”⁴⁰

Based on his three-part analysis—the broad wording of § 309, the fact that the backdating of the licenses was within the FPC's power under the substantive provisions of the FPA, and the broad remedial discretion granted to the FPC—Judge Leventhal concluded that “the actions under review, being reasonable, are within [the FPC's] authority.”⁴¹ He went on to reject Niagara's assertion that the remedial action adopted by the FPC was a penalty, stating that:

“[P]enalty” is hardly appropriate for a condition that puts the wrongdoer in no worse stance than the company that has punctiliously observed the requirements of law, and is not made collectible in any event but only as an obligation to accompany the privilege of continuing to utilize a river subject to the jurisdiction of Congress.⁴²

37. *Id.* (citing *Public Service Commission of New York v. FPC*, 327 F.2d 893, 896-97 (D.C. Cir. 1964)).

38. *Id.* at 158. Section 10(g) permitted the FPC to attach to hydroelectric licenses such “conditions not inconsistent with the provisions of this Act as the commission may require.” *Id.*

39. *Id.*

40. *Id.* at 159.

41. *Id.*

42. *Id.* at 159-60.

Thus, in Judge Leventhal's view, the FPC was simply preventing Niagara from profiting from its statutory violations, and not imposing any type of affirmative sanction for those violations.

Judge Leventhal concluded by rejecting Niagara's argument that the FPC improperly "arrogated to itself the powers of a court in equity."⁴³ Judge Leventhal stated that the "principles of equity are not to be isolated as a special province of the court. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law."⁴⁴

At first glance, *Niagara Mohawk* appears to represent a fairly expansive interpretation of the Commission's remedial authority for statutory violations. Judge Leventhal's assertion that the Commission's authority under § 309 is not limited to regulatory actions that are expressly contemplated by the FPA, his claim that the FPC's authority is sufficiently flexible to permit it to adjust its regulatory activities "subject to Congressional oversight, in the light of new and evolving problems and doctrines," and his broad view of FPC's discretion with respect to the fashioning of remedies, seem to grant to the Commission fairly broad powers in the adoption of remedial measures.

On closer inspection, however, it is apparent that Judge Leventhal delineated certain clear limits on the Commission's remedial powers. The first such limit was his insistence that FERC remedial actions under § 309 "conform with the purposes and policies of Congress and . . . not contravene any terms of the Act."⁴⁵ Indeed, this point was reinforced by Judge Leventhal's coupling of the authority granted under § 309 with specific statutory grants of power in Part I of the FPA to justify the Commission's actions. Equally as notable is his clarification that the FPC's action in backdating the licenses was not a penalty, but rather an equitable remedy designed to put both Niagara and the FPC in the position they would have occupied had Niagara submitted timely applications for licenses. The sanction imposed on Niagara was intended not so much to punish Niagara for its statutory violation, but rather to prevent Niagara from profiting from that violation, and thus to uphold FPC's regulatory authority under the FPA.

Viewed from this perspective, the principles embodied in the *Niagara Mohawk* case do not appear to be particularly broad after all. Indeed, Judge Leventhal's discussion of the FPC's use of equitable principles at the end of the decision constitutes a recognition that the powers expressly granted to the FPC (and now FERC) under the FPA are relatively narrow, and that

43. *Niagara Mohawk Power Corp.*, 376 F.2d at 160.

44. *Id.*

45. *Id.* at 158.

those powers must be supplemented by equitable powers to ensure that the purposes of the statute are upheld. As demonstrated *infra*, the tensions apparent in *Niagara Mohawk* between giving FERC sufficiently wide latitude to effectively enforce the FPA and NGA, and ensuring that the Commission does not overstep the bounds of its delegated powers, are reflected in many of the other authorities that bear on the question of the extent of the Commission's remedial powers.

B. Authority Supporting Narrow Interpretation of FERC's Remedial Powers

Niagara Mohawk is best read to stand for the proposition that FERC has the implied authority to order monetary remedies under §§ 309 and 16, but that in the absence of an express grant of remedial power, such implied authority should be exercised narrowly. A narrow exercise of that remedial power focuses on the unjust enrichment of the offending party, and does not extend to making whole any third parties damaged by the wrongdoing.

This analysis is fully supported by the terms of the FPA and NGA, by principles of statutory construction, and by prevailing principles of administrative law. Certainly, where the statutory violation involves the violation of a filed tariff provision, the Commission has little choice but to measure damages according to the seller's unjust enrichment (measured by the difference between the price received by the seller and the filed rate), and not the damages suffered by a third party. To measure damages any other way would be a violation of the filed rate doctrine. Even where the violation is of a statutory provision other than a filed tariff, however, this narrow view of the Commission's remedial authority is supported by the plain meaning rule, the doctrine of *expressio unius est exclusio alterius*, the legislative history of the FPA and NGA, and the comparison of the FPA and NGA with other statutes governing market oversight, particularly the regulatory regimes imposed by the Commodity Exchange Act, the Securities Act of 1933, and the Securities Exchange Act of 1934. The arguments supporting a narrow view of the Commission's remedial authority under the FPA and NGA also find support in caselaw on modern approaches to the delegation doctrine, and in a comparison of the Commission's authority under § 309 of the FPA and § 16 of the NGA with the powers of equity courts at common law.

1. Filed Rate Doctrine

In the case of a filed tariff violation, the filed rate doctrine effectively prevents the Commission from measuring a monetary remedy on a basis other than the seller's unjust enrichment. The doctrine and its corollary, the rule against retroactive ratemaking, are based on the statutory

requirement in the FPA and the NGA that rates, terms, and conditions of jurisdictional service be on file at the Commission.⁴⁶ The filed rate doctrine “bars a regulated seller . . . from collecting a rate other than the one filed with the Commission,” and the rule against retroactive ratemaking “prevents the Commission itself from imposing a rate increase for [power] already sold.”⁴⁷ The filed rate doctrine prohibits a regulatory agency from requiring a regulated entity from collecting less than the filed rate.⁴⁸

The filed rate doctrine and the rule against retroactive ratemaking limit the scope of FERC’s remedial authority under the FPA and the NGA to the enforcement of the filed rate. For example, in the context of violations of FERC’s Market Behavior Rules, such a remedy would require that the Commission determine what the seller would have received had the rules not been violated, and require the seller to disgorge the difference between that amount and the amount actually paid to the seller.⁴⁹ The filed rate doctrine and the rule against retroactive ratemaking would prevent FERC from going beyond this method of calculating remedies, since a broader remedial measure would run up against the strictures imposed by the rule against retroactive ratemaking.⁵⁰

Thus, the filed rate requirements of the FPA and the NGA provide a definitive limitation on FERC’s remedial authority under §§ 309 and 16. Indeed, this is the type of limitation that Judge Leventhal referred to in *Niagara Mohawk* when he warned that § 309 not be read to contravene any express terms of the FPA.⁵¹ The filed rate doctrine and the rule against

46. See 15 U.S.C. § 717c (2000); 16 U.S.C. § 824(d) (2000).

47. *Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004) (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)).

48. See *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 131-32 (1990) (holding that the Interstate Commerce Commission could not preclude the carrier from recovering the filed rate on the basis of a lower negotiated rate as a remedy for the carrier’s failure to comply with the statutory directive to file the negotiated rate).

49. While the filed rate doctrine constrains FERC’s remedial authority for violations of filed tariffs, it does not require that FERC order a seller to refund amounts collected in excess of the filed rate. See *Towns of Concord, Norwood, and Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 75-76 (D.C. Cir. 1992) (holding that because the equitable aspects of refunding past rates are inextricably entwined with an agency’s discretion, FERC need only show that it considered relevant factors and struck a reasonable accommodation among them, and that its order granting or denying refunds was equitable in the circumstances of the litigation; FERC is not required to order refunds for violations of the filed rate).

50. One remedial question presented by the filed rate doctrine and the rule against retroactive ratemaking arises in single price auction markets like the ones operated by the ISOs in the Northeast and California. The issue arises in the context of a tariff violation by a seller in a single-price auction market that causes the price in the market to be artificially inflated. Certainly, that seller can be required to disgorge its unjust gains resulting from its tariff violation. But it is highly unlikely that FERC would be able to order other, innocent sellers to pay restitution of the prices they received. See generally the discussion of factors constraining FERC’s remedial discretion in Part III, *infra*.

51. See *Niagara Mohawk Power Corp.*, 379 F.2d at 158 (stating that § 309 and similar provisions “authorize an agency to use means of regulation not spelled out in detail, provided the agency’s action conforms with the purposes and policies of Congress and does

retroactive ratemaking support the conclusion that in the context of tariff violations, FERC's remedial authority under §§ 309 and 16 is limited to ordering restitution of payments received in violation of the filed rate, and that FERC may not measure damages according to the harm caused to the purchaser.⁵²

2. Principles of Statutory Interpretation

As an administrative agency, FERC is a “creature of statute.”⁵³ FERC's authority is thus coextensive with the powers conferred on it by statute. As the Supreme Court has repeatedly noted, “an agency literally has no power to act . . . unless and until Congress confers power upon it.”⁵⁴

Whether, in fact, the FPA and NGA grant to FERC an expansive authority to measure remedies in accordance with the damages suffered by the party harmed, or instead limit the Commission's remedial powers to the imposition of restitutionary remedies, depends on how broadly § 309 of the FPA and § 16 of the NGA are interpreted. To the extent that the question can be characterized as ambiguous, the prevailing approach to interpreting FERC's authority would permit FERC itself to adopt a relatively broad view of its remedial authority, at least if that interpretation itself were reasonable.⁵⁵ However, given the structure of the FPA and NGA, particularly their pronouncements on monetary remedies and penalties, it is difficult to make a case that the statutes are ambiguous on the issue of FERC's remedial powers. As the Supreme Court recently noted, “[e]ven for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.”⁵⁶ Those devices of judicial construction give rise to a clear, and relatively narrow, interpretation of FERC's remedial powers that does not permit the imposition of broad remedies—particularly those

not contravene any terms of the Act”).

52. In some instances, requiring a wrongdoer to pay restitution equal to the difference between the rate received and the rate filed will result in a remedy that approximates a damage remedy based on the harm to the purchaser. The example above of the remedy that would be in order for a violation of the Market Behavior Rules—the difference between the rate received by the seller and the rate that would have been received in the absence of a violation—is such an instance. There, the buyer's damages would essentially be measured by the difference between the rate that it paid and the rate that it would have had to pay in the absence of a violation. For the purpose of the analysis, however, the important point is that the filed rate doctrine and the rule against retroactive ratemaking require that the remedy be calculated in accordance with the seller's filed rate, and not the buyer's damages.

53. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 614 (1983).

54. *New York v. FERC*, 535 U.S. 1, 18 (2002).

55. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (recognizing that “considerable weight should be accorded” to an agency's interpretation of the rules it has been entrusted to administer).

56. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004).

measured by the harm caused as opposed to the wrongdoer's unjust enrichment—for tariff or other statutory violations.

