UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Rover Pipeline, LLC, Energy Transfer Partners, L.P.	)	Docket No. IN19-4-000

ANSWER AND DENIAL OF ROVER PIPELINE LLC AND ENERGY TRANSFER LP TO ORDER TO SHOW CAUSE AND NOTICE OF PROPOSED PENALTY

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I. Introduction

According to the Enforcement Staff Report,[1] Rover Pipeline LLC ("Rover" or "the Company") schemed to demolish an historic house that was standing in the way of its project and then lied and misled to cover its tracks. Not only is that Report wrong, it displays a reckless disregard for the law and facts. Here are but four major examples.

First, the Enforcement Staff Report uses the word "historic" no fewer than 37 times when describing the Stoneman House—the building at issue here. This is pure sophistry. The obvious intent is to trick the Commission into thinking this house was historically or culturally significant. It was not. It lacked any independent historic or cultural value. No historic figure ever lived there, nor is the House connected to an historic event. Instead, the building met the very broad criteria of *eligibility* for listing as an historic place, which is to say it was at least 50 years old with a defined architectural style. A 1970 ranch-style home is *also* potentially "historic" under these same criteria. Enforcement Staff improperly leverage a term of art from the National Historic Preservation Act's ("NHPA") confined review *process* to mislead the Commission into thinking this House was "historic" in the real-world sense. Worse yet, Enforcement Staff know that the House was in utter disrepair. It had holes in the roof and rotting floors, and its electrical and plumbing systems needed a complete overhaul. Before it was removed, the local fire department even considered burning it down as part of a training exercise. Not even a full season on *This Old House* could have solved these problems. Try as they might, Enforcement Staff cannot use its "historic" airbrush to gussy up the Stoneman House into something it was not: a significant and intact historical or cultural resource.

[1] *Rover Pipeline LLC*, 174 FERC ¶ 61,208, App. A, Enforcement Staff Report and Recommendations (2021) [hereinafter "Enforcement Staff Report"].

Second, the Enforcement Staff Report is highly misleading on key legal issues. For instance, no law, rule, regulation, or other authority prevented anyone who owned the Stoneman House from tearing it down. The fact that the House was "potentially eligible" to be listed on the National Registry of Historic Places ("NRHP" or "National Register") did not stop its owner from removing it, or completely remodeling it at any time. Under the law, Chip and Joanna Gaines could have thoroughly gutted and updated the House, or torn it down and started over.

Third, Enforcement Staff mislead the Commission on the mitigation commitments that Rover made. The Enforcement Staff Report asserts that Rover made, and then promptly reneged on, an unlimited commitment to protect the Stoneman House from any adverse effects. That is simply wrong. From the pre-filing process, through the draft environmental impact statement ("DEIS")[2] and culminating with the final environmental impact statement ("FEIS"), Rover focused its mitigation commitment solely on potential visual and audial effects *on* all neighboring properties generally *from* the presence and operation of a compressor station (known as CS1). Rover consistently explained potential project effects in that same limited manner: the possibility that CS1 would be unsightly or cause too much noise. And, after concluding that CS1's audial effects during operations fell below the relevant threshold, Rover *did* implement the visual screening to which it had committed from the get-go—screening that mitigated CS1's visual impacts to all neighboring properties. Rover never wavered in its commitment to mitigate the potential audial and visual impacts of CS1 to *all* nearby properties, whether or not they had potential historic value.

[2] Fed. Energy Reg. Comm'n, Rover Pipeline Project, Panhandle Backhaul Project & Trunkline Backhaul Project, Draft Environmental Impact Statement (Feb. 2016) [hereinafter "DEIS"] *available at* https://www.ferc.gov/sites/default/files/2020-05/DEIS_0.pdf.

So what exactly was this visual mitigation? As noted, from draft to final impact statements, Rover committed to mitigate the visual "impacts on the residents along Azalea Road"—those owning the Stoneman House and *other* houses. Rover first responded to Project's Staff's DEIS recommendations with a commitment "to plant" a row of "4-foot-tall Colorado blue spruce" trees at 60-foot intervals "along the property boundary along Azalea Road in an effort to limit views of the facility to residents."[3] And when Project Staff deemed the initial row of trees insufficient for this purpose, the FEIS ordered Rover to "incorporate a second row of Colorado blue spruce and adopt a spacing of 20 feet or less between the trees."[4] Rover committed to that as well. To further limit CS1's appearance to its neighbors, Rover also agreed to paint the "compressor station, motor control center building, and instrument air buildings charcoal gray with polar white roofs and trim."[5]

But wait, how can that be squared with Enforcement Staff's assertion that Rover made an unrestricted commitment to protect the Stoneman House from any adverse effects of any origin? How could Enforcement Staff be right about that if the only required mitigation throughout the process—planting trees near CS1 and painting the CS1 buildings—was limited to CS1's visual impacts? Contrary to this reality, Enforcement Staff wants the Commission to believe that the mitigation centered on protecting a house (one *object* of possible effects) rather than the real focus: the *cause* of possible effects to several properties (CS1). If Enforcement Staff were right, the Commission could—and would—have drafted House-centric mitigation to protect and repair it from further physical degradation. The ordered mitigation would have included work orders

[3] *See* Fed. Energy Regul. Comm'n., Rover Pipeline, Panhandle Backhaul, and Trunkline Backhaul Projects *Final Environmental Impact Statement* at 4-188 (July 2016) *available at* https://www.ferc.gov/sites/default/files/2020-05/impact-statement.pdf [hereinafter ("FEIS")].

[4] *Id.* at 4-188–89 (bold omitted); *id.* at 5-24 P 44.

[5] *Id.* at 4-188.

for a new roof, new floors, new windows, and upgraded utilities, among others. Of course, that never occurred since no one could reasonably believe that Rover's commitment was unlimited in the way that Enforcement Staff does. These types of mitigation steps were not ordered, nor could they have been justified.

Enforcement Staff's backward approach to mitigation would mean that once an applicant commits to protect a resource from project effects, the applicant magically transforms into the resource's guardian angel, tasked with zealously protecting it—even if located outside a project's path—from *any* possible adverse impacts of *any* applicant action at *any* location. But Clarence Odbody doesn't have a part in this story. Rover's Application and the contemporaneous and subsequent communications make clear that Rover never committed—and was never required to commit—to this "in for a penny, in for a pound" arrangement. Rover properly viewed the mitigation from the correct direction: What effects would the relevant project element (here, CS1) have on neighboring properties? Rover thus committed to mitigating CS1's potential indirect audial and visual effects on properties in the area, and Rover fulfilled that commitment. Enforcement Staff's interpretation of Rover's mitigation commitment is a fundementally flawed distortion of the pipeline mitigation process.

Fourth, Enforcement Staff claim that Rover concealed its purchase of the House and the House's later removal for more than a year after acquisition. That is wrong too. The House was on 10 acres of flat, clear land, in a "perfect" location for Energy Transfer LP[6] ("Energy Transfer"), Rover's parent company, to locate a regional operations center supporting more than just Rover. And it wasn't until a year after Rover's application that Energy Transfer decided,

[6] The Commission's March 18, 2021 Order to Show Cause and Notice of Proposed Penalty was directed in part to Energy Transfer Partners, L.P. That entity no longer exists (and has not for several years). This Answer and Denial is therefore filed on behalf of Energy Transfer LP, the successor-in-interest of Energy Transfer Partners, L.P.

based on multiple site visits, that the House itself could not be used as office space. The Enforcement Staff Report concedes that Energy Transfer *did* intend to use the property and House for more than just the Rover Project. It also concedes that this one-year gap between purchase and removal was caused, in part, by the failure of Energy Transfer's proposed merger with Williams Cos., which potentially altered Energy Transfer's office space needs.[7]

After Energy Transfer decided to remove the House, Rover disclosed those plans to the appropriate state historic preservation officer ("SHPO"). Rover also confirmed with a FERC staff member that removal of such a house would not be a project effect. And Rover gave the SHPO ample time to object; the Company waited another two months after its disclosure before moving forward with removal. The Commission's regulations designating the Ohio SHPO as the point of contact for resources like the Stoneman House, along with Rover's forthright disclosures to the SHPO, undercut Enforcement Staff's concealment theory.

These four examples of Enforcement Staff's flaws help to guide the Commission's answer to the principal question that the Order to Show Cause ("Order") poses: whether Rover "file[d] all pertinent data and information necessary for a full and complete understanding of the proposed [Rover Pipeline] project." 18 C.F.R. § 157.5. The answer is an unequivocal yes. Rover fully and fairly complied with this duty.

Context is important. The Rover Pipeline is a massive project: more than 700 miles long, spanning four states, and designed to carry 3.25 billion cubic feet per day of natural gas. Its planning and construction took years. The Enforcement Staff Report narrowly focuses the Commission's attention on mitigation of a single type of indirect impact (a visual effect) that a

[7] Enforcement Staff Report at 29 n.123.

single Project component (one of several compressor stations) potentially had on one of several neighboring properties (a single house) at a single point along the multi-state pipeline route.

The Stoneman House was *never* in the pipeline right of way; instead, it was across the road from the site of CS1. Under Enforcement Staff's contrived version of events, Rover nonetheless deliberately misled Project Staff about the House. Why do Enforcement Staff say Rover would do that? According to Enforcement Staff's current theory, Rover supposedly saw the House as a significant obstacle to the pipeline's approval, and the Company therefore schemed to demolish it without anyone being the wiser.

Every element of Staff's theory is wrong. And that theory is *itself* a product of Staff's omissions and misstatements.

As already noted, Rover never made an unrestricted commitment in its project application to protect the Stoneman House from a multitude of potential adverse effects of multiple origins. It committed to an appropriately detailed and carefully tailored screening plan, to mitigate the only project effect at issue: the visibility of CS1 to several neighboring properties. As discussed above, FERC Project Staff developed and then modified the mitigation that was ultimely adopted. Under the Enforcement Staff Report's "unlimited commitment to protect the house no matter what" theory, Rover would still have to be found liable if it had first rerouted both the pipeline and CS1 so that neither came within a dozen miles of the House and then demolished the House as part of its same plan to establish the same operations center. That cannot be right.

The record also completely undermines the Enforcement Staff Report's theory that Rover bought the Stoneman Property because it needed to get rid of the House. It had no reason to do so; the visual screening plan described above was a commonly used mitigation approach that

FERC Project Staff routinely orders in similar situations. This time-tested approach was a complete solution for mitigating CS1's effects. Indeed, mitigating visual impacts of pipeline and public-utility-related facilites by planting large trees and painting facilities neutral colors can be found in thousands of neighborhoods across the United States.

Equally telling is that Rover's own *actions* contradict the Enforcement Staff Report's contrived theory, too. Energy Transfer negotiated to purchase the entire 10-acre Stoneman Property to use as an operations center. The Property had multiple structures. The House was to be converted to office space unless a later review found that the structure could not be used for that purpose. This was not a pretextual process that Rover made up to mislead on its actions vis-à-vis the Stoneman House. To the contrary, it is uncontested that Energy Transfer followed its standard practice of a *post*-purchase timetable for reviewing a structure's suitability. And far from making up this other reason for buying the Stoneman Property, it remains a regional operations center for Energy Transfer to this very day.

Apart from lacking a *reason* to conceal its actions, Rover *didn't* conceal them. The Enforcement Staff Report ignores how the mitigation process works. The Commission's regulations gave Ohio's SHPO the lead role in consulting with Rover about Project effects on resources with historic or cultural value in Ohio, and Project Staff supported that delegation of authority. As noted above, Rover told Ohio's SHPO it would mitigate CS1's visual and audial effects; disclosed that Rover had bought the House; disclosed that Rover was going to remove the House; and waited two months after that disclosure before following through. Rover had no reason to contact Project Staff too. The established process was to work with the SHPO on mitigation; Rover did work with the SHPO on mitigation relevant to CS1's effects; and the removal of the House was unrelated to those Project effects. The Enforcement Staff Report

never explains how the timing of Rover's disclosures to the SHPO can possibly be squared with the spurious allegation that Rover concealed its plans.

Finally, after attempting to mislead the Commission into thinking that some significant part of Americana had been removed, and after distorting the record and the law to allege a violation, Enforcement Staff demonstrate their unbridled zeal to punish Rover by recommending an outrageous $20 million proposed civil penalty. Commissioners Chatterjee, Danly and Christie were spot on in their separate statements refusing to pre-judge Enforcement Staff's penalty calculation. That is because Enforcement Staff err at every step on their way to calculating such an overzealous penalty range. They assert a "loss" amount of $3.6 million, even though Enforcement Staff admit that no *pecuniary* harm occurred.[8] Enforcement Staff also take Rover's payment of "compensatory mitigation funding" to Ohio's preservation officer—a *mitigating* factor—and use it to increase the penalty by double counting the supposed loss. Enforcement Staff add insult to injury with a duration modifier that would treat a one-time event, the removal of the House, like a course of conduct, such as where a market manipulator engages in a continuing course of transactions that allegedly cause higher prices every day for a period of multiple months. Finally, in calculating enhancement factors, Enforcement Staff ignore Rover's compliance program and efforts, and Staff also seek to use Energy Transfer's much larger size, rather than Rover's, the certificate holder, to again inflate the ultimate penalty.

[8] *See* Enforcement Staff Report at 80 n.353 ("Accordingly, an amount of $3,600,000 reasonably estimates the intangible loss associated with the destruction of a unique historic home and serves as a proxy for the harm imposed by Rover's failure to be forthright concerning the house."); *id.* at 79 n.348 ("Disgorgement is not appropriate in this matter because the violation did not result directly in pecuniary gain").

If, contrary to the record, the Commission considers a penalty here, the correction of these various errors yields an accurate calculation, in accordance with the penalty guidelines, of between $8,000 and $40,000.

Hindsight is 20/20. When you are not "in the arena," it is always easy to look back and identify ways in which more information could have been communicated or the timing could have been earlier, even if doing so would have been premature. But, especially for a project of this size, it would be costly and inefficient to err on the side of overloading Project Staff with information extraneous to project effects. The Commission's own regulations require an applicant to exercise good-faith judgment in how to strike the correct balance between too little and too much information. Because Rover provided all pertinent data and information necessary for the Commission to understand the Project and its effects, the Commission should dismiss this matter and decline to initiate an enforcement action.

II. Factual Background

A. Construction of the Rover Pipeline Was a Substantial Endeavor with Thousands of Potential Effects to Consider

The Rover Pipeline Project ("Project") is a 713-mile pipeline built to transport 3.25 billion cubic feet per day of natural gas from the Marcellus and Utica Shale production areas in West Virginia, Ohio, and Pennsylvania to markets around the United States as well as the Union Gas Dawn Storage Hub in Ontario, Canada.[9] The Project (now fully operational) was designed to gather natural gas from processing plants in West Virginia, Eastern Ohio, and Western Pennsylvania and transport roughly 68% of it to pipeline interconnects in West Virginia, Eastern Ohio, and the Midwest Hub near Defiance, Ohio, with the remainder going to local markets in

[9] *See Rover Pipeline Project*, https://www.roverpipelinefacts.com/.

Michigan or Canada via the Vector Pipeline.[10] Rover is one of the largest natural gas pipeline projects ever undertaken.

The Order to Show Cause concerns one aspect of the Project—the potential effects of a single compressor station in Ohio. Given the size of the Project, the need for a number of large compressor stations along the entire pipeline was obvious from the start. Rover identified that need early on and addressed and considered it throughout the design phase of the Project. Rover ultimately applied for authorization from the Commission to construct and operate ten compressor stations, six on "Supply Laterals" and four on "Mainlines," with total nameplate ratings of 72,645 horsepower and 140,775 horsepower, respectively, in order to ensure system pressure on the gas streams.[11] The one relevant here is Compressor Station 1, or CS1.

This was all well understood as early as mid-2014, when Rover began the pre-filing process to obtain authorization from the Commission to construct and operate the Project under Sections 3 and 7 of the Natural Gas Act ("NGA").[12]

B. Rover Diligently Investigated and Identified Potential Effects of the Project On Various Resources Including the Stoneman House

As part of the pre-filing process, Rover commissioned the TRC Companies, Inc. ("TRC"), specialists in historic and cultural resources, to prepare an Ohio Historic Architecture Survey to "identify any significant cultural resources [in Ohio] that could be affected by the Project in compliance with Section 106 of the National Historic Preservation Act."[13] TRC's

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[10] *Id.* ("Receipt and Delivery Points").

[11] Application of Rover Pipeline LLC for a Certificate of Public Convenience and Necessity, Docket No. CP15-93-000, at 1, 12-13 (Feb. 20, 2015) [hereinafter "February 20, 2015 Application"].

[12] *See* FERC Project Staff Letter to Advisory Council on Historic Preservation, Docket No. CP15-93-000, at Enclosure 1 (Dec. 5, 2016) [hereinafter "FERC Letter to ACHP"] ("June 27, 2014: FERC granted Rover's request to enter into FERC's 'pre-filing' process.").

[13] *See* OHSPO-002586 at 2588 (Ohio Historic Architecture Survey at i); OHSHPO-005083 at 5320

Architectural Survey reviewed and analyzed hundreds of properties and structures, and TRC submitted a detailed 434-page survey on such effects for Ohio alone.[14] The survey did not identify any architectural properties in Ohio that the Project would affect *directly*. As for properties that might be *indirectly* affected, TRC identified the Stoneman House as one it "considered potentially eligible" for inclusion on the NRHP.[15]

The Stoneman House was built in 1843 on a 10-acre parcel of flat land on Azalea Road in in Dennison, Ohio. Hundreds of thousands of properties around the United States are, like the Stoneman House, "potentially eligible" for inclusion on the NRHP, because the bar is low. Any building more than fifty years old that has distinctive characteristics specific to a time period could be potentially eligible for inclusion on the National Register, even if the property has no other historical relevance.[16] Even placement on the National Register is common. More than 96,000 properties are currently listed.[17] The listing of a property in the National Register "places no restrictions on what a non-federal owner may do with their property up to and including destruction[.]"[18] And, of course, the same is true for a property only "eligible" to be listed.

Nobody ever applied to put either the House or the Property on the National Register or any other list of historic properties. Neither the House nor the Property has any independent historic value, such as being the home of an historic figure or the location of an historic event.[19]

(Historical Architectural Survey Report at 216).

[14] *See* OHSHPO-005083 (Historical Architectural Survey).

[15] *Id*. at 5320.

[16] *See* 30 C.F.R. § 60.4(c).

[17] *See* https://www.nps.gov/subjects/nationalregister/what-is-the-national-register.htm.

[18] *See* https://www.nps.gov/subjects/nationalregister/faqs.htm. *See also* 36 C.F.R. § 60.2 ("Listing of private property on the National Register does not prohibit under Federal law or regulation any actions which may otherwise be taken by the property owner with respect to the property.").

[19] *See* Rover-00000676 (Architectural Survey Results—Mainline Compressor Station One)

The House was in disrepair, with holes in the roof and rotting floors.[20] Rover confirmed—consistent with the applicable federal regulation cited above—that no law, rule, regulation, or ordinance prevented the Property's owner from modifying or removing the Stoneman House at any time.[21] It is also indisputable that whoever owned the House could have torn it down despite its status as eligible for NRHP listing.

C. Because of the Project's Contours, the Mitigation Required for Compressor Station 1 Was Limited to its Indirect Visual or Audial Effects on Nearby Properties

All agree that the Project had no direct effect on the Stoneman House or Property. In other words, no part of the Property (which includes the House) was in the Project's right of way or otherwise necessary to building the pipeline.[22] The Project's impacts that Rover needed to consider were limited to indirect visual or audial effects after CS1 became operational.[23] As Pat

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("[R]esearch failed to associate the house and/or its original owner(s) with an important historical event or series of events."); *see also* Letter from Amanda Terrell, Ohio State Historic Preservation Office to Heather Millis, TRC Environmental Corp. at 3-4 (Jan. 25, 2016) [hereinafter "Jan. 25, 2016 SHPO Ltr. to Millis"], Rover Pipeline LLC, Response to Environmental Information Request Dated September 14, 2016, Docket No. CP15-93-000, Attachment 3 at 2–19 (filed Sept. 26, 2016) [hereinafer "Sept. 26, 2016 EIR Response"] (agreeing only that the Stoneman House and Property are eligible for listing on the National Register because of the House's age, but identifying no independent historic value).

[20] Attestation of Brad Fieseler ¶¶ 1-3; *id.* at Attach. Decl. of Brad Fieseler ¶ 12 [hereinafter "Feiseler Decl."].

[21] *See* 36 C.F.R. § 60.2 ("Listing of private property on the National Register does not prohibit under Federal law or regulation any actions which may otherwise be taken by the property owner with respect to the property."); Rover-00012712 (Apr. 13, 2016 email from Thomason to Banta and Mahmoud) ("There are no ordinances at the state, county, or township, and the county historical society said there are no official lists of historical structures at that level."); Rover-00012704 at 12704–06 (Apr. 12-13, 2016 emails between Thomason and Millis); Attestation of Patricia Patterson ¶ 3; *id.* at Attach. Decl. of Patricia Paterson ¶ 7 [hereinafter "Patterson Decl."] ("[W]e identified no regulations, ordinances, or rules limiting what Rover could do with the Stoneman House – whether that meant modernizing it or demolishing it.").

[22] *See, e.g.*, Rover-00000677 (Figure 9.23 depicts an aerial map of the Property and Project area that shows no overlap). *See also* Fieseler Decl. ¶ 4 & Ex. A (attaching aerial photo of CS1 and the Property).

[23] *See* Millis Test. at 58:13–59:1; *see also, e.g.*, FERC Letter to ACHP, at Enclosure 1 (indicating that

Patterson, TRC's lead on the Rover Project, explains in her attached declaration, "The potential adverse effects were limited to visual effects—you could see the site of a proposed compressor station from the property—and audial effects—you might have been able to hear the compressor station once built."[24] These indirect effects had *no* physical impact at all on the Stoneman House or Property. Rather, the proximity of CS1 to the Property (*i.e.*, it was within earshot and eyesight) had a potential to "change the atmosphere" of the Property.[25] TRC's Architectural Survey concluded, for example, that the "viewshed"—*i.e*, direct lines of sight—of the Property, like that of other properties, may be affected by the placement of CS1 across the street.[26]

Importantly, these indirect effects were not unique to the Stoneman Property; the final EIS recognized that CS1 had the same visual effects on several residences in the area.[27] (Audial effects were eventually ruled out as an indirect effect because CS1 did not exceed the relevant decibel threshold.)[28] The National Environmental Policy Act ("NEPA") requires an agency to account for the visual effects of major federal actions on surrounding properties whether or not those properties are "historic" under the NHPA.[29] Consistent with NEPA, FERC Project Staff

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Project Staff and Rover discussed "potential *visual* impacts" at the February 5, 2015 pre-filing meeting) (emphasis added).

[24] Patterson Decl. ¶ 4.

[25] *See* 36 C.F.R. § 800.5(a)(1).

[26] *See* OHSHPO-005083 at 5321 (Historical Architectural Survey).

[27] *See* Millis Test. 31:17–32:24 (explaining conclusion of Architectural Survey as impacts to the Property "viewshed" as a result of CS1 location "directly across" the street from the Stoneman House and Property). *See* FEIS at 4-188 ("There are several residences along Azalea Road that would face the compressor station and have a direct line of sight to the facilities, including an 1843 Federal House as described in section 4.10.1.3."). Those residences remain to this day.

[28] Patterson Decl. ¶ 4 ("It was ultimately determined that the compressor station would not raise the ambient sound above the FERC threshold. As such, the potential adverse effect was visual.").

[29] *See* 40 C.F.R. § 1502.1 (requiring a "full and fair discussion of significant environmental impacts" that "inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment."); *Backcountry Against Dumps v.*

told Rover it would need to mitigate the visual effects of CS1 on non-historic properties, rather than just its effects on the Stoneman House.[30]

Similarly, contrary to the distinction Enforcement Staff attempt to draw between the Stoneman House and the property on which it sits, the SHPO viewed the need for screening of visual effects as applying to the entire Stoneman Property.[31] The SHPO noted in its response to Rover's Cultural Resources Survey Report that analysis of the mitigation needed for "this historic property" included "development of appropriate National Register boundaries to support consultation about resolving the adverse effect."[32] Later, the SHPO continued to take the position that "[w]hether the house is to be demolished or to remain in proximity to the Mainline Compressor Station 1, it is our opinion that either alternative will have an adverse effect on this eligible historic property" and that "mitigation measures should be identified and that consultation should continue . . ."[33] As a result, Rover knew it needed to mitigate CS1's visual effects whether or not the House remained.

At *no* time was there reason to believe that these indirect effects would require relocating CS1. Rover discussed with FERC Project Staff the Project's potential indirect visual and audial effects on nearby residences at a pre-filing meeting on February 5, 2015.[34] In accordance with

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Jewell, 674 F. App'x 657, 661 (9th Cir. 2017) (explaining that environmental impact statements under NEPA must "discuss the visual impact of all the Project's facilities, from construction to operation to decommissioning, and discuss[] measures to mitigate these visual impacts").

30 Patterson Decl. ¶ 11 ("Rover intended to complete this mitigation regardless of whether the Stoneman House remained at the site at least in part because there were other residences along Azalea Road that were potentially affected by the compressor station.").

31 Enforcement Staff Report at 67.

32 Jan. 25, 2016 SHPO Ltr. to Millis at 4.

33 Rover-00009278 at 9281 (Letter from Diana Welling, Ohio SHPO, to Heather Millis, TRC Environmental Corp. (Aug. 12, 2016)).

34 *See* Millis Test. 58:13–59:1; *see also, e.g.*, FERC Letter to ACHP, at Enclosure 1 (indicating that

Resource Report 10, which as a matter of process requires consideration of alternatives, Project Staff asked whether alternative locations were possible for each major facility, including CS1.[35] Rover explained that no other feasible locations were available for CS1, given how the Project needed to be laid out and different potential effects if CS1 were placed elsewhere.

At *no* point during this early 2015 meeting, or any other meeting, did Project Staff disagree, much less did Staff ever ask Rover to move CS1.[36] As Heather Millis, one of the architectural consultants at TRC, testified about the February 2015 meeting, "there was an understanding that the compressor station would not be moved, could not be moved, but that there were still options for mitigation."[37]

Rover thus had no reason to expect that the location of CS1 would change.[38] That belief was reinforced in a number of ways. First, as discussed with Project Staff during that meeting,

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Project Staff and Rover discussed "potential *visual* impacts" at the February 5, 2015 pre-filing meeting) (emphasis added).

[35] *See* Millis Test. 59:1–15; Attestation of Buffy Thomason ¶ 3; *id.* at Attach. Decl. of Buffy Thomason ¶ 3 [hereinafter "Thomason Decl."] ("At the meeting we discussed alternative sites for all major facilities"); *id.* ¶ 5 ("In my experience, project proponents always discuss alternative siting possibilities in the 7(c) filing, and the February 5, 2015 meeting was a page-turn of the draft 7(c) filing due to the regulatory requirements."); Thomason Test. 104:8-12 ("As part of the NEPA process, FERC will ask us to . . . explain why the current location for each of the resources . . . is the preferred location.").

