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4th Circ. Ruling Gives FERC More Time For Penalties

By **Levi McAllister, Daniel Skees and Patrick Pennella** (March 5, 2020, 3:53 PM EST)

The U.S. Court of Appeals for the Fourth Circuit resolved a question of first impression on Feb. 11, concerning when the statute of limitations period commences for civil enforcement claims brought by the Federal Energy Regulatory Commission under the Federal Power Act, or FPA, if the alleged violator opts for adjudication in federal district court instead of an administrative proceeding.

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Siding with FERC, the Fourth Circuit held in FERC v. Powhatan Energy Fund that when an alleged violator decides to pursue adjudication in court, FERC's claim accrues, and thus the statute of limitations commences, when the alleged violator fails to pay within 60 days the amount set forth in FERC's Penalty Assessment Order.

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The decision means that when an alleged violator opts for the district court, FERC can enforce civil penalties for an FPA violation up to 10 years after the date of alleged unlawful conduct.

Legal Framework

As a general matter, the FPA creates two procedural options by which FERC can assess civil penalties. Under one option, the "default option," a FERC administrative law judge will hear the dispute. Under the second option, the "alternate option," adjudication occurs in federal district court. The alleged violator may chose the path.

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The process begins when FERC provides notice of a violation to the alleged violator, at which time FERC must apprise the alleged violator of the default and alternate options. FERC provides notice by issuing an order to show cause, which describes the alleged violation and orders the recipient to demonstrate why FERC should not assess a penalty.

The order to show cause commences an on-the-record proceeding. The alleged violator has 30 days in which to select the default or alternate Option. Under the default option, the case proceeds to formal adjudication before a FERC ALJ, after which the ALJ decides whether to impose a penalty.

But if the alleged violator selects the alternate option, the FPA requires FERC, without any adjudication, to "promptly assess" a civil penalty by order. The alleged violator has 60 days in which to pay, after which FERC may institute an action in a district court for an order affirming the civil penalty. The district court conducts a de novo review of the law and fact.

The FPA does not contain a statute of limitations. Accordingly, the five-year general statute of limitations for civil penalties, 28 U.S.C. Section 2462, applies. Generally, the five-year period begins to run from "when the claim first accrued."

The question before the court, however, concerned when FERC's claim first accrued: Was it when the alleged violation occurred, or once the alleged violator refused to pay the assessed penalty? Agreeing with FERC, the Fourth Circuit held the latter.

Factual Background

FERC began to investigate Dr. Houlian Chen in August 2010 for fraudulent or unlawful trading on the electric wholesale market administered by PJM Interconnection LLC. After failure of settlement efforts, FERC issued Chen an order to show cause on Dec. 7, 2014, alleging that he violated the FPA's antimanipulation provision.

Denying the charges, Chen chose the alternate option. FERC assessed Chen a civil penalty by order on May 29, 2015, for $29 million in civil penalties and $4 million in disgorgement. Chen failed to pay within 60 days, and FERC filed a complaint in district court on July 31, 2015.

Chen then moved to dismiss all but four days covered by the complaint for, among other reasons, being beyond the five-year statute of limitations. Arguing that FERC's claim accrued when his alleged manipulation occurred, he asserted that only conduct on or after July 31, 2010, would fall within the statute of limitations for a suit filed on July 31, 2015.

But Chen's purportedly manipulative trades ended on Aug. 3, 2010 — leaving only four days within the limitation period. Unsurprisingly, FERC disagreed with Chen's formulation.

FERC argued that under the alternate option, its claim accrued only once it could bring its suit in district court, i.e., only after Chen failed to pay the penalty within 60 days of issuance. Accordingly, FERC's claim would be timely until May 29, 2020, and FERC could penalize conduct within five years of its order to show cause, i.e., conduct back to Dec. 7, 2009.

Adopting FERC's position would permit penalties on nearly eight additional months of Chen's alleged FPA violations.

Court's Holding and Legal Implications for Those Opting for Court Adjudication

Agreeing with FERC and affirming the district court, the Fourth Circuit held that under the FPA's alternate option, FERC's claim accrues, and the five-year statute of limitations for FERC to pursue action in district court commences, when the recipient of an order assessing penalties refuses to pay within 60 days of the order.

The court reasoned that until this time, FERC lacks the right to commence an action in district court, arguing that although common, "no natural law principle dictates" that a "claim accrues instantly upon a

statutory violation." Rather, "as creatures of congressional intent, [statutes of limitation] must take account of any substantive prerequisites" imposed by Congress.

Here, the court reasoned, those prerequisites were FERC's issuing an order to show cause, allowing the recipient to choose the procedural path, assessing a penalty "promptly" if the recipient chooses the alternate option, and waiting 60 days for the recipient to comply.

