

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Process for Assessing Civil Penalties

Docket No. AD07-4-000

STATEMENT OF ADMINISTRATIVE POLICY REGARDING  
THE PROCESS FOR ASSESSING CIVIL PENALTIES

(Issued December 21, 2006)

1. The Commission issues this Statement of Administrative Policy to provide guidance on the process by which civil penalties may be assessed when we are enforcing the statutes, orders, rules, and regulations we administer. Previously in Docket No. PL06-1-000 we issued the Policy Statement on Enforcement<sup>1</sup> and discussed the factors we will take into account in responding to violations, including applying the enhanced civil penalty authority provided by the Energy Policy Act of 2005 (EPA 2005).<sup>2</sup> Our purpose then was to emphasize that we will provide firm but fair enforcement of our rules and regulations, to place entities subject to our jurisdiction on notice of the consequences of violating the statutes, orders, rules, and regulations administered by the Commission, and to encourage such entities to develop a culture of compliance within their organizations, and to self-report and cooperate with the Commission in the event violations occur.<sup>3</sup>

2. The Commission's purpose in this Statement is to explain the procedures that will apply when we assess a civil penalty under the primary statutes we administer—the Federal Power Act (FPA) Part I,<sup>4</sup> the FPA Part II,<sup>5</sup> the Natural Gas Act (NGA),<sup>6</sup> and the

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<sup>1</sup> *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005) (Policy Statement on Enforcement).

<sup>2</sup> P. L. No. 109-58, 119 Stat. 594 (2005).

<sup>3</sup> Policy Statement on Enforcement, 113 FERC ¶ 61,068 at P 1-2, 17-29.

<sup>4</sup> 16 U.S.C. §§ 791a-823c (2000).

Natural Gas Policy Act of 1978 (NGPA).<sup>7</sup> In doing so, however, we first note that civil penalties often are negotiated as part of a stipulation and agreement resolving compliance issues. In such cases the civil penalty is imposed through a Commission order approving the negotiated agreement, obviating the need for an assessment process. We emphasize that nothing in this Statement is intended to change the current practice of negotiating the resolution of violations, including the imposition of civil penalties, whenever possible. Nevertheless, the Commission recognizes that cases may arise where a negotiated resolution is not possible, and that the result of an investigation or other process may be an assessment of a civil penalty by the Commission. In such cases, it will assist the public and the regulated community to understand the process that will be followed under each of the applicable statutes. We note that while this Statement outlines the basic procedures to be followed, we retain the right to modify these procedures to fit the circumstances presented by specific cases, while still providing process that meets the applicable statutory criteria.

## **I. Background**

3. EPCRA 2005 amended Part II of the FPA, the NGA, and the NGPA and gave the Commission the authority to assess civil penalties of up to \$1 million per day per violation for violations of rules, regulations, and orders issued under these acts.<sup>8</sup> There

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<sup>5</sup> 16 U.S.C. §§ 824-824m (2000).

<sup>6</sup> 15 U.S.C. §§ 717 *et seq.* (2000).

<sup>7</sup> 15 U.S.C. §§ 3301 *et seq.* (2000).

<sup>8</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1284(e), 314 (b)(1)(B), and 314(b)(2), 119 Stat. 594 at 950 and 691 (2005), respectively. Under FPA Part II, the Commission can assess a penalty “of not more than \$1,000,000 for each day that such violation continues.” FPA section 316A(b). Under the NGA, the Commission can assess a penalty “of not more than \$1,000,000 per day per violation for as long as the violation continues.” NGA section 22(a). Under the NGPA, the Commission can assess a penalty “of not more than \$1,000,000” and “each day of violation shall constitute a separate violation.” NGPA section 504(b)(6)(A) and (C). There was no change to the Commission’s existing FPA Part I civil penalty authority, under which the Commission can assess civil penalties of up to \$11,000 “for each day that such violation or failure or refusal continues.” FPA section 31(c), as adjusted for inflation by 18 C.F.R. § 385.1602 (2006).

will be differences in the procedures for assessment of civil penalties because of differences among the primary statutes we administer. The FPA and NGPA have provisions detailing how penalties are to be assessed. Section 31(d)<sup>9</sup> of the FPA outlines the process by which the Commission can assess penalties for Part I violations, and FPA section 316A(b)<sup>10</sup> applies the section 31(d) procedures, as applicable, to Part II violations. Because of the differences in hydroelectric and electric regulation, however, there are some differences between the FPA Part I and Part II processes. Section 504(b)(6) of the NGPA<sup>11</sup> sets out still different procedures for assessing civil penalties under the NGPA. The NGA, however, contains no provisions specifying the process for assessing penalties under that statute.

4. This Statement discusses the processes the Commission will use when assessing civil penalties under all our governing statutes, including the NGA.<sup>12</sup> Our goal is to provide procedures that meet applicable statutory requirements and to give entities subject to possible civil penalties due process, in as uniform a fashion as possible given the different governing statutes, before a penalty assessment is made.