[36] *See* Thomason Decl. ¶ 6 ("Even though we discussed alternative locations [at the pre-filing meeting], as required by the regulations, FERC Project Staff never requested that Rover move the site of CS1."); Patterson Decl. ¶ 8 ("I attended a pre-filing meeting at FERC on or around February 5, 2015. At that meeting, Laurie Boros with FERC Project Staff raised the issue of the Stoneman House and asked us how we intended to handle the potential adverse effects. She did not ask that the compressor station be moved, and accepted that we did not believe there were viable alternative locations.").

[37] Millis Test. 59:8–10.

[38] Attestation of Heather Millis ¶¶ 1-3; *id.* at Attach. Decl. of Heather Millis ¶ 9 [hereinafter "Millis Decl."] ("Although we discussed internally that FERC *could* put pressure on Rover to move the compressor station *in theory*, we thought this was a very remote possibility. I am not aware of FERC project Staff ever making such a request prior to the certificate being issued."); Thomason Decl. ¶ 7 ("Based on our conversation with FERC Project Staff, and subsequent interactions, I thought it was very unlikely that FERC would ever ask Rover to move the compressor station. This was, in part, because there is another station a few hundred yards from CS1 which increased the ambient noise

the Architectural Survey results confirmed that the Project had only limited indirect effects on nearby residences, including the Stoneman House. Second, the Utica East Gas Plant, a natural gas processing facility, was located just a few hundred yards to the east of the proposed location for CS1, which Rover believed made the proposed location an attractive site to FERC.[39] Indeed, a flare from the Utica East Gas Plant is visible from the Stoneman House Property, affecting the Property's viewshed.[40]

Contemporaneous evidence also confirms the point. The pre-filing meeting with Project Staff was limited to the indirect visual and potential audial impacts of CS1 on the Stoneman House and Property and the other residences along Azalea Road. For example, Project Staff described this portion of the discussion as being about "potential *visual* impacts" of the Project on the Stoneman House.[41]

Similarly, in an email the day after the pre-filing meeting, Buffy Thomason, environmental project manager at Energy Transfer, asked Millis (the architectural consultant), for her "opinion on how the SHPO will respond to [visual] screening" of CS1, such as planting trees in front of it, with Thomason noting that she needed to "look back through the[] noise report to see how the existing [Utica East Gas Plant] affected" the Property.[42] Millis responded

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level, reducing the impact from CS1. I believed that FERC would prefer Rover to build a compressor station near another similar facility.").

[39] *See* Fieseler Decl. ¶ 5 ("The 8468 Azalea Road property is located not only directly across the street from CS1, but also a few hundred yards from the Utica East Compressor Station."); Patterson Decl. ¶ 5; Thomason Decl. ¶ 7.

[40] *See* Fieseler Decl. ¶ 5 & Ex. B (photograph of Utica East Gas Plant flare, taken from the Stoneman House Property).

[41] FERC Letter to ACHP at Enclosure 1 (Dec. 5, 2016) (emphasis added).

[42] *See* Rover-00000684 at 684–85 (Feb. 6, 2015 6:08 A.M. email from Thomason to Millis). In fact, it was ultimately determined that there would be no noise impacts to any of the properties along Azalea Rd. *See* FEIS at 5-14 ("Rover completed an analysis to identify the estimated noise impacts at the nearest [noise-sensitive areas] from the facilities and found that noise levels from each compressor

that she would recommend possible mitigation for the indirect visual and audial effects of CS1. She stated that the SHPO "is going to have the same question FERC raised – is there any other place to put [CS1] instead?"[43] Millis explained in the very next sentence that she did not expect the SHPO to act "unreasonabl[y]" by asking that Rover move CS1.[44] Thomason dismissed any concern that the SHPO or Project Staff would require Rover to move CS1, stating "[t]here's no chance of moving the compressor station."[45] Not surprisingly, the SHPO, like Project Staff, never asked Rover to move CS1.

Enforcement Staff offers no evidence suggesting that anyone ever requested that Rover move CS1 or indicated in any way that this was a serious possibility.[46] All Enforcement Staff offers is pure conjecture based solely on its own confected litigation theory.

In short, Rover always reasonably believed that the proposed location of CS1 would remain as planned, and Enforcement Staff have pointed to nothing that would show otherwise. Rover's discussions with Project Staff and the SHPO about the adverse effects of the Project on

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station are projected to be below the FERC criterion of 55 dBA Ldn and noise level increases would be undetectable at [noise-sensitive areas] for all compressor stations, except the Clarington Compressor Station.").

[43] *See* Rover-00000684 at 684 (Feb. 6, 2015 10:36 A.M. email from Millis to Thomason).

[44] *Id. See also* Millis Decl. ¶ 12 ("I did not think it likely that the SHPO would ask us to move the compressor station, or that the location of the compressor station would jeopardize the Section 106 process."); Patterson Decl. ¶ 16 ("While we did speculate that it was *possible* that FERC or the SHPO *could* ask that the compressor station be moved, we thought it extremely unlikely that they would do so.").

[45] *See* Rover-00000684 at 684 (Feb. 6, 2015 10:36 A.M. email from Millis to Thomason). Staff highlights Thomason's statement that "[t]here's no chance of moving the compressor station," and seems to suggest that this statement somehow shows the exact opposite: that there *was* a chance that Rover would be required to move the compressor station. *See* Enforcement Staff Report at 5, 17. As is clear from the record, Thomason "thought it was very unlikely that FERC would ever ask Rover to move the Compressor Station." Thomason Decl. ¶ 7.

[46] Rover intends to take discovery of Project Staff and the Ohio SHPO on this question.

the Stoneman House and Property were accordingly limited to the indirect audial and visual effects of the Project, specifically CS1.

D. Rover's Commitment Was to Mitigate the Project's Indirect Visual and Audial Effects on the Stoneman House and Property

Rover filed its certificate application with the Commission on February 20, 2015 ("Certificate Application" or "Application"). The Application stated that Rover would work to eliminate the two potential indirect effects of CS1 on nearby properties—visual and audial effects:

> Resource CAR0266012, an 1843 Federal House in Carroll County, is across a road from the planned location of the Mainline Compressor Station 1. No other prudent or feasible locations for this compressor station were identified, and Rover will consult with the Ohio SHPO to formulate a screening plan to eliminate any effects (visual and audial) related to the Project. Rover is committed to a solution that results in no adverse effects to this resource.[47]

Enforcement Staff selectively treats the final sentence as an unqualified commitment to protect the House from any possible effects. But that ignores the previous sentence, which shows that the only "solution" Rover committed to—formulating a screening plan—was tied to eliminating "any effects (visual and audial) related to the project," *i.e.*, the indirect effects of the planned location of CS1.[48] Those are the only two effects. No others. Rover's limited commitment to

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[47] February 20, 2015 Application, Resource Report 4, at 4-11 (emphasis added).

[48] Patterson Decl. ¶ 9 ("At that pre-filing meeting, and again in the FERC Application, Rover committed to avoiding the identified potential visual and audial effects and to work with the SHPO to mitigate any project effects on that property. However, that does not equate, in my judgment, to a commitment to maintain the property under all circumstances.") & ¶ 10 ("That 'commitment' is only to avoid adverse effects caused by the audial and visual impacts to the Stoneman House property, and to talk to SHPO about minimizing those indirect impacts. It should not be read as a broader promise to avoid any adverse effects for areas outside the project footprint, such as those associated with the Stoneman House property."); Millis Decl. ¶ 8 ("It is my understanding that Rover committed to eliminating through mitigation the identified indirect audial and visual effects to the Stoneman House during this pre-filing meeting and again in the Section 7 Application to FERC. This mitigation was solely to address the indirect visual and audial impacts of CS1.").

formulate a screening plan followed from Rover's and Project Staff's discussions about CS1 during pre-filing meetings, where the discussions were limited to CS1's indirect visual and audial effects.[49]

Enforcement Staff again relies on selective out-of-context quotations—this time from an email—to try to avoid this conclusion. Ten days before Rover submitted its Application, Thomason wrote to other team members: "I know we are trying to buy the house, but what do I put in the filing? That we don't think we'll have a sound impact over the FERC standard, and we will mitigate any visual impacts and leave it at that?"[50] This second sentence, which Staff ignore, shows that Rover personnel viewed the scope of effects and mitigation as limited to CS1's indirect visual and audial impacts. The response by Joey Mahmoud, Executive Vice President of Engineering and Construction, confirmed the point by suggesting that the Application should "[s]tick to the noise argument only and do not worry about the visual mitigation," which Rover had already discussed with Project Staff.[51] Mahmoud clearly was not worried about the cost or difficulty of remediation. He responded, referring to the House's owners at the time: "Even if they will not sell, we should not impact."[52]

A few days later—still a week before the Application was submitted—Millis had a telephone call during which she "r[an]" past Project Staff Rover's "plan for addressing the adverse effect issue for CS1 in" Resource Report 4—*i.e.*, mitigation limited to the visual and

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[49] *See* Rover-00010375 at 10397 (indicating that the response to FERC Project Staff's comments regarding avoiding the identified visual and audial impacts would be contained in Resource Report 4 Section 4.4.3.3.).

[50] *See* Rover-00000891 at 892-93 (Feb. 10, 2015 12:48 P.M. email from Thomason to Mahmoud and Banta).

[51] *See id.* at 892 (Feb. 11, 2015 9:11 P.M. email from Mahmoud to Thomason and Banta).

[52] *See id.* at 891 (Feb. 11, 2015 9:35 P.M. email from Mahmoud to Thomason and Banta).

audial effects.[53] She reiterated to Project Staff that the mitigation was limited to a visual and/or audial effect, and Project Staff confirmed that what Rover "planned to say was fine . . . as long as" Project Staff "knows that Rover is committed to eliminat[e] the adverse effect."[54]

A year later, in Rover's response to the Commission's DEIS, Rover again committed only to mitigating potential visual and audial effects of CS1 on surrounding properties including Stoneman. The DEIS told Rover to "file with the Secretary . . . a visual screening plan for [CS1] that minimizes the visual impacts on nearby property owners and residences."[55] To fulfill its commitment, Rover submitted a visual screening plan with the Commission stating that it would include measures such as painting CS1 and planting a line of trees on the CS1 Property.[56]

Enforcement Staff's backward approach to mitigation would require an applicant to protect a building located outside a project's path from *any* possible effects of *any* applicant action at *any* location. Rover's Application and the contemporaneous and subsequent communications make clear that Rover never committed—and was never required to commit—to such a thing. Rover instead viewed the mitigation from the correct direction: What effects

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[53] *See* Rover-00000896 at 896 (Feb. 13, 2015 10:02 A.M. email from Millis to Patterson and Thomason).

[54] *See id.* Millis added in her email that eventually FERC Project Staff will want to understand why Rover "cannot move the CS1" and that Rover considered alternatives, but Project Staff saw no "logical place for that to go in any of the [Resource Reports] now," so it could be addressed at a later date. *Id.* at 896–897. Thomason replied that "[a]ll that data she wants for moving CS1 will be in RR10 anyway." *Id.* at 896 (Feb. 13, 2015 10:06 A.M. email from Thomason to Millis and Patterson). Project Staff went on to ask whether there were alternative locations for CS1 in order to meet the requirements of Resource Report 10, which requires consideration of alternatives as a matter of process. Rover explained that there were no feasible alternative locations, and at no point did Project Staff ask Rover to move CS1. *See* Thomason Decl. ¶ 6 ("Even though we discussed alternative locations [at the pre-filing meeting], as required by the regulations, FERC Project Staff never requested that Rover move the site of CS1."); Patterson Decl. ¶ 8.

[55] DEIS at 4-180–81 (bold omitted); *see also* Informational Response to Draft Environmental Impact Statement, Docket No. CP15-93-000, at 21 (Mar. 25, 2016) [hereinafter "Response to DEIS"].

[56] Response to DEIS at 22, Vol. IIA, App. 8E.

would a project element (here, CS1) have on neighboring properties? The only potential effects were the sight and sound of CS1. Rover committed to mitigating those potential indirect audial and visual effects on properties in the area, and Rover fulfilled that commitment.[57]

E. Energy Transfer Ultimately Purchased the Stoneman Property for Use by Its Operations Group

Pipeline companies regularly purchase properties near their assets to assist with operational support.[58] Mahmoud testified that he had been involved in purchasing more than 100 properties proximate to pipelines for such purposes.[59] Where, as here, the company operates multiple lines in a region, these supporting facilities require a significant amount of space for offices, maintenance facilities, and storage. Pipeline companies like Energy Transfer often convert existing structures on these properties if the structures prove to be suitable to the company's needs.[60] If an existing structure ends up being unsuitable, Energy Transfer follows common industry practice by removing the abandoned structure to avoid it becoming a dangerous nuisance that attracts trespassers.[61]

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[57] *See* Fieseler Decl. ¶ 17 ("ETP has planted visual screening in front of CS1").

[58] *See* Attestation of Mark Vederal ¶¶ 1-3; *id.* at Attach. Decl. of Mark Vedral ¶ 3 [hereinafter "Vederal Decl."] ("Properties are purchased in fee for various reasons. The company may need property for access roads, staging areas, office space, space, or other needs."); Attestation of Stephen Schumen ¶ 3; *id.* at Attach. Decl. of Stephen Schuman ¶ 10 [hereinafter "Schuman Decl."] ("[I]t is Energy Transfer's practice to plan for regional operations centers at or near its assets and to purchase centrally located properties for use by operations.").

[59] Mahmoud Test. 106:20–107:5.

[60] Schuman Decl. ¶ 10 ("After purchasing centrally located properties, operations staff will typically review the property's existing structures for suitability. It is Energy Transfer's practice to use existing structures, to the extent that they are suitable for the company's needs.").

[61] Vedral Decl. ¶ 6 ("When the company purchases in fee a property with a structure on it, the standard operating procedure is to either repurpose the structure or demolish it. This is common industry practice. This is primarily for liability reasons. If a structure remains vacant, it could become a public nuisance. For example, it could attract squatters, pose a danger for trespassers, or become an eyesore for the neighborhood.").

Consistent with that industry practice, Energy Transfer purchased the 10-acre Stoneman Property with the intent of using it to support regional operations.[62] Also consistent with that practice, Energy Transfer planned to evaluate the Stoneman House *after its purchase* with an eye toward repurposing it as an office to assist with operations. Whether or not the House ultimately could be repurposed, the Property remained an ideal location for facilities to support Energy Transfer's operations.

1. Energy Transfer Purchased the Property so Its Operations Group Could Support Energy Transfer's Regional Assets.

Energy Transfer purchased the 10-acre Property for its Operation Group's Midwest Division to house employees servicing Energy Transfer assets throughout the region such as Rover, the Ohio River System ("ORS"), legacy assets of Regency Energy Partners LP that were acquired in an April 2015 merger,[63] and future acquisitions. Energy Transfer's plans for an operational office near CS1 are well documented. Budgets and organizational charts from September and October 2014—more than 18 months before removal of the Stoneman House—projected approximately nine to eleven Midwest Division Operations employees stationed near

[62] *See* Vedral Decl. ¶ 8 ("These offices are often used for staff that service multiple Energy Transfer assets in the region. The property (structure and land) may be bought in the name of one ETP entity or another due to convenience and accounting reasons (or because of mistakes), and not because that property is being used for the sole benefit of that particular asset."); Banta Testimony 18:12–16 ("Q . . . [D]o you know why they purchased the Stoneman House property? A. We were needing the 10 acres to build an operating center is what we were talking about.").

[63] *See* https://ir.energytransfer.com/news-releases/news-release-details/energy-transfer-partners-and-regency-energy-partners-announce-8.

CS1 in Leesville, Ohio.[64] Resource Report 5 to Rover's February 20, 2015 Application set forth similar staffing plans for at least nine permanent employees at an operational office near CS1.[65]

In an April 17, 2015 email exchange, Leon Banta, Rover Project Manager, asked Dutch Schuman, then Operations Director for Energy Transfer's Midwest Operations Division, for payroll projections for Operations' employees, including the nine employees who would be eventually stationed across the road from CS1.[66] All of these documents refer to the same employees who Schuman testified were intended to service multiple assets in the region.[67] Indeed, when asked in a July 2016 email where Operations' "main office for Ohio will be located[, s]pecifically, where will the employees be that are responsible for monitoring the plant 24/7," Schuman responded, "this is CS-1."[68]

Energy Transfer planned to use the Property even if it turned out that the Stoneman House could not be repurposed. In fact, Operations continues to use the Property for the original purpose that these earlier documents set forth: a base of operations for employees servicing

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[64] *See* Schuman Decl. ¶ 14 & Exs. A & B (attaching September 2014 budget and October 2014 organizational chart listing proposed employees to be stationed at CS1); *see also* Schuman Test. 113:8–15 ("Q: Okay. When did you sort of develop that plan, that is to say, to have a person stationed at Defiance and also have a person stationed at CS 1? A: That was in our original staffing plan going clear back in 2014 that I personally didn't even put together. This was something that was put together in the planning phase for Rover and was developed by the operation groups out of the midwest division.").

[65] February 20, 2015 Application, Resource Report 5 at 5-6 Tbl. 5.2-1 (showing nine permanent operational employees at or near CS1).

[66] S*ee* Rover-00015344 at 15345–46 *(*Apr. 17, 2015 1:11 P.M. email from Banta to Ryan and Schuman requesting information from ETC Operations regarding personnel listed on Resource Report 5 Table 5.2-1).

[67] *See* Schuman Test. 88:3–7 ("[T]hose employees will be serving the entire area, all assets. I mean, they're not just designated Rover employees. They work on Rover Pipeline. They work on ORS Pipeline. Whatever assets are in the area, they can support."); Mahmoud Test. 105:7–10 ("[W]e bought this for – not just for Rover. It was for multiple operating assets in the region. So we have multiple pipelines that are in that area.").

[68] *See* Rover-00015737 at 1537–38 (July 15, 2016 8:38 A.M. email from Schuman to Threeton).

assets throughout the region.[69] The Company has "built a permanent office on the Stoneman property" and there are "now 12 Energy Transfer employees stationed at the site."[70]

2. Rover and Energy Transfer Confirmed That No Laws Or Regulations Limited How The Company Could Use The House and Property.

Before the Stoneman Property was purchased, Millis and Patterson of TRC, among others, were asked whether the House was "under some protection due to historical relevance."[71] The answer was unanimous: there were not "any limitations" to the Property's use;[72] it was not in a "historical district";[73] and no "regulations prohibit[ed]" modifications to the Stoneman House, including removing it.[74] Millis and Patterson instead raised a point as to timing: removing the Stoneman House "may not be the best course of action at this point in time"[75] and

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[69] *See* Fieseler Decl. ¶ 15 (Stating in 2018 that "[t]here currently sits a double wide trailer on the property that we use as a regional operations office. Eight or nine people currently work at the office on a regular basis, and I intend to hire three or four more people to work there. The employees include mechanics, technicians, corrosion technicians, a mechanical specialist, measurement technicians, an area safety representative, and others necessary to service the Rover pipeline, the Bobcat pipeline in West Virginia, and ETP's other regional assets."); *see also id.* ¶ 16 ("The company plans to build a one story, 60 x 96 sq. ft. office space on the property."); Schuman Decl. ¶ 12 ("[A]s of September 2017, Energy Transfer operations personnel under my supervision began operating from the Stoneman House Property. There is currently a double wide trailer on the site serving as a temporary office, and the company has plans to build a one story office building at the site."); Schuman Test. 88:3–7 ("And those employees will be serving the entire area, all assets.").

[70] Fieseler Attestation ¶ 4.

[71] *See* Rover-00003817 at 3819 (Mar. 3, 2015 1:07 P.M. email from Vedral to Roberts, Zaccaro, Thomas, and Banta).

[72] *See id.* at 3818–19 (Mar. 3, 2015 1:21 P.M. email from Zaccaro to Vedral, Roberts, Thomas, and Banta); *see also* Vedral Declaration ¶ 14 ("As part of my due diligence before the sale, I asked the right-of-way team to look into whether there were any limitations on what the company could do with the structure once it owned it in fee. I recall that we found no limitations.").

[73] *See* Rover-00003817 at 3818 (Mar. 3, 2015 2:29 P.M. email from Thomason to group) ("From the report, it doesn't seem to be in an historical district . . . .").

[74] *See id.* at 3817–18 (Mar. 3, 2015 5:06 P.M. email from Patterson to Millis, Thomas, Thomason, Zaccaro, Banta, Vedral, Roberts); *see also* Banta Testimony 19:18:20 ("I think we had discussions and we had concurrence that there was nothing saying that the house could not be torn down.").

[75] *See* Rover-00003817 at 3817 (Mar. 3, 2015 5:06 P.M. email from Patterson to Millis, Thomas, Thomason, Zaccaro, Banta, Vedral, and Roberts) and (Mar. 3, 2015 5:38 P.M. email from Millis to

could be a "politically risky strategy" that could "negatively affect the relationships with our reviewers." Rover did not remove the House at that time. Instead, the removal occurred another 14 months after this discussion about the best timing. But, even at that earlier stage, Rover's consultants confirmed that nothing in the law forbade Energy Transfer from using the House as an office or, if necessary, removing the House.[76] Millis and Patterson have since confirmed they were raising issues of prudence, not what the law allowed.[77]

With this reasonable, and correct, understanding of what was lawful, Energy Transfer decided to move forward with the purchase. Although final decisions on details for the Property's use were delayed until "after [] close,"[78] it was understood that Energy Transfer "need[ed] the 10 acres to build an operating center."[79] The Company closed on the Property on May 11, 2015 and took possession on August 1, 2015.[80]

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group).

[76] *See id.* at 3817 (Mar. 3, 2015 5:38 P.M. email from Millis to group).

[77] *See* Millis Decl. ¶ 16 ("I did not identify a regulation or ordinance that prohibited a private landowner from demolishing an older structure that was not already listed as a historic resource in state and/or county records and I conveyed that information to Rover."); Patterson Decl. ¶ 13 ("While I thought that the demolition of the Stoneman House should have been delayed until after the Section 106 process was fully concluded, I do not believe that the demolition was done in order to avoid that process.").

[78] *See* Rover-00003817 at 3817 (Mar. 3, 2015 4:42 P.M. email from Banta to group).

[79] *See* Banta Test. at 18:12–16. *See also* Vedral Decl. ¶¶ 4, 9 (explaining that because a property's price skyrockets once a pipeline company expresses interest in it, often due to aggressive negotiation by attorneys on landowners' behalf, it was Rover's "standard practice" to "make all purchases as soon as possible" after identifying a property of interest).

[80] Sept. 26, 2016 EIR Response, Attachment 1 at 10 (Warranty Deed); *id.*, Attachment 1 at 5 (Option to Purchase ¶ 11). Energy Transfer paid $1.3 million for the Property. *Id.*, Attachment 1 at 3 (Option to Purchase). *See* Rover-00019094 (Mar. 6, 2015 4:10 P.M. email from Zaccaro to Banta requesting authorization for a wire transfer of the "Purchase Option money," indicating that "[f]ull [p]urchase price will be $1,300,000.00 for 10 acres with house and outbuildings").

3. After Reviews Lasting More than a Year, Energy Transfer Ultimately Decided to Remove the Stoneman House.

Energy Transfer did not remove the Stoneman House until it had considered possible alternative uses over the course of more than a year. Throughout this process, Energy Transfer took steps to preserve the House in the event it could be repurposed. For example, when reviewing the draft purchase agreement, Vedral (the Manager of Right of Way) asked whether there was "any type of special protection for the historical house," because "I have no idea?"[81] Vedral wanted to prevent the sellers of the Stoneman House from stripping the building of things of value before Energy Transfer took possession, because he was aware of that problem occurring with other properties that had the potential to be repurposed.[82] Thus, an hour later—in the same email chain—Vedral stated that he would edit the purchase agreement "accordingly to ensure that [the sellers] do not have the right to remove or take the house."[83] The purchase agreement shows that Vedral did just that, thus preserving Energy Transfer's option to convert the Stoneman House into office space.[84]

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[81] *See* Rover-00001751 at 1751 (Feb. 19, 2016 4:07 P.M. email from Vedral to Banta, Roberts, and Thomason).

[82] *See* Vedral Decl. ¶ 6 ("If a structure remains vacant, it could become a public nuisance. . . . There is also a risk that people will strip the structure of anything useable including pipe, electrical wiring, windows, doors, and shingles. When that happens, the structure cannot be used and must be demolished. It is not just vandals who do this. Sellers (or their neighbors) have sometimes stripped a structure of anything of value and left behind only a shell for the company.") & Ex. B (photographs showing damage that sellers have done to homes that the company bought on the Rover Pipeline Project, including removing everything not nailed down and even things that were, like windows, doors, and siding).

[83] *See* Rover-00001751 at 1751 (Feb. 19, 2015 5:20 P.M. email from Vedral to Banta, Roberts, and Thomason).

[84] Vedral Decl. Ex. C; *id*. ¶ 12 ("The email chain actually describes a desire to *preserve* the Stoneman House, not 'destroy' it. For example, approximately an hour after I allegedly 'summarized' an order to 'destroy' the Stoneman House, I clearly state that I planned to edit the purchase agreement 'accordingly to ensure that [the prior owners] do not have the right to remove or take the house.' This was because of my concern regarding situations I describe above where sellers have virtually

After Energy Transfer completed the purchase, its Operations group conducted three on-site reviews to determine which structures on the Property were suitable for Operations' use.[85] In the summer of 2015, Banta (the Project Manager) asked Schuman (Energy Transfer's Midwest Area Operations Director), to "take a look at" the Property "from an operations perspective to see what we could use there."[86] Schuman evaluated the Property as a potential location for "keeping operation personnel's office there and having an area where we could put emergency pipe,"[87] and determined that the location "looked terrific as far as where it was at"[88] and was "very favorable."[89] Schuman "could not enter the house itself on that trip," but what he "could see of the house from the outside did not render it unsuitable for" Energy Transfer's purposes.[90]

Operations reviewed the property again in the Spring of 2016, almost a year after purchasing the house. Schuman and Brad Fieseler, the Operations Manager, assessed "the current facilities on that location, and what would be usable for operations in the way of storage,

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demolished structures before handing them over.").

[85] *See* Schuman Test. 138:9–140:13 (describing first visit to the Property in "summer of 2015" "a month or two" after Banta notified Schuman that Energy Transfer had acquired the Property for Operations, and indicating that his visit was "just to view th[e] property"); *id.* 168:16–174:9 (describing second visit); *id.* 92:6–14 ("A: Early in the spring [of 2016], operations went back and did [a third] assessment of what was existing and whether it would be usable, the current facilities on that location, and what would be usable for operations in the way of storage . . . garages, and also the house itself and whether it would be acceptable for operations. Q: Okay. And what did you conclude? A: That the building was unacceptable."); Fieseler Decl. ¶¶ 6, 7, 13 (explaining that he saw the house for the first time in the fall or early winter of 2015, and visited the house with Dutch Schuman in late 2015 and spring 2015); *see also* Schuman Test. 94:5–12 ("Q: Was there anything about the house that was suitable?" "A: The house itself, no. The location was perfect for us."); *id.* 95:5-16 (same).

[86] Schuman Test. 96:23–25.

[87] Schuman Test. 132:20–22; *id.* 135:7–11 ("I was looking at it for all of operations, whether we could put extra storage pipe there, equipment there, four-wheelers, tractors, you know, whatever operations would use and could store, as well as office space, you know, the need for office there as well.").