In the panoply of judicial construction devices, there are four in particular that support a narrow reading of FERC's remedial authority under § 309 of the FPA and § 16 of the NGA: 1) the plain meaning rule; 2) the doctrine of *expressio unius est exclusio alterius*; 3) the legislative history of the FPA and NGA; and 4) the comparison of the FPA and NGA with other statutes governing market oversight.

a. Plain Meaning Rule

The starting point for analyzing the meaning of any statute is the language of the statute itself. If the language of the statute is clear, then the court's role is simply to give effect to the terms of the statute, and not to look to any other sources to divine the meaning of the law. This is known as the plain meaning rule of statutory construction.⁵⁷

The plain language of § 309 of the FPA and § 16 of the NGA is far from crystal clear. That language authorizes FERC “to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act.” This language gives no clear indication of any limits on FERC's remedial authority. But when read in conjunction with the rest of the statutes, the meaning of the two provisions becomes much clearer and indicates definite limits on their scope.

As an initial matter, the title of both provisions is “Administrative Powers of Commission; Rules, Regulations, and Orders,” indicating that they are not meant to confer substantive authority on the Commission, but rather to give the Commission the power to implement the substantive authority in other subsections. This reading is reinforced by the fact that § 309 of the FPA resides in Part III of the FPA, which primarily addresses administrative issues. Added to this limiting language is the fact that neither the FPA nor the NGA contains a general damages provision that permits the Commission to award damages based on the economic harm to a party based on a tariff or other statutory violation. The FPA does permit the Commission to award retroactive refunds under certain circumstances for unjust and unreasonable rates, but that remedy is strictly limited in temporal scope, and is not tied to a tariff violation.

In addition to the lack of a general damages provision in either the FPA or NGA, both statutes provide defined and quite limited penalty for statutory violations. The FPA contains a civil forfeiture provision in § 315

57. See NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, § 46.01 (6th ed. 2000) (explaining the meaning of the plain language rule for statutory construction).

for willful statutory violations other than violations of §§ 211, 212, 213, and 214.⁵⁸ Section 316A of the FPA permits the Commission to impose civil penalties up to \$10,000 per day for violations of §§ 211, 212, 213, and 214 of the FPA.⁵⁹ Section 316 of the FPA and § 21 of the NGA provide for criminal penalties that permit the use of imprisonment and the imposition of monetary sanctions in the amount of \$5,000 plus \$500 per day that a violation occurs for willful and knowing violations of the FPA and NGA.⁶⁰ To the extent that payment of legal damages, as measured by the harm to a third party purchaser, would result in payment of an amount that exceeds the wrongdoer's unjust enrichment, such a remedy (or at least the portion that exceeds the wrongdoer's unjust enrichment) would be akin to a penalty of the kind defined by §§ 315, 316, and 316A of the FPA, and § 21 of the NGA.⁶¹ Given that penalties are specifically defined by the FPA and NGA, any monetary remedy that exceeds the wrongdoer's unjust enrichment would appear to conflict with the specific penalty provisions of the two statutes.

Thus, when the two statutes are read as a whole, the "plain meaning" of §§ 309 and 16 is fairly clear. Both provisions provide FERC with the power to enforce the substantive responsibilities imposed elsewhere in the statutes, but nothing more, and neither permit the Commission to impose a monetary remedy that conflicts with the specific penalty provisions in the FPA and NGA. This reading of §§ 309 and 16 is a variation of the plain meaning rule known as "whole statute interpretation,"⁶² which has been endorsed by courts as well as by the Commission itself. As the D.C. Circuit stated: "[B]oth sections are of an implementary rather than substantive character These sections merely augment existing powers conferred upon the agency by Congress, they do not confer independent authority to act."⁶³

58. See 16 U.S.C. § 825n (2000) (describing the civil forfeiture penalty).

59. See 16 U.S.C. § 825o-1 (2000) (describing the civil penalties available).

60. See 15 U.S.C. § 717i (2000) (describing the criminal penalties for willful violations); 16 U.S.C. § 825o(a) (2000).

61. See *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986) (holding that FERC order requiring pipeline to disgorge all revenues received through sales made in violation of § 7 of the NGA "constitutes a penalty not authorized by law and, consequently, an abuse of the agency's discretion"). Cf. *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159-60 (D.C. Cir. 1992) (stating that "'penalty' is hardly appropriate for a condition that puts the wrongdoer in no worse stance than the company that has punctiliously observed the requirements of law . . .").

62. See SINGER, *supra* note 57, at § 46.05 (explaining that the whole statute rule requires the statute to be interpreted as a whole).

63. *New England Power Co. v. FPC*, 467 F.2d 425, 430-31 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974); see also *San Diego Gas & Elec. Co.*, 96 F.E.R.C. ¶ 61,120, at 61,509-10 (2001).

b. Expressio Unius and Legislative History

Another method of statutory construction that supports a narrow interpretation of FERC's remedial authority under §§ 309 and 16 is the principle of *expressio unius est exclusio alterius*—the inclusion of one is the exclusion of others. The principle is more specifically defined in the following way:

When what is expressed in a statute is creative, and not in a proceeding according to the course of the common law, it is exclusive, and the power exists only to the extent plainly granted. When a statute creates, and prescribes the mode and names the parties granted right to invoke its provisions, that mode must be followed and none other, and such parties only may act.⁶⁴

Certainly, the FPA and NGA are themselves “creative,” and all rights granted under those statutes are based solely on their language. Thus, the lack of an express provision in the statutes granting FERC the authority to impose damages for tariff or other statutory violations can be read as a limitation on FERC's remedial authority. As the Supreme Court recently noted, however, it has “not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.”⁶⁵ Indeed, “the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.”⁶⁶ Thus, the question is whether the omission of any broad damages authority in the FPA or NGA for statutory violations was a result of congressional choice.

This is where the legislative history of the FPA and NGA is relevant to the interpretation of §§ 309 and 16. That legislative history indicates that Congress has expressly limited FERC's authority to order monetary remedies or penalties. For example, when the FPA was originally proposed, it included a provision—§ 213—that would have permitted the Commission to “order that the public utility make due reparation . . . with interest, for amounts charged by an electric utility which were thereafter found to be unreasonable or excessive.”⁶⁷ This provision, however, was subsequently stripped from the legislation that Congress ultimately passed and signed into law. Courts read the elimination of this provision to limit the Commission's authority to impose remedies for unjust and

64. SINGER, *supra* note 57, at § 47.23.

65. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

66. *Id.*

67. S. 1725, 74th Cong. (1935).

unreasonable rates to prospective relief only.⁶⁸ Indeed, it was not until the passage of the Regulatory Fairness Act of 1988 that Congress specifically granted FERC the authority to order retroactive monetary relief for unjust and unreasonable rates. This history evinces an intent to restrict monetary remedies to those specifically set forth in the statute itself.

A similar intent is manifested in the penalty provisions of the statute. Until the passage of the Energy Policy Act of 1992 (EPAAct), FERC only had express penalty authority under §§ 315 and 316 of the FPA, and § 21 of the NGA. As explained *supra*, § 315 of the FPA gives FERC civil forfeiture authority for willful violations of the FPA, while § 316 of the FPA and § 21 of the NGA permit the enforcement of the two statutes through the initiation of a criminal action in a United States district court for willful and knowing statutory violations, and allow only for the imposition of a general penalty of \$5,000 and a more specific penalty of \$500 for each day a violation occurs.⁶⁹

In the EPAAct, Congress effectively endorsed FERC's attempts to change the regulation of wholesale electricity markets from cost-of-service regulation to market-based regulation. Congress did this by giving FERC the express authority to order transmission-owning utilities to provide open access transmission, and by establishing an exemption from regulation under the Public Utility Holding Company Act of 1935 for generators that produce electricity solely at wholesale. Recognizing that FERC's regulatory role was evolving from the exercise of ratemaking powers to the exercise of market oversight, Congress added § 316A to the FPA, which expanded FERC's enforcement authority by granting the Commission the power to impose civil penalties of up to \$10,000 per day on any entity that violates the open access transmission provisions that were added by the EPAAct. That penalty authority was limited to those open access provisions, however, and did not extend to any other violations of the FPA.⁷⁰ Furthermore, Congress did not match that slightly expanded penalty authority with an expanded authority to order monetary remedies.

The incremental grant of penalty authority to FERC for violations of the FPA even after FERC had begun exercising more of a market oversight role and less of a ratemaking role, and Congress's unwillingness to provide for expanded remedial authority for the Commission, indicates an intent to limit FERC's remedial authority for violations of the statute. As FERC has consistently pointed out in recent years, it has no penalty authority for acts

68. See *City of Bethany v. FERC*, 727 F.2d 1131 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 917 (1984).

69. See 16 U.S.C. §§ 825n, 825o (2000); 15 U.S.C. § 717t (2000).

70. See 16 U.S.C. § 825o-1 (2000).

of market manipulation.⁷¹ Given that limited penalty authority, and the limited remedial authority conferred under the FPA and NGA, it can be inferred that Congress intended to restrict FERC's ability to order the payment of monetary remedies from one party to another for violations of the act. Under this reading, FERC's authority extends only to the grant of a restitutionary remedy, and not a remedy based on the damages suffered by third parties.

c. Other Market Oversight Statutes

A limited reading of FERC's remedial authority under the FPA and NGA can also be supported by reference to other statutes governing market oversight. Indeed, it is reasonable not only to interpret the various provisions of an individual statute by their relationship with other provisions of that statute, but also to interpret a statute by reference to other statutes governing the same general subject matter. Under this analysis, a comparison of the FPA and NGA with three other statutes that govern market manipulation and fraud—the Commodity Exchange Act of 1936 (CFA), the Securities Act of 1933 (33 Act), and the Securities Exchange Act of 1934 (34 Act)—highlight fundamental differences in the damage remedies afforded by those statutes on the one hand, and the remedies offered by the FPA and NGA on the other.⁷²

The CFTC's responsibilities under the CFA are similar to those now being exercised by FERC. The primary purpose of the CFA is to prevent market manipulation and fraud in the trading of commodities. Unlike the FPA and NGA, however, the CFA provides private parties with an individual right of action for specified damages against persons who violate the CFA's prohibitions on market manipulation and fraud. Section 25(a) of the CFA states that:

Any person . . . who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this

71. See *Va. Natural Gas, Inc. v. Columbia Gas Transmission Corp.*, 109 F.E.R.C. ¶ 61,090 at P 11 (2004); see also *El Paso Elec. Co.*, 108 F.E.R.C. ¶ 61,071 at ¶ 31 (2004).

72. On a superficial level, it may not seem reasonable to compare the FPA and NGA with the Commodity Futures Act, the Securities Act of 1933, or the Securities Exchange Act of 1934, given that the FPA and NGA were drafted as ratemaking statutes giving rate regulatory authority to FERC, while the other three statutes were drafted to permit regulatory oversight of competitive markets. Nonetheless, the role that FERC is now trying to fill in its oversight of both electricity and natural gas markets is very similar—and in many ways, nearly identical—to the role played by the Commodity Futures Trading Commission and the Securities and Exchange Commission under their organic statutes. Thus, in asking what FERC's regulatory powers are under the FPA and NGA, it is reasonable to compare those two statutes with the Commodity Futures Act, the Securities Act of 1933, and the Securities Exchange Act of 1934. The disparity between the two groups of statutes only highlights the difficulties that FERC faces in attempting to exercise oversight over competitive markets using ratemaking statutes.

chapter shall be liable for actual damages . . . caused by such violation to any other person (A) who received trading advice from such person for a fee; (B) who made through such person any contract of sale of any commodity for future delivery . . . or who deposited with or paid to such person money, securities, or property . . . ; (C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of [specified wash trades or margin accounts] an interest or participation in a commodity pool; or (D) who purchased or sold a contract referred to in subparagraph (B) hereof if the violation constitutes a manipulation of the price of any such contract or the price of the commodity underlying such contract.⁷³

Section 25 also provides for “actual damages” against each “person” specified in §25(a), as well as registered exchanges and other futures associations registered under the CFA for failing to enforce their bylaws or rules.⁷⁴ These damage provisions supplement the enforcement authority of the CFTC, which retains the power to enforce the CFA through the imposition of civil penalties.

