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FERC Wins Statute of Limitations Fight in Market Manipulation Enforcement Case, But Uncertainty Remains

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Brief Background on the Case

The Day-Ahead Load Response Program (DALRP) was a demand response program run by ISO New England until June 2012. In July 2012, FERC initiated Order to Show Cause (OSC) proceedings against four entities, including Respondents, alleged to have committed fraud in connection with the DALRP by altering "baseline" energy consumption during a test period for the purpose of misrepresenting the amount of demand response they would actually provide once the program started. All subjects elected the Federal Power Act's (FPA) "de novo review" procedural option, where FERC assesses penalties without an agency hearing and then files an action in federal district court to enforce the penalty, which the court reviews de novo. In August 2013, following the OSC proceedings, FERC assessed civil penalties against CES, Silkman, and one of the other subjects (the fourth settled with FERC during the OSC proceeding). In December 2013, after the subjects did not pay the assessed penalties, FERC filed enforcement actions in the District of Massachusetts. In April 2016, the court denied the subjects' motion to dismiss (including on statute of limitations grounds), but transferred to the case to the District of Maine.[1] The third subject subsequently settled with FERC, but Respondents continued to litigate. In February 2018, Respondents and FERC filed cross-motions for partial summary judgment on Respondents' statute of limitations defense, which claimed that FERC's December 2013 enforcement action was untimely since it was filed more than five years after the alleged manipulation occurred (which began in 2007).

The January 4 Order

The court found that FERC's enforcement action against Respondents was timely even though it was filed in court more than five years after the conduct occurred. The court found the issue was governed by the First Circuit's decision in *U.S. v. Meyer*,[2] which held that where an agency proceeding (there, a Department of Commerce (DOC) administrative enforcement proceeding) is a statutory prerequisite to a civil enforcement action, the civil enforcement claim does not "accrue" until the penalty has been assessed administratively. The result, under *Meyer*, is that there are two limitations periods—one five-year period to initiate administrative proceedings to assess the penalty, and another five-year period to enforce the penalty in court once it has been assessed. Thus, although FERC did not file its district court enforcement action against Respondents until December 2013 (well more than five years after the conduct began), the court found FERC's action was timely.

The court rejected Respondents' argument that *Meyer* was no longer good law following the Supreme Court's decisions in *Gabelli v. SEC* (which held that the "discovery rule" in fraud actions does not extend to Securities and Exchange Commission (SEC) enforcement actions) and *Kokesh v. SEC* (which held that disgorgement in SEC enforcement actions constitutes a penalty subject to the statute of limitations).[3] The court found that neither of these cases addressed the specific statute of limitations questions presented in *Meyer* and *Silkman*: when the limitations period for an enforcement action begins to run when an administrative proceeding is a statutory prerequisite to bringing a case. The court also rejected Respondents' argument that *Meyer* did not apply because FERC's penalty assessment proceeding (the OSC process) is merely a "decision to prosecute" rather than a true administrative proceeding with procedures and due process comparable to the DOC proceeding in *Meyer* (which was a more traditional agency adjudication involving a hearing before an administrative law judge). The court found that the FERC OSC proceeding, despite not providing for discovery or a live hearing, was more than merely a prosecutorial determination such that the *Meyer* framework of two statute of limitations periods should apply.

Implications

FERC is still likely to move cases more quickly. This marks FERC's second consecutive win on statute of limitations challenges to enforcement actions—with the last case being the September 2018 decision in *FERC v. Powhatan Energy Fund* in the Eastern District of Virginia (discussed here).[4] While one might think FERC would be emboldened by these wins, we continue to expect that FERC will try to bring cases more quickly to mitigate statute of limitations litigation risk. Courts within the First Circuit have found *Meyer* to provide a helpful (and binding) framework for considering FERC enforcement cases. However, courts elsewhere have (understandably) found statute of limitations questions confounding given the FPA's unique procedural framework. This was reflected in the *Powhatan* decision, where the court (reluctantly) agreed with FERC that its claim technically did not accrue until FERC had assessed the penalty administratively rather than at the time of the conduct, but took the unusual step of allowing defendants to seek an interlocutory appeal before the Fourth Circuit (and inviting Congress to provide clarity). Further, the *Powhatan* court, despite ruling in FERC's favor, found that *Meyer* should not govern FPA "de novo review" cases because of the differences between FERC's penalty assessment process and a traditional agency adjudication. The bottom line, in our view, is that the agency will continue to face real statute of limitations risk by not filing a federal complaint within five years of the conduct—particularly in jurisdictions that do not follow *Meyer*.

All eyes on the Fourth Circuit. As noted above, in the *Powhatan* case, the court ruled in FERC's favor on the statute of limitations question but allowed the defendants to seek an interlocutory appeal. The Fourth Circuit has agreed to hear the case, and briefing will begin later this month. This will be the first appellate decision on this issue.

Disgorgement likely a "penalty" for statute of limitations purposes. As we wrote about here, the *Kokesh* case—which held that disgorgement of unjust profits in SEC enforcement cases is subject to the five-year statute of limitations—should apply equally to FERC. In *Powhatan*, the court concluded that *Kokesh* would apply to disgorgement in FERC enforcement cases provided the disgorgement is punitive in nature rather than purely remedial. But the court found this question was fact-specific and could not be resolved at the motion to dismiss stage. The *Silkman* court, however, found the question more straightforward as a matter of law, holding that, under *Kokesh*, disgorgement in FERC enforcement cases constitutes a penalty and is subject to the five-year statute of limitations.

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[1] *FERC v. Silkman*, 177 F. Supp. 3d 683 (D. Mass. 2016) (Order on Mot. to Dismiss). *FERC v. Silkman*, No. 13-13054-DPW, 2016 U.S. Dist. LEXIS 48409 (D. Mass. April 11, 2016) (Order on Mot. to Transfer).

[2] 808 F.2d 912 (1st Cir. 1987).

[3] *See Gabelli v. SEC*, 568 U.S. 442 (2013); *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

[4] Order on Motions for Summary Judgment, FERC v. Silkman, No. 1:16-cv-00205-JAW (D. Me. Jan. 4, 2019).

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