[88] *Id.* 95:13.

[89] Schuman Decl. ¶ 11.

[90] *Id.*

buildings that were there on location, garages, and also the house itself and whether it would be acceptable for operations."[91] The Operations group determined that the Property itself was "perfect," but ultimately found the house "unsuitable" for a variety of reasons, including that it was too small and the layout was unsuitable for housing the required staff; it lacked a modern electrical system; and it would need extensive remodeling to repair water damage and years of neglect.[92] On the last visit, the county inspector accompanied the Operations group on their inspection visits because the local fire department was considering whether to burn the house down as part of a training exercise.[93] In each instance, the Operations group reported its views to Banta, who ultimately controlled the budget for construction in the area.[94] Furthermore, Enforcement Staff concedes that the year-long review was affected by Energy Transfer's proposed acquisition of Williams Cos., and its evaluation of how many personnel would be stationed at the Property to serve other nearby assets.[95]

Throughout this process, Energy Transfer's plan for the site included the contingency of removing the House if it turned out to be unsuitable. As explained above, normal practice was to

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[91] Schuman Test. 92:8–12.

[92] *See id.* 92:4–94:20; Fieseler Decl. ¶ 8 ("It was immediately apparent to me that the 8468 Azalea Road property was well situated for use as an operations office. The property was larger than the immediately surrounding parcels, which meant that we could store more equipment there. Furthermore, the property was flat relative to other nearby parcels."); *id.* ¶¶ 11–13 (explaining that based on his inspections of the house, it became clear that "the house was not suitable" for use as office space).

[93] *See* Rover-00015599 at 600 (request from Banta about the firefighter training exercise); Rover-00015626 at 629 (weekly report discussing same).

[94] *See also* Schuman Test. 146:7–10 (indicating that after his first review, "[i]f I felt like we could have accommodated, used the outbuildings, used the office, I would have reported back to Leon that hey, I think we can make this work"); *id.* 90:19–92:14 (indicating after third review his recommendation to Banta that a new structure be built on the Property).

[95] Enforcement Staff Report at 29 n.123.

remove an unusable building to prevent it from becoming a nuisance.[96] Although removal was always a potential element in the planning, Energy Transfer did not reach a decision to remove the building until well after the purchase.[97] In the meantime, Energy Transfer spent more than a year considering whether it could retain and make use of the Stoneman House and other structures on the Property.

F. Rover Removed the House Only After It Notified the SHPO of that Plan, Repeatedly Attempted to Engage with the SHPO Further on Historic Resource Issues, Sought Guidance from a FERC Project Staff Member, And Confirmed that No Laws or Regulations Prohibited Removal

In January 2015, before Rover filed its Application with the Commission, Rover submitted its recommendations to the SHPO for archaeological and architectural properties potentially affected by the Project. Typically the "SHPOs will review that report within 30 days and provide their comments."[98] Had the SHPO timely responded, remediation issues for CS1 would have been resolved well before Energy Transfer concluded its efforts to purchase the Stoneman House and Property. Ultimately, however, the SHPO delayed its response a full year—until January 2016.[99] The comments in that response confirmed that mitigation would be

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[96] Mahmoud Test. 92:21–93:5.

[97] Enforcement Staff claims that Mahmoud "conceded that it was his intent to tear down the house once Rover owned it." Enforcement Staff Report at 21. That is not what Mahmoud testified. Mahmoud testified that "if there's structures on those properties that we we're not going to utilize, we typically get rid of those." Mahmoud Test. 92:24–93:1. He never testified that at the time of purchase they had determined whether they were going to utilize the Stoneman House—the necessary predicate to a decision to demolish. The overwhelming evidence—including the fact that they waited well over a year after purchasing to remove—establishes that they intended to use the House if possible.

[98] Millis Test. 47:25–48:2.

[99] *See* Sept. 26, 2016 EIR Response Attachment 3 at 2–19 (Ohio SHPO Jan. 25, 2016 Letter to Heather Millis).

limited to CS1's indirect visual effects on surrounding properties, including the Stoneman House and Property.[100]

In late March 2016, Rover representatives met with the SHPO to discuss potential Project impacts on archaeological and architectural resources along the entire pipeline route in Ohio.[101] Contemporaneous emails, confirmed by testimony, show that during this same timeframe Energy Transfer had made its decision to remove the Stoneman House.[102] Rover considered discussing those plans with the SHPO at that meeting, but the agenda covered a number of potential effects along the pipeline, and the SHPO had yet to finalize the recommended mitigation for CS1's effects. Rover's consultants advised that "it would be best not to mention anything about removing the resource."[103] At the meeting, Rover notified the SHPO that it had purchased the Property.[104] The Enforcement Staff Report notes that this disclosure occurred some time after the purchase closed, but at the time of the purchase Rover was waiting for the SHPO's long-delayed

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[100] *Id.* at 3–4. The SHPO also asked for additional information regarding the boundaries of the Property. *Id.* That information was provided on June 15, 2016. *Id.* at 24 (June 15, 2016 Letter from Heather Millis to Lisa Adkins).

[101] *See id.* at 20 (Mar. 29, 2016 Meeting Minutes).

[102] *Compare* Rover-00012116 at 12117 (Mar. 28, 2016 10:32 A.M. email from Thomason to Millis) ("The CS1 house still worries me a lot. We are not planning to keep it intact. If we document it, then remove it, is it just adding insult to injury?") *with* Rover-00011899 at 11900 *(*Mar. 17, 2016 4:21 P.M. email from Thomason to Millis and Patterson) ("[M]aybe we could study the architectural properties we are near or cross (like the one at CS1 that we'll likely tear down – I'm half kidding)?"); *see also* Thomason Test. 221:22–222:3 ("Q. At that time, did you know the house was going to be knocked down, at the time you had that March 29[, 2016] conversation? A. I knew that it was being discussed, that we might very well take it down, but I wasn't sure that that was the final plan. So I wanted to double-check before I made that official.").

[103] *See* Rover-00012116 at 12116 (Mar. 28, 2016 10:16 A.M. email from Millis to Thomason) (adding: "SHPO just doesn't need to know that"); Millis Test. 74:20–75:2 ("Q. So it wasn't as if you were suggesting hiding the imminent destruction of the house from the SHPO, right? A. No. I did not want that to be something that they were thinking about while . . . they were coming up with whatever plan we needed to do for mitigation.").

[104] *See* Sept. 26, 2016 EIR Response Attachment 3 at 20 (Mar. 29, 2016 Meeting Minutes); Millis Decl. ¶ 15.

response.[105] Rover understood that providing new information while the SHPO's response was pending could lead the SHPO to restart its review and could even further delay its response. Thus, waiting for the SHPO's response would be the most efficient and expeditious approach to discussion in addressing potential SHPO's issues. For example, the SHPO could have concluded that the House was not eligible for listing.

Just one week later, Thomason notified the SHPO that a decision had been made to remove the Stoneman House and other structures from the Property as part of a plan to construct an operations center at the site.[106] The SHPO did not instruct or ask Energy Transfer to delay removal of the Stoneman House.[107] In fact, another four months passed before the SHPO sent a letter responding to Energy Transfer's notification. By then, almost 20 months had passed since Energy Transfer submitted its recommendations to the SHPO for mitigating CS1's indirect effects.[108] Even the SHPO's response to notification that Rover would remove the House was consistent with mitigating the indirect visual effects of CS1 on nearby properties.[109]

Energy Transfer also sought input from a FERC staff member on what could be done about a property like the Stoneman House. In April 2016, Energy Transfer's outside counsel for the Project "talked to Paul Friedman with FERC," an environmental project manager

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105 Enforcement Staff Report at 27.

106 *See* Sept. 26, 2016 EIR Response Attachment 3 at 23 (Apr. 5, 2016 email from Thomason to Adkins) ("Ms. Adkins, per our conversation, please accept this email as documentation that Rover intends to remove the Stoneman house (CAR-266-12) and associated buildings from the property."); *see also* Sept. 26, 2016 EIR Response Attachment 3 at 22 (Apr. 5, 2016 Telephone Conversation Memorandum from Thomason to Adkins).

107 *See* Rover-00012826 (May 18, 2016 9:47 P.M. email from Thomason to Banta) ("The SHPO has been informed. I haven't heard anyone cry about it.").

108 *See* Sept. 26, 2016 EIR Response Attachment 3 at 34–39 (Aug. 12, 2016 Letter from the SHPO to Heather Millis).

109 *Id.*

specializing in cultural resources, whom the outside counsel had asked similar questions of in the past. Friedman "ultimately said if" a house "wasn't listed on the NRHP and it's not on the pipeline [right-of-way], then it's a non-issue."[110]

Energy Transfer also reached out to local authorities to confirm there were no legal impediments to removing the House. In April 2016, Millis reviewed local laws and ordinances, and "called the county's regional planning department" to confirm "there were no ordinances or zoning laws outside the villages."[111] She also reached out to the "genealogy/historical society" and confirmed "there were 'no official lists of historic structures' or ordinances against the removal of older structures."[112]

Contemporaneous evidence shows that Rover has continued to this day in its unwavering commitment to complete the mitigation of CS1's visual impacts on all nearby properties. Because those visual effects applied to multiple neighboring properties and to the entire Stoneman property (not merely the House), the House's removal did not change the screening

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[110] Rover-00012712 at 12712 (Apr. 13, 2016 12:48 P.M. email from Thomason to Banta and Mahmoud).

[111] Rover-00012701 at 12701 (Apr. 12, 2016 12:26 P.M. email between Heather Millis and Buffy Thomason).

[112] Rover-00012704 at 12704 (Apr. 13, 2016 11:47 A.M. email from Millis to Thomason). Enforcement Staff suggest that Millis intentionally "withheld any identifying information from [the Regional Planning Department and the County Historical Society] so that they would not be able to connect the inquiry to the Rover project or Stoneman." Enforcement Staff Report at 38. Millis stated, however, it was "common practice" "to not identify the specific project I am researching unless it is necessary to obtain the information I am seeking. This approach ensures that information and answers I get are untainted by preconceptions about any one particular project or its sponsors." Millis Decl. ¶ 4. Furthermore, Enforcement Staff's suggestion that Rover was trying to keep the demolition secret from authorities is flatly incompatible with Staff's concession that Operations solicited the local fire department to burn the building down as part of a training exercise. *See* Enforcement Staff Report at 37 ("In March or April, Schuman met with the local fire department to discuss the possibility that Rover – as part of community outreach – could allow the fire department to use the house for a controlled burn.").

plan for CS1. Numerous documents establish that the same mitigation efforts went forward.[113] Several witnesses confirmed that this was always Rover's intention.[114]

Enforcement Staff disputes this commitment, pointing to a June 15, 2016 letter from Millis to the SHPO stating "Rover has purchased this property and intends to remove the Stoneman House," and "Rover recommends no further consideration of this resource for this Project."[115] Enforcement Staff mischaracterizes Millis's testimony by asserting that this was "a 'gambit' to get the SHPO to agree that Rover did not have to do any mitigation given Rover's demolition of the house."[116] That is wrong. Instead, Millis testified that the "recommend[ation]" in her June 15, 2016 letter was designed to "push [the SHPO] to finally say what they really

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[113] *See, e.g.*, Rover-00015621 at 15621 (Apr. 27, 2016 3:16 P.M. email from Thomason to Richardson, Banta, Vandygriff, McCurdy, Willougby, and Schuman) ("Rover has developed a visual screening plan for the Compressor Station 1 based on the revised site plan . . . . Rover intends to paint all compressor station, motor control center (MCC) building, and instrument air buildings charcoal gray with polar white roofs and trim. . . . The visual screening plan for Compressor Station 1 includes planting a tree line between Azalea Road SW and the existing pipeline that runs parallel to and north of the road. . . . In addition, Rover proposes to insert slats in the chain-link fence surrounding the tap site at this location to visually screen that equipment, which will be shorter than Rover's standard 6-foot security fence."). *See also* Rover-00015562 at 15562 (Feb. 25, 2016 2:45 P.M. email from Grantham to McDonald, Farley, Schuman, Thomason, Banta, and Oldham) ("Team, we need to meet next week and develop . . . a Visual Screening Plan for CS1 and CS3."); Rover-00032383 at 32383 (Oct. 28, 2016 10:52 A.M. email from Thomason to Grantham and McDonald) ("Here is the first proposal we received for the visual screening plans . . .").

[114] Thomason Decl. ¶ 14 ("I also do not agree with Enforcement Staff's assertion that Rover was not committed to performing any required mitigation. Rover was not only committed to performing the required mitigation, but went through several different iterations of a visual screening plan with FERC Project Staff to ensure that they were satisfied. Rover has implemented that plan at CS1."); Patterson Decl. ¶ 11 ("Rover was always committed to completing the recommended mitigation, which at the time was just a visual screening plan.") & ¶ 13 ("I believe that Rover always intended to continue the Section 106 process with the SHPO, regardless of its decision to demolish the structure.").

[115] Enforcement Staff Report at 40–41 (quoting Sept. 26, 2016 EIR Response Attachment 3, at 24). The House had been removed soon before the letter.

[116] *Id.* at 41 (citing Millis Test. 139).

wanted" in terms of mitigation.[117] As Millis explained to Enforcement Staff in her testimony, "this was so long and dragged out with the Ohio SHPO that, you know, just getting them to talk and getting to the point where we could figure out what to do was such a process."[118]

When the SHPO finally responded—four months later—to Rover's notification that it planned to remove the Stoneman House, the SHPO expressed the same understanding about mitigation that Rover has consistently held.[119] The SHPO stated that consultation over mitigation should continue "[w]hether the house is to be demolished or to remain."[120] Rover agreed, consistent with its commitment to mitigate CS1's visual effects for the benefit of all surrounding properties, and Rover thus responded that it would like to continue to "discuss mitigation."[121] This exchange was indicative of a shared desire to "tie together a more comprehensive" mitigation "strategy,"[122] in which one plan would address all of the SHPO's concerns about the Project throughout Ohio.

Rover and the SHPO ultimately agreed to a Memorandum of Understanding.[123] Under it, Rover completed limited projects to satisfy the SHPO and paid approximately $2.3 million, consisting of: $1,331,322.33 for an endowment to the Ohio History Connection Foundation to

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117 Millis Test. 142:13–18.

118 *Id.* 141:3–6.

119 *See* Sept. 26, 2016 EIR Response Attachment 3 at 34–39 (Aug. 12, 2016 Letter from the SHPO to Heather Millis).

120 *Id.* at 37 (emphasis added).

121 Rover-00013401 at 13406 (Aug. 17, 2016 11:23 A.M. email from Millis to Adkins).

122 *Id.* at 13401 (Aug. 18, 2016 4:47 A.M. email from Millis to Thomason and Patterson).

123 Section 106 of the NHPA required Rover to work with the SHPO to create a plan to address specifically defined "adverse effects" on potentially historic resources within a pre-defined area of impact. This type of agreement is common among the SHPOs and applicants under Section 7 of the NGA.

achieve positive historic preservation outcomes throughout Ohio, $50,000 to support the establishment of an Archeological database to document artifacts, and $1,000,000 to establish a community historic preservation fund to be used by the Ohio History Connection Foundation as directed by the Ohio SHPO for historic preservation in the 18 counties the Project crosses.[124]

G. Staff Requested Information about the Stoneman House

On September 14, 2016, Project Staff issued an Environmental Information Request ("EIR") seeking, among other things, "a record of Rover's consultations with [the SHPO] regarding the demolition of [the Stoneman House]" as well as "any SHPO comments on Rover's proposed method of mitigation."[125] Staff also requested answers to various questions about the removal of the House. Rover provided narrative responses and relevant documents.[126]

III. Summary of Argument

Rover complied with all of its obligations under the Natural Gas Act, including its obligation to provide all "pertinent" data and information "necessary" for the Commission to understand the Project and its effects. Enforcement Staff's claims fail for the following reasons:

First, Rover committed, through a screening plan, to mitigate the only effects that the Project posed to properties outside the right-of-way near the Stoneman House: CS1's visual and audial impacts. That is it. Rover's sole commitment was a solution to those limited, Project-specific effects. Rover honored that commitment.

Second, the evidence overwhelmingly shows that from the time Energy Transfer identified the Property, it intended to use it as office and storage space for all of its nearby

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[124] Memorandum of Understanding: Mitigation Plan for Preservation of Cultural Resources for the Rover Pipeline Project at 2-3 (Oct. 12, 2016).

[125] Environmental Information Request for the Rover Pipeline Project, Docket No. CP15-93-000, at Enclosure 1 (Sept. 14, 2016) [hereinafter "EIR Request"].

[126] Sept. 26, 2016 EIR Response.

projects, and it intended to use the House unless that building proved unsuitable. This was in accordance with Energy Transfer's standard practice. In fact, it is beyond dispute that Energy Transfer sought a regional operations center near CS1 long before it had even identified the Stoneman House and Property. Everyone agreed that the location was perfect due to its proximity to CS1 and other projects. In buying the Property, the company took steps to protect the House from harm until it could be evaluated as office space. It only decided to remove the House—a full year after closing on the purchase—after three on-site reviews. The company concluded that the House's condition rendered it unsuitable as an office; it confirmed that no laws or regulations prevented removal; it informed the SHPO and gave ample time for objection (the SHPO didn't object); and it asked a FERC Staff member whether removing the House raised any issues (it didn't). The law required nothing more.

Third, Enforcement Staff's allegations of motive make no sense. It was never in the cards that CS1 would be placed in a different location. And for the location chosen, the screening plan was a tried and true method to mitigate CS1's effects. In fact, screening fully satisfied the mitigation requirement for effects on *all* neighboring properties. Even if other mitigation options *had* been on the table (such as moving the House), it did not matter whether the owner was Energy Transfer or someone else. In the end, the evidence is clear that Energy Transfer acquired the House, as part of acquiring the Property, for the legitimate purpose of a regional operations center, and that it did not remove the House until satisfying itself that removal was both necessary and lawful.

Fourth, Rover did not try to conceal its plans for the House. Rover told the SHPO, who was the very agency responsible for recommending mitigation for effects on the House. And Energy Transfer waited another two months after the SHPO was informed before acting on the

decision to remove the House. Enforcement Staff also fail to explain *why* Rover would conceal its purchase if, as Enforcement Staff theorize, that purchase was intended to avoid certain mitigation options. If Enforcement Staff were right—*i.e.*, that Rover was trying to limit mitigation needs—Rover would have notified FERC about the purchase as soon as it could. But Rover did not "purchase and conceal" for the simple reason that mitigation was always focused on how the sight or sound of CS1 would affect all neighboring properties. And purchasing the House thus had nothing to do with those mitigation options.

Fifth, apart from lack of merit, Enforcement Staff's claims are procedurally barred. All but one of the alleged misrepresentations or omissions that Enforcement Staff raise took place more than five years ago and any claim based on them is barred by the statute of limitations. In addition, the federal district courts have exclusive jurisdiction over enforcement actions; the Commission cannot pursue one through the administrative process. This conclusion is compelled by the plain language of the Natural Gas Act and multiple constitutional provisions.

Finally, as a majority of Commissioners alluded to in their concurring statements, there are strong reasons to scritunize Enforcement Staff's penalty calculation, which produces an astronomically overstated result. Enforcement Staff seek to impose a $20 million fine for the removal of a structure that appraised for just $41,090. Among other things, Enforcement Staff assert a "loss" amount of $3.6 million, after failing to show any *pecuniary* harm, which is a prerequisite to a penalty enhancement for loss. Even if the House's value could substitute for the intangible harm Enforcement Staff alleges, Enforcement Staff identifies two measures that are both seriously inflated, and then compounds the error by adding them together—a plain example of improper double counting. Enforcement Staff also propose a "duration" enhancement for a one-time event; use enhancements based on Rover's size that are untethered to reality; and fail to

account for Rover's compliance program. Even if Enforcement Staff's theories for violations were not factually unfounded and procedurally barred, the proper penalty calculation yields a range of $8,000 to $40,000.

IV. Legal Standards

Two sources of law are relevant to Enforcement Staff's allegations. The NHPA governs the mitigation that may be required for direct or indirect effects on resources with potential historic or cultural significance. That statute does not forbid owners of such structures from removing them. Instead, it creates a process for considering a project's effects and devising a plan for mitigating those effects. Section 157.5 of FERC's regulations governs communications with the Commission regarding certificate applications. It requires an applicant to submit the information needed to understand the proposed project. Each is discussed below.

A. National Historic Preservation Act

The NHPA creates a process for considering and addressing effects of federally approved activities on historic resources. As relevant here, the NHPA authorized the Secretary of the Interior to create a National Register of "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture."[127] A place may be listed on the National Register if it is "of significance in American history, architecture, archeology, engineering, and culture," which the implementing regulations define as places:

> (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
> (b) that are associated with the lives of persons significant in our past; or
> (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high

[127] Pub. L. No. 89-665, 80 Stat. 915 § 101 (1966). The Secretary of the Interior and the National Park Service are responsible for maintaining the National Register, assessing the qualifications of nominations to the National Register, and promulgating rules necessary to maintain the Register. *See* 54 U.S.C. §§ 302101, 302102, 302107; 36 C.F.R. § 60.3(h).

artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.[128]

Buildings more than fifty years old can be eligible for listing.[129] This means a ranch home built in 1970 with distinctive faux wood-paneled walls could be listed. And listing itself is hardly an exclusive club. The National Register currently contains approximately 96,255 listed properties; about 4,100 in Ohio alone.[130]

An owner might try to list his or her property on the National Register to qualify for preservation grants and tax benefits, but such a listing "does not prohibit under Federal law or regulation any actions which may otherwise be taken by the property owner with respect to the property."[131] In other words, whoever owns the property is free to alter or remove it despite its listing on the National Register. Instead of restricting what can happen to such properties, the NHPA creates a process for federal agencies, like FERC, to consider potential adverse effects that federal actions will have on them. Some states and localities have restrictions of their own on removing or altering "historic" properties; no such restrictions applied to the Stoneman House, however.

The NHPA requires "each federal agency to take responsibility for the impact that its activities may have upon historic resources, and establishes the Advisory Council on Historic

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128 36 C.F.R. § 60.4.

129 *See id.*

130 National Park Service, National Registry of Historic Places Listed Properties, https://www.nps.gov/subjects/nationalregister/upload/national_register_listed_20210214.xlsx (last visited June 16, 2021).

131 36 C.F.R. § 60.2.

Preservation . . . to administer the Act."[132] Federal agencies must account for a proposed undertaking's effects on "any historic property."[133] As a procedural statute, the NHPA only requires an "accounting" of effects; it does not prohibit them:

> It does not itself require a particular outcome, but rather ensures that the relevant federal agency will, before approving funds or granting a license to the undertaking at issue, consider the potential impact of that undertaking on surrounding historic places. As such, courts have sometimes referred to Section 106 as a "stop, look, and listen" provision.[134]

Much like the National Environmental Policy Act, the NHPA "upholds [its] objectives 'neither by forbidding the destruction of historic sites nor by commanding their preservation, but instead by ordering the government to take into account the effect any federal undertaking might have on them.'"[135] The general process for doing so is found in the implementing regulations at 36 C.F.R. Part 380.

The basic NHPA process is as follows: First, the federal agency determines (a) the scope of the federal undertaking, (b) whether it has the potential to cause effects on "historic" properties (as defined above), and (c) the relevant state historic preservation officer (SHPO).[136] Next, the federal agency determines and documents the area of potential effects of the undertaking and then works, in consultation with the SHPO, to identify and evaluate the potentially affected qualifying properties.[137] If the agency determines that the undertaking may

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[132] *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 224 (5th Cir. 2006) (quoting *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003)).

[133] 54 U.S.C. § 306108.

[134] *Coliseum Square Ass'n,* 465 F.3d at 225 (quoting *Bus. & Residents All. of E. Harlem v. HUD*, 430 F.3d 584, 591 (2d Cir. 2005)).

[135] *Id.* (quoting *United States v. 162.20 Acres of Land*, 639 F.2d 299, 302 (5th Cir. 1981).

[136] *Id.* § 800.3.

[137] *Id.* § 800.4.

affect such properties, the agency solicits the views of the consulting parties (*i.e.*, the SHPO and the property owner) to assess any adverse effects.[138] If the agency determines that the undertaking will adversely affect the resource, the agency engages in further consultations in an attempt to resolve the adverse effect.[139]

The NHPA regulations define an "adverse effect" to include both direct and indirect alterations of a property's relevant characteristics:

> An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.[140]

When a federal undertaking will have an adverse effect on a property eligible for inclusion in the National Register, the agency must then consult with the SHPO "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects."[141]

The statute does not require the elimination of all adverse effects on such resources.[142] Instead, interested parties must be consulted to seek agreement about mitigation to "resolve" the adverse effect.[143] The NHPA requires no specific form of mitigation. For example, a common

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[138] *Id.* § 800.4(2).

[139] *Id.* § 800.5(d)(2).

[140] *Id.* § 800.5(a)(1).

[141] *Id.* § 800.6(a).

[142] *See id.* § 800.7.

[143] *Id.* § 800.6(b).

mitigation measure for archeological sites is data recovery, an option that preserves a record of the site rather than the physical resource.[144] Mitigation can be anything that serves to remedy or offset the adverse effect, including protecting other qualifying resources in lieu of those impacted by the undertaking.[145]

FERC uses its NEPA process to comply with its NHPA obligations.[146] Under FERC's regulations, "[t]he project sponsor, as a non-Federal party, assists the Commission in meeting its obligations under the NHPA section 106 and the implementing regulations at 36 CFR part 800 by following the procedures at § 380.12(f)."[147] FERC then reviews the results of the consultation process.[148]

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144 Advisory Council on Historic Preservation, Reaching Agreement on Appropriate Treatment, https://www.achp.gov/Section_106_Archaeology_Guidance/Questions%20and%20Answers/Reaching%20agreement%20on%20Appropriate%20Treatment ("42. When is data recovery the appropriate treatment? One of the strengths of the Section 106 consultation process is that there is no predetermined outcome. This means that a range of solutions is usually available for consideration by consulting parties. Contrary to the view held by some Section 106 practitioners, data recovery is not required by law or regulation. It is, though, the most commonly agreed-upon measure to mitigate adverse effects to archaeological sites eligible or listed under Criterion D, as it preserves important information that will otherwise be lost.").

145 Advisory Council on Historic Preservation, Section 106 Archaeology Guidance—Terms Defined, https://www.achp.gov/Section_106_Archaeology_Guidance/Terms%20Defined ("Mitigation is a way to remedy or offset an adverse effect or a change in a historic property's qualifying characteristics in such a way as to diminish its integrity.") (bold omitted). *See* Advisory Council on Historic Preservation, Reaching Agreement on Appropriate Treatment at Question 44, https://www.achp.gov/Section_106_Archaeology_Guidance/Questions%20and%20Answers/Reaching%20agreement%20on%20Appropriate%20Treatment ("Another example of these alternatives is archaeological "mitigation banking." This term refers to the acquisition and preservation of archaeological sites away from the project area in return for doing little or no direct mitigation on sites within the area of potential effects.").

146 *See* Enforcement Staff Report at 51 (citing 18 C.F.R. pt. 380). Part 380 of the Commission's regulations are regulations implementing NEPA. *See also* 36 C.F.R. § 800.8(c) (allowing use of NEPA regulations for this purpose).

147 18 C.F.R. § 380.14(a).