Similarly, the SEC’s responsibilities under the 33 Act and the 34 Act are analogous to the market oversight responsibilities assumed by FERC under the current market structures in the electricity and natural gas industries. The 33 Act is intended to ensure that investors receive pertinent public information about stock offered for public sale, and to prevent misrepresentations and fraud in the sale of securities. These regulatory goals are effected through the requirement that entities offering securities register those securities with the SEC, and thus publicly disclose specified information about their stock. Section 11 of the 33 Act specifically provides for private suits for misrepresentations on registration statements. It states, in relevant part, that a person acquiring a security for which the issuer posted a material, untrue statement on the registration statement may sue 1) every person who signed the registration statement; 2) every person who was a director of or partner in the issuer at the time the misleading statement was filed; 3) every person named in the registration statement as being or about to become a director, person performing similar functions, or partner; 4) every accountant, engineer, appraiser, or other person who certified the untrue statement; and 5) every underwriter of the stock.⁷⁵ Section 11 of the 33 Act also states that the damages imposed are:

[The] difference between the amount paid for the security . . . and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of

73. 7 U.S.C. § 25(a)(1) (2000).

74. See 7 U.S.C. § 25(b) (2000).

75. See 15 U.S.C. § 77k(a) (2000).

after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security . . . and the value thereof as of the time such suit was brought⁷⁶

Section 12 of the 33 Act, in turn, gives purchasers of securities a private right of action for sales of unregistered stock, and for misrepresentations in SEC filings other than registration statements on which a purchaser relied.⁷⁷ The measure of damages is “the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.”⁷⁸

The 34 Act gives the SEC authority over the day-to-day trading of securities, and broadens its authority over entities issuing securities. Under the 34 Act, the SEC has the authority to register and regulate brokerage firms, transfer agents, clearing agencies, and securities self-regulatory organizations. The 34 Act also gives the SEC authority to require entities issuing publicly-traded securities to issue periodic reports about the status of their business activities, and prohibits certain behavior in securities trading, most notably the use of fraudulent information, and trading based on the possession of material, non-public information.

Section 18 of the 34 Act gives a private right of action for false or misleading statements used in securities trading. It states, in relevant part:

[A]ny person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this title . . . which statement was at the time . . . false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance⁷⁹

Section 20A of the 34 Act, in turn, gives a private right of action to persons aggrieved by insider trading activities. It states, in relevant part:

[Any] person who violates any provision of this title or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a

76. See 15 U.S.C. § 77k(e) (2000).

77. See 15 U.S.C. § 77l(a) (2000).

78. *Id.*

79. 15 U.S.C. § 78r(a) (2000).

purchase of securities) securities of the same class.⁸⁰

Section 20A further states that the damages imposed in a suit for insider trading may “not exceed the profit gained or loss avoided in the transaction or transactions that are the subject of the violation” and must be offset by the amount of any civil penalty imposed on the wrongdoer by the SEC.⁸¹

These express rights of action under the 33 Act and the 34 Act are supplemented by additional implied rights of action that have been established in the years since the statutes were enacted.⁸² They also exist in addition to the specific penalty authority granted to the SEC by the 33 Act and the 34 Act.⁸³

The express rights of action granted to private parties to recover damages for violations of the CFA, the 33 Act, and the 34 Act stand in stark contrast to the lack of such rights in the FPA and the NGA. The difference between the CFA, the 33 Act, and the 34 Act on the one hand, and the FPA and NGA on the other, is largely explained by the fact that the CFA, the 33 Act, and the 34 Act were enacted as market oversight statutes, while the FPA and NGA were enacted as rate regulation statutes. Nonetheless, because FERC is now attempting to exercise its authority under the FPA and NGA in much the same way that the SEC and CFTC exercise their powers under the securities and commodities regulatory statutes, the CFA, the 33 Act, and the 34 Act are relevant to the interpretation of FERC’s authority under the FPA and NGA. The contrast between the express rights of action in the CFA, the 33 Act, and the 34 Act, and the lack of any express rights of action for damages under the FPA and NGA supports the conclusion that the authority to order monetary remedies for violations of the FPA or NGA is narrow.

3. *Delegation Doctrine*

A narrow interpretation of §§ 309 and 16 is further reinforced by modern approaches to the delegation doctrine, the set of principles that constrains the ability of Congress to delegate lawmaking authority to administrative agencies.⁸⁴ Those approaches focus less on the clarity of the statutory limitations on an agency’s authority, and more on the entire system of constraints, both substantive and procedural, which are in place to ensure that the agency exercises its authority in a legitimate manner.⁸⁵

80. 15 U.S.C. § 78t-1(a) (2000).

81. 15 U.S.C. § 78t-1(b) (2000).

82. *See* J.I. Case Co. v. Borak, 377 U.S. 426 (1964); *see also* Superintendent of Ins. of New York v. Bankers Life & Casualty Co., 404 U.S. 6 (1971).

83. *See* 15 U.S.C. §§ 78u-1, 78u-2 (2000).

84. *See* Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971).

85. *Id.* at 737.

One such constraint adopted by the courts has been the adoption of relatively narrow interpretations of delegated authority to ensure the valid exercise of that authority. Indeed, there are numerous examples of courts adopting a narrow interpretation of a statute in order to ensure that it passes constitutional muster under the delegation doctrine. For instance, *Industrial Union Department, AFL-CIO v. American Petroleum Institute*⁸⁶ involved a regulation governing the protection of workers from benzene that had been promulgated by the Secretary of Labor under a provision of the Occupational Safety and Health Act of 1970 requiring the Secretary to issue rules governing the protection of workers from the hazards of toxic substances “to the extent feasible.”⁸⁷ In order to prevent the statute’s invalidation on delegation grounds, the Court read into the statute a requirement that the Secretary of Labor find that the regulations promulgated under that section were necessary to cure a “significant risk” of injury to workers. The Court held that this narrowing of the statutory authorization granted to the Secretary, although forced under the language of the statute, was necessary to avoid the kind of “sweeping delegation of legislative power that . . . might be unconstitutional under the Court’s reasoning in *A. L. A. Schechter Poultry Corp. v. United States* . . . and *Panama Refining Company v. Ryan*”⁸⁸ According to the Court, a “construction of the statute that avoids this kind of open-ended grant should certainly be favored.”⁸⁹

Similarly, in *National Cable Television Association v. United States*,⁹⁰ the Supreme Court struck down an effort by the Federal Communications Commission (FCC) to use a broad delegation of authority granted it to regulate the communications industry to impose substantial charges on cable television systems that were unrelated to the regulatory benefits conferred by the FCC. The Court held that the charges imposed by the FCC were more like taxes than regulatory fees, and that without an express grant of taxing authority by Congress, the Court would not interpret the FCC’s statutory powers to confer such a broad authority on the FCC.⁹¹

As these cases demonstrate, courts often read substantive limitations into vague statutory language to ensure that the powers granted to administrative agencies are legitimately exercised. Under this approach, FERC’s remedial authority under the broad but otherwise vague language

86. 448 U.S. 607 (1980).

87. *See id.* at 612.

88. *Id.* at 646.

89. *Id.*

90. 415 U.S. 336 (1974).

91. *See id.* at 342 (“Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems.”).

of § 309 and § 16 should be narrowly interpreted to encompass only the types of equitable remedies that are measured by a wrongdoer's unjust enrichment, and not remedies measured in accordance with the damages caused by a tariff or other statutory violation.

4. *Equitable Powers of the Commission*

Finally, a narrow reading of the Commission's powers under §§ 309 and 16 is supported by a comparison of the Commission's authority under those provisions with the equity powers possessed by the Chancery courts in England and, subsequently, by courts in the United States.

Equity courts developed both in parallel, and as a supplement, to the English law courts in which expressly defined writs of action were adjudicated.⁹² The writs of action specifically permitted in the law courts were slow to develop or change, largely because of political struggles between the English kings, who issued the writs, and the English nobility, whose local authority was restricted each time a new writ was recognized. These writs did not always address the problems raised by a particular set of facts.⁹³ Because the primary remedy in law courts was money damages, the inadequacy of law courts was particularly pronounced in instances in which money damages were insufficient to provide justice to an individual litigant.⁹⁴ Thus, litigants started petitioning the Chancellor of England, a high-ranking minister to the King of England, for relief not otherwise available in law courts.⁹⁵

Over time, the Chancellor developed his own court with its own set of principles and rules that were different from, and largely supplemental to, the law courts.⁹⁶ The authority of these equity courts was in many ways narrower than the authority of the law courts.⁹⁷ The authority of equity courts also was primarily focused on the behavior of the defendant.⁹⁸ Equity doctrines, for the most part, focus on individual behavior, and are intended to correct an individual's wrongdoing.⁹⁹ In this way, equity courts differed substantially from law courts, which were focused almost exclusively on damage remedies measured according to the harm caused by the defendant.¹⁰⁰

92. See DAN B. DOBBS, *THE LAW OF REMEDIES* § 2.2 (2d ed. 1993).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. DOBBS, *supra* note 92, § 2.2.

99. *Id.*

100. *Id.*

The Commission's authority under §§ 309 and 16 can be seen as akin to the powers exercised by equity courts. Indeed, as Judge Leventhal wrote in *Niagara Mohawk*:

The principles of equity are not to be isolated as a special province of the courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law. The courts may not rightly treat administrative agencies as alien intruders poaching on the court's private preserves of justice. Courts and agencies properly take cognizance of one another as sharing responsibility for achieving the necessities of control in an increasingly complex society without sacrifice of fundamental principles of fairness and justice.¹⁰¹

The view that the Commission's authority under §§ 309 and 16 is equitable is exemplified not just by *Niagara Mohawk*, but by numerous other cases addressing the Commission's remedial authority.¹⁰²

As noted above, equity powers are relatively narrow in scope, and serve as a supplement to express authority recognized under the law. Furthermore, equity powers are focused on the wrongdoer, and not on the harm caused to the plaintiff. For these reasons, to the extent that the Commission's authority under §§ 309 and 16 is viewed as akin to equity power exercised by courts, such a perspective supports the contention that monetary remedies under §§ 309 and 16 for statutory violations should be measured in accordance with the unjust enrichment of the wrongdoer, and not according to the harm caused to third parties.