## **II. Process for FPA Part II Penalty Assessment**

5. FPA section 316A(b) grants the Commission the authority to assess civil penalties against any person who violates any provision under Part II of the FPA or any order or rule issued thereunder.<sup>13</sup> Section 316(A)(b) also refers to the process set forth in section 31(d) as applicable to violations related to FPA Part II. Accordingly, the following

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<sup>9</sup> 16 U.S.C. § 823b(d) (2000).

<sup>10</sup> 16 U.S.C. § 825o-1 (2000).

<sup>11</sup> 15 U.S.C. § 3414(b)(6) (2000).

<sup>12</sup> The Commission's regulations address penalties under FPA Part I only. 18 C.F.R. §§ 385.1501-1511 (2006). There are no parallel regulations for FPA Part II or the NGPA, nor has the Commission previously provided general guidance about the process for imposing penalties under FPA Part II or the NGPA.

<sup>13</sup> 16 U.S.C. § 825o-1(b) (2000), *amended by* Energy Policy Act 2005, Pub. L. No. 109-58 § 1284(e), 119 Stat. 594, 980 (2005). Before EPAct 2005 the Commission's Part II civil penalty authority was limited to violations of sections 211-214 of the FPA or of rules or orders issued thereunder. The Commission has not had occasion to assess a penalty outside a settlement context for a violation of sections 211-214 of the FPA.

outlines the process for assessing a civil penalty under FPA Part II in accordance with section 31(d).<sup>14</sup> These procedures apply to the assessment of a civil penalty by the Commission in the first instance, not to the review by the Commission of a penalty assessed by another entity.<sup>15</sup>

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<sup>14</sup> The FPA Part II process is limited to the procedures in FPA section 31(d) that are applicable to Part II violations, as indicated by FPA section 316A(b). The process therefore excludes the effect of issuing compliance orders under FPA section 31(a), as such compliance orders are directed to compliance with terms and conditions of licenses and permits issued under FPA Part I and of exemptions from any requirement of FPA Part I. As described in the procedures for FPA Part I violations, *infra*, where a licensee or exemptee does not comply with a final compliance order issued under FPA section 31(a), the Commission can assess a penalty after an administrative hearing and the licensee or exemptee will not have the option of choosing review in district court. *See* FPA section 31(d)(1), 16 U.S.C. § 823c(d)(1)(2000). While there may be circumstances in which, in response to violations of FPA Part II requirements, the Commission may issue orders directing compliance with such requirements, such compliance orders will not affect the choice of administrative or district court review.

<sup>15</sup> In certain circumstances, other entities may impose a penalty that is subject to review by the Commission. For instance, EPAct 2005 section 1211(a) enacted new section 215 of the FPA, 16 U.S.C. § 824n, imposing electric reliability standards. Under section 215(e), the selected Electric Reliability Organization (ERO), or a qualifying Regional Entity acting under authority delegated by the ERO, can impose penalties for violations of a Commission-approved electric reliability standard, and such penalties are subject to review by the Commission. Similarly, an independent system operator (ISO) or a regional transmission organization (RTO) may be authorized by tariff to impose penalties for certain Commission-approved, objectively-identifiable violations of organized market rules. *See, e.g., Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267, at P 5 (2005); *California Independent System Operator Corp.*, 106 FERC ¶ 61,179, at P 14-16, *order on reh'g*, 107 FERC ¶ 61,118 (2004). In both situations, the Commission reviews the action taken in the first instance by the ERO or Regional Entity, ISO, or RTO. The Commission may act on the record submitted to it and any submission or response by the affected entity, or the Commission may order further hearing procedures (*see, e.g.,* 18 C.F.R. § 39.7(e)(5)). An order of the Commission affirming or modifying the ERO, ISO, or RTO action is subject to rehearing and court review.

(continued...)

1. **Notice.** Before issuing an order assessing a civil penalty against any person under FPA Part II, the Commission will issue such person notice of the proposed penalty and a statement of the material facts constituting the violation. The notice will give the person the option to choose between either (a) an administrative hearing before an Administrative Law Judge (ALJ) at the Commission prior to the assessment of the penalty under section 31(d)(2) or (b) an immediate penalty assessment under section 31(d)(3).<sup>16</sup> Though not required by the statute, the Commission will allow the person to file with the Commission within 30 days of the notice any legal or factual arguments that could justify not issuing the assessment or a reduction or modification of the proposed penalty.<sup>17</sup>
  - a. **Administrative Hearing Pursuant to Section 31(d)(2).** If the person elects an administrative hearing before an ALJ at the Commission, the procedure will be as follows:
    - i. **Hearing Order.** The Commission will issue a hearing order that will inform the person of the opportunity for an administrative hearing before an ALJ. The ALJ will conduct a hearing under Part 385 of the Commission's regulations. Staff from the Office of Enforcement will serve as trial staff at the hearing.<sup>18</sup>

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If, however, the Commission initiates an action to assess a penalty for a violation of FPA Part II, including Commission-ordered penalties for violations of reliability standards (*see* 18 C.F.R. § 39.7(f)), the process described here is applicable.