148 *Id.*

This framework puts the SHPO in the lead role for identifying and resolving effects on resources identified in the NHPA. Section 380.12(f) requires an applicant to provide, in its application, documentation of its initial consultation with the SHPO, along with survey reports (as deemed necessary by the SHPO), and comments from the SHPO, if available.[149] The SHPO's comments, an evaluation report (as necessary), and a treatment plan (as necessary) must be filed with FERC before the Commission issues its certificate.[150] If a treatment plan is needed for mitigating adverse effects, the applicant consults with the SHPO in preparing, and with FERC project staff in finalizing, that plan.[151]

B. 18 C.F.R. § 157.5

Under Section 7 of the Natural Gas Act, FERC has exclusive jurisdiction over the construction and operation of facilities for the interstate transportation of natural gas.[152] The scope of relevant activity for NHPA purposes here (*i.e.*, the "federal undertaking") was therefore approval of the Rover Pipeline's construction.[153] FERC does not regulate the acquisition or construction of natural gas company office buildings; office space is outside the definition of "natural gas facilities" requiring FERC certification.[154] As will be shown below, Enforcement

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149 *Id.* § 380.12(f)(2).

150 *Id.*

151 *Id.* § 380.12(f)(3).

152 15 U.S.C. § 717f; *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988) ("The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale," including "authority over the rates and facilities of natural gas companies[.]"); *see also Del. Riverkeeper Network v. Sec'y Penn. Dep't of Envtl. Prot.,* 833 F.3d 360, 367 (3d. Cir. 2016) ("Section 7 of the Natural Gas Act grants FERC the power to authorize the construction and operation of interstate transportation facilities.").

153 *See* 36 C.F.R. § 800.3.

154 Order No. 790, 145 FERC ¶ 61,154 at P 22 n.39 (2013) ("We note that a new corporate headquarters building is not a 'natural gas facility' which requires certification under the NGA.").

Staff's concession that the purchase of the property and ultimate decision to remove the house were governed, at least in part, by the Company's intent to create a base for Operations to service multiple assets throughout the reason demonstrates why Section 157.5 is inapplicable here and why Enforcement Staff's allegations must fail.

FERC sets forth the requirements for certificate applications in Part 157 of its regulations.[155] Section 157.5(a) requires Section 7 applications to set forth the information "necessary to advise the Commission fully concerning" the "construction . . . for which a certificate is requested."[156] Although "[s]ome applications may be of such character that an abbreviated application may be justified," that does not excuse them from the general requirement to "file all pertinent data and information necessary for a full and complete understanding of the proposed project."[157] If information does not relate to the "proposed project" "for which a certificate is requested," it falls outside the ambit of Section 157.5. As explained below, because the use of the property was not related to the "proposed project," Section 157.5 is inapplicable here.

Section 157.5(b) states that these application requirements include "a forthright obligation of the applicant," but that obligation can "be avoided by a definite and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application."[158] Finally, Section 157.5(c) puts the

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[155] *See* 18 C.F.R. Pt. 157.

[156] 18 C.F.R. § 157.5(a).

[157] *Id*.

[158] *Id*. § 157.5(b).

burden on the applicant to "adequate[ly] present[] information in intelligible form" and to provide the "justification for omitted data or information."[159]

The Enforcement Staff Report acknowledges that Section 157.5 has a purpose far removed from the allegations here. The provision was adopted to (1) "eliminate sketchy and incomplete applications" that require "extensive correspondence" to overcome "deficiencies," and (2) achieve "general improvement in the form and content of applications."[160] The Enforcement Staff Report does not seriously suggest that Rover's application was "sketchy," incomplete," or contrary to the "form and content" of Section 7 applications.

To support its theory of a Section 157.5 violation, Enforcement Staff Report relies solely on a 40-year old case that falls wide of the mark. In *Black Marlin Pipeline Co.*,[161] unlike here,

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[159] *Id*. § 157.5(c). The full text of Section 157.5 is as follows:

> (a) Applications under section 7 of the Natural Gas Act shall set forth all information necessary to advise the Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested or the abandonment for which permission and approval is requested. Some applications may be of such character that an abbreviated application may be justified under the provisions of § 157.7. Applications for permission and approval to abandon pursuant to section 7(b) of the Act shall conform to § 157.18 and to such other requirements of this part as may be pertinent. However, every applicant shall file all pertinent data and information necessary for a full and complete understanding of the proposed project, including its effect upon applicant's present and future operations and whether, and at what docket, applicant has previously applied for authorization to serve any portion of the market contemplated by the proposed project and the nature and disposition of such other project.
>
> (b) Every requirement of this part shall be considered as a forthright obligation of the applicant which can only be avoided by a definite and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application.
>
> (c) This part will be strictly applied to all applications as submitted and the burden of adequate presentation in intelligible form as well as justification for omitted data or information rests with the applicant.

[160] Enforcement Staff Report at 55 (quoting NOPR).

[161] *Black Marlin Pipeline Co*., 4 FERC ¶ 61,039 (1978).

the company violated the Natural Gas Act by transporting gas without certificate authority.[162] The company asserted that its actions were within the scope of its existing certificate authority, but the Commission concluded that the application disclosed transportation of gas from certain sources when, in reality, some of the gas was transported from others.[163] Because the company had *already* entered into contracts to transport gas from these undisclosed sources when it submitted its application, and because the applicant withheld that information from the Commission, the applicant was found to have been less than forthright about the project's true scope.[164] That failure, in turn, meant that the company had knowingly and willfully transported natural gas beyond the scope of its certificate.[165] As a result, the Commission ordered the company to cease and desist its illegal transporation of natural gas and remanded the case to investigate repayment for the illegally transported gas.[166]

There was no question in *Black Marlin* that information showing contemplated changes to *the certificated project itself* (*i.e.*, the natural gas pipeline facilities and its operations) was necessary for the Commission to fully and completely understand the project. For example, Section 157.14(10) requires an applicant to provide flow diagrams for a proposed project and Section 157.14(11) requires statements about the production areas accessible to the project or

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[162] *Id.* at 61,088 ("Having determined that the transportation of the Gulf and Chevron gas was unauthorized and should not be authorized in the future, we concur with the Presiding Judge that a cease and desist order should be issued to prevent continued unlawful transportation in violation of the Natural Gas Act. We will also direct Black Marlin to file a report with the Commission, within 15 days from the date hereof, setting forth all steps taken for the purpose of complying with this order.").

[163] *Id.* at 61,088.

[164] *Id*. at 61,089.

[165] *Id*. ("We find that Black Marlin knowingly and willfully violated the Natural Gas Act and the Commission's Regulations thereunder.").

[166] *Id*. at 61,091.

"potential gas supplies for the proposed project."[167] Therefore, when Black Marlin filed a flow diagram that omitted flows and that did not disclose the fields it later transported from as potential supplies for the project,[168] it omitted information that the regulations plainly required for the Commission to evaluate the application. That is nothing like the information at issue here, which had no effect on the Project's scope, footprint, or sources of gas. Rather, the issue is whether Rover accurately laid out the limited mitigation needed for of a small part of the Project's potential effects. As explained below, Rover did so.

V. Argument

In their four-year-plus quest to punish Rover, Enforcement Staff have struggled mightily to manufacture a violation from a record that simply does not show one. The extent to which Enforcement Staff's allegations have changed over time is a telling sign of this effort's futility. For example, whereas Enforcement Staff initially insisted that Rover repeatedly "lied" to the Commission and submitted multiple "false" statements, the Enforcement Staff Report retreats to assertions that Rover should have been more "forthright."[169] Enforcement Staff also initially made much of the fact that the sellers of the House and local officials were not told the House might be removed, but with it now clear that proper notice was given and no local or other source of law prevented the House's removal, Enforcement Staff abandon those facts.[170] The same is true of spurious allegations that entirely appropriate conduct on this project and others

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[167] 18 C.F.R. §§ 157.14(10)-(11).

[168] *Black Marlin*, 4 FERC ¶ 61,039 at 61089.

[169] *Compare* Preliminary Findings of Enforcement Staff's Investigation of Rover Pipeline, LLC and Energy Transfer Partners, L.P. at 15-17 (Apr. 3, 2017) [hereinafter "Preliminary Findings"] (alleging that Rover's statements were "simply false") *with* Enforcement Staff Report at 58-63 (alleging that Rover made "misleading commitments" and "omit[ted] truthful information.").

[170] *See* Preliminary Findings at 11 (alleging that "Rover decided not to tell the Hunt family that it wanted to tear down the house"). Staff dropped these allegations.

somehow showed that Rover lacked the resolve to comply with the law.[171] Rover's continuous engagement with federal and state officials belies that assertion. And now, the Enforcement Staff Report also features—for the very first time—a new legal theory that Rover's parent company needed FERC approval for a regional operations center outside the Project's right-of-way that services multiple already completed projects in addition to Rover.[172] As explained below, Enforcement Staff's new theories, propped up by newly confected facts, are just as unavailing as those Enforcement Staff started with.

A. The Application Filings Were Not Misleading

1. The February 2015 Certificate Application Falls Outside the Limitations Period

As explained below, *see* Section V.C *infra*, the five-year statute of limitations has run or soon will on all of the alleged violations here. But even if the Commission concludes that an agency need only issue an Order to Show Cause within five years of a violation, the limitations period still has run for any alleged failures to comply with Section 157.5 in the February 2015 Certificate Application. That application predates the Show Cause Order by more than six years. Thus, Enforcement Staff proposes to bring a case challenging the completeness of a certificate application after the limitations period has long run on the alleged incompleteness of that application. That is reason alone not to bring an enforcement action.

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[171] *See* Preliminary Findings at 19 (making unsupported allegations that internal emails discussing how Rover could "make our compressor station look like a barn" evidenced that Rover "did not take FERC compliance seriously") & 20 (making unsupported allegations that Rover's conduct with respect to a project in Texas was improper).

[172] Enforcement Staff Report at 67.

2. The February 2015 Certificate Application Was Not Misleading.

If Enforcement Staff had timely challenged the statements in the February 2015 Certificate Application, that challenge still would have failed because Rover spoke truthfully in that Application, in compliance with Section 157.5. The Enforcement Staff Report's theory rests on two flawed factual allegations: (1) Rover made an "unrestricted" commitment in the Application to preserve the Stoneman House, and (2) it "concealed its plans to purchase the house as well as the possibility that it would demolish the house."[173] Rover did not make an unrestricted commitment to preserve the House, nor did it conceal anything—and certainly nothing it was obligated to disclose—about its plans for the House.

a) Rover Accurately Stated that It Intended to Mitigate the Project's Potential Effects on the Stoneman House.

The Enforcement Staff Report claims that Rover's February 2015 Certificate Application made two "unrestricted" commitments to preserve the Stoneman house.[174] Neither statement made an unrestricted commitment, and both statements were fully accurate.

The Enforcement Staff Report repeatedly relies on a truncated and out-of-context quotation from the Application to argue that Rover promised, without limitation, that "no adverse effects" of any kind would befall the Stoneman House from other causes.[175] The full passage from the Application reads as follows:

> Resource CAR0266012, an 1843 Federal House in Carroll County, is across a road from the planned location of the Mainline Compressor Station 1. No other prudent or feasible locations for this compressor station were identified, and Rover will consult with the Ohio SHPO to formulate a screening plan to eliminate

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[173] Enforcement Staff Report at 5, 70.

[174] *Id.* at 70.

[175] Enforcement Staff Report at 2, 5, 22, 23, 59, 60, 62, 70, 73 (quoting February 20, 2015 Application, Resource Report 4, at 4-11).

> any effects (visual and audial) related to the Project. Rover is committed to a solution that results in no adverse effects to this resource.[176]

Rather than present and analyze this paragraph as a whole, Enforcement Staff act as if Rover only wrote the final sentence. From that inaccurate rendition, Enforcement Staff contend that "no adverse effects" means all possible effects on the House from all possible sources that have any connection to Rover.

As an old saying goes, "take the text out of context and all you have is a con." Enforcement Staff's reading here is completely divorced from the context that Rover plainly set forth in the immediately preceding sentence. Rover explained in that sentence that there were no other "prudent or feasible" locations for the compressor station; it identified the limited nature of the effects that needed to be remediated (visual and audial); and it identified the only source of those project effects (the nearby presence of CS1). And, in case of any doubt, Rover expressly stated it would "consult with the Ohio SHPO to formulate a screening plan to eliminate any effects (visual and audial) related to the Project."[177] Rover's commitment to "a solution that results in no adverse effects" was therefore specific to "eliminat[ing]" *those* effects from *that* source by "formulat[ing] a screening plan."[178] It was not a freestanding open-ended commitment that the House would be protected from any effects of other origins without any time limitation.

Enforcement Staff's interpretation also disregards a second important contextual limitation: the understandings of all parties at the time of Rover's Application. At that time, third parties owned the only relevant properties—those near the planned location for CS1.

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[176] February 20, 2015 Application, Resource Report 4, at 4-11 (emphasis added).

[177] *Id.*

[178] *Id.*

Because those properties fell outside the Project's footprint,[179] the only potential impacts that needed to be considered were the indirect visual and audial effects of CS1 that an owner of each property would experience. The architectural survey described the relevant effects in that manner: effects on the "integrity of the location and setting due to proximity of the proposed aboveground compressor station in relation to the potentially eligible resource, as well as the unobstructed viewshed between the property and the proposed compressor station location."[180]

Contemporaneous documents also confirm that the only Project effects Rover believed it needed to consider were the visual and audial effects of the compressor station on nearby properties. The very email on which Staff heavily relies—from Thomason on February 10, 2015—proves this: "I know we are trying to buy the house, but what do I put in the filing? *That we don't think we'll have a sound impact over the FERC standard, and we will mitigate any visual impacts and leave it at that*?"[181] Mahmoud's response to Thomason confirms that Rover believed the sole issue was CS1's audial or visual effects. Mahmoud stated that Rover would be able to avoid those two types of effects. Referring to the owners of the Stoneman Property, he replied: "Even if they will not sell, we should not impact."[182] That was true. The Stoneman Property fell outside the Project's footprint, and screening would eliminate the Project's (*i.e.*, CS1's) only potential effects on any property along Azalea Road.

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[179] *See, e.g.*, Enforcement Staff Report at 14 (Figure 9.23 depicts an aerial map of the Property and Project area that shows no overlap). *See also* Fieseler Decl. ¶ 4 & Ex. A (attaching aerial photo of CS1 and the Property).

[180] Rover-00000881 at 881–82 (Architectural Survey Results—Mainline Compressor Station One).

[181] Rover-00000891 at 893 (Feb. 10, 2015 12:48 P.M. email from Thomason to Mahmoud and Banta) (emphasis added).

[182] *Id.* at 891 (Feb, 11, 2015 9:36 P.M. email from Mahmoud to Thomason and Banta); Enforcement Staff Report at 19.

The Enforcement Staff Report states that Rover had no power to limit its commitment because the nature and resolution of adverse effects are determined at the end of the consultation process.[183] But, unlike with some other applications, the resource at issue here was not within the Project footprint and the manner of mitigation (screening) was well-established and uncontroversial. Rover believed as much. And it was reasonable to do so, because it has always been clear—even in hindsight—that screening would eliminate the only Project effects on neighboring properties.

Rover's communications with FERC Project Staff at the time of the Application further prove that Rover was reasonable in its belief that CS1's visual or audial effects were the sole concern. The Enforcement Staff Report acknowledges that, from the very beginning, Resource Report 4 identified only a "visual effect evaluation" as necessary with respect to the Stoneman house.[184] According to FERC's own records, Project Staff stated the same thing at the February 5, 2015 pre-filing meeting: "staff met with representatives from Rover and expressed concern about potential visual impacts on the historic Stoneman house from a proposed compressor station to be sited across the street from the structure."[185] Project Staff asked—consistent with normal procedure—if it was possible to move CS1 to avoid these indirect effects, and Rover forthrightly explained the absence of an alternative that would not create its own adverse effects.[186] As a result, during the meeting FERC Project Staff "did not ask that the compressor

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[183] Enforcement Staff Report at 71-72.

[184] *Id.* at 12.

[185] *Id.* at 15 (quoting OEP timeline).

[186] Millis Decl. ¶ 7 ("[Project Staff] asked whether there were viable alternative locations for the compressor station and to the best of my recollection, Buffy Thomason on behalf of Rover stated that there were none.").

station be moved, and accepted that we did not believe that there were viable alternative locations."[187] The timeline later prepared by Project Staff confirms this. It makes no mention of an option to move the compressor station.[188] And even the Enforcement Staff Report admits it would have been "costly and technically difficult" to do so.[189]

The second statement in the Application that the Enforcement Staff Report describes as an "unrestricted commitment" to preserve the house was this: "Rover is committed to avoiding any Project impacts to all NRHP eligible resources."[190] That statement does not say what Enforcement Staff alleges. It addressed generally the mitigation for *all* resources along the entire pipeline route. It did not somehow negate Rover's more detailed statement specific to the Stoneman House. As explained above, when Rover committed to a "solution" that results in "no adverse effects to" the Stoneman House, it was referring to CS1's potential audial and visual effects, which would be addressed through a screening plan. Those are the same "Project impacts" that Rover "commit[ed] to avoid" in the same manner when it made this second statement that the Enforcement Staff Report cites. Rover honestly and accurately committed to alleviate CS1's effects (visual and audial) on the Stoneman Property and other surrounding properties.

b) Rover Did Not Conceal Necessary Information in the February 2015 Certificate Application.

The Enforcement Staff Report also accuses Rover of "conceal[ing] its plans to purchase" the Stoneman house and "the possibility that it would demolish the house" in its February 2015

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187 Patterson Decl. ¶ 8.

188 Dec. 5, 2016 FERC Project Staff Letter to ACHP at Enclosure 1.

189 Enforcement Staff Report at 17 n.73.

190 *Id.* at 70.

Application.[191] This comes down to Monday morning quarterbacking of a decision whether to disclose an event that may not even occur and that would not affect the mitigation of project effects even if it did. At the time of its Application, Rover did not even own the house, much less had it made a decision to remove it. Simply put, there was nothing "necessary" or pertinent" for Rover to leave out of the Application.

The emails cited in the Enforcement Staff Report make clear that Rover was only beginning to explore purchasing the Stoneman Property when it filed its Application. In fact, as the Enforcement Staff Report acknowledges, Rover's "first known effort to buy the Stoneman House" pre-dates the Certificate Application by a mere two weeks.[192] In that email, Banta asked for "a drawing with the house outlined" so he can "make sure" he is "going after the correct one,"[193] demonstrating that Rover had not yet even begun the purchase process.

The Enforcement Staff Report next cites an internal February 10, 2015 email that refers to Rover "*trying* to buy the house" (emphasis added), again showing that a possible purchase was still in the exploration stage.[194] And as of the day before Rover filed its Application, its negotiations to purchase were only in the early stages.[195] That reinforces the accuracy and completeness of Rover's statement that it was "committed to a solution that results in no adverse effects to" the house because it would "consult with the Ohio SHPO to formulate a screening

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[191] *Id.* at 5.

[192] *Id.* (citing Rover-00000684–85 (Feb. 6, 2015 email exchange between Thomason and Millis)).

[193] *Id.* at 16 (citing Rover-00000675 (Feb. 6, 2015 10:17 AM email from Banta to Thomason)).

[194] *Id.* at 5 (citing Rover-00000891-93 (Feb. 10, 2015 12:48 P.M. email from Thomason to Mahmoud and Banta)).

[195] *Id.*

plan to eliminate any effects (visual and audial) related to the Project." A possible purchase of the House at a later date did not affect that commitment.

Even assuming, incorrectly (as explained below), that Rover was ever obligated to disclose removal of the House, it would have been premature to saddle Rover with such an obligation in February 2015.[196] The Enforcement Staff Report concedes that even later—when Rover bought the House in May 2015—it had not decided to remove it. That would only happen "if necessary," contingent on future information.[197] That need did not arise until many months later.

The Enforcement Staff Report's contrary theory of what Rover had in mind simply makes no sense. Enforcement Staff contends that Rover included a supposedly open-ended commitment of causing "no adverse effects" "to encourage the Commission to view the Rover Pipeline project favorably."[198] But if Rover had already decided to remove the House, and if Rover thought that the quoted sentence would communicate an unqualified, false commitment to preserve the House under all circumstances, it would have left that sentence out of the Application. The rest of the paragraph *already* committed to a screening plan that would *eliminate* the *only* potential adverse effects of CS1 on neighboring properties. And, as documented above, there is no reason to believe Project Staff expected more of a commitment before they would have a "favorabl[e]" view as to this issue. Thus, Rover forthrightly disclosed the information relevant to the Project's potential effects on properties near CS1, and it honestly committed to avoid those effects.

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196 *Id.*

197 *Id.* at 2.

198 *Id.*

According to the Enforcement Staff Report, the February 19, 2015 email correspondence demonstrates that Rover already had decided to demolish the house.[199] But—putting aside the irrelevance of such an intent—a complete reading of the correspondence (rather than cherry-picking a sentence out of context) shows the opposite. Enforcement Staff's conclusion relies entirely on Vedral's statement in an email: "I remember Joey said to tear it down."[200] Even if Vedral was accurately recalling what Mahmoud thought at some earlier date, Rover's true intent on that date is revealed by the later messages in the *same* email chain. In these messages Vedral said he wanted to modify a term in the purchase agreement to bar the sellers from removing structures on the land.[201] Vedral also asked whether there was "any type of special protection for the historical house,"[202] prompting the response that "we will figure out everything else when we are the owners."[203] All of this is consistent with the truth: Rover deferred until later its decision whether it might be able to preserve the House by converting it to office space.

The Enforcement Staff Report also claims that Mahmoud admitted in testimony "his intent to tear down the house once Rover owned it."[204] That is a serious mischaracterization. Mahmoud instead testified that the decision to remove the House was not made until March or April 2016—more than a year later.[205] He explained that although the Rover pipeline itself may not have had a use for the House, Energy Transfer's Operations group needed to conduct its own

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199 *Id.* at 19–21.

200 *Id.* at 20–21 (quoting Rover-00001751-52 (Feb. 19, 2015 4:07 PM email from Vedral to Banta, Roberts, and Thomason)).

201 Rover-00001751 at 1751 (Feb. 19, 2015 5:20 P.M. email from Vedral).

202 *Id.* (Feb. 19, 2015 4:07 P.M. email from Vedral to Banta, Roberts, and Thomason).

203 *Id.* (Feb. 19, 2015 5:08 P.M. email from Banta).

204 Enforcement Staff Report at 21 (citing Mahmoud Test. at 92).

205 Mahmoud Test. 129:17-21.

evaluation to decide if the House could be used for broader purposes.[206] Enforcement Staff ignores this clear testimony on the timing, choosing instead to misrepresent an answer earlier in the testimony when Mahmoud merely agreed that "[i]t was always part of our plan" to tear the house down.[207] Mahmoud went on to explain that the *potential* for such teardowns is built into the plans for *every* Energy Transfer property purchase of this nature, because "if there's structures on those properties that we're not going to utilize, we typically get rid of those."[208] That is entirely consistent with Mahmoud's testimony—when he was asked directly about timing—that the decision to remove the House came only a year later, after Operations conducted its review.

In sum, setting aside that the statute of limitations has run on statements Rover made in the February 2015 Application, that Application complied with Section 157.5.

3. Rover's April 22, 2015 Response to the Environmental Information Request Regarding Resource Report 4 Was Not Misleading.

The Enforcement Staff Report also states that Rover could be held liable for "failing to disclose" in its April 22, 2015 response[209] to a data request regarding Resource Report 4, that it was "negotiating to purchase the House."[210] But, setting aside that this allegation is also indisputably barred by the statute of limitations, the information Rover allegedly "fail[ed] to disclose" would not have been responsive to the request. Project Staff requested that Rover "[p]rovide any resulting Ohio SHPO correspondence and any treatment plan to mitigate potential

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206 *Id.* 129:24-30:11.

207 Enforcement Staff Report at 21 (citing Mahmoud Test. 92).

208 Mahmoud Test. 92:24–93:1.

209 Rover Pipeline LLC Response to Environmental Information Request, Docket No. CP15-93 (filed Apr. 22, 2015) [hereinafter "April 22, 2015 EIR Response"].

210 Enforcement Staff Report at 59 n.253.

adverse effects to architectural resource CAR0266012 (1843 Federal House)."[211] Rover responded, "Comments have not yet been received from Ohio SHPO regarding the Phase 1 Survey Report so consultations have not been initiated regarding mitigation plans for this resource."[212] That response was truthful and complete regardless of who owned the House. The Enforcment Staff cite an email in which Thomason states "I haven't decided how much of that I want to say yet" as evidence that Rover "expressly contemplated whether to inform the Commission of the potential purchase" in the April 22, 2015 response.[213] But the obligation is to include information "necessary" or "pertinent" to an application; the regulation does not require the applicant to advise the Commission of *all possible* information.[214] This is particularly true where, as here, the applicant considered the information but then correctly determined that it was neither necessary nor pertinent. The same email also makes clear that the purchase had not yet closed and would not be expected to close for "a few weeks."[215] It did not close until May 11, 2015.[216]

4. Rover's March 25, 2016 filing (Draft Environmental Impact Statement response) Was Not Misleading.

a) Rover Did Not Omit or Conceal Important Information From its March 25, 2016 Response to the DEIS.

The Enforcement Staff Report is also wrong in alleging that Rover's March 2016 Response to the DEIS omitted and concealed important information. Enforcement Staff assert

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211 April 22, 2015 EIR Response at 91 (italtics omitted).

212 *Id.*

213 Enforcement Staff Report at 62 (quoting Rover-000004293 at 4293 (Apr. 11, 2015 2:57 P.M. email from Thomason to Millis)).

214 *See* 18 C.F.R. § 157.5.

215 Rover-000004293 at 4293 (Apr. 11, 2015 2:57 P.M. email from Thomason to Millis).

216 Sept. 26, 2016 EIR Response at Attachment 1.

that Section 157.5 obligated Rover to disclose three things: it had previously purchased the Stoneman House; it had "long-considered demolition" of it; and it "was in the midst of finalizing plans to demolish" the House.[217] Not only does the Enforcement Staff Report badly misrepresent the record, this allegation reflects a fundamental misconception of the Commission's NEPA and NHPA processes.

According to Enforcement Staff, Rover had an obligation to "provide a full and forthright update on the status of the Stoneman House."[218] This line of reasoning starts with Enforcement Staff's point that the DEIS "addressed the Stoneman House issue directly," stating that "'[i]f adverse effects to the resource cannot be avoided, a treatment plan to mitigate the potential adverse effects would be required.'"[219] According to Enforcement Staff, because the DEIS mentioned the Stoneman House, Rover's submission of a visual screening plan for CS1 as part of its DEIS Response "perpetuated and advanced [a] misrepresentation" in its Application. The alleged misrepresentation, says Enforcement Staff, was that Rover said it was "committed to a solution that results in no adverse effects."[220] Enforcement Staff deem this statement incompatible with the fact that Rover had already purchased and had plans to remove the House.[221]

The first problem with Enforcement Staff's theory has already been laid out above. Just as the February 2015 Application did not commit to protecting the Stoneman House from any effect of unspecified origins, the DEIS Response only reaffirmed a commitment to addressing

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[217] Enforcement Staff Report at 59 n.253.