C. Precedent Supporting Broad Interpretation of FERC Remedial Powers

The contention that FERC should be able to measure monetary remedies for tariff or other statutory violations by the harm caused to third parties rather than simply the unjust enrichment of the wrongdoer finds support in a Fifth Circuit case, *Coastal Oil and Gas Corp. v. FERC*.¹⁰³ Given the flexibility of both the FPA and NGA to support market-based pricing and the ambiguity in § 309 of the FPA and § 16 of the NGA, it might be argued that a broad interpretation of the Commission's remedial authority also finds at least some support in the principles enunciated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,¹⁰⁴ the case addressing the degree to which courts should defer to an agency's interpretation of its governing statutes, and in the flexibility under the FPA and NGA alluded to

101. *Niagara Mohawk Power Corp.*, 379 F.2d at 160.

102. See *Towns of Concord, Norwood & Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992); see also *Laclede Gas Co. v. FERC*, 997 F.2d 936 (D.C. Cir. 1993).

103. 782 F.2d 1249 (5th Cir. 1986).

104. 467 U.S. 837 (1984).

by the *Niagara Mohawk* court to address “new and evolving problems and doctrines.”¹⁰⁵

I. Coastal Oil

Coastal Oil & Gas Corp. v. FERC (Coastal Oil) involved an unauthorized abandonment of a sale of natural gas pursuant to § 7 of the NGA. In 1958, four years after the landmark decision in *Phillips Petroleum Co. v. Wisconsin*¹⁰⁶ subjecting sales by natural gas producers to FPC regulation under the NGA, Coastal Oil & Gas Corp. (Coastal) entered a contract to sell natural gas to Florida Gas Transmission Company (FGT) from four specific tracts off the Texas coast.¹⁰⁷ The FPC officially certified these sales in 1964.¹⁰⁸

In mid-1965, Coastal began to make intrastate sales of gas from Tract 120, one of the four tracts specified in the FGT contract, to Lo-Vaca Gas Gathering Company (Lo-Vaca), an intrastate pipeline that was a wholly-owned subsidiary of Coastal.¹⁰⁹ In the late 1970s, questions raised by Coastal’s lawyers about whether the gas sold to Lo-Vaca had been dedicated to interstate use led Coastal to submit a filing at the FERC for abandonment authority under § 7 of the NGA for the Lo-Vaca gas from Tract 120.¹¹⁰ In the early 1980s, the Commission initiated an investigation before an Administrative Law Judge to determine whether Coastal’s sales of gas to Lo-Vaca were being made in violation of § 7 of the NGA and, if so, to fashion an appropriate remedy for that violation.¹¹¹

The Administrative Law Judge found that the gas being sold to Lo-Vaca by Coastal had been certificated for interstate use in 1964, and that the sales to Lo-Vaca were therefore being conducted in violation of the NGA because of Coastal’s failure to obtain abandonment authority from the Commission.¹¹² As a remedy, the Administrative Law Judge ordered Coastal to pay FGT in kind the quantities of gas that Coastal had illegally sold from Tract 120 in intrastate commerce.¹¹³

After Coastal took exceptions to the Administrative Law Judge’s ruling, the Commission affirmed the holding that Coastal’s intrastate sales of gas to Lo-Vaca from Tract 120 violated § 7 of the NGA.¹¹⁴ The Commission, however, altered the remedy adopted by the Administrative Law Judge.

105. *Niagara Mohawk Power Corp.*, 379 F.2d at 158.

106. 347 U.S. 672 (1954).

107. *See Coastal Oil & Gas Corp.*, 782 F.2d at 1250.

108. *Id.* at 1250-51.

109. *Id.* at 1251.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Coastal Oil & Gas Corp.*, 782 F.2d at 1251.

114. *Id.*

FERC considered three separate remedies. The first was a remedy based on FGT's losses: requiring Coastal to pay to FGT the amounts that FGT had to pay for volumes of natural gas to replace the volumes it should have received from Coastal. This remedy would have required Coastal to pay FGT \$918,947.¹¹⁵ The second was a remedy based on Coastal's unjust enrichment: requiring Coastal to refund to FGT the revenues received by Coastal in excess of what Coastal would have received had it made the sales to FGT under the 1958 contract. This remedy would have required Coastal to pay FGT \$1,885,104—twice the amount of the damages option based on the harm to FGT.¹¹⁶ The third remedy required Coastal to pay to FGT all the revenues received by Coastal from the sales to Lo-Vaca from Tract 120. This remedy was the most expensive for Coastal, totaling \$2,559,146.¹¹⁷ The Commission chose the third option, and ordered Coastal to pay this sum to FGT.¹¹⁸

On appeal, the Fifth Circuit upheld the Commission's holding that Coastal had violated § 7 of the NGA by selling gas from Tract 120 to Lo-Vaca in intrastate commerce. The court, however, took issue with the Commission's remedial ruling. The court began its analysis by noting that the NGA "does not give the Commission the authority to impose civil penalties."¹¹⁹ The court further concluded that there is "no way to characterize the 'disgorgement' remedy in the present case as anything other than a penalty" because the amount ordered to be paid to FGT "exceeds both the injury to FGT's interstate customers and the unjust enrichment of Coastal."¹²⁰

The court went on to assert that as long as "the Commission heeds our decision that a penalty, as such, is neither appropriate nor permissible . . . we think that either of the two alternatives considered by the Commission would constitute a starting point in fashioning an appropriate remedy."¹²¹ According to the court, a "remedy requiring a refund to FGT in the amount that FGT had to pay for replacement of the illegally diverted gas (approximately \$900,000 including interest) is authorized by our decision in *Mesa Petroleum Co.* . . ."¹²² The court also noted that "in *Cox v.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Coastal Oil & Gas Corp.*, 782 F.2d at 1253.

120. *Id.*

121. *Id.*

122. *Id.* (internal citations omitted). *Mesa Petroleum Co. v. FPC*, 441 F.2d 182 (5th Cir. 1971), is largely inapposite to the analysis in this Article because it involved refunds imposed on a newly regulated seller of natural gas in the aftermath of *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), and other cases expanding the FPC's jurisdiction over natural gas producers. The refunds imposed in *Mesa* were based substantially on the authority provided under the NGA to impose refunds after the filing of an initial rate.

FERC . . . we ruled that it is proper for the Commission, in fashioning a remedy for unauthorized abandonment of interstate service, to restore the status quo ante and prevent unjust enrichment of the wrongdoer.”¹²³ Thus, the court concluded that “the remedy stripping Coastal of its profits in excess of what it would have made under the contract with FGT is also an appropriate remedy.”¹²⁴

Because it approved a monetary damage measure based on the harm caused to FGT (i.e., the amounts that FGT had to pay to replace the volumes that FGT was supposed to receive from Coastal), *Coastal Oil* can be read to support the proposition that FERC has the authority to measure monetary remedies based on the harm to a purchaser.

The approval of this type of remedy is potentially explained by a number of factors apart from a broad reading of the Commission’s remedial authority under the NGA. The most notable of these factors is the fact that in *Coastal Oil*, the restitutionary remedy was twice as large as the damages remedy. This unusual circumstance can explain, at least in part, why the court did not see the damages remedy as a prohibited penalty, or otherwise proscribed under the NGA.

Coastal Oil also involved a jurisdictional seller violating the NGA in order to favor an affiliate. This fact might also explain why the court was willing to sanction not only the disgorgement remedy, but also the remedy based on the harm to the buyer.

These factors notwithstanding, *Coastal Oil* potentially supports a relatively broad reading of the Commission’s remedial authority under the NGA. Indeed, *Coastal Oil* is an interesting case because it places limits on the Commission’s remedial authority while at the same time implying that the Commission has a relatively broad authority to remedy statutory violations. *Coastal Oil* makes clear that the Commission must be careful not to run up against the limits on its penalty authority under the NGA—limits that still exist in both the NGA and the FPA. But the case can also be read to support the proposition that, in spite of those limits on the Commission’s penalty authority, the NGA permits FERC to measure monetary remedies for statutory violations by either the wrongdoer’s unjust enrichment or the buyer’s damages.

2. *Statutory Flexibility and Chevron Deference*

A broader view of the Commission’s authority to measure monetary remedies also might find some support in the regulatory flexibility described by Judge Leventhal in *Niagara Mohawk*, and in the deference granted to the Commission’s judgments under the well-known *Chevron*

123. *Coastal Oil & Gas Corp.*, 782 F.2d at 1253.

124. *Id.*

test. As Judge Leventhal noted, “the Act is one that entrusts a broad subject-matter to administration by the Commission, subject to Congressional oversight, in the light of new and evolving problems and doctrines.”¹²⁵ The Commission has used this flexibility to implement new forms of regulation to fit the changing nature of the electricity industry over the past 30 years—most notably, the use of market-based rates and the requirement that jurisdictional transmission owners and operators provide open access transmission.¹²⁶

An argument can be made that the regulatory flexibility afforded the Commission under the FPA and the NGA is sufficient to permit the Commission to award real damages—that is, damages based on the harm caused to a third party as opposed to the wrongdoer’s unjust enrichment—for statutory violations. Such an argument is buttressed by the point that market-based regulatory structures demand the use of sufficient tools on the part of regulators to ensure that market participants act in a pro-competitive manner. Arguably, narrow monetary remedies for statutory violations are inadequate given the scope of the Commission’s regulatory obligations under a competitive market structure, particularly violations of tariff provisions that are intended to ensure pro-competitive behavior on the part of market participants. Thus, the argument can be made that the Commission’s authority extends to measuring monetary remedies for statutory violations based on the harm caused by those violations.

This argument depends, of course, on the assumption that such a broad interpretation of the Commission’s authority under §§ 309 and 16 is not precluded by other provisions of the FPA and NGA (an assumption that is difficult to make given the considerations outlined above). To the extent that such a broad reading is not precluded by the other provisions of the two statutes, a Commission determination that monetary remedies may be measured according to the harm caused by a statutory violation would be protected by the deference afforded to agency statutory interpretations under *Chevron*.

125. *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1957).

126. *See* *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998) (approving the use of market-based rates); *see also* *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (holding the same); *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Servs. By Pub. Utils.*, Order No. 888, F.E.R.C. Stats. & Regs. ¶ 31,036 at 31,743-44 (1996), *order on reh’g*, Order No. 888-A, F.E.R.C. Stats. & Regs. ¶ 31,048 at 30,272 (1997), *order on reh’g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff’d in part and rev’d in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom.*, *New York v. FERC*, 535 U.S. 1 (2002).

D. Conclusion

The arguments and caselaw in favor of a broad interpretation of the Commission's remedial authority notwithstanding, the best reading of the FPA and NGA is that the Commission is limited to measuring monetary remedies for statutory violations under §§ 309 and 16 by the wrongdoer's unjust enrichment, and may not impose broader remedies based on the harm caused to third parties. This limitation certainly applies in instances in which a jurisdictional entity has violated a filed tariff. In those cases, the filed rate doctrine prohibits the Commission from ordering the utility from paying a monetary remedy that would cause it to receive less than the filed rate. Even in other instances, however, the FPA and NGA are written too narrowly to permit the Commission to order a monetary remedy based on the harm to third parties.