<sup>16</sup> Section 31(d) expressly requires that an administrative hearing be “on the record” pursuant to 5 U.S.C. § 554 “before an administrative law judge” appointed under 5 U.S.C. § 3105, and that a penalty assessment order “include the administrative law judge’s findings.”

<sup>17</sup> The Commission has done so in assessing FPA Part I penalties. *See, e.g., American Hydro Power Company LP*, 71 FERC ¶ 61,078, at 61,284 (1995).

<sup>18</sup> Even though Rule 1508 of the Commission's Rules of Practice and Procedure does not by its terms apply to civil penalties assessed under FPA Part II, the Commission will issue a hearing order if an administrative hearing is chosen, and will set the matter for hearing under the Rules of Practice and Procedure, in order to provide the due process required under FPA section 31.

- ii. **Initial Decision.** The ALJ will issue an Initial Decision and determine whether a violation or violations occurred. If a violation is found, the Initial Decision will recommend any appropriate penalty, taking into account factors described in the Policy Statement on Enforcement.
  - iii. **Exceptions and Assessment.** The Commission will consider the Initial Decision of the ALJ and any exceptions filed. If the Commission determines that there is a violation, the Commission will issue an order and may assess any appropriate penalty, taking into account all relevant factors.
  - iv. **Rehearing.** In accordance with FPA section 313(a) and Rule 713, the person may request a rehearing no later than 30 days after the issuance of the order assessing the penalty.
- b. **Immediate Penalty Assessment Pursuant to Section 31(d)(3).** If the person elects an immediate penalty assessment by the Commission, the procedure will be as follows:
- i. **Immediate Penalty Assessment.** If the Commission finds a violation, the Commission will issue an order setting forth the material facts that constitute the violations and assess any appropriate penalty.
  - ii. **District Court Review.** If the assessed penalty is not paid within 60 days, the Commission will institute an action in a United States district court, where, pursuant to FPA section 31(d)(3)(B), the court is authorized to review *de novo* the law and facts involved.
  - iii. **Judgment.** The United States district court will have jurisdiction to enter a judgment enforcing, modifying, enforcing as modified, or setting aside, in whole or in part, the Commission's penalty assessment. The Commission can appeal an order that modifies or sets aside the Commission's penalty assessment.
2. **Appeal.** The person can appeal to a United States Court of Appeals within the appropriate time for review of a Commission order or appeal of a district court order.

3. **Judicial Enforcement.** Once there is a final Commission order under the section 31(d)(2) process or the Commission has obtained a judgment under section 31(d)(3), the Commission can institute a collection action in an appropriate United States district court. In such action, the validity and appropriateness of such final assessment order or judgment is not subject to review.<sup>19</sup>

### III. Process for NGA Penalty Assessment

6. EPAAct 2005's grant of civil penalty authority under the NGA did not specify the process by which a penalty is to be assessed. The only statutory guidance given is that the "penalty shall be assessed by the Commission after notice and opportunity for public hearing."<sup>20</sup> In the Policy Statement on Enforcement, the Commission noted this and stated its intent to provide an administrative process for penalty assessment.<sup>21</sup> In many instances issues in dispute can be resolved fairly and expeditiously by means of the "paper hearing" procedures the Commission has made use of in various circumstances.<sup>22</sup> Such procedures are appropriate where facts can be determined on the basis of written submissions.<sup>23</sup>

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<sup>19</sup> 16 U.S.C. § 823b(d)(5) (2000).

<sup>20</sup> 15 U.S.C. § 717t-1, *added by* Energy Policy Act of 2005, Pub. L. No. 109-58 §314(b)(1)(B), 119 Stat. 594, 691 (2005). 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), 15 U.S.C. § 717s(a) (2000), and collection actions in district court under NGA section 24, 15 U.S.C. § 717w (2000).

<sup>21</sup> Policy Statement on Enforcement, 113 FERC ¶ 61,068, at P 16.

<sup>22</sup> *See, e.g., ISO New England, Inc.*, 117 FERC ¶ 61,070, at P 30 (2006) (reasonableness of certain expenses); *Midwest Independent Transmission System Operator, Inc.*, 101 FERC ¶ 61,221 (2002), *reh'g denied*, 103 FERC ¶ 61,035 (2003) (FTR billing determinants and exit fees); *Great Lakes Gas Transmission L.P.*, Opinion No. 367, 57 FERC ¶ 61,140 (1991) (NGA Section 4 rate case); *Transcontinental Gas Pipe Line Company*, 47 FERC ¶ 61,244, *order on reh'g*, 48 FERC ¶ 61,199 (1989) (gas inventory charge).

<sup>23</sup> Indeed, there is substantial case law upholding the Commission's use of paper hearings. *See Carlisle & Neola v. FERC*, 741 F.2d 429, 431 (D.C. Cir. 1984) ("The Commission has broad discretion in deciding whether to grant a hearing, and this court previously has upheld the power of the Commission to dispose of cases on a 'paper

(continued...)

