

the Commission respectfully requests that it be permitted to defer filing of the certified list of contents of the administrative record, as well as transmission of the underlying administrative record to the other parties, pending the Court's disposition of the Commission's motion to dismiss. The FEC has conferred with counsel for plaintiffs on this motion. Plaintiffs oppose the motion. The FEC has also conferred with counsel for the proposed-intervenors John Doe 1 and John Doe 2, who do not oppose this motion.

BACKGROUND

The full background on the administrative matter and the filing of plaintiffs' judicial complaint before this Court are set forth in the Commission's motion to dismiss. The FEC respectfully refers the Court to that brief. (FEC's Mot. to Dismiss at 2-7 (Docket No. 22).)

ARGUMENT

Plaintiffs' prior motion for clarification discussed the timetable for filing the administrative record, and the Commission's opposition overlaps substantially with the arguments in this motion to defer. (*See* Pls.' Mot. for Clarification or, In the Alternative, a Protective Order (Feb. 27, 2018) (Docket No. 10); FEC's Opp'n to Pls.' Mot. for Clarification, Or, In the Alternative, a Protective Order at 7-11 (Docket No. 14).)

As the Commission explained, it has long been settled that a court should satisfy itself that it has jurisdiction over an action before it proceeds on the case. As the Supreme Court has explained, "[w]ithout jurisdiction the court cannot proceed at all in any cause. . . . [W]hen [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (citation and internal quotation marks omitted.). The question of jurisdiction is thus one that "the court is bound to ask and answer for itself, even when not otherwise suggested, and without

respect to the relation of the parties to it.” *Id.* (citation and internal quotation marks omitted).

“The requirement that jurisdiction be established as a threshold matter ‘spring[s] from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’”

Id. at 94-95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

In this action challenging a final enforcement decision by the FEC under 52 U.S.C. § 30109(a)(8), plaintiffs seek review of the Commission’s action on an administrative complaint that they filed with the FEC. The Commission has moved to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Proposed intervenor-defendants have also lodged a motion to dismiss that will be filed should their motion for intervention be granted. (Proposed Intervenor-Defs.’ Mot. to Dismiss Pls.’ Compl. For Injunctive and Declaratory Relief (Docket No. 11-1).) The Commission’s motion relies on the allegations in plaintiffs’ judicial complaint; review of the administrative record in the underlying matter is thus unnecessary for the Court to decide the motion. *See Campaign Legal Ctr. v. FEC*, 245 F. Supp. 3d 119, 125-26 (D.D.C. 2017) (granting in part FEC motion to dismiss without resort to administrative records in two dismissed underlying administrative matters). The motion to dismiss explains that because this action does not fit within the narrow judicial review parameters of section 30109(a)(8), and review is not otherwise available under the Administrative Procedure Act, the Court lacks jurisdiction over this case. If the Court agrees with the Commission here and concludes that it lacks jurisdiction over this action, “the court cannot proceed” and “the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Steel Co.*, 523 U.S. at 94. A decision granting the Commission’s motion on the threshold question of this Court’s jurisdiction would obviate the need for an administrative record in this action. (*See also* FEC’s Opp’n to Pls.’ Mot. for Clarification, Or, In the Alternative, a Protective Order at 7-

11 (Docket No. 14).)

Deferring the preparation of the administrative record as requested would serve the interest of economy because a decision granting the FEC's motion to dismiss would render the administrative record unnecessary and avoid the need for the Court to resolve present and future disputes about the contents of that administrative record. (*E.g.*, Pls.' Mot. for Clarification, Or, In the Alternative, a Protective Order (Docket No. 10).) The time and effort required for the agency to compile, certify, and produce the record documents in this case would be substantial. Although some documents from the Commission's large administrative file in the underlying enforcement matter have already been publicly released, those documents were selected solely based upon the Commission's disclosure policy, which lists certain documents routinely published by the Commission at the conclusion of every closed enforcement case. In contrast, the additional effort which would be required to review the Commission's full administrative file here, and to compile, certify, and produce the full administrative record would impose substantial and potentially unnecessary additional burdens upon the agency. In fact, the Commission cannot certify the accuracy and completeness of a list of certified record documents without performing a full review of its file. Production of the contents of the record also would require additional time and resources, including reviewing record documents for information that would have to be redacted, such as personally identifiable information, *see* LCvR 5.4(f), as well as material subject to attorney-client, work product, and other privileges.

In the interest of economy, the Commission should be permitted to defer filing of a certified list of the contents of the administrative record (and transmitting that record) pending the Court's disposition of the Commission's motion to dismiss. The Court of Appeals has granted deferral requests in analogous circumstances. *See, e.g., Wisc. Elec. Power Co. v. Dep't*

of Energy, No. 99-1342, 1999 WL 1125165, at *1 (D.C. Cir. Nov. 24, 1999) (per curiam) (granting motion to defer filing the certified index pending resolution of motion to dismiss); *see also Dynegy Power Mktg., Inc. v. FERC*, Nos. 04-1034, *et al.*, 2004 WL 1920775, at *1 (D.C. Cir. Aug. 26, 2004) (per curiam) (granting motion to defer filing the certified index after appellants moved to dismiss).

This court has done the same. For example, in *People for the Ethical Treatment of Animals, Inc. v. U.S. Fish and Wildlife Service*, 59 F. Supp. 3d 91 (D.D.C. 2014) (“*PETA*”), the court excused the agency from the former requirement to file a certified copy of the contents of the administrative record simultaneously with the agency’s motion to dismiss under Rule 12(b). Order, *PETA* (Docket No. 21) (D.D.C. July 18, 2014); *see also Mdewakanton Sioux Indians of Minn. v. Zinke*, 264 F. Supp. 3d 116, 123 n.12 (D.D.C. 2017) (construing motion to dismiss to include motion for waiver from LCvR 7(n), and granting the motion “because the administrative record [wa]s not necessary for [the court’s] decision”). In *Campaign Legal Center v. FEC*, the court resolved a similar motion to defer that the FEC had filed along with its motion to dismiss by denying the deferral motion as moot simultaneously with its decision granting in part the FEC’s motion to dismiss. 245 F. Supp. 3d at 129. Furthermore, allowing the FEC to defer transmitting the administrative record and filing the certified list of its contents would serve additional economies in this case because such a decision would also defer — and potentially avoid — present and further disputes about whether the administrative record in this case should publicly disclose the identities of the proposed-intervenors, a subject about which the Court is familiar.

CONCLUSION

For the foregoing reasons, the Commission requests that it be permitted to defer the filing of a certified list of the contents of the administrative record, as well as the transmission of the administrative record to the other parties, pending the Court's disposition of the Commission's motion to dismiss.

Respectfully submitted,

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