III. LIMITS ON THE COMMISSION'S EXERCISE OF ITS REMEDIAL DISCRETION

The next question is how to define the constraints on the Commission's discretionary authority to impose monetary remedies under §§ 309 and 16 for statutory violations.¹²⁷ The cases, which reinforce the conclusion above that the monetary remedies under §§ 309 and 16 are more akin to the equitable remedy of restitution than money damages at law, establish a general consensus that FERC "should order restitution only when money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it."¹²⁸ This is a standard formulation used by courts to describe the circumstances under which

127. It should be noted that the limitations on FERC's remedial discretion described in this section are generally not applicable to refunds imposed under §§ 205(e), 206(b), and 4(e) for unjust, unreasonable, or discriminatory rates. Although the Commission retains the discretion to order refunds for unjust, unreasonable, or discriminatory rates under the circumstances described in those provisions, and is not required to order refunds even if it finds that rates are unjust, unreasonable, or unduly discriminatory. *See* 16 U.S.C. § 824d(e) (2000) ("the Commission . . . may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid"); *see also* 16 U.S.C. § 824e(b) (2000) ("the Commission may order the public utility to make refunds of any amounts paid"); 15 U.S.C. § 717c(e) (2000) ("the Commission may . . . order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified"), the discretionary considerations, although based partially on equitable factors, are somewhat different in that context. Because utilities have notice under the refund mechanisms in §§ 205(e), 206(b), and 4(e) that their sales might be subject to refund, and because refunds are only available if the rates being charged are found to be unjust, unreasonable, or unduly discriminatory (except in the limited instances specified under the Mobile-Sierra doctrine, when refunds are only available if dictated by the public interest), considerations regarding unjust enrichment, and the clarity of the applicable standard violated by the jurisdictional utility do not apply.

128. *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 817 (D.C. Cir. 1998) (citing *Towns of Concord, Norwood & Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992)); *see also* *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301, 309 (1935).

restitution will be granted. Although it broadly defines the scope of the Commission's discretionary authority to order monetary remedies for statutory violations, a more precise analysis of the limits on the Commission's discretion requires a review of relevant appellate court cases.

Most of the cases have the effect of defining unjust enrichment by spelling out circumstances in which a jurisdictional entity will not be deemed to have been unjustly enriched. Although the equitable factors relevant to an order to pay restitution are highly variable and case-specific, the cases tend to establish at least five general limitations on the Commission's discretionary authority to order monetary remedies for statutory violations under §§ 309 and 16. The first two are almost self-evident from the unjust enrichment standard set forth above, and are closely related to one another. The Commission may not order a wrongdoer to pay a monetary remedy if 1) it was not enriched, or 2) there was no relationship between the wrongdoer's enrichment and its statutory violation. The third is a restriction on the imposition of monetary remedies when the statutory requirement itself is unclear. The fourth limitation applies in circumstances where a third party has agreed to a limitation of its rights under the FPA or NGA. Where the wronged party affirmatively agreed to limit its rights, courts may find that the wrongdoer was not unjustly enriched. Finally, the fifth limitation involves circumstances in which the Commission treats similarly situated utilities differently with respect to the imposition of monetary remedies. Where the Commission allows one utility to avoid paying a monetary remedy, and requires a similarly-situated utility to pay a monetary remedy, courts will generally find that the imposition of the monetary remedy is unjustified unless the Commission sufficiently distinguishes the two factual scenarios.

A. No Relationship Between Violation and Enrichment

The first two constraints on the Commission's remedial discretion prohibit the Commission from imposing monetary remedies if the wrongdoer was not enriched, or, conversely, if there was no relationship between the wrongdoer's enrichment and its statutory violation. These constraints are reflected in two D.C. Circuit rulings, *Koch Gateway Pipeline Co. v. FERC*¹²⁹ and *Gulf Power Co. v. FERC*,¹³⁰ and in an Eighth Circuit ruling, *Minnesota Power & Light Co. v. FERC*.¹³¹

129. 136 F.3d 810 (D.C. Cir. 1998).

130. 983 F.2d 1095 (D.C. Cir. 1993).

131. 852 F.2d 1070 (8th Cir. 1988).

I. Koch

Koch Gateway Pipeline Co. v. FERC involved an accounting practice related to transportation imbalances—that is, differences between the amount scheduled by a shipper and the amount actually injected into the pipeline by that shipper.¹³² Koch Gateway Pipeline Co. (Koch) had developed a practice, encoded in its transportation tariff, under which shippers with net positive imbalances (meaning that the shippers had provided more gas than they scheduled) would receive credits towards their transportation costs, and shippers with net negative imbalances were required to pay Koch for the cost of acquiring imbalance gas.¹³³ The monies paid to Koch under this “cash-in/cash-out” system were held in a separate account, and Koch’s tariff required that any money held in that account be credited to transmission customers on a quarterly basis.¹³⁴

Koch subsequently began the practice of paying for imbalance gas out of the cash-in/cash-out fund.¹³⁵ To facilitate this practice, it used an accounting adjustment at the end of each quarter in which it set aside the amounts held in the cash-in/cash-out fund for the purpose of potential imbalance gas purchases.¹³⁶ This accounting adjustment had the effect of showing no money in the cash-in/cash-out fund at the end of each quarter, meaning that Koch had no monies to credit customers under the requirements of its tariff.¹³⁷ The purpose of the adjustment was to allow Koch to hold the monies so that it could determine whether those monies would need to be used to purchase imbalance gas.¹³⁸

When the Commission subsequently became aware of this practice, it held that Koch was violating the requirement in the tariff that monies held in the cash-in/cash-out fund be credited to transmission customers on a quarterly basis.¹³⁹ The remedy adopted by the Commission was to order Koch to pay out to its transmission customers \$3,288,178, the total amount that was in the cash-in/cash-out fund at the end of the fourth quarter of 1995.¹⁴⁰

Responding to Koch’s argument that it did not violate its transmission tariff, the D.C. Circuit noted that there was some ambiguity in the exact requirements of the tariff’s crediting provision (a discussion that is relevant in the next section addressing vague tariff requirements).¹⁴¹ The court

132. See *Koch Gateway Pipeline Co.*, 136 F.3d at 812-13.

133. *Id.* at 813.

134. *Id.*

135. *Id.* at 813-14.

136. *Id.*

137. *Id.*

138. *Koch Gateway Pipeline Co.*, 136 F.3d at 814.

139. *Id.*

140. *Id.*

141. *Id.* at 815.

deferred to the Commission's interpretation of the Koch tariff, and thus upheld the Commission holding that Koch's accounting practice violated the tariff.¹⁴² Nonetheless, the court overturned the monetary remedy, holding that the Commission had abused its discretion.¹⁴³ One of the bases for the court's holding was that Koch had not been enriched by its tariff violation. The court stated:

[B]ecause Koch replaced the needed gas from its own reserves, it did not gain a windfall from its failure to refund the revenues in the cash-in/cash-out fund The funds retained by Koch in this case were to be used to purchase replacement gas—and, indeed, they eventually were, as Koch's figures for 1996 bear out.¹⁴⁴

The court further concluded that the remedy adopted by the Commission would only give a windfall to Koch's customers, stating that if "Koch is required to issue a refund in this case, thus diminishing the purchase funds available, Koch's shareholders, rather than the shippers, will ultimately bear the burden of replenishing Koch's gas reserves."¹⁴⁵

Koch thus illustrates a principle that is evident from the unjust enrichment formulation—that the Commission may not require a jurisdictional seller to provide restitution if the seller was not itself enriched by its violation. *Koch* also supports the corollary to that principle—that restitution is not permitted if there is no relationship between the violation committed by the jurisdictional entity and the revenues received by that entity.

2. Gulf Power

Gulf Power Co. v. FERC presents a similar scenario to the one presented in *Koch*. Gulf Power, a public utility that provided electricity service to certain wholesale customers, was a party to high-priced coal purchase contracts.¹⁴⁶ Gulf Power ultimately bought out the high-priced contracts for approximately \$250 million, and entered into new, lower-priced contracts.¹⁴⁷ The net savings from the new contracts was projected to be approximately \$600 million in total.¹⁴⁸ Gulf Power subsequently used fuel adjustment clauses (FACs) in its wholesale contracts to pass on to its wholesale customers both the buyout costs and the savings associated with the new contracts.¹⁴⁹ Even though the buyout costs were included in the

142. *Id.*

143. *Id.* at 816.

144. *Koch Gateway Pipeline Co.*, 136 F.3d at 817.

145. *Id.* at 818.

146. *See Gulf Power Co. v. FERC*, 983 F.2d 1095, 1097 (D.C. 1993) (detailing how Gulf renegotiated its coal purchase contracts from late 1986 to early 1988).

147. *Id.*

148. *Id.*

149. *Id.*

FACs, the total fuel costs passed on by Gulf Power to its customers after the buyout were lower than the pre-buyout costs because of the savings associated with the new contracts.¹⁵⁰ Other electric utilities during this time, including Mississippi Power, a Gulf Power affiliate, were also engaged in similar buyout strategies regarding high-priced coal contracts.¹⁵¹

Through a routine audit of Mississippi Power, the Commission subsequently discovered that Mississippi Power was passing on its buyout costs to its wholesale customers through the Mississippi Power FAC.¹⁵² In response, the Commission issued an order holding that buyout costs could not be automatically passed through to wholesale customers under an FAC, and that utilities were required to seek an express waiver from FERC in order to include buyout costs in FAC charges.¹⁵³ Mississippi Power subsequently sought, and was granted, a retroactive waiver from FERC permitting Mississippi Power to pass through its buyout costs in its FAC.

In spite of these rulings, Gulf Power continued to pass through its own buyout costs to its wholesale customers through its FAC for another two years until the Commission discovered this practice in an audit of Gulf Power.¹⁵⁴ To sanction Gulf Power for violating the FACs in its wholesale tariffs, the Commission ordered Gulf Power to pay back to its wholesale customers a total of \$2.1 million plus interest—the buyout cost amounts that Gulf Power had passed on to its customers.¹⁵⁵

On judicial review, the D.C. Circuit vacated FERC's remedial order on the ground that it was "wholly disproportionate to the error Gulf committed."¹⁵⁶ The court based its holding primarily on the conclusion that Gulf Power had not been enriched by its tariff violation. The court stated that "Gulf received no windfall profit by passing on the buyout costs. Gulf recovered only the costs it had incurred in producing significant savings for its customers."¹⁵⁷ The court further concluded:

Here, the buyouts undisputedly produced savings for Gulf's customers rather than windfall profits for Gulf. Equitable principles would seem to dictate that the customers should bear the costs of the buyouts. Nonetheless, FERC's order denying the retroactive waiver contains no indication that the Commission considered the savings the customers received or the lack of profit for Gulf.¹⁵⁸

150. *Id.*

151. *Id.*

152. *Gulf Power Co.*, 983 F.2d at 1097.

153. *Id.*

154. *Id.*

155. *Id.* at 1098.

156. *Id.*

157. *Id.* at 1100.

158. *Gulf Power Co.*, 983 F.2d at 1100.

Thus, *Gulf Power* also illustrates the principle that in the absence of any enrichment on the part of a wrongdoer, or of any relationship between an entity's wrongdoing and its enrichment, an order requiring restitution is an improper remedy under §§ 309 and 16.