7. Against this backdrop, the following draws on existing processes for the FPA and NGPA for the administrative process the Commission generally will follow in assessing civil penalties under the NGA. Depending on the circumstances presented, the Commission may employ paper hearing procedures or refer the matter to an ALJ if additional procedures are necessary.<sup>24</sup> The NGA civil penalty process does not include the possibility for the person to receive a *de novo* review in district court, because there is no statutory provision permitting *de novo* review,<sup>25</sup> but meets the requirement of “notice and opportunity for a public hearing.”<sup>26</sup>

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hearing”), citing *Cities of Batavia v. FERC*, 672 F.2d 64, 91 (D.C. Cir. 1982), and *Public Service Company of New Mexico v. FERC*, 653 F.2d 681, 692-93 (D.C. Cir. 1981). See also *Public Service Company of Indiana*, Opinion No. 349, 51 FERC ¶ 61,367, order on reh’g, Opinion 349-A, 52 FERC ¶ 61,260, clarified, 53 FERC ¶ 61,131 (1990), dismissed, *Northern Indiana Public Service Company v. FERC*, 954 F.2d 736 (D.C. Cir. 1992) (trial-type hearing necessary only if the material facts in dispute cannot be resolved on the basis of the written record); *Tennessee Gas Pipeline Company*, 49 FERC ¶ 61,348 (1989) (same).

<sup>24</sup> We note also that ALJ hearings can be tailored to the circumstances presented. For instance, where expedition is appropriate, the Commission could direct the ALJ to compile a record but omit the initial decision and instead certify the record to the Commission for decision, accompanied by a report or a recommended decision in lieu of an initial decision. See, e.g., *Transmission Congestion on the Delmarva Peninsula*, 103 FERC ¶ 61,163 (2003) (report in lieu of initial decision); *Stowers Oil & Gas Co.*, 26 FERC ¶ 61,207 (1984) (recommended decision in lieu of initial decision).

<sup>25</sup> See *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619 n.17 (1966) (in the absence of specific statutory authorization, a *de novo* review is generally not to be presumed); see also *Chandler v. Roudebush*, 425 U.S. 840, 862 (1976).

<sup>26</sup> NGA section 22(b), 15 U.S.C. § 717t-1. The FPA either requires an “on the record” hearing before an ALJ or authorizes a *de novo* review in district court, FPA section 31(d)(2)(A), and the NGPA authorizes *de novo* review in district court, NGPA section 504(b)(6)(F). While these steps are not applicable to the NGA, the process outlined here meets the requirement of Commission action after notice and opportunity for a public hearing and provides persons subject to potential penalties the opportunity to present evidence and argument to the Commission.

1. **Notice.** Before issuing an order assessing a civil penalty against any person under the NGA, the Commission will issue such person notice of the proposed penalty and a statement of the material facts constituting the violation. The notice will give the person the opportunity to respond, including information to show why the penalty should either not be assessed or be modified or reduced. If the person chooses to pay the amount of the proposed penalty, the process will terminate.
2. **Hearing Order.** If the person contests the alleged violation and proposed assessment, the Commission will issue a further order. 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 ALJ. In the latter case, the ALJ will conduct a hearing under Part 385 of the Commission's regulations. In either case, staff from the Office of Enforcement will serve as trial staff at the hearing.
3. **Initial Decision.** If the matter has been set for hearing before an ALJ, and unless otherwise directed in a hearing order, the ALJ will issue an Initial Decision and determine whether a violation or violations occurred. If a violation is found, the Initial Decision will recommend any appropriate penalty, taking into account factors described in the Policy Statement on Enforcement.
4. **Penalty Assessment.** If the Commission has conducted a paper hearing, it will issue an order on the paper hearing record. If the case was set for hearing before an ALJ, the Commission will consider the Initial Decision of the ALJ and any exceptions filed. In either case, if the Commission determines that there is a violation, the Commission will issue an order and may assess any appropriate penalty.
5. **Rehearing.** In accordance with NGA section 19(a) and Rule 713, the person may request a rehearing no later than 30 days after the issuance of the order assessing the penalty.
6. **Appeal.** The person can appeal a final Commission order to a United States Court of Appeals within the appropriate time for review of a Commission order.
7. **Judicial Enforcement.** If the person fails to pay the civil penalty, the Commission will institute a collection action in an appropriate United States district court.
8. The principal difference between the process for civil penalties under the NGA and the statutory process under the FPA is that there would be no option to have a

*de novo* review of the Commission's decision regarding an NGA penalty in a district court. As noted, unlike the FPA and NGPA, Congress did not establish a *de novo* court review under the NGA, and the Commission cannot provide what can only be provided by Congressional action.