[218] *Id.* at 61.

[219] *Id.* (citing DEIS at 4-207).

[220] *Id.* at 61-62.

[221] *Id*.

the Project effects in the area, which were limited to CS1's indirect potential visual and audial effects. The Response did not make an unlimited commitment unbounded in scope and time. The Enforcement Staff Report assigns fault to Rover's submission for "convey[ing] that the adverse impact at issue was merely audial and visual."[222] But that proves Rover's point. Rover reasonably understood, based on all of its interactions with the SHPO and Project Staff, that Rover needed to mitigate *those* effects. And, as the Enforcement Staff Report admits, Rover was forthright in disclosing that understanding. It is Enforcement Staff that misunderstands the nature of the mitigation commitment, not Rover. Indeed, Enforcement Staff offers no evidence suggesting that anyone else (FERC Project Staff or the Ohio SHPO) believed that this commitment extended further than those potential audial or visual impacts.

In addition, Rover was already consulting with the Ohio SHPO on potential adverse impacts to resources in Ohio, including the Stoneman House. And, at about the same time as this DEIS Response, Rover notified the SHPO that Rover had purchased the House. Rover reached a decision to remove the House, and it told the SHPO that too. That is consistent with the expectation that the DEIS set forth for cultural resources in Section 4.10.[223] In particular, the language in Section 4.10.1.3 summarized the Ohio cultural resource analysis that had been completed to date, including for the Stoneman House.[224] That section noted that "Rover has not yet provided" to Project Staff "the Ohio SHPO's comments on the architectural survey report."[225] The reason is simple—Ohio SHPO *had not yet provided those comments to Rover*—and it reinforces that Rover's work with the SHPO was still in process.

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[222] *Id.* at 62.

[223] *See* Enforcement Staff Report at 61 (citing DEIS at 4-207).

[224] DEIS at 4-207.

[225] *Id.* at 4-207.

The Ohio SHPO was also Rover's principal point of contact until SHPO consultation was completed. Consistent with the Commission's standard DEIS format, the cultural resources portion concludes with a section that provides Project Staff's recommendations and outstanding items on the subject.[226] As to each item, the DEIS asked for materials that would be prepared and submitted only after Rover completed consultation with the SHPO. Consistent with applicable regulations, FERC delegated those consultation responsibilities to Rover and directed Rover to file the resulting documents for approval.[227] Indeed, the DEIS explicitly noted that "Rover is assisting the FERC to meet [its] obligations under Section 106 by preparing the necessary information, analyses, and recommendations as authorized by 36 CFR 800.2(a)(3)."[228] Therefore, Rover forthrightly responded that it "will continue to work with the State Historic Preservation Officers (SHPOs) concerning cultural resources as requested and will provide an update on the status of the cultural resources by or before April 1, 2016."[229]

As this shows, when Rover submitted its DEIS response on March 25, 2016, it was still in the process of consulting with the SHPO on the Project's impacts and preparing the relevant documents. The Enforcement Staff Report acknowledges that Rover met with Ohio SHPO a few days later.[230] Rover advised the SHPO at the meeting that it had purchased the Stoneman House,

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226 *Id.* at 4-211–12.

227 *Id.*

228 *Id.* at 4-205.

229 Response to DEIS at 23. This section of the DEIS largely mirrors the requirements of the FERC regulations that a project sponsor must file all the reports, evaluations, and treatment plans prior to the issuance of the certificate. *See* 18 C.F.R. § 380.12(f)(2).

230 Enforcement Staff Report at 61 n.264 ("Three days later, on March 28, 2016, Rover discussed internally whether to tell the Ohio SHPO of its plans to destroy the Stoneman House and decided not to do so. Email between Heather Millis and Buffy Thomason (Mar. 28, 2016) Rover-00012116-12119. In a meeting with the Ohio SHPO the next day, Rover told the SHPO for the first time that it had purchased the house, but still did not reveal its plans to destroy it. Adkins Test. at 38; Thomason

followed soon thereafter by Rover's notification to the SHPO that the House would be removed. Rover reasonably understood from the DEIS, as well as established practice from other projects, that was the process Project Staff expected. Rover would work out the details of cultural resource impacts and treatment plans through consultation with each SHPO before involving Project Staff.[231] This is confirmed by the Ohio SHPO staff themselves, who noted that Project Staff were leaving these matters to the SHPO.[232] Consistent with that approach, Rover advised the SHPO of the purchase of, and then the plan to remove, the Stoneman House as part of its continued consultations to reach agreement on the extent of project impacts and how to mitigate them in order to generate the documents FERC requested in the DEIS. Rover did not omit any material information from its March 26, 2016 DEIS submission.

As for Rover's visual screening plan, Rover submitted it in response to a different DEIS section related to general visual impacts—*i.e.*, one of the categories of impacts that must be assessed under NEPA *regardless* of a resource's historical status under the NHPA. For those types of impacts, DEIS Section 4.8.7.2 states:

> Mainline Compressor Station 1 would be constructed within agricultural land and would abut Azalea Road. There are several residences along Azalea Road that would face the compressor station and have a direct line of sight to the facilities. During construction, these residences would be able to view construction equipment and workers. Once the facility is constructed, residents would be able to see most of the buildings and structures, as well as the lighting within the facility and the fences surrounding these areas. Several of the residences have vegetation buffers on their property that may help screen views of the compressor station. Visual impacts during operation would be moderate and permanent.

DEIS at 4-180. This DEIS section plainly was not limited to CS1's visual impacts on the

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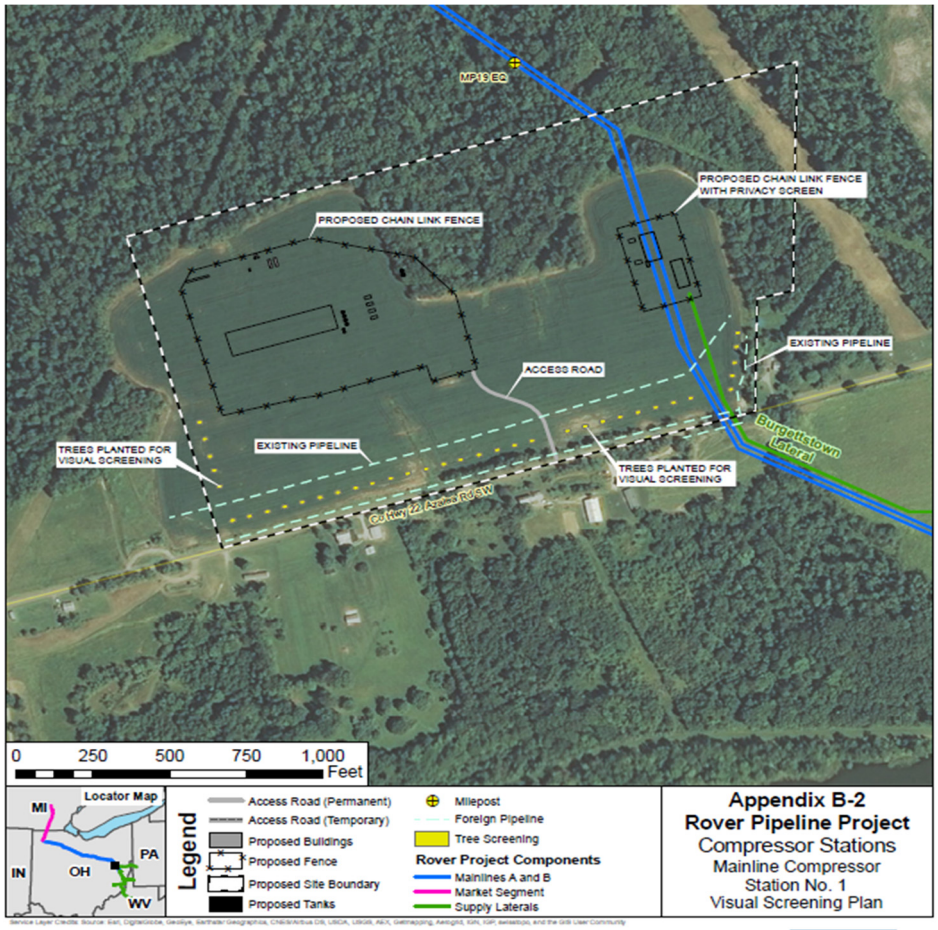
Test. at 221.").

[231] *See* DEIS at 4-111–12 (requesting copies of the SHPO's comments, evaluations, and treatment plans).

[232] Rover-00012163 at 12163 (Mar. 29, 2016 2:23 P.M. email from Thomason to Patterson ("Yeah, Dave [at the Ohio SHPO] is upset because FERC hasn't been talking to them. Then I made the mistake of asking if they got the DEIS, and he said that was NOT talking to them, that was throwing paper at them.").

Stoneman House; instead it invited a screening plan "to minimiz[e] the visual impacts on nearby property owners and residences" more generally—in fact "several residences."[233] Rover properly responded by submitting a visual screening plan for CS1 that included painting the facilities to make their appearance blend in, installing slats in the security fencing, and planting trees to obscure the facility.[234] As part of this plan, Rover provided the following diagram cited by Enforcement Staff in Appendix 8E:



Rover Resp. to DEIS, Appendix 8E at B2-7. The Stoneman House is shown in the diagram on the left-hand side, next to the words "Co. Hwy. 22." As the diagram shows, visual screening was

[233] DEIS at 4-180 (bold omitted).

[234] Response to DEIS 22, Vol. IIA, App. 8E.

needed for other properties in the area (under NEPA), regardless of any separate need to screen views from the Stoneman Property (under the NHPA).

Enforcement Staff's allegation that Rover's submission of this visual screening plan "furthered Rover's misrepresentation by conveying that the adverse impact at issue was merely audial and visual"[235] is nonsensical. The adverse impact of the federal undertaking under the NHPA (*i.e.*, the construction of the Rover pipeline) on the Stoneman House indisputably *was* merely audial and visual—the Property on which the House was built was across the street from the compressor station and would not be directly impacted by Project construction. The construction of a regional operations office for Energy Transfer was not part of the federally authorized Project. Nor, for that matter, would it have been part of the Project if Energy Transfer had decided to remove the House to avoid nuisance problems. The obligations to provide all "necessary" and "pertinent" information in 18 C.F.R. § 157.5 applies to construction "for which a certificate is requested." The Enforcement Staff Report concedes that the purchase and ultimate removal of the House were related to the Company's intent to use the property as a base of operations for multiple regional assets. Such information is not required under Section 157.5, much less is it "necessary" or "pertinent" to a *different* project. Enforcement Staff have never alleged (nor could they credibly) that office and storage space for regional assets are part of the Project.

Rover was under no duty to include in its Response to the DEIS the change in ownership of the Stoneman House or Rover's later plan to remove it. And its contemporaneous communication of both of these facts to the SHPO confirm that Rover was consulting in good

[235] Enforcement Staff Report at 62.

faith on mitigation relevant to both NEPA and the NHPA. Those communications likewise disprove the suggestion that Rover was trying to conceal its plans for the House.

b) Rover's Landowner Lists Did Not Violate Section 157.5 Either.

The Enforcement Staff Report asserts that when Rover submitted its DEIS response it included "landowner lists" that "falsely claimed that the [Stoneman] house was still owned by the prior owners."[236] This meritless effort to manufacture an affirmative misrepresentation from landowner lists is itself highly misleading. Enforcement Staff have knowingly concealed from the Commission the fact that the purpose of the lists is entirely inconsistent with Enforcement Staff's theory. Landowner lists are required so that affected landowners know they have the right to comment on a proposed project. There is no question that the owner of the Stoneman Property was given that opportunity. Rover mailed its initial notices to the family that owned the Stoneman Property. And updated lists are used to correct mailing addresses when the original notices come back undeliverable. Had Enforcement Staff disclosed to the Commission the true purpose of the landowner lists in the Enforcement Staff Report, it would have been clear that nobody at Rover used the landowner lists to try to mislead the Commission into believing the Stoneman House still belonged to its original owners. In fact, to the best of our knowledge, the Commission has never before used landowner lists to support a theory like the one Enforcement Staff has invented here.

FERC directs project applicants to create landowner lists so that property owners who are potentially affected by a project can comment on those potential effects. To that end, FERC's regulations governing Natural Gas Act permits state that the "applicant shall make a good faith

[236] Enforcement Staff Report at 6.

effort to notify all affected landowners" through certified mail and by publishing a notice of the application in a local newspaper.[237] "[A]ffected landowners include[] owners of property interests, as noted in the most recent county/city tax records as receiving the tax notice, whose property . . . [a]buts either side of an existing right-of-way or facility site[.]"[238] Among other requirements, the notification must describe the project, explain how the project will impact the community, and inform property owners of their rights.[239] The requirement to notify nearby landowners promotes stakeholder participation in the siting process.[240] Rover complied with these requirements by, among other things, sending notice by certified mail using the most recent tax records to identify affected landowners, including the owners of the Stoneman Property.

The Enforcement Staff Report does not challenge the accuracy of Rover's initial landowner lists. Instead, it asserts that an updated list was false because it did not update the ownership of the Stoneman Property to show that it changed hands. Updated lists serve the same purpose as the initial lists: getting notification to affected landowners. The regulation requiring updated lists seeks to address a particular problem in that notification effort: the U.S. Postal Service sometimes returns notices as undeliverable, typically because the intended recipient has moved. The regulation states that "[i]f the notice is returned as undeliverable, the applicant will make a reasonable attempt to find the correct address and notify the landowner."[241] Soon after the applicant makes that effort, it "shall file an updated list of affected landowners, including

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[237] 18 C.F.R. § 157.6(d)(1).

[238] *Id.* § 157.6(d)(2)(ii).

[239] *Id.* § 157.6(d)(3).

[240] *See Dominion Transmission, Inc.*, 155 FERC ¶ 61106, 2016 WL 1723521, at *30 (Apr. 28, 2016).

[241] 18 C.F.R. § 157.6(d)(4).

information concerning notices that were returned as undeliverable."[242] The Commission "adds the names and addresses to its environmental mailing list for the project."[243]

This landowner list purpose—notifying affected landowners of a project—is confirmed by the requirement that the applicant file an environmental report that "[p]rovide[s] the names and mailing addresses of all affected landowners specified in § 157.6(d) and certify that all affected landowners will be notified as required in § 157.6(d)."[244] FERC's Guidance Manual provides that "[t]o facilitate use by Commission staff in mailing notices (e.g., Notice of Intent to prepare an EA or EIS, or Notice of Availability of a draft or final EIS) [FERC] recommend[s] . . . provid[ing] updated lists as warranted based on route modifications, returned mailings, or other new information."[245]

All of these provisions show that the purpose of updating lists is to confirm that the applicant has both identified the subset of "affected landowners" whose notices were "undeliverable" and "ma[de] a reasonable attempt to find the correct address and notify the landowner."[246] FERC Guidance confirms this, stating: "If any notice is returned as undeliverable, you must make a **reasonable attempt** to find the correct address and notify the landowner. You must file an updated list of landowners within 30 days of the date the application was filed, including information concerning any notices that were returned as undeliverable."[247] Nothing requires the applicant to update entries on its landowner lists in the

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[242] *Id.* § 157.6(d)(5).

[243] *Transcontinental Gas Pipe Line Co.*, 155 FERC ¶ 61016, 2016 WL 1533030, at *7 (Apr. 7, 2016).

[244] 18 C.F.R. § 380.12(c)(10).

[245] Guidance Manual for Environmental Report Preparation, Vol. I, § 4.1.7 at 4–36 (Feb. 2017) [hereinafter "Guidance Manual"].

[246] 18 C.F.R. § 157.6(d)(4) & (5).

[247] Guidance Manual, § 2.1 at 2–3 (Feb. 2017).

scenario that applies here: (1) the notice *was* delivered to the affected landowner, and (2) that owner sold his or her property after receiving the notice. If that were required, nearly every updated landowner list for a large project would be in violation of the regulations.

Rover's landowner lists complied with the notification regulations. On multiple occasions during the permitting process—October 2014, June 2015, and March 2016—Rover submitted landowner lists to FERC. Three categories of landowners were affected, resulting in three categories of lists: those whose property was along the mainline (mainline list), adjacent to the pipeline (abutter list), or near a compressor station (compressor list).[248] Rover properly updated the landowner lists as warranted. If, for example, the pipeline's route changed—thereby creating new "affected landowners"—Rover updated the mailing list by adding the new landowners.[249] And when notices were returned as undeliverable, Rover made a good faith effort to find the correct address and revised the list to add the new information.[250]

In 2014, Rover identified each of the 3,500 affected landowners along the pipeline route using then-current county tax records.[251] Those records correctly listed Barbara Hunt as the owner of the Stoneman Property at 8468 Azalea Road. When Rover sent its first landowner list to FERC in October 2014, it therefore identified Barbara Hunt as the Property's owner.[252]

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[248] Vedral Decl. ¶ 15 (also noting that there were "thousands of tracts on each list."); *see also id.* ¶ 17 ("Rover included properties within a broader radius to insure that all potentially affected tracts were on the lists.").

[249] *Id.* ¶ 18.

[250] *Id.* ¶ 20; *see also* 18 C.F.R. § 157.6(d)(4) ("If the notice is returned as undeliverable, the applicant will make a reasonable attempt to find the correct address and notify the landowner.").

[251] Vedral Decl. ¶ 19.

[252] *Id.* ¶ 15.

In March 2015, Rover notified "affected landowners," including Barbara Hunt, about the project, in accordance with 18 C.F.R. § 157.6(d).[253] Rover's notification to Barbara Hunt was not returned as undeliverable because she lived at the address to which the notice was mailed: 8468 Azalea Road.[254] In June 2015, Rover submitted landowner lists to FERC that again listed Barbara Hunt as the property owner as defined by the regulations, because she had been "noted in the most recent county[] tax records as receiving the tax notice,"[255] and her notification was not returned as undeliverable. When Rover submitted its mailing lists in March 2016, it followed the regulation again by updating the addresses for notices that had been returned as undeliverable. Because the notice previously sent to 8468 Azalea Road had not been returned as undeliverable, no change was made to that entry. Unless an original notice came back undeliverable, all of the other original entries on the list remained unchanged too.

There is no evidence—none whatsoever—that anyone who was involved in updating the landowner lists at Rover paid any attention to the thousands of entries where a notice did *not* come back undeliverable. This was not a situation where a change in the project route resulted in newly affected properties. And barring such circumstances, Rover's practice is to change an entry on an existing list *solely* to account for notices returned as undeliverable.[256] RoverThe Company "did not revisit tax card information for tracts already on a list (unless a specific error was identified), because the tax identification number and street address do not change."[257] And

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253 *Id.* ¶ 20.

254 *See id.* ¶ 21.

255 18 C.F.R. § 157.6(d)(2).

256 Vedral Decl. ¶ 20 ("It was our policy that when we received mail back as undeliverable, we would attempt to update and correct the landowner's information.")

257 *Id.* ¶ 22.

Rover especially had no reason to update the mailing list if Energy Transfer purchased a property for which the original notice was deliverable, because "the purpose of the lists is to provide notice to landowners" and that "purpose is fulfilled automatically when the company is the landowner."[258]

This all aligns with industry practice, FERC Guidelines, and the lists' purpose. It cannot come as a surprise to Enforcement Staff that affected properties will change hands on many projects, especially projects that take years to complete. Yet neither Enforcement Staff nor Project Staff have ever previously complained to Energy Transfer—or any other company to our knowledge—that a landowner list failed to list the new owner of a property that changed hands after the applicant properly notified the original owner with a mailing that did not come back undeliverable.

FERC points to Mahmoud's testimony as its sole evidence that Rover intentionally sought to deceive the Commission by submitting an updated landowner list showing Barbara Hunt as owner of the House at 8468 Azalea Road. But Mahmoud's testimony shows the opposite. When asked whether Rover ever notified the Commission of Rover's ownership of the Stoneman House, Mahmoud testified that he "believe[d] we told FERC that we own the house" but that he "d[idn't] know exactly. But I think it's somewhere out there. I thought we told them we owned the house."[259] When pressed, Mahmoud speculated that "it would have been in our landowner list for sure."[260]

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[258] *Id.* ¶ 23.

[259] Mahmoud Test. 127:18–22.

[260] *Id.* 127:25–128:1.

Enforcement Staff twists Mahmoud's mistaken belief that the Company included Rover as the owner of the Stoneman House on one of the mailing lists as evidence that Rover intentionally omitted its ownership from those lists. But if Rover had intentionally plotted to use the landowner lists as part of a scheme to conceal ownership of the House from the Commission, the last thing Mahmoud would have done is tell Enforcement Staff to look at the ownership information on those lists. The fact of the matter is that no evidence shows that anyone was ever directed to leave Rover's name off the lists. None.

In addition, no evidence supports Enforcement Staff's suggestion that Project Staff use mailing lists to identify landowners for anything other than ensuring that interested parties have the chance to participate in the process—which indisputably happened here. Nor is there any suggestion that the identity of landowners who may have purchased an affected property after the original owner was notified is "necessary" or "pertinent" to FERC's consideration of the Application, as contemplated by Section 157.5. Indeed, FERC *routinely* grants applications notwithstanding irregularities in the landowner lists or changes in property ownership.[261] Staff has not pointed to a single instance of denying, or even criticizing, an application because the applicant did not go back to the county tax record months or even years after an initial notice to determine if properties had changed hands after the original owner received notice. That is because the *only* purpose of the lists is to "facilitate use by Commission staff in mailing notices" to the landowners at the time of the notices, in order to promote stakeholder participation in the

[261] *See Dominion Energy Cove Point LNG*, 162 FERC ¶ 61056, 2018 WL 548643, at *7 (Jan. 23, 2018) (rejecting claim that public comment period should be extended due to improper notice); *Transcontinental Gas Pipe Line Co.*, 157 FERC ¶ 61095, 2016 WL 6662547, at *13 (Nov. 9, 2016) (rejecting claim of improper notice, noting that aggrieved landowner was able to "intervene[] and meaningfully participate[] in the proceedings").

siting process.[262] If this matter proceeds beyond the Show Cause stage, Rover intends to depose Project Staff and subpoena documents to prove that they have not used landowner lists for any other purpose.

If accepted, Enforcement Staff's novel theory would impose an obligation to continually update mailing lists for changes in ownership even though the original owner received notice of, and had a full and fair opportunity to comment on, the Project. That proposed obligation is not grounded in the regulatory text, conflicts with clear FERC guidance, is divorced from the purpose of the lists, imposes onerous and unnecessary burdens on Project proponents, and would cause the Commission to be continually bombarded with irrelevant information. And above all, such information is neither "necessary" nor "pertinent" to the Commission's consideration of the application. Rover committed no violation when it submitted an updated landowner list.

5. Rover Did Not Subsequently Conceal Its Purchase or Removal of the Stoneman House.

The Enforcement Staff Report contends that Rover had an affirmative duty to update Project Staff of changes in the ownership or status of the Stoneman house. But Section 157.5 limited Rover's disclosure duty to "pertinent data and information necessary for a full and complete understanding of the proposed project." Neither the purchase nor the removal of the house was necessary to a full and complete understanding of the Project. As explained above, whatever the ownership or status of the House, the Project's only possible effects on the Stoneman Property were CS1's visual or audial effects of which Project Staff were already aware.[263] Rover devised a plan that eliminated those indirect visual effects, and no changes were needed for audial effects because the sounds that CS1 produced were below the relevant decibel

[262] Guidance Manual § 4.1.7.

[263] *See* Sections II.D & V.A.2 *supra*.

threshold. The means for addressing visual effects (a screening plan) were also implemented without regard to who owned the Stoneman House or whether it remained intact, because the same effects needed to be mitigated anyway for multiple other nearby properties.[264]

Enforcement Staff suggest that Rover's ownership would have expanded the menu of options for avoiding adverse effects, including "relocating the compressor station, moving the house to another location, donating the house to be maintained by a historic society, documenting the historic house by photograph, measured drawings, video, or other archive techniques, or taking other mitigating measures."[265] None of that is true. Project Staff never once disagreed with Rover that "relocating the compressor station" was infeasible. And Project Staff never requested that CS1 be relocated. Nor would the Property owner's identity have had any bearing on other CS1 location options had there *been* other options. Likewise, Project Staff never suggested that the *House* needed to be moved, nor do Enforcement Staff explain why that option was unavailable if the Property remained in the hands of the original owner or how that option would have avoided an adverse effect to the House's "viewshed" (it wouldn't). Moving the house was *never* on the table, because the purpose of the mitigation, based on how the Project affected the house, was limited to CS1's potential visual and audial effects.[266] None of the other "options" hypothesized in the Enforcement Staff Report (such as documenting or donating the house) would have been responsive to these limited indirect effects either. Nor does the Enforcement Staff Report explain why Rover would have been motivated to avoid something

[264] *See* Sections II.F & V.A.2 *supra*.

[265] Enforcement Staff Report at 63.

[266] *See* Sections II.D & V.A.2 *supra*.

as simple as allowing someone to take a video of the House. Rover did not need to disclose that it owned the House because its ownership was neither "necessary" nor "pertinent" information.

Rover acted reasonably in reaching this conclusion. Energy Transfer's outside counsel for the Project, Lisa Tonery, reached out to FERC staff before the House was removed. She had a contact there: Paul Friedman, an Archaeologist and Senior Technical Expert for Cultural Resources with 28 years of experience at the Commission. Tonery asked Freidman whether it was permissible to remove an historical structure that is situated outside a project's footprint. Tonery reported the results of her call to Buffy Thomason, who wrote in an email that Friedman "ultimately said if it wasn't listed on the NRHP and it's not on the pipeline, then it's a non-issue."[267]

Enforcement Staff calls this email a "single, third-hand communication indicating that a conversation between Tonery and Friedman occurred."[268] But Staff cannot seriously dispute the reliability of this contemporaneous evidence, which shows Rover reasonably believed that removal of the House was neither necessary nor pertinent to the Commission's consideration of the project. And it is not a "single" email. It is corroborated by Thomason's similar contemporaneous summary to Millis and Peterson stating that "Lisa, our FERC attorney, talked to Paul Freedman [sic], and he said that if the house isn't listed on the historical register and isn't on the pipeline route, then its fair game."[269]

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267 Rover-00012712 at 12712 (Apr. 13, 2016 12:48 A.M. email from Thomason to Banta and Mahmoud).

268 Enforcement Staff Report at 76.

269 Rover-00067994 at 67994 (Apr. 13, 2016 12:42 P.M. email from Thomason to Millis and Patterson). Thomason admitted she was "not totally convinced" of the answer, but given that Friedman was presented with the relevant facts, it was "good enough for" her. *Id.*

Enforcement Staff counter with an affidavit from Friedman that is most notable for what Friedman does *not* dispute. Instead of denying that the conversation with Tonery occurred, Friedman all but admits to it. Consistent with Tonery's account, Friedman admits he has known Tonery for years, that they spoke every few months, and that she "has informally asked [him] about hypothetical or theoretical scenarios involving cultural resources"—exactly the type of conversation that Tonery had with him about the Stoneman House.[270] And the informal guidence he gave was correct—that there would be no issue with removing a house that is neither on the NRHP list nor in the pipeline's path. Friedman's declaration does not dispute this, nor could his advice be affected by whether he was assigned to the project. Surely Friedman does not have one answer for projects to which he is assigned and a different answer for all others. Nor was there reason for Rover to think that other "FERC Staff" would disagree with him.[271] If a property is not listed on the Register and is not in the right away, then it's a "non-issue." Nothing in Friedman's declaration disputes any of this.