3. Minnesota Power & Light

Minnesota Power & Light Co. v. FERC involved the attempted pass-through of litigation costs to wholesale customers through an FAC.¹⁵⁹ Minnesota Power & Light had incurred approximately \$700,000 in attorney's fees and other litigation costs to challenge the Interstate Commerce Commission (ICC) rate charged to it by a railroad for transporting coal to certain Minnesota Power & Light generating facilities.¹⁶⁰ The ICC litigation resulted in Minnesota Power & Light receiving a \$7.6 million refund on its coal transportation charges, and Minnesota Power & Light passed both this refund and the \$700,000 in litigation expenses through to its wholesale customers under its FAC.¹⁶¹

The Commission subsequently became aware that Minnesota Power & Light was passing its ICC litigation expenses through its FAC.¹⁶² Accordingly, the Commission issued an order prohibiting such a pass-through, and directing Minnesota Power & Light to refund to its customers, with interest, the litigation expenses recovered through the FAC.¹⁶³ On appeal, the Eighth Circuit upheld the Commission's holding that an FAC may not be used to recover litigation expenses of the type that Minnesota Power & Light incurred before the ICC,¹⁶⁴ but reversed the Commission's determination that Minnesota Power & Light should refund amounts collected through its FAC.¹⁶⁵

The court relied in part on the fact that the prohibition on passing through the litigation costs under an FAC was not clear when Minnesota Power & Light engaged in that practice (a point that will be discussed in more detail below), and in part on the ground that Minnesota Power & Light was not enriched through its use of the FAC to pass through the litigation costs to its customers. The court stated:

[W]ithout a waiver MP&L will be denied the ability to recover the fees and expenses incurred and which resulted in saving MP&L ratepayers millions of dollars in fuel expenses. Thus, while the benefits of the

159. 852 F.2d 1070 (8th Cir. 1988).

160. *Id.*

161. *Id.*

162. *Id.* at 1072.

163. *Id.*

164. *Id.* at 1073.

165. *Minn. Power & Light Co.*, 852 F.2d at 1074.

litigation flow to the ratepayer, the costs are placed on the shareholders.¹⁶⁶

The court further concluded that it was inequitable to require “the shareholders to bear the burden of expenses to obtain a refund benefiting the wholesale customers of MP&L.”¹⁶⁷

B. Unclear Statutory Requirements

The cases also demonstrate that the Commission should not impose a monetary remedy under §§ 309 or 16 if the statutory requirement violated was unclear or uncertain. Under such circumstances, monies will not be deemed to have been received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. This principle is illustrated in *Koch*,¹⁶⁸ *Towns of Concord, Norwood & Wellesley, Massachusetts v. FERC (Towns of Concord)*,¹⁶⁹ *Minnesota Power & Light*,¹⁷⁰ and *Borough of Ellwood City v. FERC*.¹⁷¹

I. Koch

In addition to holding that restitution is improper when a wrongdoer is not enriched, *Koch* stands for the proposition that restitution is not a proper remedy when the statutory requirement violated by a jurisdictional utility was not clear. In *Koch*, the threshold question was whether *Koch* had violated its tariff when it did not immediately credit its transportation customers with monies held in the cash-in/cash-out fund at the end of each quarter. The court immediately focused on the lack of clarity in the relevant tariff provision, stating that after “examining the tariff provision at issue . . . we cannot say that the language is free from ambiguity.”¹⁷² The court noted that the requirement that *Koch* credit its customers on a quarterly basis “is open to two interpretations.”¹⁷³ First, “the phrase could mean that *Koch*’s revenues were to be calculated and credits issued “quarterly”—*i.e.*, every three months based on whatever information on transportation activity was available to *Koch* at that time.”¹⁷⁴ On the other hand, “and equally compelling, the phrase could be interpreted to mean that the analytical ‘basis’ for the calculation of any refunds due would be a three-month period—in other words, that credits had to reflect the total activity that occurred during a given quarter, even if that information did

166. *Id.* at 1073.

167. *Id.*

168. *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810 (D.C. Cir. 1998).

169. 955 F.2d 67 (D.C. Cir. 1992).

170. 852 F.2d at 1070.

171. 583 F.2d 642 (D.C. Cir. 1978).

172. *Koch Gateway Pipeline Co.*, 136 F.3d at 815.

173. *Id.*

174. *Id.*

not become fully available until one or two months after the quarter ended.”¹⁷⁵

The court ultimately held that although “[n]either interpretation emerges naturally from the language of the tariff,” it would “defer to the Commission’s interpretation.”¹⁷⁶ The Commission had held that the tariff required Koch to credit revenues in the cash-in/cash-out fund to customers at the end of each calendar quarter, and did not permit Koch to hold those revenues longer than the end of a given quarter. Nonetheless, the court also factored the lack of clarity in the tariff into its decision to reverse the Commission’s imposition of a restitutionary remedy on Koch. Although the court’s ruling rested primarily on the fact that Koch gained no windfall from its tariff violation, the court also relied on the lack of clarity in the tariff, holding that “the Commission’s remedial actions must be based upon a considered analysis of the facts of the case and the precise purposes of the filed rate doctrine” and that “Koch’s actions, even if technically violative of its tariff, did not truly implicate the doctrine’s concerns.”¹⁷⁷

2. Towns of Concord

Towns of Concord involved another dispute over the scope of fuel adjustment clauses. Boston Edison sold power to the Towns of Concord, Norwood, and Wellesley, Massachusetts (Towns), and had an FAC in its power sales contract to pass along to the Towns Boston Edison’s fuel costs. The power sold to the Towns was derived, in part, from purchases that Boston Edison made from two New England nuclear power plants—Connecticut Yankee and Massachusetts Yankee. Around 1977, the two Yankee plants began passing on to their customers, including Boston Edison, costs associated with disposing of nuclear fuel rods. These costs were themselves quite small. Furthermore, Massachusetts Yankee did not begin identifying these disposal charges to Boston Edison until 1980, while Connecticut Yankee did not identify these disposal charges to Boston Edison until 1983.

At the same time, the Commission itself took a long time to clarify whether nuclear fuel disposal costs could be passed on to a customer through an FAC. The Commission’s policy was unclear until 1980, when it expressly held that nuclear fuel disposal costs could not be passed through to customers under FACs. The Commission subsequently affirmed this policy in 1981. After the passage of the Nuclear Waste Policy Act in 1983, however, the Commission reversed its prior rulings, and permitted nuclear fuel disposal costs to be passed on to customers under FACs. The

175. *Id.*

176. *Id.*

177. *Id.* at 817 (citations omitted).

Commission initiated an amnesty program in 1986. This resulted from the Commission recognizing that even between 1980 and 1983, many utilities had passed on nuclear fuel disposal costs through their FACs due to confusion over the Commission's policies and uncertainty about whether they were even paying for nuclear fuel disposal costs. Under this amnesty program, utilities that had improperly passed on nuclear fuel disposal costs through their FACs in violation of the Commission's policies prior to 1983 were permitted to retain the revenues that they had collected if they were able to demonstrate that their collection of nuclear fuel disposal costs through an FAC did not result in a double-recovery for the utility.

Prior to 1983, Boston Edison had collected from the Towns under Boston Edison's FAC a total of \$33,720 in nuclear fuel disposal costs that the two Yankees had imposed on Boston Edison. Invoking the amnesty granted by the Commission, Boston Edison sought to be able to retain the nuclear fuel disposal costs that it had recovered from the Towns prior to 1983. The Commission granted Boston Edison's request, holding that because of uncertainty on Boston Edison's part it was even being charged for nuclear fuel disposal costs by the two Yankees and because of the lack of clarity of the Commission's policy on collections of nuclear fuel disposal costs through an FAC, Boston Edison was not unjustly enriched through its collection of those monies from the towns.

On appeal, the towns argued that the Commission had erred in not requiring Boston Edison to repay the nuclear fuel disposal monies collected from the towns through Boston Edison's FAC prior to 1983. The court rejected these arguments. According to the court, "Boston Edison did not disregard or evade any of the [Federal Power] Act's commands. . . . [I]t did not even know that it was passing through the [nuclear fuel disposal costs]" ¹⁷⁸ The court also concluded that even if Boston Edison had known that it was passing through to the towns nuclear fuel disposal costs, or that such a pass-through contravened the Commission's requirements, "its violation was of the most minor, technical sort." ¹⁷⁹ Thus, the court held that Boston Edison had not been unjustly enriched, and "FERC's refusal to order a refund neither implicates the purposes of the filed rate doctrine nor contravenes any explicit statutory requirement." ¹⁸⁰

3. Minnesota Power & Light

In *Minnesota Power & Light*, the Eighth Circuit reversed the Commission's decision to impose a restitutionary remedy on Minnesota Power & Light. The court based its decision partly on the ground that the

178. *Towns of Concord v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992).

179. *Id.*

180. *Id.*

pass-through of ICC litigation expenses under the FAC did not give any windfall profits to Minnesota Power & Light, and partly on the ground that the question whether such expenses were properly included under the FAC was not clear prior to the Commission's ruling on Minnesota Power & Light's pass-through practices. Indeed, the court noted that "the inclusion of legal expenses which are directly assignable to [the] cost of fuel in the FAC [was] a question of first impression before the Commission,"¹⁸¹ and that "FERC should have very little concern that waiver of the FERC's retroactive application of the regulation will weaken the force of its precedent and ruling on the merits of the case."¹⁸² The court further noted that the "FERC's decision [to exclude litigation costs from costs recoverable under an FAC], buttressed by our affirmance, serves as notice to all utilities that the regulations governing Account 151 will be very strictly construed."¹⁸³ Thus, because of the lack of clarity in the Commission's FAC requirements, the court reversed the Commission's imposition of a restitutionary remedy on Minnesota Power & Light.

4. Borough of Ellwood City

Borough of Ellwood City v. FERC involved wholesale power sales by Pennsylvania Power Company (PPC) to the Borough of Ellwood City, Pennsylvania (Ellwood) between 1939 and 1964. PPC began selling power at wholesale to Ellwood in 1939 under a wholesale electricity contract that PPC filed at the FPC. Subsequently, PPC determined that its wholesale sales to Ellwood were not subject to the FPC's jurisdiction under the FPA because the sales occurred within the State of Pennsylvania, a conclusion that the FPC itself apparently endorsed. Thus, until 1964, PPC filed all additional changes to its contract with Ellwood only with the Pennsylvania Public Utilities Commission (PUC).

In 1964, the Supreme Court decided *FPC v. Southern California Edison Co. (SCE)*,¹⁸⁴ which held that wholesale sales of power by a California utility to the City of Colton, California were subject to the FPC's jurisdiction under the FPA, even though the sale occurred entirely in a single state. The effect of the Supreme Court's decision in *SCE* was to subject all wholesale sales by jurisdictional utilities, including those that were nominally intrastate in character, to FPC jurisdiction under the FPA. In response to this ruling, the FPC granted jurisdictional utilities a certain time period to file intrastate wholesale sales contracts that had not previously been on file. PPC complied with this directive by filing its then-

181. *Minn. Power & Light Co. v. FERC*, 852 F.2d 1070, 1073 (8th Cir. 1988).

182. *Id.* at 1074.