#### **IV. Process for FPA Part I Penalty Assessment**

9. FPA section 31(a) grants the Commission the authority to monitor and investigate compliance with licenses, permits, and exemptions for hydropower projects issued under Part I. If the Commission finds a violation, it can assess civil penalties under section 31(c). Pursuant to section 31(a), the Commission can also issue compliance orders to the person who is in violation of the license, permit, or exemption. If the person violates a compliance order, the Commission can assess civil penalties under section 31(c) or issue a revocation order under section 31(b). Section 31(d) of the FPA establishes a process for assessing civil penalties issued pursuant to FPA section 31(c). This process is restated in greater detail in Rules 1501 through 1511 of the Commission's Rules of Practice and Procedure.<sup>27</sup>

10. Section 31(c) requires the Commission to notify the person of the violation and the proposed penalty, and to give the opportunity for a public hearing. The notice gives the person the option (unless the violation is of a final compliance order under section 31(a)) to choose between either (a) an administrative hearing before an ALJ at the Commission prior to the assessment of the penalty pursuant to section 31(d)(2) or, (b) an immediate penalty assessment by the Commission which may be reviewed *de novo* by a United States district court when the Commission files for a court order affirming the penalty assessment pursuant to section 31(d)(3). This election must be made within 30 days of receiving the notice of proposed penalty. If the violation is of a final compliance order under section 31(a), however, there is no choice and the penalty is assessed after an administrative hearing before an ALJ. The following outlines the process for assessing a civil penalty under FPA Part I:

1. **Notice.** Before issuing an order assessing a civil penalty against any person under FPA Part I, the Commission will issue such person notice of the proposed penalty and a statement of the material facts constituting the violation.<sup>28</sup> Unless the violation is of a final compliance order under section 31(a), the notice will give the person the option to choose between either (a) an administrative hearing before an

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<sup>27</sup> 18 C.F.R. §§ 385.1501-1511 (2006).

<sup>28</sup> 18 C.F.R. § 385.1506(b) (2006).

Administrative Law Judge (ALJ) at the Commission prior to the assessment of the penalty under section 31(d)(2) or (b) an immediate penalty assessment under section 31(d)(3).<sup>29</sup> Though not required by the statute, the Commission allows the person to file with the Commission within 30 days of the notice any legal or factual arguments that could justify not issuing the assessment or a reduction or modification of the proposed penalty.<sup>30</sup> In the case of a violation of a final compliance order, the Commission will conduct an administrative hearing pursuant to section 31(d)(2)(A).

- a. **Administrative Hearing Pursuant to Section 31(d)(2).** If there has been a compliance order or if the person elects an administrative hearing before an ALJ at the Commission, the procedure will be as follows:
  - i. **Hearing Order.** The Commission will issue a hearing order that will inform the person of the opportunity for an administrative hearing before an ALJ. The ALJ will conduct a hearing under Part 385 of the Commission's regulations. Staff from the Office of Enforcement will serve as trial staff at the hearing.
  - ii. **Initial Decision.** The ALJ will issue an Initial Decision and determine whether a violation or violations occurred. If a violation is found, the Initial Decision will recommend any appropriate penalty, taking into account factors described in the Policy Statement on Enforcement.
  - iii. **Exceptions and Assessment.** The Commission will consider the Initial Decision of the ALJ and any exceptions filed. If the Commission determines that there is a violation, the Commission will issue an order and may assess any appropriate penalty.
  - iv. **Rehearing.** In accordance with FPA section 313(a) and Rule 713, the person may request a rehearing no later than 30 days after the issuance of the order assessing the penalty.

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<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., *American Hydro Power Company*, *supra* n.17; *Bluestone Energy Design, Inc.*, 56 FERC ¶ 6,426, at 62,526 (1991); 18 C.F.R. § 1507(a) (2006).

- b. **Immediate Penalty Assessment Pursuant to Section 31(d)(3).** If there has not been a compliance order, and the person elects an immediate penalty assessment by the Commission, the procedure will be as follows:
  - i. **Immediate Penalty Assessment.** If the Commission finds a violation, the Commission will issue an order setting forth the material facts that constitute the violations and assess any appropriate penalty.
  - ii. **District Court Review.** If the assessed penalty is not paid within 60 days, the Commission will institute an action in a United States district court, where, pursuant to FPA section 31(d)(3)(B), the court is authorized to review *de novo* the law and facts involved.
  - iii. **Judgment.** The United States district court will have jurisdiction to enter a judgment enforcing, modifying, enforcing as modified, or setting aside, in whole or in part, the Commission's penalty assessment. The Commission can appeal an order that modifies or sets aside the Commission's penalty assessment.
2. **Appeal.** The person can appeal to a United States Court of Appeals within the appropriate time for review of a Commission order or appeal of a district court order.
3. **Judicial Enforcement.** Once there is a final Commission decision under the section 31(d)(2) process or the Commission has obtained a judgment under section 31(d)(3), the Commission can institute a collection action in an appropriate United States district court.

## V. Process for NGPA Penalty Assessment

11. The Commission also has civil penalty authority under section 504(b)(6) of the NGPA.<sup>31</sup> Though EAct 2005 did not create the penalty authority, section 314(b)(2) did amend the NGPA to allow for civil penalties up to \$1 million per day per violation. NGPA section 504(b)(6)(A) grants the Commission the power to assess a civil penalty on any person who knowingly violates any provision of the NGPA or any rule or order

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<sup>31</sup> 15 U.S.C. § 3414(b)(6) (2000).

issued under the NGPA. NGPA sections 504(b)(6)(E) and (F) establish a process by which the Commission can assess civil penalties. The process is similar to, but not the same as, the FPA penalty process.