The Enforcement Staff Report asserts that a conversation between Tonery and Friedman would have been "hypothetical or theoretical" and therefore "not … an example of full, complete, and forthright information."[272] But that begs the question. What more did Friedman need to know? Would giving him the house's name have changed his answer? No. What mattered is what he was told: it was an eligible (historic) building; it wasn't on the NRHP; and it wasn't in the pipeline right-of-way. His answer to the question posed to him—it can be removed—would not have changed had he known other particulars.

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[270] Enforcement Staff Report at 77 (quoting Friedman Decl. ¶ 4).

[271] *Id.* at 76 (complaining that Rover "did not seek or obtain any manner of endorsement for destroying the Stoneman House from FERC staff").

[272] *Id.* at 77.

Rover already had good reason to believe that information about the removal of the House was neither "necessary" nor "pertinent" to "a full and complete understanding of the proposed project," and Tonery's conversation with Friedman about the facts that applied to the Stoneman House confirmed the understanding. Rover had no reason to believe that Friedman would have given a different answer had he known the name of the House: as Heather Millis explained, it is common practice to use anonymous inquiries when gathering information of this nature.[273] And Rover already confirmed that no local or state laws prevented the removal of the House. Because Rover confirmed that its plans for the House were not "pertinent" to a full and complete understanding of the Project, it did not violate Section 157.5.

The Enforcement Staff Report also wrongly accuses Rover of knowing it needed to disclose its plans for the Stoneman House but concealed them anyway. Any doubt about Enforcement Staff's error is removed by Rover's contemporaneous actions: Rover disclosed those *same* plans to the SHPO during the *same* period. Enforcement Staff acknowledge that at a meeting just two business days after Rover's DEIS Response, Rover told the SHPO that it owned the Stoneman House, and just a week later Rover told the SHPO that it was going to remove it.[274] If Rover had concealment in mind, it picked a very poor way to pull it off.

Enforcement Staff try to distract from that obvious weakness in their theory by quibbling over an irrelevant detail: it is "unclear" to Enforcement Staff "whether Rover advised in the [March 29, 2016] meeting that it had owned the house for nearly a year."[275] It made no difference to possible future effects and future mitigation when ownership had changed hands.

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[273] Millis Decl. ¶ 4.

[274] Enforcement Staff Report at 35–36.

[275] *Id.*

Nor do Enforcement Staff explain how it matters under Section 157.5 that Rover told the SHPO of its ownership of the House and plans to remove it in separate conversations merely a week apart.[276] The irrefutable facts are that Rover told the SHPO that Rover would be removing the House, and then followed its oral disclosure up in writing: "[P]lease accept this email as documentation Rover intends to remove the Stoneman house (CAR-266-12) and associated buildings from the property."[277]

According to the Enforcement Staff Report, Lisa Adkins at the SHPO has testified that she "expected more information to follow" the email documenting Rover's plan to remove the House.[278] In particular, the SHPO supposedly expected additional consideration of alternatives.[279] But whatever Adkins may have been *thinking* would follow Rover's email, the fact of the matter is that she communicated none of her thoughts to Rover. Instead, the Enforcement Staff Report relies on an email from Adkins to a colleague at the SHPO stating, with reference to Thomason's email: "And, this is all I got from her. To be continued."[280] Adkins did not share this comment or her expectations with anyone at Rover. Nor is there any evidence that Adkins or anyone else at the SHPO acted on her expectation. Enforcement Staff offers no evidence suggesting that anyone at the SHPO reached out to Rover for more information during the ensuing weeks. In fact, the SHPO did not respond at all to Rover's email notification of plans to remove the house. The SHPO did not object to the plan, nor did it ask

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276 *Id.*

277 Rover-00012231 at 12231 (Apr. 5, 2016 2:02 P.M. email from Thomason to Adkins).

278 Enforcement Staff Report at 36–37.

279 *Id.*

280 Enforcement Staff Report at 37 n.160 (quoting email from Lisa Adkins to Dave Snyder (Apr. 5, 2016)).

Rover to delay for added consultation. In the absence of any communication from SHPO, Thomason understood that her email had satisfied Adkins' request that she "please document their decision and provide us with information so that we knew what was going on with the house."[281]

Rover also did not rush ahead to remove the House before the SHPO could respond. Nearly two months (from April 5 until the end of May) passed before Rover removed the house. Contemporaneous emails confirm Rover's understanding that the SHPO did not object to the removal. As Thomason explained to others at Rover: "I am good with [the removal]. The SHPO has been informed. I haven't heard anyone cry about it."[282] It took the SHPO until August 12, 2016, four months after learning of Rover's plans to remove the House, to communicate again on the topic as part of a letter addressing effects along the entire route in Ohio. Even then, the only Project effects that the SHPO mentioned relevant to the Stoneman House were those caused by "proximity to [CS1]," *i.e.*, the potential visual and audial effects, and the SHPO yet again proposed no mitigation beyond the screening that Rover had already identified to address CS1's visual effects on the entire neighborhood.[283]

B. Rover's Response To The September 2016 Environmental Information Request Was Not Misleading

The Enforcement Staff Report's remaining allegations that Rover violated Section 157.5 are based on Rover's response to a September 2016 Environmental Information Request ("EIR") from Project Staff. Out of that lengthy response, the Enforcement Staff Report finds fault in just two discrete statements. Neither statement was inaccurate or misleading.

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[281] Adkins Test. 48; Thomason Attestation ¶ 8.

[282] Rover-00012826 (May 18, 2016 9:47 P.M. email from Thomason to Banta).

[283] Sept. 26, 2016 EIR Response Attachment 3 at 34–39 (Aug. 12, 2016 Letter from the SHPO to Heather Millis at 4).

1. Rover Accurately Stated that It Purchased the Property with the Intent of Converting the House into an Operations Office.

The Enforcement Staff Report alleges that Rover's EIR response inaccurately described how the Company intended to make use of the Stoneman Property, including the House, at the time of the purchase.[284] This response stated that Rover bought the Property "with the intent of converting the House into an operating office for Energy Transfer Company (ETC) owned and affiliated operating assets in the region."[285] Staff claims this is misleading because, according to Staff, Energy Transfer always intended to remove the House. The record repeatedly and conclusively shows that allegation to be wrong.

The overwhelming evidence shows that when Energy Transfer purchased the Stoneman Property in May 2015, and continuing through the early months of 2016, the Company intended to use the House as an office if feasible. That intent was qualified in just one respect—one that applies to nearly all purchases of this nature. Energy Transfer would need to perform a post-purchase evaluation of the House and other buildings on the property to confirm their suitability for Energy Transfer's intended uses. Rover's EIR response made no effort to hide that its intent was qualified in that single way. In the *very next* sentence of its EIR response, Rover stated that the Company *later* decided to demolish the structure *after* the post-purchase evaluation.[286] This intention to use the House as an office—if feasible—is reinforced by extensive evidence, *long predating* the purchase, proving that Energy Transfer intended to locate an Operations office near CS1.[287]

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[284] Enforcement Staff Report at 65.

[285] Sept. 26, 2016 EIR Response at 1.

[286] *Id*. (explaining that "the House ultimately was determined to be too small and ill-suited for its intended purpose").

[287] *See supra* Part II.C; Sept. 26, 2016 EIR Response Attachment 3 at 22 (Apr. 5, 2016 Telephone

The Enforcement Staff Report's contrary position here rests on a key factual error: Staff insist that Rover "intended to demolish the house" from the time "negotiations to purchase the house began."[288] As explained *supra*, Section II.E, extensive evidence shows that Energy Transfer's intent at the time of the purchase—and for several months thereafter—was to preserve the option of using the House as office space. Staff again fixate on Vedral's February 19, 2015 email, months *before* the purchase, recounting that Mahmoud "said to tear it down."[289] But regardless of what Mahmoud's intent was prior to Vedral's email, removal was not *the Company's* intention at the time of *the purchase*. As the same email chain itself shows, Vedral decided to include terms in the purchase agreement to prevent the sellers from tearing it down or taking *any other* step that would interfere with Energy Transfer's ability to convert the House to an office.[290] His email expressly stated the need for such terms "to ensure that [the sellers] do not have the right to remove or take the house."[291] If someone buys a house with the intention of demolishing it, there would be *no* reason to go to that effort—and good reasons to do the *opposite*. After all, a company would be off the hook for adverse effects to a house if the

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Conversation Memorandum from Thomason to Adkins) ("I told [Adkins] that we had considering using the [Stoneman] house for Operations, but it was determined to not be acceptable."); Schuman Decl. ¶ 14 & Ex. B (attaching September 2014 budget and October 2014 organizational chart listing proposed employees to be stationed at CS1); *see also* Schuman Test. 113:8–15 ("Q: Okay. When did you sort of develop that plan, that is to say, to have a person stationed at Defiance and also have a person stationed at CS 1? A: That was in our original staffing plan going clear back in 2014 that I personally didn't even put together. This was something that was put together in the planning phase for Rover and was developed by the operation groups out of the midwest division."); February 20, 2015 Application, Resource Report 5, 5-6, Table 5.2-1 (showing nine permanent operational employees at or near CS1).

288 Enforcement Staff Report at 65.

289 *Id.* at 5, 19, 60, 65 (quoting Leesville Historical House Email, Rover-00001751 (Feb. 19, 2015 4:07 P.M. email from Vedral to Banta, Roberts, and Thomason)).

290 Rover-00001751 at 1751 (February 19, 2015 5:20 P.M. email from Vedral to Roberts).

291 *Id.*

previous owners destroyed it themselves or left it in a condition that rendered it incapable of being preserved.

It also makes no sense to send employees out to evaluate a house's suitability as office space—and it makes even less sense to do so *three* times over the course of a year—if the intention from the beginning was to remove it. Yet three site visits for that purpose is what Energy Transfer conducted. Only after those three reviews, and only after it was apparent that the House was in a condition unsuitable for further use, did Rover decide to remove the House. That removal post-dated the purchase by *more than a year*. This timing alone completely repudiates Enforcement Staff's argument that Energy Transfer bought the House with the intent of tearing it down to avoid mitigation. Instead, Rover gave the SHPO more than enough time to comment on Rover's proposed mitigation for the only relevant effects—those resulting from the location of CS1—and then waited to remove the House until after (a) notifying the SHPO of Rover's intent to remove it and (b) after no proposed mitigation from the SHPO beyond the visual screening that Rover had proposed 16 months in advance ofremoving the House.

Enforcement Staff have little to offer in response to these clear facts. They lead off with the underwhelming assertion, offered in Mahmoud's testimony, that the EIR response "could have been written more clearly."[292] But Section 157.5 does not penalize companies because their writing could stand improvement. (Many lawyers can be grateful that the same is true in the legal profession.) The point Mahmoud made, when he said the response was probably "oversimplified," is that at the time of the purchase there were contingencies to the Company's stated intent for the House and other structures on the Property. The Company's first choice was to use the House as an office. And more information was needed before the Company would

[292] Enforcement Staff Report at 65 (quoting Mahmoud Test. 112).

know if another path was required. Mahmoud's less optimistic "glass is half empty" take on the House's potential as an office does not change that fact that this remained the Company's preferred route at the time of the purchase.[293] Mahmoud confirmed that this preferred option remained available, and the Company continued to pursue it, *after* the purchase, stating "there was the intent to convert the house into an office along the way."[294] As already noted, Rover candidly acknowledged the contingent nature of its intent in the next sentence of the response.

Of course there are always multiple ways to say the same thing. Rover might have instead written more verbosely as follows, with the text from the EIR response underlined: "When Energy Transfer purchases property for use by Operations, its practice is to evaluate the suitability of existing structures on the property for such use. That evaluation occurs after the purchase. The Stoneman Property was such a property. That is, Rover purchased the Property from its then owners in an arms' length transaction because of its central location to Rover's proposed Pipeline and ancillary facilities . . . with the intent of converting the House into an operating office for [ETC] owned and affiliated operating assets in the region contingent on the House turning out to be suitable. Because the House ultimately was determined to be too small and ill-suited for its intended purpose, a decision was made to demolish the structure and two outbuildings and move forward with plans to construct a new structure at the site." Both this lengthier wording *and* Rover's wording are accurate. And both versions convey the same material points. Failing to write something the way Enforcement Staff prefer is no basis for sanctioning an applicant's choice of a different way to make the same point.

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[293] Mahmoud testified that "we knew way back when we bought it that the long-term potential of that house *may not* be suitable for a facility." Mahmoud Test. 111 (emphasis added). That pessimism is entirely consistent with intending to use the House as an office, subject to obtaining more information.

[294] Enforcement Staff Report at 65 (quoting Mahmoud Test. 112).

Enforcement Staff next mischaracterizes Thomason's testimony as a concession that the House *never* would have been suitable as office space. According to Enforcement Staff, Thomason's testimony proved that "preserving the house was at odds with Rover's intent to utilize the property."[295] Enforcement Staff rely here on Thomason's testimony that "the way that the property is set up, the house effectively blocks the entrance. So if we submitted it to a historical society, it would seriously affect, if not totally negate our use of the property."[296] To understand why this mischaracterizes Thomason's testimony, one need look no further than the first picture in the Enforcement Staff Report.

The House is the white building to the right, with the light colored roof, that faces the road. The driveway next to the house is the sole entrance to the property. If Energy Transfer had been able

[295] *Id.* (emphasis omitted).

[296] *Id.* at 66 (quoting Thomason Test. 227–28).

to convert the House to an office, its employees could have accessed all of the property using that driveway. But if a third party (such as an historical society) owned the House, driveway access to the rest of the property would be lost to—or at least have to be shared with—that third party. And, a large portion of the property would no longer be available (access questions aside), rendering it less useful. In other words, the House would seriously affect the ability to access the rest of the property only if a third party owned the House. Thus, Energy Transfer would not have been impeded in its use of the property had it been able to convert the House to office space.[297]

Enforcement Staff's next point has already been addressed. The Report questions how Energy Transfer could have "intended" to use the House as an office if it did not "consider reviewing the [House] for suitability for office space until after" the purchase.[298] As already noted, the EIR response disclosed that the suitability review came post-purchase: "the House was ultimately determined to be too small and ill-suited for its intended purpose."[299] The fact that this review *occurred* later does not mean the Company first *thought* of conducting such a review later. As explained above, it is Energy Transfer's "practice to plan for regional operations centers at or near its assets and to purchase centrally located properties for use by operations."[300] After "purchasing centrally located properties, operations staff will typically review the property's existing structures for suitability. It is Energy Transfer's practice to use existing structures, to the extent that they are suitable for the company's needs."[301] Consistent

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297 Thomason Attestation ¶ 6.

298 Enforcement Staff Report at 65.

299 Sept. 26, 2016 EIR Response at 1.

300 Schuman Decl. ¶ 10.

301 *Id.*

with this practice, Energy Transfer intended to use the House as an office, if possible, as part of its overall plan for the Property as an operations center. The fact that Mahmoud first focused post-purchase on the possibility of using the House as an office does not negate the Company's intent to follow its standard practice of using existing structures if circumstances permitted.[302]

It is no surprise that Banta asked Schuman to look at the House for use as an office "after" the purchase.[303] Energy Transfer was going to use the Property for operations regardless of whether the House could be saved; the company's normal practice is to assess existing buildings after a property purchase; and Energy Transfer did not take possession of the Property until three months after the May 2015 purchase.[304] Schuman also did not become area manager until the month before the purchase.[305] And there is no dispute that Energy Transfer *acted* on the intention to use the House as an office soon after the purchase, nor is it disputed that its evaluation process continued over the course of the year before a decision was reached that the House could not be used. The EIR response accurately conveys this chronology.

Enforcement Staff next claim that Rover could not have intended to use the House as an office at the time of purchase, because the "litany of problems with the house … would have

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[302] An analogy shows Staff's error: If a person goes to the beach most summer weekends, but tends not to go when significant rain is in the forecast, it would be accurate for him to say, as to a relevant weekend: "When I bought a new bathing suit on Monday, I intended to wear it at the beach the following weekend. On Friday, when the weather forecast called for rain all weekend, I decided instead not to go." A wordier version would be accurate too: "When I bought a new bathing suit on Monday, it was possible that I would wear it at the beach the following weekend but any number of things might have prevented me from doing so including being invited to an event, my boss making me finish a project over the weekend, feeling ill, bad weather, etc., etc. As it turned out, the weather forecast on Friday said rain so I did not go." The fact that this lengthier wording is also accurate does not render the shorter version inaccurate.

[303] Enforcement Staff Report at 66.

[304] Schuman Decl. ¶ 10; Sept. 26, 2016 EIR Response Attachment 1 at 5 (Option to Purchase ¶ 11).

[305] Rover-00015331 at 15331 (Apr. 10, 2015 10:33 A.M. email from Bacher to Coffey, et al).

been inconsistent with anyone's intent to buy it to use for any type of office space."[306] Again, Staff misstates what Rover knew and when Rover knew it. The problems with the House were not apparent from the outside. In fact, elsewhere the Enforcement Staff Report points out that, viewed from the outside, it appeared to be a "well-cared for house."[307] Schuman confirmed that what he "could see of the house from the outside did not render it unsuitable for our purposes."[308] The problems that Enforcement Staff highlights—the wiring, the breaker box, the plumbing, the insulation, the utilities[309]—were only evident after entering the House. The Company thus did not know of these problems until after the purchase.

This "litany of problems" with the House is precisely why Energy Transfer found it unsuitable, and it directly refutes the allegation that Rover bought the House intending to shirk its mitigation obligations. In fact, if Rover had demolished the House without there being a "litany of problems" that prevented its conversion to an office, Enforcement Staff no doubt would use *that* against Rover as supposed proof that the company never intended to use the House as an office. The Commission should reject Enforcement Staff's "heads I win, tails you lose" ploy. The fact of the matter is that after the purchase Energy Transfer realized that the inside of the building was in poor and otherwise unsuitable condition, and—consistent with Energy Transfer's established practice—the House was removed to make way for the later-constructed office building rather than letting it sit abandoned and become a public nuisance.

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306 Enforcement Staff Report at 66.

307 *Id.* at 19.

308 Schuman Decl. ¶ 11.

309 Enforcement Staff Report at 66 (quoting Schuman Test. 93).

Finally, Enforcement Staff claims that "if Rover intended to use the property or house as an operations center, it was required to disclose that under the cumulative impacts analysis."[310] The novelty and incorrectness of that theory are both made obvious by the fact that Enforcement Staff did not even think to include this theory in their Preliminary Findings Letter or 1b.19 Notice. It is incorrect because a cumulative impacts analysis is only required for effects relating to the Project.[311] The operations center was meant to serve all of Energy Transfer's assets in the region; it was not specific to the Project. And that is how Energy Transfer uses it to this day: "as a regional operations office."[312] Energy Transfer has constructed a "permanent office on the Stoneman property . . . and there are now [twelve] Energy Transfer employees stationed at the site."[313] Regardless, Rover can hardly be faulted for not considering this novel theory when Enforcement Staff first thought it up years after-the-fact.

2. Rover's Statement that "It Did Not Occur to It at that Time" to Inform FERC of Plans for the House Was Accurate and Not Misleading.

Rover stated in its EIR Response that "at [the] time" it told the SHPO about plans for the House (*i.e.*, late March and early April 2016), "it did not occur to Rover" to report the same information to the Commission "because neither" the purchase nor the planned removal "was directly associated with or a result of the Project." Enforcement Staff does not cite a single piece of evidence from *this* time period showing that Rover considered telling FERC about the

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310 *Id.* at 67.

311 18 C.F.R.§ 380.12(b)(3) requires applicants to "[i]dentify the effects of construction, operation (including maintenance and malfunctions), and termination *of the project*, as well as cumulative effects resulting from existing or reasonably foreseeable projects." (emphasis added).

312 *See* Fieseler Decl. ¶ 15

313 *See* Fieseler Attestation ¶ 4.

removal. Nor do Staff explain how *thinking* about a disclosure is material if it results in the *conclusion* that disclosure is unnecessary.

One of the many requests in FERC's EIR was as follows: "*d. why Rover did not report the demolition to the FERC staff.*"[314] Rover responded (with the language Staff questions highlighted):

> d. While Rover informed the SHPO of its purchase of the Property and subsequent intent to remove the House as an update to the information included in its January 2015 Report in the context of ongoing consultation, it did not occur to Rover at that time to report this information to the Commission because neither its purchase of the Property nor its removal of the House was directly associated with or a result of the Project, as fully discussed above. In this regard, Rover still intends to implement the proposed visual screening plan as mitigation. However, in retrospect, Rover could have updated its docket with the Commission to reflect that the Property's status had changed.

This answer, which includes an acknowledgement that Rover could have said more at the time, was accurate. On March 29, 2016, Rover informed the SHPO that it had purchased the property. A week later, on April 5, 2016, it informed the SHPO that it planned to remove the Stoneman House.[315] Enforcement Staff points to nothing showing that "at that time"—March and April of 2016—it "occur[red] to Rover" to communicate the same information to FERC.

Enforcement Staff mislead by relying on emails from a *different* time: a year or more earlier. Staff points exclusively to internal discussions from March and April of *2015* about the possibility of informing Project Staff that Energy Transfer might purchase the House (which happened even later, in May 2015).[316] Apart from the time discrepancy, these emails also did not discuss whether to disclose an intent (not yet even formed) to remove the structure. Nothing

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[314] EIR Request at 1.

[315] Sept. 26, 2016 EIR Response Attachment 3 at 22 (Apr. 5, 2016 Telephone Conversation Memorandum from Thomason to Adkins).

[316] Enforcement Staff Report at 67–68.

from the relevant time shows internal deliberation about whether Rover needed to disclose its plans to FERC in addition to the SHPO.

Enforcement Staff also do not explain what difference it would have made if the response had replaced the words "it did not occur to Rover at that time to report this information to the Commission because . . ." with these: "Rover did not report this information to the Commission because . . ." The EIR asked "why Rover did not report the demolition to the FERC staff," and Rover provided its *reason* "because neither its purchase of the Property nor its removal of the House was directly associated with or a result of the Project."

Take this hypothetical example: Assume, contrary to the facts on which Enforcement Staff rely, there were evidence that sometime in late March or early April 2016, the idea of disclosing the same information to FERC "occur[red]" to someone at Rover. And further assume—again, with no factual support—that this thought led to a discussion, which in turn led to a decision not to make the disclosure "because neither the purchase nor the removal was directly associated with or a result of the Project." Enforcement Staff are free to take issue with the reason underlying that decision—which Rover fully disclosed in its EIR response—but Staff has failed to make a case for how it could be "necessary" (or "pertinent") to FERC's consideration of the Project application to know whether the *thought* of disclosure passed through someone's mind. Rover is aware of no case where it mattered to FERC's consideration of a certificate application whether a representative of the applicant gave thought to an internal decision when the applicant has disclosed both the decision and the reason behind it. The Commission need not ponder that hypothetical, though, because, as noted above, Enforcement Staff have pointed to nothing contradicting the statement that it did not occur to Rover in late March and early April 2016 to disclose certain facts about the House to FERC.

Finally, because Rover provided a truthful EIR response, the Enforcement Staff Report's alleged motives for filing an untruthful response (which are pure conjecture) are beside the point.[317] It bears mention, however, that Staff's position on motive helps show why the Commission should resist an expansive reading of the Section 157.5's obligations.

The Enforcement Staff Report highlights the costs that an applicant can incur when a project encounters undue delay. Enforcement Staff argue that Rover was incentivized to put questions about the Stoneman House behind it so that Project construction could commence. Enforcement Staff broadly invoke supposed "time pressures" and the risks of "delay." Delay is unquestionably a valid concern for many project applicants. Projects like this take years to complete, and the applicant must navigate thousands of steps, requiring approval from multiple agencies and decision-makers. That reality goes a long way toward proving the dangers in Enforcement Staff's reflexive "more is better" approach to obligations under Section 157.5. It is all too easy for Enforcement Staff to take what may seem like a close call over the quantity or quality of information that could have been transmitted to Project Staff, and ask, "well, what's the harm of erring on the side of more information?" The harm is very real when extraneous information is added to a process requiring multiple levels of consideration and approval by dozens of decisionmakers for literally thousands of potential effects and consequences.

Rover was accurate and forthright in presenting information to Project Staff about its application. But even were the question close, the Commission should resist the temptation to conclude that applicants violate the law if they elect not to err on the side of over-providing information.

[317] Enforcement Staff Report at 68–69.

C. Enforcement Staff's Allegations Are (or Will Be) Time Barred by the Statute of Limitations

Many of Enforcement Staff's allegations are time barred (or soon will be) by the five-year statute of limitations set forth in 28 U.S.C. § 2462 ("Section 2462").[318] Indeed, *all but one* of the alleged misrepresentations or omissions raised by Enforcement Staff took place more than five years ago.[319] Each of those alleged misrepresentations or omissions is therefore *already* barred from enforcement by Section 2462. The last remaining alleged misrepresentation or omission—contained in Rover's September 26, 2016 EIR data responses—will be time barred unless the Commission files an action in federal district court for "the enforcement of any civil . . . penalty, or forfeiture . . . " by September 26, 2021.[320]

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[318] Because the NGA, 15 U.S.C. § 717 et seq., does not include a statute of limitations for alleged violations of the Act, FERC's proposed enforcement action against Respondents is subject to the general federal five-year statute of limitations set forth in 28 U.S.C. § 2462. *See* Prohibition of Energy Market Manipulation, Final Rule, Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 62, *reh'g denied*, 114 FERC ¶ 61,300 (2006) ("We note . . . that when a statutory provision under which civil penalties may be imposed lacks its own statute of limitations the general statute of limitations for collection of civil penalties, 28 U.S.C. [§] 2462, applies.").

[319] *See, e.g.*, Show Cause Order at 58–59 n.253 ("[E]ach of the following misrepresentations or omissions could be considered independent violations: Rover's February 20-23, 2015, Application . . .; Rover's April 22, 2015, response to a FERC data request regarding Resource Report 4 . . .; Rover's March 25, 2016, response to the Commission's DEIS, . . .; Rover's final decision to destroy the house without informing the Commission; Rover's May 2016 demolition of the house without informing the Commission; and Rover's September 26, 2016, post-demolition explanations provided to OEP that were false and misleading.").

[320] *See United States v. Core Labs., Inc.*, 759 F.2d 480, 483 (5th Cir. 1985). *See also Gabelli v. SEC,* 568 U.S. 442, 448 (2013) ("[T]he most natural reading of the statute" is that "the five-year clock begins to tick—when a defendant's allegedly [violative] conduct occurs."); 28 U.S.C. § 2462 ("an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . .").

1. The "Claims Accrued" and the Statute of Limitations Clock Began to Tick at the Time of the Alleged Wrongful Acts.

The Commission's "claims first accrued" at the time of the allegedly misleading actions. The Supreme Court has confirmed that in enforcement schemes similar to the NGA, the five-year statute of limitations period in 28 U.S.C. § 2462 begins to run at the time of the alleged violation.[321]

Neither Enforcement Staff—nor the Commission—can contend that the claims have not already accrued, or that this proceeding resets or otherwise tolls the five-year statute of limitations. *First*, Fifth Circuit precedent[322]— which controls in this case because the alleged misrepresentations and omissions were made at Rover's principal place of business in Dallas, Texas—holds that a claim "accrues at the time of the underlying violation," and not at the "date of the final administrative order assessing the penalty."[323] Thus, the Fifth Circuit has squarely addressed and rejected the same contention that Enforcement Staff has made in Federal Power

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321 *Gabelli*, 568 U.S. at 448.