183. *Id.*

184. 376 U.S. 205 (1964).

current contract with Ellwood, but PPC did not file any of the contracts with Ellwood that had been executed prior to 1964 and filed with the PUC (other than the original contract from 1939).

Ellwood subsequently filed a complaint at the FPC seeking retroactive monetary payments from PPC equal to the difference between the amounts actually paid by Ellwood between 1939 and 1964 and the amounts permitted under the 1939 contract, which was the only contract with Ellwood that PPC had on file at the FPC. The FPC denied Ellwood's complaint. On appeal, the Third Circuit upheld the FPC's ruling, holding that PPC was not unjustly enriched by its failure to file its contracts with Ellwood at the FPC. The court held that PPC's failure to file did not implicate the purposes of the filing requirements under the FPA, since the goal of those requirements is to ensure that jurisdictional utilities and their customers are fully aware of the requirements with which they must comply when transacting under jurisdictional tariffs.¹⁸⁵ The court held that because it was unclear whether PPC was required to file its contract with Ellwood with the FPC, declining to order a restitutionary remedy for PPC's failure to file would not further the goals of the filed rate doctrine.¹⁸⁶

C. Limitation of Rights by Contracting Party

Still another limitation on the Commission's authority to order a restitutionary remedy can occur when a wrongdoer's counterparty has agreed to a limitation on its rights. This principle is illustrated by the First Circuit's ruling in *Boston Edison Co. v. FERC*.¹⁸⁷

That case involved long-term wholesale power sales by Boston Edison to certain municipal utilities. Under the contracts between Boston Edison and its purchasers, entities could not challenge charges imposed by Boston Edison if such a challenge was not raised within one year of the imposition of those charges.

In 1980, Boston Edison began invoicing its customers for plant addition interest (PAI) costs under the contracts. It was not until 1984, however, that the customers under the contracts objected to the inclusion of PAI costs under the contracts. The customers filed a complaint at FERC asking the Commission to reverse the charges after Boston Edison rejected their objections. The Commission agreed that PAI costs were improperly imposed on Boston Edison's customers under the contracts, and, in spite of the claims limitation provision in the contracts, ordered Boston Edison to disgorge the monies received for PAI costs dating back to 1980.

On appeal, the First Circuit agreed with the holding that PAI costs were

185. See *Borough of Ellwood City v. FERC*, 583 F.2d at 648-50.

186. *Id.*

187. 856 F.2d 361 (1st Cir. 1988).

not properly charged to Boston Edison's customers under the contract, but reversed the Commission's imposition of a restitutionary remedy on Boston Edison for the period between 1980 and 1983. The court held that the claims limitation clause was part of Boston Edison's filed rate, and that the Commission was therefore required to give that provision full effect. The court supported this conclusion by finding that all of the parties to the relevant contracts were sophisticated, and that a "reasonable claims limitation clause—and no one asserts that Paragraph C-8.3 [the claims limitation clause] is unconscionable, overweening, or otherwise unreasonable—clearly enhances economic equilibrium by bringing certainty to the parties' dealings after the passage of an adequate period of time."¹⁸⁸ The court further concluded that because the claims limitation provision should be given full effect under the filed rate doctrine and the Mobile-Sierra doctrine, Boston Edison was not unjustly enriched by collecting PAI costs during the three-year period in which the customers failed to challenge those costs, as required by their agreements.

Boston Edison Co. thus demonstrates that, under appropriate circumstances, the Commission's authority to order restitution for a tariff or other statutory violation can be limited by an agreement on the part of a utility's counterparty to limit its rights. *Boston Edison* suggests that the threshold question in such circumstances is whether the party agreeing to limit its rights was coerced into doing so, or otherwise suffered from an imbalance of contracting power. The case also establishes that if the limitation was negotiated between two parties of roughly equal bargaining power, then the negotiated limitation should be given effect by the Commission, and thus plays a role in determining whether a utility was unjustly enriched.

D. Disparate Treatment of Similarly Situated Utilities

Finally, the cases demonstrate that the Commission's discretion to impose monetary remedies on utilities under §§ 309 and 16 for statutory violations must be carefully exercised to ensure that similarly situated utilities are treated alike. In *Gulf Power Co.*, the D.C. Circuit chastised the Commission for appearing to treat Gulf Power differently for its pass-through of fuel buyout costs under its FAC than other utilities that had engaged in the same practice. The court noted specifically that Gulf Power's affiliate, Mississippi Power, had passed its fuel buyout costs through to its customers under its FAC, and that the Commission had not imposed a retroactive restitutionary remedy on Mississippi Power. The court also compared Gulf Power's treatment with the Commission's ruling

188. *Boston Edison Co.*, 856 F.2d at 372.

that Boston Edison did not have to refund fuel disposal costs to its purchasers in *Towns of Concord*, and with the Eighth Circuit's reversal of the Commission's ruling in *Minnesota Power & Light*. The court concluded that the "precedent established in *Minnesota Power & Light*, *Concord*, and *Mississippi Power* requires FERC to give a better explanation for its broad refund order than it provided in this case."¹⁸⁹ The court held that "when an agency takes inconsistent positions, as FERC did here, it must explain its reasoning."¹⁹⁰

E. Conclusion

Notwithstanding the broad language in *Niagara Mohawk* regarding the breadth of FERC's remedial discretion, the caselaw on FERC remedial authority establishes a number of important limitations on the Commission's discretion to order monetary remedies for tariff or other statutory violations. Specifically, the Commission will generally not be permitted to order a retroactive monetary remedy under §§ 309 and 16 for statutory violations if the wrongdoer has not been enriched, if the enrichment is wholly unrelated to the statutory violation, or if the statutory requirement that was violated was unclear or ambiguous. The Commission's ability to order a retroactive monetary remedy for a statutory violation may also be restricted if the entity seeking the remedy has agreed to limit its rights under the statute, or if the Commission attempts to impose a monetary remedy based on facts that are similar to facts on which it declined to order such a remedy in other cases.¹⁹¹

IV. LIMITATIONS ON WHO MAY SEEK TO RECOVER FOR A STATUTORY VIOLATION

Still a third question that must be addressed in analyzing the scope of the Commission's authority to order monetary remedies under §§ 309 and 16 for statutory violations is defining who may seek to recover for such violations.¹⁹² As with questions about limitations on the measure of

189. *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1100 (D.C. Cir. 1993).

190. *Id.* at 1101.

191. These limitations are not necessarily exhaustive, and their applicability depends substantially on the specific facts of each particular case. *See* La. Pub. Serv. Comm'n v. FERC, 174 F.3d 218, 224-30 (D.C. Cir. 1999) (upholding FERC's decision not to impose restitutionary remedy for violation of intra-company cost allocation tariff where the violation conferred benefits on the company's entire system (and thus benefited entities seeking restitutionary remedy), even though company may have been enriched by violation); *see also* *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1546-51 (D.C. Cir. 1985) (upholding FERC's decision to require liquefied natural gas companies to pay restitution of amounts collected in excess of amounts permitted by minimum bill provisions of their tariffs, even where the minimum bill provisions were deemed to be ambiguous for purposes of interpreting relevant language).

192. *See* Federal Power Act, 16 U.S.C. §§ 824(d), 824(e), 797(e) (2000) (detailing how

monetary remedies under §§ 309 and 16, this question primarily implicates the Commission's relatively recent efforts to impose behavioral rules—particularly prohibitions on manipulation—on market participants. This is a particularly thorny question given that the restitutionary remedy available to the Commission is based on the unjust enrichment of the seller that commits a statutory violation, and not on the harm caused to a third party.

Certainly, any party that purchases jurisdictional services from a public utility, and is therefore in privity of contract with that utility, may seek to recover a restitutionary remedy from that utility. Indeed, to the extent that a jurisdictional utility is unjustly enriched as a result of sales of electric energy made in violation of a statutory requirement, the counterparties in those transactions can be said to have been harmed, and are clearly eligible to recover restitutionary payments from the wrongdoer. The question is whether third parties that lack contractual privity with a wrongdoer may petition the Commission for restitutionary redress of the harm caused to them by the statutory violation.

The answer to this question is far from clear, and there is little in the FPA or NGA, or in the legislative history of those two statutes, that suggests an unambiguous resolution. As ratemaking statutes, both the NGA and Part II of the FPA were written primarily to govern relationships between contracting parties. Thus, the focus of the two statutes is on justness, reasonableness, and the non-discriminatory nature of the rates, terms, and conditions of jurisdictional service. The authors of the statutes did not contemplate their use to regulate a competitive market in which the behavior of a single market participant can have potentially significant effects on other market participants with which the first participant is not in privity of contract. For this reason, an argument can be made that the requirements imposed on jurisdictional utilities under the FPA and NGA impose a duty that extends only to a utility's counterparty, and that other parties that lack contractual privity with a wrongdoer may not seek a remedy from that entity under the FPA or NGA.

On the other hand, the language in the FPA and the NGA is not so crystal clear that it forecloses the possibility that a jurisdictional utility could be held liable to a third party with which it lacks contractual privity. Indeed, § 306 of the FPA states that “[a]ny person, state, municipality, or state commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act

the entities eligible to recover monetary remedies under §§ 205(e), 206(b), and 4(e) are clearly limited to direct purchasers of the entity charging unjust, unreasonable, or discriminatory rates).

may apply to the Commission by petition¹⁹³ Accordingly, the language in the statutes is flexible enough to support the conclusion that contractual privity is not a prerequisite for the Commission to award restitutionary remedies for a jurisdictional utility's statutory violation. Given the need to permit the Commission to exercise regulatory authority under the FPA and NGA to address "new and evolving problems and doctrines,"¹⁹⁴ at least where such authority is not precluded by either statute, the better view is that the Commission does have the authority to order a jurisdictional utility to pay part of its restitution to an entity with which the utility lacks contractual privity. Indeed, there is nothing in either statute that would prohibit such an action by FERC, as long as the Commission follows the appropriate procedures at the outset, and makes it clear, on an *ex ante* basis, that a jurisdictional utility's duty extends to entities other than those in direct contractual privity with the utility.

Even if it is assumed, however, that it is within the Commission's authority to order a jurisdictional utility to pay restitution to a third party with which the utility otherwise has no contractual relationship, there are a number of obstacles that would prohibit the Commission from addressing the damages caused to that third party as a result of a statutory violation. As an initial matter, and as discussed in detail above, it is difficult to read the FPA or NGA to permit the Commission to order monetary damages—that is, damages measured by the harm caused to an entity—under §§ 309 and 16 for violations of a statutory requirement. The only real remedy available to the Commission is the requirement that the wrongdoer disgorge its unlawfully obtained profits. This restitutionary remedy is unlikely to be sufficient to compensate injured third parties, particularly when they have to vie for a share of the remedy with entities that were in contractual privity with the wrongdoer.

Still another problem is to define the class of potential claimants in a way that is administratively feasible. Given the interrelated nature of competitive energy markets, and of participants within those markets, it is possible to have numerous third parties that might seek a remedy against a wrongdoer—particularly for market manipulation—even if they otherwise lack contractual privity with that wrongdoer. Thus, even if the FPA and NGA are read to permit third parties that otherwise lack contractual privity with a wrongdoer to seek a remedy from that wrongdoer, it would nonetheless be necessary to limit remedial actions to entities that have a relatively close and easily defined relationship to the wrongdoing.