12. Under the NGPA, the Commission is required to give notice of the alleged violation and proposed penalty. The person can choose to pay the proposed penalty and terminate the process, or can contest the penalty. The NGPA does not provide for an on-the-record hearing before an ALJ. Rather, after considering the response to the proposed penalty (and in the absence of a settlement of the matter), the Commission assesses the penalty by order after considering the facts presented. If the person does not make the required payment within 60 days of the assessment order, the Commission will institute an action in United States district court at which time the court provides a *de novo* review of the law and facts involved. Once the Commission has a favorable judgment, the person can either pay the penalty or appeal the district court decision.

1. **Notice.** Before issuing an order assessing a civil penalty against any person under the NGPA, the Commission will issue such person notice of the proposed penalty and a statement of the material facts constituting the violation. Though not required by the statute, the Commission allows the person to file with the Commission within 30 days of the notice any legal or factual arguments that could justify not issuing the assessment or a reduction or modification of the proposed penalty.<sup>32</sup> If the person chooses to pay the amount of the proposed penalty, the process will terminate.
2. **Penalty Assessment.** If the Commission finds a violation, the Commission will issue an order setting forth the material facts that constitute the violation and assess any appropriate penalty.
3. **District Court Review.** If the assessed penalty is not paid within 60 days, the Commission will institute an action in a United States district court, where, pursuant to NGPA section 504(b)(6)(F), the court is authorized to review *de novo* the law and facts involved.

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<sup>32</sup> See, e.g., *El Paso Natural Gas Co.*, 59 FERC ¶ 61,188, at 61,657 (1992); *Questar Pipeline Co.*, 57 FERC ¶ 61,058, at 61,224 (1991); *Transcontinental Gas Pipe Line Corp.*, 48 FERC ¶ 61,189, at 61,701 (1989).

4. **Judgment.** The district court will enter a judgment enforcing, modifying, enforcing as modified, or setting aside, in whole or in part, the Commission's penalty assessment. The Commission can appeal an order that modifies or sets aside the Commission's penalty assessment.
5. **Appeal.** The person can appeal to a United States Court of Appeals within the appropriate time for appeal of a district court order.
6. **Judicial Enforcement.** Once the Commission has obtained a district court judgment, the Commission can institute a collection action in an appropriate United States district court.

## **VI. Conclusion**

13. This Statement provides general guidance on the processes applicable to the assessment of civil penalties under the primary statutes the Commission administers. Consistent with the Commission's commitment to firm but fair enforcement of our statutes, rules, regulations, and orders,<sup>33</sup> the Commission is also committed to providing due process to persons against whom enforcement action is taken, while retaining the flexibility necessary to tailor civil penalty assessment procedures to the circumstances presented in specific cases.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

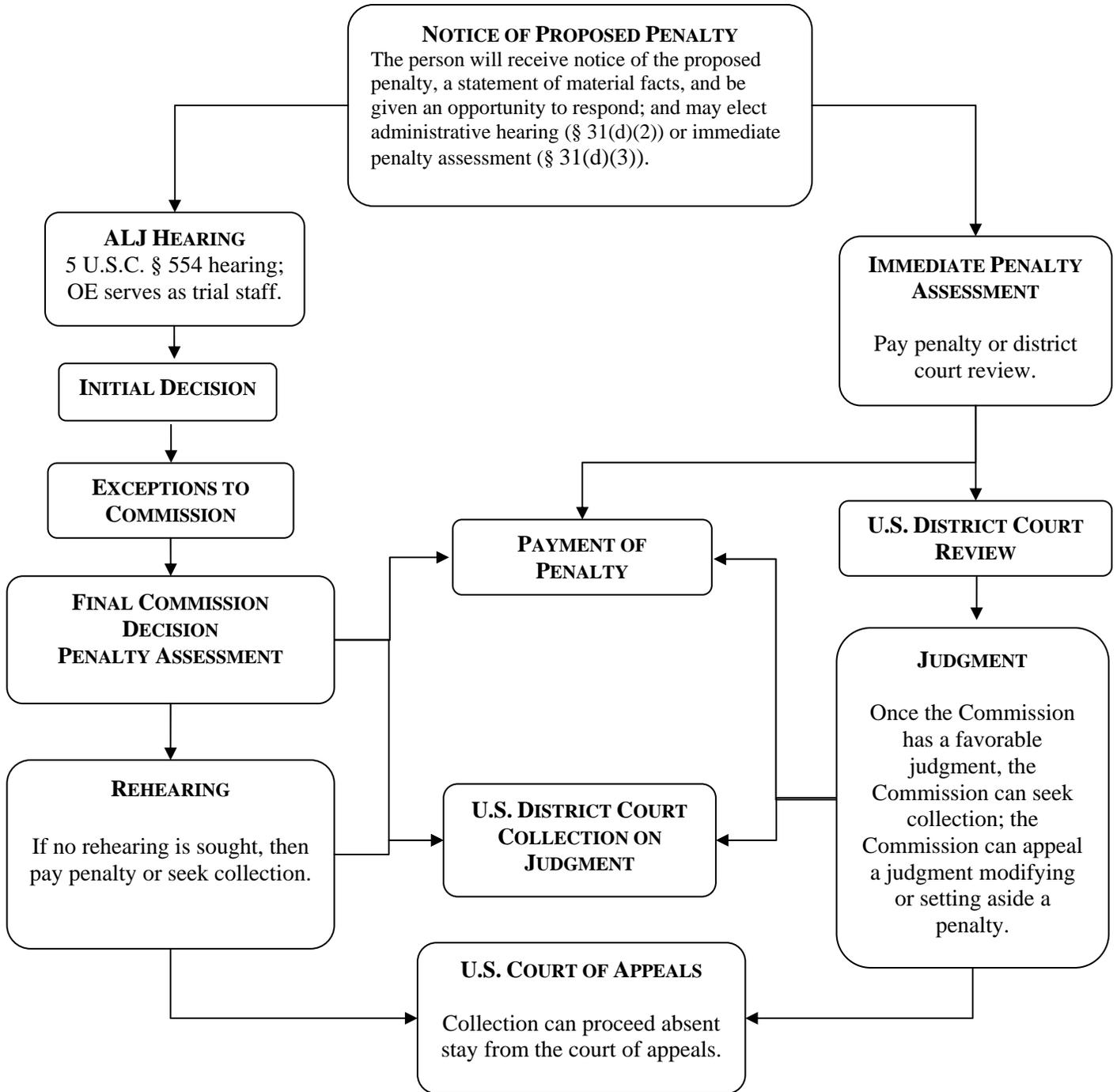
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<sup>33</sup> Policy Statement on Enforcement, 113 FERC ¶ 61,068 at P 1, 28.