322 *Core Labs.*, 759 F.2d at 483 ("The interpretation of § 2462 [that will be] advanced by [Enforcement Staff] is in derogation of the right to be free of stale claims, which comes in time to prevail over the right to prosecute them.").

323 *Id.* at 481-83; *see also Gabelli*, 568 U.S. at 448. In *Core Labs*, the government sought to enforce a civil penalty following an administrative proceeding in which the respondent was deemed to have violated the Export Administration Act. 759 F.2d at 481. Although the agency in that case initiated its administrative action within the five-year limitations period of Section 2462, it failed to initiate suit in district court within five years of the alleged violation. *Id.* As a result, the district court dismissed the action as time barred. *Id.* The Fifth Circuit agreed with that decision and explicitly rejected the government's contention that "the date when the claim first accrued is the date of the final administrative order assessing the penalty." *Id.* (internal quotation marks omitted). The Fifth Circuit has continued to rely on this ruling, such as in *SEC v. Bartek*, 484 F. App'x 949, 953 (5th Cir. 2012) ("*Core* examined § 2462's language, 'the date when the claim first accrued. Upon reviewing the history of the statute and the 'respectable body of decisional law,' we held that the case law 'clearly demonstrates that the date of the underlying violation has been accepted without question as the date when the claim first accrued, and therefore, as the date on which the statute began to run.'" (citation omitted)).

Act ("FPA") cases—that a civil penalty claim would only accrue "after the agency assesses a penalty through an administrative proceeding."[324]

Second, the Fifth Circuit in *Core Labs* also squarely addressed and rejected the proposition that a limitations period might be "tolled during the administrative proceedings."[325] As the Commission has previously conceded, whatever procedures are used prior to the assessment of a penalty, Section 24 of the NGA requires the Commission to file a collection action in district court to collect any penalty that has been assessed after an administrative action is final.[326] That is precisely the procedure the Fifth Circuit addressed in *Core Labs*, where the court concluded that even when a government enforcement action proceeds in stages—*e.g.*, it

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[324] FERC's Opp. to Resps. Mot. to Dismiss and Incorporated Memorandum at 1, *FERC v. Silkman*, Case Nos. 13-cv-13054, 13-cv-13056 (D. Mass. Jan. 9, 2014). Enforcement Staff may attempt to rely on *United States v. Meyer* for this proposition—that it is entitled to a second statute of limitations which only accrues at the conclusion of the administrative action. 808 F.2d 912, 918 (1st Cir. 1987) (holding that "the district court claim accrues only after the administrative proceeding has ended" (internal quotation marks omitted)). However, such reliance would be misplaced. *Core Labs.*—which controls in the Fifth Circuit—and *Meyers* are directly contradictory: each case in determining the statute of limitations issue examined the rationale put forward in *U.S. Dep't of Labor v. Old Ben Coal Co.*, 676 F.2d 259 (7th Cir. 1982), which decided in favor of a second tolling period under a different statute following an administrative adjudication. *Meyers* expressly adopted the *Old Ben* rationale, while *Core Labs.*—which controls—flatly rejected it. *Compare Meyers*, 808 F.2d at 918 ("The logic of *Old Ben* seems compelling."), *with Core Labs*., 759 F.2d at 481 (finding *Old Ben* "less than overwhelming" support for the argument put forward by the Commission, because *Old Ben* concluded "that § 2462 had no application," and "[c]ases dealing with other limitations statutes are of extremely limited value" (citing *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967)). *Meyers* is inapposite for another reason. In *Gabelli*, the Supreme Court found that generally "a claim based on fraud accrues—and the five-year clock begins to tick—when a defendant's allegedly fraudulent conduct occurs" in the context of an agency enforcement action. 568 U.S. at 448. *Gabelli* arguably overruled *Meyers*. Lincoln Paper and Tissue, LLC's Mem. of Law in Support of Mot. to Dismiss Compl. at 17 n.24, *FERC v. Silkman*, Case Nos. 13-cv-13054, 13-cv-13056 (D. Mass. Feb. 14, 2014).

[325] *Core Labs.*, 759 F.2d at 483.

[326] *Statement of Admin. Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 at P 7 n. 20 (2006) ("Although the NGA is silent on procedures for assessing civil penalties, the NGA does provide for enforcement of Commission rules and regulations in district court under NGA section 20(a) and collection actions in district court under NGA section 24." (citations omitted)).

includes an agency adjudicatory proceeding followed by a district court collection action—the district court collection action is subject to the initial five-year statute of limitations.[327] Rover has not entered into any agreement with the Office of Enforcement or the Commission that would have the effect of tolling the statute of limitations, and none of the procedures so far implemented by the Commission have tolled or satisfied the statute of limitations.

The Fourth Circuit's recent decision in *FERC v. Powhatan Energy Fund* does not change that analysis.[328] In *Powhatan*, the Fourth Circuit held that, under the FPA, the statute of limitations in Section 2462 does not begin to run until sixty days after the issuance of a penalty assessment order by the Commission.[329] Putting aside that *Powhatan* is poorly reasoned, the decision relies on statutory language unique to the FPA, which, according to that court, restricts the Commission's ability to bring a case in federal district court before certain procedural steps have occurred.[330] The NGA, the Act at issue here, does not contain any language restricting the ability of the Commission to bring a case in federal district court. Indeed, the NGA expressly confers "exclusive jurisdiction" on the federal district courts to hear this type of case.[331] As such, any reliance by the Commission on *Powhatan* would be inapposite.[332]

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327 *Core Labs.*, 759 F.2d at 483–84.

328 *FERC v. Powhatan Energy Fund, LLC*, 949 F.3d 891, 899 (4th Cir. 2020).

329 *Id.* at 898–99.

330 *Id.* at 895 ("If the subject of an [Order to Show Cause ("'OSC'")] elects the Default Option, then the case proceeds to a formal adjudication before an ALJ. . . . Limited judicial review of the ALJ's determination is available in the applicable court of appeals. . . . On the other hand, if, after receiving an OSC, a party elects the Alternate Option. . . the case is channeled into an abbreviated agency proceeding. . . Then, if the violator does not pay the amount set forth in this penalty assessment order (PAO) in full within 60 calendar days, FERC must 'institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty.'") (quoting 16 U.S.C. § 823b(d)(3)(B)) (internal citations omitted).

331 15 U.S.C. § 717u; *see* Section VI.A *infra*.

332 *Gabelli v. SEC*, 568 U.S. 442, 448 (2013).

For all of these reasons—the clear precedent set by *Core Labs* and *Gabelli*, the inapplicability of *Powhatan*, and the Commission and Enforcement Staff's previous concessions [333]—any claim would have accrued at the time of the alleged underlying unlawful acts, and not at some future date after FERC makes a decision to prosecute.

2. To Satisfy the Requirements of 28 U.S.C. § 2462, FERC Must Bring an Action in a Federal District Court before the Five Year Statute of Limitations expires.

In its Show Cause Order, the Commission stated its intention either to assess a penalty on the record alone, or to conduct a hearing before a FERC ALJ, rather than pursuing a case in federal district court.[334] The Commission lacks the authority to make a legally-binding determination that Respondents violated the NGA. Rather, such a determination must be made by a federal district court.

As discussed in greater detail in the next section, the unambiguous text in Section 24 of the NGA vests federal district courts with "exclusive jurisdiction of [NGA] violations."[335] Indeed, under established precedent, district courts are presumed to possess authority to adjudicate civil penalty claims, "unless [that authority] is in express terms placed exclusively

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[333] *See, e.g.*, *BP Am. Inc.*, 173 FERC ¶ 61239, 62540–44 (2020) (noting that Enforcement Staff argued in an enforcement matter under the NGA that precedent regarding FPA investigations was inapposite given the dramatically different procedure provided by the FPA that does not apply to NGA cases, but declining to resolve the issue on the ground that it had been waived).

[334] Show Cause Order at 3.

[335] "The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of" those same provisions. 15 U.S.C. § 717u. The NGA's civil penalty authority parallels Section 24's language by making civil penalties applicable to any person that "violates this chapter, or any rule, regulation, restriction, condition or order made or imposed by the Commission under authority of this chapter." *Id*. § 717t-1(a).

elsewhere."[336] Yet nothing in the NGA "express[ly]" grants FERC jurisdiction to conduct an administrative adjudication to determine a violation. Under the NGA's civil penalty provision, FERC may hold a "hearing" to "assess[]" a "proposed penalty,"[337] but to give legal effect to that proposed penalty, it must bring an action in district court for a *de novo* determination whether Respondents violated the NGA and whether a penalty is warranted.

Because FERC therefore lacks the authority under the NGA to impose a legally binding penalty, the requirement in § 2462 that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture [be] commenced within five years" can only be satisfied by "commenc[ing]" an action in the only venue with such authority, a federal district court.[338]

3. Even if a Federal District Court Case Is Not Deemed Necessary, Filing the Show Cause Order is Inadequate; the Matter Must Be Set for Hearing within the Five Year Statute of Limitations.

Notwithstanding the foregoing arguments, if the Commission erroneously concludes that an in-house adjudication is sufficient to satisfy Section 2462, the operative act would be a Commission order setting this matter for hearing, and not the Commission's March 18, 2021 Order to Show Cause and Notice of Proposed Penalty. In order for an action to be deemed adequate to stop the limitations clock from ticking, the action must include a trial-type hearing that entails an opportunity to fully litigate the issues. In other words, filing the Show Cause Order alone is inadequate to stop the clock.

The Commission's Order to Show Cause is insufficient to satisfy the statute of limitations. While the Order to Show Cause provides Rover an opportunity to respond to Enforcement Staff's allegations, it does not permit Rover to conduct discovery, confront

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[336] *Lees v. United States*, 150 U.S. 476, 478–79 (1893).

[337] 15 U.S.C. § 717t-1(b), (c).

[338] 28 U.S.C. § 2462.

witnesses, or litigate any of the facts that are in material dispute. And, *absent another Commission order setting this matter for hearing*, Rover may never have that opportunity.

The D.C. Circuit's ruling in *3M Co. v. Browner* is illustrative of this point.[339] In that case, the D.C. Circuit determined that an agency adjudication by the Environmental Protection Agency (EPA) to enforce the Toxic Substances Control Act (TSCA) was subject to the five-year statute of limitations in § 2462, and wrote in relevant part, "Given the reasons why we have statutes of limitations, there is no discernible rationale for applying § 2462 when the penalty action or proceeding is brought in a court, but not when it is brought in an administrative agency. The concern that after the passage of time 'evidence has been lost, memories have faded, and witnesses have disappeared' pertains equally to factfinding by a court and factfinding by an agency."[340] Such rationales cannot be adequately served on the papers alone through the Show Cause process. Rather, they must be served with an opportunity, as required by the NGA, to litigate the numerous genuine issues of disputed material fact in this case, which must be investigated through discovery and testimony. For instance, Enforcement Staff's allegations suggest that Rover violated Section 157.5 of the Commission's Rules and Regulations. But Section 157.5 sets forth an affirmative defense to such allegations: "a definite and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application."[341] Rover is therefore entitled to discovery regarding the Commission's "consideration and ultimate determination of the

339 *3M Co. (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994).

340 *Id.* at 1457 (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)).

341 18 C.F.R. §157.5(b).

application"—information that has *never* been in Rover's possession. Such discovery includes, but is not limited to, the following:

- Rover must have the opportunity to seek discovery from and depose members of the Commission's Office of Energy Projects regarding their consideration of Rover's application and the statements therein;
- Rover must have the opportunity to seek discovery and depose Commission employees regarding their understanding of the meaning of, and the good faith intention behind, Rover's "commit[ment] to avoiding any Project impacts to all NRHP eligible resources";
- Rover must have the opportunity to seek discovery and depose Commission employees and third-parties regarding the content and adequacy of Rover's disclosures to and approval of the Ohio SHPO; and
- Rover must have the opportunity to seek discovery and depose Commission employees regarding the content and adequacy of Rover's subsequent disclosures to the Commission.

While it would conflict with controlling precedent as discussed above, the only possible Commission action that might have satisfed the statute of limitations would be an order setting this matter for hearing, where Rover would be guaranteed discovery and other due process protections.[342]

VI. Any Claims Must Be Tried in Federal District Court in the First Instance

Any claims that the Commission authorizes as part of an enforcement action against Rover must be tried in federal district court pursuant to Section 24 of the NGA,[343] where the parties will litigate whether the alleged violations occurred and, if so, what penalty—if any—is justified.

If the Commission rejects the view that it must proceed in federal district court, at a minimum it cannot assess a penalty against Respondents without holding a trial-type hearing, as

[342] *Id.* §§385.401-385.510 (providing for rights to discovery, present evidence, examine witnesses, and rules governing admissibility).

[343] 15 U.S.C. § 717u.

there are numerous genuine issues of disputed material fact to be investigated through discovery and testimony, including but not limited to:

- Whether FERC Staff uses landowner lists for any reason beyond notifying landowners of their opportunity to participate in the certificate process;
- Whether Rover's ownership of the Stoneman house was material to FERC's decisionmaking process;
- Whether Rover omitted material information from its application submissions; and
- Whether Rover omitted material information from its EIR.

A. The Commission Lacks the Authority to Adjudicate Alleged Violations Under the NGA and Must Pursue Such an Action in Federal District Court Instead

The Show Cause Order states that the Commission intends to adjudicate any claims against Respondents through a FERC ALJ proceeding—or possibly even just a "paper hearing"—rather than pursue any charges of alleged violations in federal district court.[344] But, wholly apart from the insufficiency of the Show Cause Order and the Enforcement Staff Report on the merits,[345] the Commission *lacks the authority* to make a legally-binding determination that either Respondent violated the NGA.

The unambiguous text in Section 24 of the NGA vests federal *district courts* with "*exclusive* jurisdiction *of violations of [the NGA]*."[346] Indeed, under established precedent,

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[344] Show Cause Order at P 5 ("If the record is sufficient, the Commission may assess a civil penalty. If a hearing is needed, the Commission will issue a hearing order and indicate whether the Commission will conduct a paper hearing or a hearing before an Administrative Law Judge (ALJ)."). The Show Cause Order further provides that the result of an ALJ hearing or "a paper hearing" will be an agency adjudication "whether a violation or violations occurred." *Id.*

[345] *See supra* Sections V.A & V.B.

[346] "The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of" those same provisions. 15 U.S.C. § 717u. The NGA's civil penalty authority parallels Section 24's language by

district courts are *presumed* to possess authority to adjudicate civil penalty claims, "unless [that authority] is in express terms placed exclusively elsewhere,"[347] yet nothing in the NGA "express[ly]" grants FERC jurisdiction to conduct an administrative adjudication to determine a *violation*.

Just the opposite, in fact. Section 24 expressly grants federal district courts "exclusive jurisdiction of violations of this chapter [*i.e*., the NGA] or the rules, regulations, and orders thereunder[.]"[348] Under the NGA's civil penalty provision, FERC thus may hold a "hearing" to "assess[]" a "proposed penalty,"[349] but to give legal effect to that proposed penalty, it must bring an action in district court for a *de novo* determination whether Respondents violated the NGA and whether a penalty is warranted.

The other statutes FERC administers—the FPA and the Natural Gas Policy Act ("NGPA")—confirm this reading by demonstrating that Congress has consistently vested jurisdiction over "violations" of these acts in the federal district courts except in limited circumstances not applicable to the NGA. Each of these statutes preserves the traditional role of the federal district courts, which have long exercised exclusive jurisdiction of all alleged

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making civil penalties applicable to any person that "violates this chapter, or any rule, regulation, restriction, condition or order made or imposed by the Commission under authority of this chapter." *Id*. § 717t-1(a).

[347] *Lees v. United States*, 150 U.S. 476, 478-79 (1893).

[348] 15 U.S.C. § 717u. The precise language is: "The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder." *Id.*

[349] *Id*. § 717t-1(b), (c).

violations of FERC's core statutes and all remedies for those violations, whether civil penalties, criminal penalties, or injunctive relief.[350]

In a small universe of cases—falling exclusively under the FPA—Congress granted FERC jurisdiction to adjudicate violations and impose penalties through the administrative hearing process. When Congress *intended* such a path for adjudicating violations, it expressly authorized the Commission to make "a determination of [the] violation . . . on the record after an opportunity for an agency hearing pursuant to [APA § 554]."[351] That language carves out a narrow exception to the district courts' exclusive jurisdiction of violations.

Congress did not include any such carve-out in the NGA. Instead, the NGA's civil penalty provision, Section 22,[352] permits FERC only to "assess" a penalty that the Commission has "proposed," while preserving the district courts' express authority to adjudicate violations under Section 24.[353] Section 22 does so in precisely the same terms the FPA uses—by granting the Commission authority to "assess[]" the penalty "after notice and opportunity for public hearing."[354] And the FPA uses this same language in the large category of civil penalty claims

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350 For the NGA: Criminal penalties "upon conviction," 15 U.S.C. § 717t; injunctive relief "in the proper district court of the United States," *id.* § 717s(a). For the FPA: Criminal penalties "upon conviction," 16 U.S.C. § 825o; "action[s]" for civil penalties "in the appropriate district court of the United States," *id.* §§ 823b(d)(3)(B), 825o-l(b); injunctive relief "in the proper District Court of the United States," *id.* § 825m(a). For the NGPA: "[C]riminal penalties," 15 U.S.C. § 3414(c); civil penalties adjudicated "in the appropriate district court of the United States," *id.* § 3414(b)(6)(F); injunctive relief in the "appropriate district court of the United States," *id.* § 3414(b)(1).

351 16 U.S.C. § 823b(d)(2).

352 15 U.S.C. § 717t-1.

353 Under the implied repeal doctrine, moreover, a "repeal" of Section 24—enacted in 1938—will not be presumed unless the "intention of the legislature to repeal [is] clear and manifest." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). The NGA's civil penalty provision, enacted in 2005, does not mention administrative adjudication in a way that would override the default of exclusive federal court jurisdiction. 15 U.S.C. § 717t-l. This shows that Congress's grant of civil penalty authority to FERC did not impliedly repeal the district court's exclusive jurisdiction of violations.

354 *Compare* 15 U.S.C. § 717t-1, *with* 16 U.S.C. § 823b(c).

that must then be adjudicated in the district court.[355] The FPA thus makes clear that when FERC "assess[es]" its "proposed penalty," that penalty, except where Congress has expressly provided otherwise, lacks any legally binding force until FERC brings an action in federal district court and that court determines, with no deference to FERC, that a violation has occurred and a penalty is warranted.[356] The identical language in Section 22 compels the same conclusion—as under the FPA, an assessment alone does not result in a legally binding penalty.

It is simply implausible, moreover, that Congress meant to authorize FERC to issue legally binding orders imposing civil penalties—potentially hundreds of millions of dollars—based solely on the *informal* agency procedures through which FERC claims it can adjudicate violations under the NGA.[357] The NGA allows proposed penalties of up to "$1,000,000 *per day per violation* for as long as the violation continues."[358] But it is missing key protections in other federal statutes that allow agency adjudication. The FPA, for example, provides for "an agency hearing pursuant to section 554 of title 5 before an administrative law judge" when agency adjudication is permitted.[359] The Exchange Act permits the SEC to impose penalties through administrative adjudication only after making findings "*on the record* after notice and

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[355] In the FPA, Congress limited FERC's ability to conduct an administrative hearing to situations where the *accused*—not FERC—"elect[s]" an ALJ hearing in lieu of the default district court proceeding. 16 U.S.C. § 823b(d)(3). Under the NGA, the adjudication occurs in district court without requiring the accused to elect that forum.

[356] *Id*. § 823b(d)(3) (requiring *FERC* to "institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty"); *id.* § 823b(d)(5) (allowing FERC to collect penalty only "*after* the appropriate district court has entered final judgment in favor of the Commission under paragraph (3)" (emphasis added)).

[357] *Statement of Admin. Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 at P 7 n.26 (2006) (requirement of "an 'on the record' hearing before an ALJ" is "not applicable to the NGA").

[358] 15 U.S.C. § 717t-1(a) (emphasis added).

[359] 16 U.S.C. § 823b(d)(2)(A).

opportunity for hearing,"[360] thus triggering formal ALJ adjudication under the APA.[361] Section 22, though, contains none of the language that Congress typically uses to provide for formal agency adjudication. Instead it provides only for an assessment "after notice and opportunity for public hearing."[362] If Congress intended to allow FERC to adjudicate liability for millions in civil penalties through an administrative hearing, it surely would have at least expressly provided for formal agency adjudication as it did in the FPA and the Exchange Act.[363] Congress's failure to do so further proves that it did not intend to displace federal district court jurisdiction of NGA violations.

FERC has sought to construe narrowly Section 24's grant of "exclusive jurisdiction" to district courts by confining it to (1) "collection action[s]" and (2) "injunction[s]."[364] But Section 24 extends the district courts' "exclusive jurisdiction" to three—not just two—categories: (1) "violations of [the NGA]"; (2) "all suit[s] . . . and actions" to "enforce any liability or duty created by" the NGA; and (3) "suits. . . to enjoin any violation" thereof.[365] FERC's reading

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360 15 U.S.C. § 78u-2(a)(1) (emphasis added).

361 5 U.S.C. § 554(a).

362 15 U.S.C. § 717t-1(b).

363 The civil penalty authority for "violations" that Congress added to the NGA in 2005 is distinct from FERC's traditional *regulatory* authority to issue final "order[s]," *e.g.*, 15 U.S.C. § 717c(e), which cover such things as licensing and rate-making and can be challenged in the federal courts of appeals, *id.* § 717r(b). In exercising that traditional and long-standing rate-making and certification authority, FERC has used the administrative process, including agency hearings, to fashion appropriate remedies for unjust or unreasonable rates, among other things. *See, e.g., Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313, 1318–20 (5th Cir. 1993) (exercising authority under 15 U.S.C. § 717c(e) to hold hearings and order refunds for "[un]justified" rates). When FERC (like its predecessor, the Federal Power Commission) has carried out these types of duties, it was not to penalize violations. FERC and the FPC It had no authority to pursue civil penalties for NGA violations until Congress enacted Section 717t-1 in 2005.

364 *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282 at P 58 (2007).

365 15 U.S.C. § 717u.

would thus impermissibly render Section 24's separate grant to district courts of "exclusive jurisdiction *of violations*"[366] superfluous.

Nor can Section 24 be read as nothing more than an exclusion of *state* court jurisdiction.[367] If that were the provision's *only* effect, federal court jurisdiction would hardly be "exclusive," because district courts, under this view, would somehow "share" that jurisdiction with FERC and its ALJs. It would also conflict with the meaning of "exclusive" in the NGA's judicial review provision, which indisputably works to divest *FERC* of jurisdiction.[368]

B. A FERC Administrative Adjudication Would Violate Multiple Constitutional Provisions, Further Requiring Pursuit of this Action Only in Federal District Court

Permitting FERC to adjudicate its allegations through an in-house administrative proceeding, moreover, "would raise a multitude of constitutional problems."[369] The principle of constitutional avoidance thus supports an interpretation of the NGA requiring FERC to prove its claims in federal district court. And even if that interpretation is rejected, the constitutional deficiencies in FERC's proposed procedures compel FERC to proceed in federal district court.

Appointments Clause. A proceeding before an ALJ, to resolve disputed facts and then apply the relevant law, would violate the Appointments Clause of Article II because FERC ALJs

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366 *Id*. (emphasis added).

367 Defs. Opp. to Plts. Mot. for Summ. J. at 9, *Total Gas & Power N. Am, Inc. v. FERC*, Case No. 16-cv-1250 (S.D. Tex. June 9, 2016).

368 15 U.S.C. § 717r(b). This judicial review provision authorizes judicial review of FERC orders in the courts of appeals, who have "jurisdiction . . . to affirm[], modify[], or set[] aside [FERC] order[s]" "upon the filing of a petition" for review. *Id.* "Until the record . . . ha[s] been filed," the courts of appeals exercise that jurisdiction concurrently with FERC, which also may "modify or set aside . . . any finding or order." *Id.* § 717r(a). "[U]pon the filing of the record," however, the court of appeals' jurisdiction to review orders becomes "exclusive" (*id.* § 717r(b))—*i.e*., FERC's concurrent jurisdiction ceases. It is thus *FERC's* jurisdiction, and not solely the jurisdiction of state courts that is excluded by the judicial review provision's reference to "exclusive" jurisdiction.

369 *See Clark v. Martinez*, 543 U.S. 371, 380–81 (2005).

are "inferior officers" of the United States who have been improperly appointed by the FERC Chairman, rather than the Commission acting as a whole. The Appointments Clause authorizes Congress to invest the appointment of "inferior Officers" in the President, in courts of law, or in "the Heads of Departments."[370] Every federal official with an ongoing position "established by Law" and who exercises "significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" the Clause.[371]

FERC's ALJs possess both qualities. The office of an ALJ is plainly "'established by Law,'"[372] with duties that are "ongoing," rather than "temporary" or "episodic."[373] And FERC's ALJs exercise the same kind of discretionary authority the Supreme Court concluded was "significant" when it determined, in *Lucia v. SEC*, that SEC ALJs were "officers."[374] That is, "[b]oth sets of officials have all the authority needed to ensure fair and orderly adversarial proceedings": the "powers" to (1) "take testimony" ("[m]ore precisely, they receive evidence and examine witnesses at hearings, and may also take pre-hearing depositions"); (2) "conduct trials" ("administer oaths, rule on motions, and generally regulate the course of a hearing, as well as the conduct of parties and counsel"); (3) "rule on the admissibility of evidence" (and, thus, "critically shape the administrative record (as they also do when issuing document subpoenas)"); and (4) "have the power to enforce compliance with discovery orders."[375] FERC ALJs are

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[370] U.S. Const. art. II, § 2, cl. 2.

[371] *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) (per curiam).

[372] *Id*. at 125. *See* 5 U.S.C. § 3105.

[373] *Lucia v. SEC*, 138 S. Ct. 2044, 2052 (2018).

[374] *Id. Lucia*, in turn, concluded that SEC ALJs were very much like the Tax Court Special Trial Judges that the Court held to be officers in *Freytag v. Commissioner,* 501 U.S. 868 (1991).

[375] *Id.* at 2053 (alterations and quotations omitted). *Freytag* made clear that Commission's authority to

therefore "inferior officers," and the Appointments Clause therefore requires that they be appointed by either the President, a court of law, or a "Head of Department"—here the Commission acting *collectively*[376]—yet FERC ALJs are appointed by the FERC Chairman in his or her sole capacity.[377]

Seventh Amendment and Article III. The Seventh Amendment and Article III also give Respondents the right to require FERC to prove its allegations that Respondents violated the NGA in district court. The Seventh Amendment guarantees the right to a jury trial in actions "brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty."[378] Because a "civil penalty was a type of remedy at common law that could only be enforced in courts of law," "the Seventh Amendment require[s] a jury trial" in any action that seeks such penalties.[379]

Article III[380] likewise entitles Respondents to a federal district court proceeding because "the question whether the Seventh Amendment permits Congress to assign its adjudication to a

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review the decisions of its ALJs does not alter their status as inferior officers. 501 U.S. at 873, 877-78. *Lucia* added, as to the fourth listed power (enforcing compliance), that it was enough that an SEC ALJ's power is limited to excluding a wrongdoer from the proceedings. 138 S. Ct. at 2054. And *Lucia* added that the designation of officer is unaffected by whether the ALJ's fact-finding is reviewed deferentially. *Id.*

376 *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 511-12 (2010).