193. 16 U.S.C. §825(e) (2000). Section 13 of the NGA contains a substantially similar provision permitting complaints by "[a]ny State, municipality, or State commission." 15 U.S.C. §717(L) (2000).

194. *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1957).

Otherwise, providing a remedy could prove to be difficult administratively for the Commission.

In this respect, the rules governing antitrust standing provide a potential guide for defining the parties that may seek a restitutionary remedy for statutory violations under §§ 309 and 16. Section 4 of the Clayton Act provides a private right of action to “[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws”¹⁹⁵ This broad directive, combined with the broad prohibitions in the Sherman Act of “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States,”¹⁹⁶ and monopolization of “any part of the trade or commerce among the several States,”¹⁹⁷ gives rise to potentially large numbers of potential plaintiffs seeking damages under the antitrust laws.

To better define the universe of potential plaintiffs in antitrust actions, and to ensure that the administration of private antitrust actions remains feasible for the federal courts, the Supreme Court has imposed a series of standing requirements that plaintiffs must meet before they will be allowed to proceed with a claim under § 4 of the Clayton Act. As an initial matter, plaintiffs “must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.”¹⁹⁸ Explaining this requirement further, the Supreme Court stated that the “injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be ‘the type of loss that the claimed violations . . . would be likely to cause.’”¹⁹⁹ Thus, for example, the Court in *Brunswick* held that the plaintiff suffered no antitrust injury when the defendant, a competing bowling alley, acquired a series of additional bowling alleys that increased the competition faced by the plaintiff.²⁰⁰

To assert a claim under § 4 of the Clayton Act, a plaintiff must also establish that it is in sufficient proximity to the violation to justify its standing to bring suit. The Supreme Court requires that five factors be considered in determining whether a plaintiff is in close enough proximity to the violation to have standing under § 4: 1) the causal connection between the antitrust violation and injury to the plaintiff; 2) the nature of the injury, including whether the plaintiff is a consumer or competitor in the relevant market; 3) the directness of the injury and whether claimed damages are too speculative; 4) the potential for duplicative recovery and

195. Clayton Antitrust Act, 15 U.S.C. § 15(a) (2000).

196. 15 U.S.C. § 1 (2000).

197. 15 U.S.C. § 2 (2000).

198. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

199. *Id.* (citing *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969)).

200. *See id.* at 487-88.

whether apportioning damages would be too complex; and 5) the existence of more direct victims.²⁰¹ The Supreme Court has tended to interpret these criteria narrowly, and to focus particularly on the second of these criteria—whether the plaintiff is a consumer or competitor in the relevant market. For example, in *Illinois Brick Co. v. Illinois*,²⁰² the Court announced the “direct purchaser” rule, which limits standing among consumers to those persons or entities that purchase a product directly from the alleged wrongdoer, and prohibits indirect purchasers (that is, purchasers more than one step removed from the alleged wrongdoer) from bringing suit under § 4 of the Clayton Act. The purpose of this limitation was to avoid the complexity and burden on the courts of determining the amount of the harm in a given case to different levels of the distribution chain.²⁰³ The Court expressed concern that this complexity could give rise to duplicative recoveries, and could have the effect of deterring suit on the part of parties directly harmed by an antitrust violation.²⁰⁴ Thus, in *Illinois Brick*, the Court denied standing to the State of Illinois, which had purchased concrete bricks indirectly through contractors for use in the construction of state-owned buildings.²⁰⁵

Similarly, in *Associated General Contractors of California*, the Supreme Court narrowly interpreted the requirement that the plaintiff, if not a direct customer, must be a competitor of the defendant. In that case, the Supreme Court held that a union did not have standing to sue a construction contractors’ association for forcing third parties to forego doing business with the union and its members. The Court concluded that the union lacked standing primarily because it was not a competitor in the market affected by the alleged restraint.²⁰⁶

Another set of potential guides for FERC as it defines the entities that may seek financial redress for statutory violations are the market oversight statutes administered by the SEC and the CFTC, many of which expressly permit private actions for statutory violations. Those statutes expressly define the scope of potential parties to a suit. Some of the statutes accomplish this goal by limiting the plaintiff to persons who acquired a security or commodity affected by the relevant violation, and by defining the persons or entities that may be sued by the plaintiff. For instance, § 11 of the 33 Act permits a person acquiring a security for which the issuer posted a material, untrue statement on the registration statement to sue 1)

201. See *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 537-45 (1983) (outlining the factors impacting standing analysis).

202. 431 U.S. 720 (1977).

203. See *Illinois Brick Co.*, 431 U.S. at 737-47.

204. See *id.* at 745-47.

205. See *id.*

206. See *Associated Gen. Contractors*, 459 U.S. at 530.

every person who signed the registration statement; 2) every person who was a director of or partner in the issuer at the time the misleading statement was filed; 3) every person named in the registration statement as being or about to become a director, person performing similar functions, or partner; 4) every accountant, engineer, appraiser, or other person who certified the untrue statement; and 5) every underwriter of the stock.²⁰⁷

Other statutes accomplish this goal by defining both the plaintiffs and the defendants. For instance, the Commodity Exchange Act states that:

Any person . . . who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages . . . caused by such violation to any other person (A) who received trading advice from such person for a fee; (B) who made through such person any contract of sale of any commodity for future delivery . . . or who deposited with or paid to such person money, securities, or property . . . (C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of [specified wash trades and margin accounts or] an interest or participation in a commodity pool; or (D) who purchased or sold a contract referred to in subparagraph (B) hereof if the violation constitutes a manipulation of the price of any such contract or the price of the commodity underlying such contract.²⁰⁸

Like the Supreme Court's rules on antitrust standing, these statutes define the scope of potential plaintiffs by requiring that those plaintiffs have suffered a type of harm contemplated by the statutes, and that potential plaintiffs be in relatively close proximity to the violation.

The antitrust standing rules and the express standing rules in the securities and commodities statutes suggest the type of restrictions that the Commission should place on complaints for relief for statutory violations. Entities should be able to seek relief at FERC only to the extent that they have suffered harm that the relevant statutory requirements were intended to prevent. Even then, the Commission should inquire about the causal connection between the violation and the injury, whether the injury was intended or foreseeable, and whether apportioning monies to the claimant would be too complex or speculative.²⁰⁹ For all practical purposes, these criteria will generally limit the scope of potential claimants to purchasers of the alleged wrongdoer, and to competing sellers participating in the same markets.

207. See Securities Act of 1933, 15 U.S.C. § 77k(a) (2000).

208. Commodity Exchange Act, 7 U.S.C. § 25 (2000).

209. Some of the factors cited by the Supreme Court in its antitrust standing cases—particularly the danger of a duplicative recovery—have no applicability in the FERC context. Nonetheless, most of those factors, and the remedial principles underlying them, are relevant to the question of standing at FERC to recover monetary remedies for statutory violations.

V. EFFECT OF EXPANSION OF FERC'S PENALTY AUTHORITY

The last question to be addressed is whether an expansion of the Commission's civil penalty authority—which has been contemplated by Congress in recent energy bill proposals—would have any effect on the Commission's power to impose monetary remedies for statutory violations under §§ 309 and 16. The answer depends on how the civil penalties are drafted.

Under the current FPA and the NGA, the Commission's penalty authority is punitive, and not remedial. Civil and criminal penalties are paid directly to the United States Treasury.²¹⁰ The requirement that these payments go to the federal government appears to preclude their diversion to injured parties.²¹¹

Thus, to the extent that the Commission is granted expanded civil penalty authority by Congress, but is nonetheless required to have any civil penalties paid directly to the federal government, this expanded authority should have no effect on the Commission's authority to order restitutionary remedies under §§ 309 and 16. The only way to alter that authority would be to expand the authority of the Commission to award damages for statutory violations. Such an expansion of the Commission's authority to award damages would require that Congress insert into the FPA and NGA provisions that are akin to the provisions in the 33 Act, the 34 Act, and the CFA that permit private suits.

CONCLUSION

Judge Leventhal's formulation regarding FERC's remedial authority notwithstanding, there are distinct limits on the Commission's ability to order monetary remedies for statutory violations. Indeed, although it is true that the Commission's discretionary authority is at its zenith when acting to fashion remedies for violations of the FPA and NGA, that discretion must nonetheless remain within the bounds established by the two statutes. As outlined above, the analytical framework under which those boundaries are defined essentially requires answers to three separate but related questions regarding the scope of the Commission's authority to order remedial monetary remedies—the limitations on the measure of the remedies that the Commission may order, the limitations on the Commission's discretion to

210. See *Flambeau Hydro, LLC*, 105 F.E.R.C. ¶ 61,022 (2003); see also *Transcon. Gas Pipe Line Corp.*, 55 F.E.R.C. ¶ 61,318 (1991).

211. For the same reason that civil and criminal penalties under the FPA and NGA must be paid to the government, and cannot be used for remedial purposes, the restitutionary remedies imposed under §§ 309 and 16 must go to third parties, and cannot be paid to the government. The civil and criminal penalties provided for under the FPA and NGA are the exclusive mechanisms under which the government can collect monetary payments for violations of the two statutes.

order such remedies, and the limitations on the parties eligible to receive such remedies.

The answer to the first question is fairly clear. For violations of the requirement that rates be just, reasonable, and non-discriminatory, the FPA and NGA limit FERC's monetary remedial authority to the specific remedies set forth in §§ 205(e), 206(b), and 4(e). For violations of other requirements of the two statutes, the Commission is effectively limited to ordering the wrongdoer to pay restitution of its unjust enrichment. The Commission's authority does not extend to ordering a wrongdoer to pay damages to third parties that are measured by the harm suffered by such entities.

The answer to the second question—the limits on the Commission's remedial discretion under the FPA and NGA—is based heavily on the specific facts of each individual violation. Nonetheless, as a general matter, the cases establish that FERC's remedial discretion is limited when the wrongdoer is not enriched, when there is no relationship between the wrongdoing and the wrongdoer's enrichment, when the statutory standard violated is ambiguous or unclear, when the third party has limited its own enforcement rights against the wrongdoer, and when the Commission treats similarly-situated utilities differently without sufficient explanation of the difference in treatment.

The answer to the third question is the most uncertain of the three, in part because of the lack of precedent, and in part because the remedy available to the Commission is based on the unjust enrichment of the seller that commits a statutory violation, and not on the harm caused to a third party. Both the FPA and the NGA are written broadly enough to potentially confer standing on entities other than those in direct contractual privity with a wrongdoer. Nonetheless, based on guidance provided by the Supreme Court's interpretation of private antitrust rights under the Clayton Act, and the private rights of action granted under the CFA, the 33 Act, and the 34 Act, the Commission should generally limit standing to entities that have suffered harm that the relevant statutory requirements were intended to prevent. Even then, the Commission should inquire about the causal connection between the violation and the injury, whether the injury was intended or foreseeable, and whether apportioning monies to the claimant would be too complex or speculative. As noted above, these criteria will generally limit the scope of potential claimants to purchasers of the alleged wrongdoer, and to competing sellers participating in the same markets.