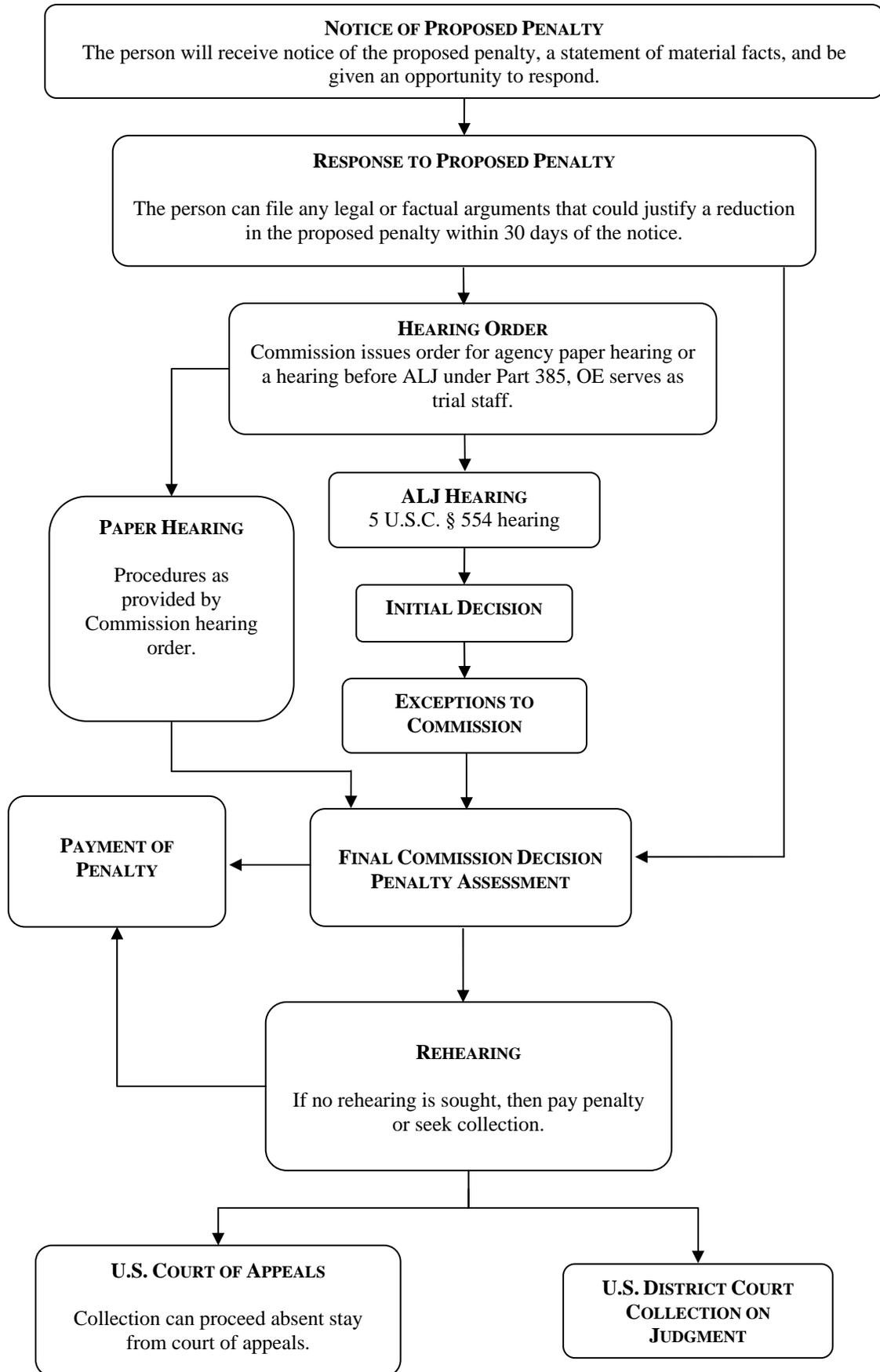
## **APPENDIX**

### **FLOW CHARTS ILLUSTRATING CIVIL PENALTY ASSESSMENT PROCESSES UNDER THE FPA, NGA, AND NGPA**

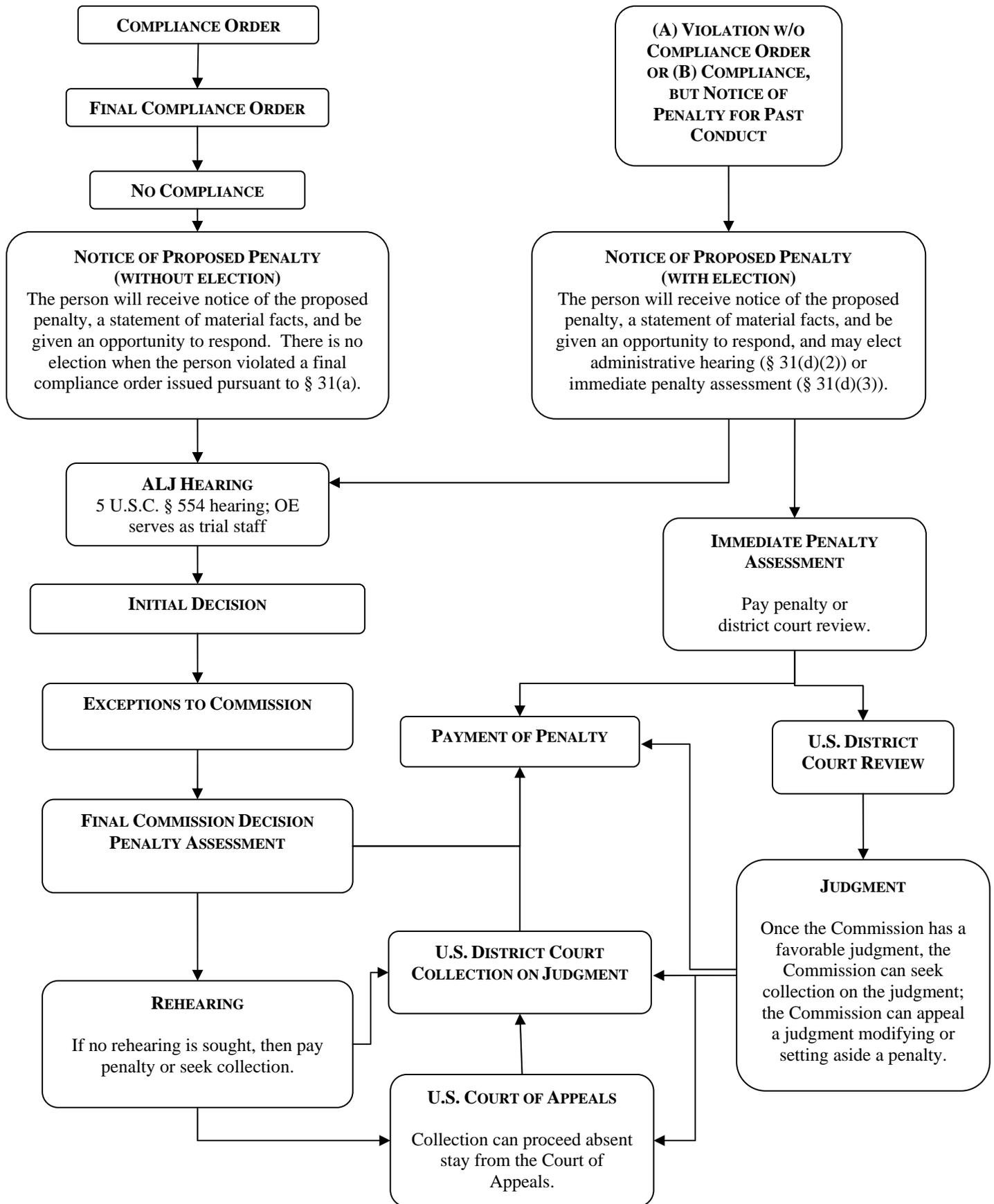
## PROCESS FOR FPA PART II PENALTY ASSESSMENT



# PROCESS FOR NGA PENALTY ASSESSMENT



# PROCESS FOR FPA PART I PENALTY ASSESSMENT



# PROCESS FOR NGPA PENALTY ASSESSMENT