377 42 U.S.C. § 7171(c); 18 C.F.R. § 376.105.

378 *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989).

379 *Tull v. United States*, 481 U.S. 412, 420, 422-23 (1987).

380 Article III provides that "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish" and that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1.

tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal."[381] Thus, under Article III, this proceeding implicates "[t]he judicial Power of the United States" and must be conducted by a judge with life tenure and salary security[382]—protections "incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government."[383]

The "public rights" exception to this regime—which permits Congress to assign the initial adjudication of certain matters to an administrative agency when "the Government sues in its sovereign capacity to enforce public rights created by statut[e]"[384]—does not apply. To determine if a public or private right is at stake, a court must weigh (1) "'the extent to which the essential attributes of judicial power are reserved to Article III courts'"; (2) "'the origins and importance of the right to be adjudicated'"; and (3) "'the concerns that drove Congress to depart from the requirements of Article III.'"[385] These factors demonstrate the private nature of the rights that FERC is seeking to enforce in this action: FERC ALJs exercise substantial "judicial power" by determining the amounts of NGA civil penalties, subject only to review for "substantial evidence,"[386] and Congress never articulated any concern warranting removal of NGA violations from the traditional jurisdiction of Article III courts subject to the right to a jury

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381 *Granfinanciera*, 492 U.S. at 53.

382 U.S. Const. art. III, § 1.

383 *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (plurality op.).

384 *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977).

385 *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 678–79 (2015) (quoting *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 851 (1986)).

386 *See, e.g.*, *Statement of Admin. Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 at P 7 (2006); 15 U.S.C. § 717r(b).

trial. Indeed, Congress expressly approved of district court adjudication of materially identical violations under the FPA.[387] Yet Congress provided no reason why a different administrative procedure was needed for such claims under the NGA; as FERC concedes, "the legislative history of the [Energy Policy Act of 2005] does not discuss the grant of NGA civil penalty authority in any detail,"[388] and thus does not justify the departure from Article III and the Seventh Amendment that would result if FERC's interpretation of the NGA were adopted.

Fifth Amendment. The Fifth Amendment's Due Process Clause precludes FERC from subjecting Respondents to an administrative adjudication because FERC's practices and procedures will (and already have) denied Respondents "impartial adjudicators" in a tribunal lacking "the appearance" or reality "of justice."[389] That is because, under the Commission's procedures, the very Advisory Staff who communicate *ex parte* with Enforcement Staff during the investigation phase are permitted to advise the Commissioners and FERC's ALJs during the adjudicatory phase.[390] Because FERC does not keep records of *ex parte* communications between Enforcement Staff and Advisory Staff, Respondents have no assurance that Advisory Staff has not been biased by these *ex parte* communications with Enforcement Staff—or that Advisory Staff will not, in turn, provide biased advice to FERC's decision-makers in subsequent *ex parte* communications with those adjudicators.

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387 18 C.F.R. § 1c.1; 16 U.S.C. § 824v; *id.* § 823b(d)(3).

388 *Energy Transfer Partners*, 121 FERC ¶ 61,282 at P 55.

389 *In re Murchison*, 349 U.S. 133, 134–36 (1955) (quoting *Offutt v. United States,* 348 U.S. 11, 14 (1954)).

390 Written Testimony of Larry R. Parkinson, Director, Office of Enforcement, FERC, Before the Energy and Commerce Committee, Energy and Power Subcommittee, U.S. House of Representatives, at 10-11 (June 3, 2015).

The FERC's decisional process thus *cannot* operate with even the appearance of impartiality. For *years*, FERC's proceeding against Respondents has been tainted by these "candid back-and-forth discussions and oral briefings"[391]—with no opportunity for Respondents to challenge Enforcement Staff's (erroneous) findings. The result of this bias is that FERC cannot identify a *single* case in which the Enforcement Staff issued a 1b.19 Notice recommending civil penalties and the Commissioners then declined to issue an Order to Show Cause or reached a finding that no violation had occurred in that case.[392] It is thus unsurprising that, despite the many gaping errors in Enforcement Staff's case, the Commission has adopted Enforcement Staff's recommendation and issued the Show Cause Order here.

Instead of heeding Congress's express grant to federal district courts of "exclusive jurisdiction" to adjudicate alleged NGA violations,[393] the Commission contends it can adjudicate Respondents' action through a process slanted in favor of the Enforcement Staff. In that proceeding, FERC ALJs do not apply the Federal Rules of Civil Procedure and Evidence, but rather FERC's own evidentiary rules.[394] In the Commission's view, these rules give FERC ALJs free reign to admit hearsay evidence—including evidence derived from the Enforcement Staff's *ex parte* depositions of witnesses—which Respondents may lack any meaningful opportunity to rebut.[395] And despite this low standard for admissibility of prosecution evidence in FERC

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391 *Id*.

392 *See* FERC Enforcement Resources, "Reports" Tab, https://www.ferc.gov/enforcement-legal/enforcement/enforcement-resources (last visited June 17, 2021) (summarizing FERC's investigations since the Energy Policy Act of 2005 expanded the Commission's civil penalty authority under the NGA, the FPA, and the NGPA).

393 *See supra* Section VI.A.

394 18 C.F.R. § 385.101.

395 *Id.* § 385.509(a).

hearings, the Commission maintains that its ALJs are also free to prevent respondents from gaining access to relevant exculpatory evidence by, for example, permitting FERC's Enforcement Staff to claim privilege without producing a privilege log.[396] Respondents thus may never see all of the exculpatory evidence necessary to defend themselves.[397]

FERC's own Commissioners—the same set of officials who will have *already* concluded that the Enforcement Staff made out a *prime facie* case of a violation based on extensive and allegedly privileged *ex parte* discussions—then purport to review the ALJ's findings in "appeals" from the ALJ's decision.[398] It is thus hardly surprising that FERC cannot point to a single instance in which these procedures have *ever* resulted in a finding by the Commission that no violation of the NGA (or the other main statutes FERC administers) has occurred and that no civil penalty is warranted. And under the Commission's view, all this fact-finding will be subject only to highly deferential "substantial evidence" review in a court of appeal—thus potentially allowing FERC to compel Respondents to pay tens of millions of dollars even if the preponderance of the evidence shows that no violation occurred.[399]

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396 *E.g.*, Order Confirming Ruling at P 7, *BP Am. Inc., et al.*, Docket No. IN13-15-000 (July 3, 2014) (permitting Enforcement Staff to not produce privilege log of documents withheld during discovery in recent market manipulation case—despite the requirement it do so in FERC's own regulations, 18 C.F.R. § 385.410(d)(2)(i)—because it would have been "unduly burdensome and it would take staff resources away from preparing for the hearing").

397 Despite FERC purported policy of disclosing this *Brady* evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), through June 2014, Enforcement Office had provided exculpatory material in only four cases since EPAct 2005 increased its authority.

398 *Statement of Admin. Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 at P 7 (2006).

399 *Columbia Gas Transmission Corp. v. FERC*, 448 F.3d 382, 385 (D.C. Cir. 2006) (substantial evidence standard requires "'less than a preponderance of the evidence'"); *see also Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (standard equates with "more than a mere scintilla" of evidence of a violation). *See, e.g.*, *BP America Inc.*, 173 FERC ¶ 61,239, P 15 (2020) ("[W]e continue to find that Opinion No. 549 properly found that Enforcement Staff had the burden of proof and, therefore, the burden of persuasion requiring proof by a preponderance of the evidence of a

There is no doubt that this impermissible process has denied, and will continue to deny, Respondents an "impartial" adjudication in a tribunal with both "the appearance" and the reality "of justice," and thus an agency adjudication would violate due process.[400]

VII. The Recommended Remedies and Sanctions Are Vastly Exaggerated

The Commission need not address remedies and sanctions because, as explained above, no violation occurred. But if the Commission reaches this topic, it should reject Enforcement Staff's proposed penalty. Staff's calculation under the guidelines is badly flawed, and the $20,160,000 penalty it proposes is grossly disproportionate to the alleged violations. A proper application of the Commission's penalty guidelines yields a penalty range of $8,000 to $40,000—a mere fraction of Enforcement Staff's proposed penalty.

A. Enforcement Staff Miscalculated the Penalty

A majority of the Commissioners expressed concerns in their concurring statements about Enforcement Staff's penalty calculation.[401] These concerns are well founded. Enforcement Staff err at every step on their way to calculating a penalty range. Enforcement Staff use Section 2B1.1 of the penalty guidelines, which covers fraud, anticompetitive conduct, and other rule, tariff, and order violations. Even though no fraud or other deprivation of money or property occurred here, Enforcement Staff allege a "loss" of $3.6 million from the supposed

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claim of manipulation.").

400 *In re Murchison*, 349 U.S. at 134-36 (quoting *Offutt*, 348 U.S. at 14).

401 Order, Chatterjee Concurrence at P 2 ("I believe that the proposed civil penalties in the amount of $20,160,000, which were calculated with reference to the Commission's Revised Policy Statement on Penalty Guidelines, would be excessive in this matter."); Order, Danly Concurrence at P 1 n.1 ("[T]he order proposes a penalty at the highest end of the range provided by the Penalty Guidelines [using Enforcement Staff's proposed factors]. I would be particularly interested in any evidence offered regarding remedy and whether imposing the highest possible penalty permitted by the Penalty Guidelines under OE Staff's allegations is appropriate given the facts alleged."); Order, Christie Concurrence at P.5 (reserving judgment on issues of liability and penalty).

violation. There was no loss. Enforcement Staff's proposal to use the value of the House as a "proxy" for loss conflicts with the guideline's loss definition, and it is wildly inflated in any event because the House's appraised tax roll value was $41,090.[402] Enforcement Staff also include an enhancement for the "duration" of the violation, which cannot be squared with the theory that the purported harm resulted from the single event of removing the House. On the issue of "multipliers," Enforcement Staff compound their errors by mistakenly treating Rover's parent company, rather than Rover, as the certificate holder and violator. And, despite clear evidence that Rover had a compliance program in place and consulted regularly with outside subject matter experts, the Ohio SHPO, and FERC staff, all with the assistance of outside consultants and outside counsel, Enforcement Staff disallows any credit for a compliance program.

The result of these and other errors is a proposed penalty many orders of magnitude greater than could possibly be warranted for violations like those alleged here.

B. Enforcement Staff Committed Several Errors in Its Penalty Calculation.

To arrive at a proposed penalty, Enforcement Staff first apply § 2B1.1, the Penalty Guideline for Fraud, Anti-Competitive Conduct and Other Rule, Tariff and Order Violations.[403] As that provision's title shows, it is mainly aimed at penalizing such things as overcharging customers, anticompetitive conduct that skews market prices, or defrauding persons of money through false statements. The common thread is inflicting pecuniary loss on innocent third

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[402] Vederal Decl. Ex. A.

[403] Enforcement Staff Report at 79–80 (citing FERC Penalty Guidelines § 2B1.1, Application Note 2). There is a separate Penalty Guideline at § 2C1.1 for Intentional or Reckless Misrepresentations and False Statements to the Commission or Commission Staff. It has a scienter element. § 2C1.1, Application Note 1. The Enforcement Staff Report, which argues that Staff need not prove scienter under § 157.5, does not seek to apply § 2C1.1.

parties. But the alleged violations here—not being forthright in submissions to the Commission—is not claimed to have inflicted any of those types of harms.

Enforcement Staff's effort to pound the square peg of a lack-of-forthrightness violation into the round hole of penalties for fraud and market manipulation unleashes a series of errors in its penalty calculation. Section 2B1.1 starts with a "base violation level" of six.[404] And that is where Staff's proposed violation level should have ended. An increase based on "loss" applies if—and only if— "the loss exceeded $5,000[.]"[405] There was no loss here. The Enforcement Staff Report nonetheless comes up with an astounding figure of $3.6 million, reasoning that the asserted "historic value of the Stoneman House" is a "proxy" for "the loss in this case."[406] The Enforcement Staff Report does not claim that anyone lost $3.6 million. Instead, it asserts that this figure "estimates the *intangible* loss" of destroying a "unique historic home," and Enforcement Staff admit that it serves as no more than a "proxy" for that the alleged harm Rover "imposed" through a supposed "failure to be forthright."[407]

The Enforcement Staff Report does not say how the *definition* of loss possibly supports its "proxy" theory. In fact, Enforcement Staff completely *ignore* the definition. A review of the definition reveals why Staff do not address it. The guideline defines loss as "the greater of actual loss or intended loss."[408] And "[a]ctual loss"—the Staff's theory—"means the reasonably foreseeable pecuniary harm that resulted from the violation."[409] Importantly, "pecuniary harm

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404 FERC Penalty Guidelines § 2B1.1(a).

405 *Id.* § 2B1.1(b)(1).

406 Enforcement Staff Report at 79 n.353.

407 *Id.* (emphasis added).

408 FERC Penalty Guidelines § 2B1.1, Application Notes 2(A).

409 *Id.* § 2B1.1, Application Notes 2(A)(i).

does not include emotional distress, harm to reputation, or other non-economic harm."[410] Because harm qualifying as a loss must be "pecuniary," and because that exlucdes "non-economic harm," to qualify as a loss, Staff's theory of "intangible loss" by "proxy" is unavailable.

Putting aside that error, the Enforcement Staff Report *admits* that removal of the house is not even the right "harm" for the violations it alleges. In fact, when Enforcement Staff Report refuses to credit Rover's payments to the Ohio SHPO as "'efforts to remedy the violation,'" that is "because they relate to the destruction of the house, not the *separate* harm caused by the violation at issue: Rover's failure to fulfil its forthright obligation in its statements to the Commission."[411] Staff cannot have it both ways. Assuming Rover had an obligation under Section 157.5 to tell FERC that Rover bought and planned to remove the House, no pecuniary harm occurred because no matter the type of mitigation required for Project effects, nothing stopped the owner of the House from removing it during or after Project construction.

Even if Staff could overcome the two separate obstacles just discussed—removal of the House is not the harm from any alleged failure to be forthright, and loss does not include the non-pecuniary harm that Staff asserts from that removal—Staff greatly exaggerate what the loss amount *could* be here. Staff offers no evidence of the House's actual value. It was appraised at $41,090. The price that Rover paid ($1.3 million) was for the entire 10-acre property, including a number of other structures, and it reflects the negotiating leverage of sellers who own property that a project applicant seeks.[412] There is no evidence that anyone ever made an offer to purchase

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410 *Id.* § 2B1.1, Application Notes 2(A)(iii).

411 Enforcement Staff Report at 78 n.351 (emphasis added).

412 Energy Transfer's purchase price for the 10-acre Stoneman Property equated to roughly 32 times its tax roll value. Property purchases on or near a pipeline corridor are often made at many multiples of

the House for anything close to the price Rover paid under those special circumstances or that the House was insured for a similar value. Nor does Staff offer appraisals of any other houses from that era as comparables. As already noted, the House was merely eligible for National Register listing, and was unconnected to any historical event or figure.

Making matters worse, Staff double count its inflated figure by adding the amount Rover paid the Ohio SHPO to resolve, among other things, issues related to the House. If the House's intangible value is used as a proxy for the loss, Staff cannot ignore that the SHPO agreed to accept $2.3 million to account for that non-pecuniary harm, in addition to all other Project effects throughout Ohio. As Staff concedes, that $2.3 million figure consisted of "the amount Rover paid for the Stoneman House and its demolition" plus an additional $1 million to a state "historical education fund."[413] So the $2.3 million not only overstates any approximation of the harm caused (because it is for more than the House's value), the portion attributable to the House is a different way to arrive at the same "intangible" harm number that the Enforcement Staff Report already calculated at the exaggerated level of $1.3 million. In fact, the Commission itself previously found that this amount that Rover "independently agreed to provide the Ohio SHPO" was "compensatory mitigation funding."[414] If anything, the Commission should consider the

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market prices or tax roll values. Vedral Decl. ¶ 4 ("Pipelines typically buy properties for multiples of their tax roll or market value. Property prices are inflated because landowners have significant leverage. Once the company expresses interest in a property, Landowners usually demand a premium before they will sell. Increasingly, landowners hire attorneys who negotiate aggressively on their behalf. . . . I have attached a spreadsheet that shows the tax roll value and the amount that the company paid for properties related to the Rover Pipeline project.") & Ex. A at line 34. By way of comparison, just a month or two before Rover bought the Stoneman property, it purchased the property directly across the street, for CS1, at roughly *45* times its tax roll value. *Id.* at Ex. A (line 33).

413 Show Cause Order at 46.

414 *See Rover Pipeline LLC et al,* 158 FERC ¶ 61,109 n.245 (Feb. 2, 2017).

amount Rover already paid as reason for a *lower* penalty.[415] In adding the two together, Staff do the opposite: They nonsensically treat Rover's compensatory payment as reason for a *higher* penalty.

Staff's next error is to apply a duration enhancement of four levels because the violation supposedly "continued for 185 days."[416] Once again, Staff cannot have it both ways. Staff's duration enhancement is grounded in the assertion that the alleged failure to be forthright lasted from March 25, 2016 (DEIS Response) until September 26, 2016 (EIR Response).[417] But Staff wants to use the value of a demolished house to measure "loss," and the demolition was a one-time event. The duration enhancement does not apply to such events. Instead, it is meant for such things as market manipulation that allows the violator to charge the same improper rate or inflict some other harm over a multiday period instead of just one day. The longer such a violation, the greater the harm.[418] Enforcement Staff do not explain how to compute, by contrast, the duration of a home's destruction.

Having calculated the base penalty, Enforcement Staff's second step was to calculate the minimum and maximum modifiers that would be applied to the base penalty to calculate the

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[415] One commenter to Section 2B1.1 suggested that public utilities receive a credit against their loss (or gain) amount for any operational penalties they paid under their tariffs. The Commission responded to this comment by noting that it could, in its discretion, "consider operational penalties that an organization has already paid under a utility's tariff for the same violation." FERC Penalty Guidelines at 79 (¶ 207) That is the opposite of Staff's suggestion to use a previous payment to *increase* the proposed penalty.

[416] Enforcement Staff Report at 79.

[417] *Id.* at 79 n.354.

[418] 132 FERC ¶ 61216 at PP 180, 183. The Commission addressed a commenter's hypothetical in which false bids are used to obtain capacity. The commenter asked whether that is one violation (based on a single bid) or multiple violations for day the capacity is unlawfully retained. The Commission responded that the Penalty Guidelines would "consider the duration of the violation in [the] hypothetical as part of the duration enhancement in section 2B1.1(b)(2)."

penalty range. But Enforcement Staff's calculation of the modifiers was flawed for at least two reasons.

First, Enforcement Staff invoked the much larger size of Energy Transfer, the parent company, to justify a stiff enhancement based on the size of the violator. But the alleged violator is Rover, the certificate holder.[419] Enforcement Staff try to justify this by a combination of mis-using Mahmoud's testimony and referencing Energy Transfer's size. According to the Enforcement Staff Report, Mahmoud testified that the "total team" for the Rover Project is "somewhere around 1,800 people."[420] And the Report further notes that Energy Transfer employs more than 5,000.[421] But, as Staff are forced to acknowledge, the 1,800 number includes "only 25 – 50 Energy Transfer employees."[422] The rest are third-parties, including consultants, contractors, and inspectors.[423] Employees of *other* organizations do not count toward the enhancement. Rather, by the enhancement's express terms, the first requirement is that "the organization had 1,000 or more employees," not that 1,000 or more persons from other organizations participated in a project.[424] Instead of adding 4 points to the culpability score, the increase should have been 1 point.[425]

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[419] Enforcement Staff Report at 81 n.356; *see also id.* at 81 (quoting FERC Penalty Guidelines § 1C2.3(b)(2) (imposing an enhancement of 4 on organizations with 1,000 or more employees when there is high-level tolerance of a violation)).

[420] *Id*. at 81 n.356.

[421] *Id*.

[422] *Id.*

[423] Mahmoud Test. at 26–27.

[424] Penalty Guideline § 1C2.3(b)(2)(A).

[425] Penalty Guideline § 1C2.3(b)(5) (for between 10 and 49 employees).

Enforcement Staff's second error is that it provides no credit to Rover for having an effective compliance program.[426] The Penalty Guidelines provide that "hav[ing] an effective compliance program" means that "an organization… exercise[s] due diligence to prevent and detect violations" and "otherwise promote[s] an organizational culture that encourages a commitment to compliance with the law."[427] Rover meets this standard, both in general and in this specific case.[428] Rover, through Energy Transfer, enforces a robust set of compliance guidelines and policies, including annual recertification of Energy Transfer's Code of Business conduct by every employee—including those who worked on this Project—every year[429] and providing a confidential ethics helpline available to employees 24 hours a day and 7 days a week.[430]

In this particular case, Rover and its staff acted in accordance with this commitment to compliance. Rover's staff conferred repeatedly with consultants and attorneys to ensure that their acquisition and disposition of the House was lawful.[431] Rover's consultants checked to

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426 Show Cause Order at 81–82 (citing FERC Penalty Guidelines § 1C2.3(f)).

427 FERC Penalty Guidelines § 1B2.1(a).

428 *See generally* Response at 72–77.

429 *Id.* at 72 (citing Energy Transfer Partners, L.P. Sixth Amended and Restated Code of Business Conduct and Ethicsat 12, 16 (Apr. 2017)).

430 *Id.* (citing Energy Transfer Family of Partnerships Employee Handbook at 15 (Jan. 2018)). The Staff attempt to argue that Rover "did not have an effective compliance program" based on a misleading characterization of Buffy Thomason's testimony. Enforcement Staff Report at 91-92. *See* Thomason Attestation ¶ 9.

431 Response at 27–28 (citing Rover-00003817-3822 (Mar. 3, 2015 2:29 P.M. email from Thomason to group) ("From the report, it doesn't seem to be in an historical district . . . ."); Banta Test. 19:18:20 ("I think we had discussions and we had concurrence that there was nothing saying that the house could not be torn down."); Rover-00003817-3822 (Mar. 3, 2015 5:38 P.M. email from Millis to group) (reiterating that tearing down the Stoneman House was not unlawful); Millis Decl. ¶ 16 ("I did not identify a regulation or ordinance that prohibited a private landowner from demolishing an older structure that was not already listed as a historic resource in state and/or county records and I conveyed that information to Rover.")).

ensure that no state or local ordinances prevented removal of the House, and Rover waited more than a year from its purchase before removing it. When the decision was made to finally remove the House, Rover alerted the Ohio SHPO and gave that office more than a month to state an objection.[432] During that period, Rover also satisfied itself that because the House "wasn't listed on the NRHP and it's not on the pipeline [ROW], then it's a non-issue."[433] Rover acted with the diligence expected by the Penalty Guidelines. Therefore, a full compliance credit of 3 points, or at the very least a partial credit of 1 or 2 points, is warranted.

All told, Enforcement Staff's erroneous calculations produce a dramatically inflated penalty range of between $10,080,000 and $20,160,000 as demonstrated by the following table:

Staff Calculations

Fraud, Anti-Competitive Conduct and Other Rule, Tariff and Order Violations		
Violation Level	Base Violation level	6
	Loss Modifier	18
	Volume/Duration Modifier	4
	Transparency Modifier (+/= 16)	N/A
	Net Base Violation Level:	28
Base Penalty (Greater of loss/gain or Violation Table)		$6,300,000
Culpability Score	Base Culpability (=5)	5
	High-Level Tolerance (≤+5)	4
	Prior History of Violations (≤+2)	0
	Order Violation (≤+2)	0
	Obstruction (≤+3)	0
	Effective Compliance Program (≤-3)	0
	Self-reporting (≤-2)	0
	Full Cooperation (≤-1)	-1
	Avoidance of Trial (≤-1)	0
	Acceptance of Responsibility (≤-1)	0
	Net Score:	8
Minimum Culpability Score Multiplier		1.60
Maximum Culpability Score Multiplier		3.2
Penalty Range	**Minimum Penalty**	**Maximum Penalty**
	$10,080,000	$20,160,000

[432] *Id.* at 33 (citing Sept. 26, 2016 EIR Response Attachment 3 at 20, 23).

[433] *Id.* at 34 (quoting Rover-00012712 (Apr. 13, 2016 12:48 P.M. email from Thomason to Banta and Mahmoud)).

C. An Accurate Calculation Using 2B1.1 Would Produce a Significantly Lower Penalty.

By correcting Enforcement Staff's numerous errors as discussed *supra*, the penalty guidelines produce a range of $8,000 to $40,000 for the alleged violations. As with Enforcement Staff's calculation, the first step is calculating the estimated pecuniary "loss." By any measure there was no pecuniary loss. And even if there had been, the House had an appraised value of $41,090. Moreover, Rover paid the SHPO more than enough to offset any possible loss. No duration modifier applies if a loss figure is used based on the removal of the House. But because the harm was purely non-pecuniary (*i.e.*, no dollar loss), a duration enhancement of 4 levels results in a Base Penalty of $20,000.

Turning next to the Culpability Score, Rover's size (25 – 50 employees) and credit for a compliance program (either partial or complete) yields a low end of $8,000 and a high end of $40,000:

Corrected Calculations

Fraud, Anti-Competitive Conduct and Other Rule, Tariff and Order Violations		
Violation Level	Base Violation level	6
	Loss Modifier	0
	Volume/Duration Modifier	4
	Transparency Modifier (+/= 16)	N/A
	Net Base Violation Level:	**10**
Base Penalty (Greater of loss/gain or Violation Table)		$20,000
Culpability Score	Base Culpability (=5)	5
	High-Level Tolerance (≤+5)	1 to 2
	Prior History of Violations (≤+2)	0
	Order Violation (≤+2)	0
	Obstruction (≤+3)	0
	Effective Compliance Program (≤-3)	-1 to -3
	Self-reporting (≤-2)	0
	Full Cooperation (≤-1)	-1
	Avoidance of Trial (≤-1)	0
	Acceptance of Responsibility (≤-1)	0
	Net Score:	**2 to 5**
Minimum Culpability Score Multiplier		0.4 to 1
Maximum Culpability Score Multiplier		0.8 to 2
Penalty Range	**Minimum Penalty**	**Maximum Penalty**
	$8,000 to $20,000	$16,000 to $40,000

VIII. Conclusion

An old and decaying house with no cultural or historic signficance. Notice given that removal would be occuring even though no law or regulation prevented the house's removal. The mitigation that FERC Project Staff proposed from day one was fully implemented. There has never been a stronger case for the full Comission to reign in the prosecutorial misue of FERC authorty that Enforcment Staff display here.

For all of the foregoing reasons, the Commission should dismiss this matter and decline to initiate an enforcement action. Should the Commission decide to initiate such an action, it must do so in federal district court. And, should the Commission decide to assess a penalty here, its penalty guidelines call for a penalty of between $8,000 and $40,000.

Respectfully submitted,

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