Among his concerns on appeal, Chen asserted that FERC's control over the timing of issuing a penalty assessment order could extend indefinitely the commencement of the limitations period. The FPA imposes no period other than "promptly" in which FERC must issue a penalty after the alleged violator selects the alternate option.

Rejecting this argument, the court first noted that the order to show cause may only look back five years. Thus, the alleged violator is on notice of the allegations. Second, the court held that the FPA's "promptly assess" requirement "is not merely precatory," but imposes upon FERC a nondiscretionary duty under the Administrative Procedures Act to act "within a reasonable time."

Channeling the FPA's purpose of protecting a well-functioning electric market free from manipulation, the court found that when an alleged violator selects the alternate option, requiring FERC to complete within five years the show cause process and its underlying investigation, and then perfect all of the steps necessary before FERC can file suit, would "materially disrupt this carefully reticulated enforcement scheme."

Such an outcome would harm market participants, held the court, by requiring FERC to conduct "potentially slipshod investigations, hastily undertaken to protect against the effect of a premature limitations period." In effect, Chen's formulation would allow those opting for district court adjudication to shorten the period FERC could penalize.

Under the default option, FERC may penalize conduct up to five years from the date of the order to show cause. But if the show cause recipient opts for the alternate option, a decision of which FERC cannot have a priori knowledge, the recipient can shave at least 90 days from the period subject to enforcement; the recipient can wait 30 days before choosing the alternate option, and — assuming FERC assesses the penalty the day the recipient make the choice — a further 60 days must elapse.

The Fourth Circuit's decision cited Crown Coat Front Company v. United States[1] for the proposition that congressional purpose determines when a claim accrues, in a case where a contract claim accrued against the government upon the conclusion of administrative proceedings rather than upon the plaintiff's fulfillment of the contract. The U.S. Court of Appeals for the Federal Circuit has adopted similar claim accrual rules for suits where administrative adjudication procedures exist.

Though applying to cases where private plaintiffs are suing the U.S. government under the Tucker Act,[2] the Federal Circuit has held consistently that when the statute of limitations commences depends on whether the administrative remedy is mandatory or permissive.[3] Under the Tucker Act, a claim accrues when a plaintiff is entitled to sue.

For permissive administrative remedies, those where a plaintiff may sue without pursuing administrative relief, the claim accrues with the conduct underlying the government's liability. But where a plaintiff must pursue an administrative remedy, the statute of limitations commences once the plaintiff exhausts the mandatory administrative process.

Though the roles of the parties in both Chambers and Crown Coat are opposite that of Powhatan, the unifying principle is that for a claim where an administrative process must be followed before resorting to federal court, the claim accrues upon completion of that administrative process.

The Fourth Circuit's decision applies to a statutory process prescribed by the FPA, meaning that its formulation here may not apply necessarily to violations of other regulatory provisions that lack an express statute of limitations or that do not grant an alleged violator the option to choose between an administrative or judicial adjudication in the first instance.

Takeaways for Physical Energy Market Participants

At its core, the Fourth Circuit's decision is noteworthy because it addresses an important issue that has previously been unresolved. For that reason, there are some important considerations for market participants that are active in trading and/or marketing physical energy products.

For example, market participants that pursue the alternate option through their election to go to federal district court face a risk that a lengthy investigation will become even further protracted. This is sure to disappoint entities looking to resolve investigations and/or allegations with certainty in a prompt manner — or at least litigate the merits in a prompt manner.

Numerous trade associations that actively represent dozens of physical energy market participants across all sectors of the energy industry raised this issue in their comprehensive white paper filed with FERC in June 2019, in which the associations urged FERC to revisit some of its enforcement-related practices and policies in an effort to achieve greater transparency, efficiency and fairness. Nevertheless, the court rejected it when it was raised in the Powhatan proceeding.

Notwithstanding, the Fourth Circuit's decision is not without limitation. As explained above (and in the decision itself), the court's holding is limited to factual instances in which a market participation elects the alternate option. Therefore, in practice, the court's decision reaches only those instances where the Office of Enforcement is alleging wrongdoing in violation of the FPA and the investigated entity or individual(s) elect to pursue a de novo review in federal district court.

In instances where the an investigation target foregoes their right to pursue de novo review, and instead elects to pursue adjudication FERC enforcement allegations by a FERC ALJ, the Fourth Circuit's decision is inapplicable. Similarly, in instances where FERC enforcement alleges wrongdoing in violation of the Natural Gas Act, the Fourth Circuit's decision should be inapplicable, because the investigation target has no option to pursue de novo review; that investigation target is limited to adjudication by a FERC ALJ.

In summary, for civil enforcement actions under the FPA, at least within the Fourth Circuit's territory, FERC may penalize conduct within five years of its order to show cause, regardless of whether the alleged violator chooses administrative or judicial adjudication.

And if the alleged violator chooses a district court in the Fourth Circuit, FERC may pursue its claim within five years of its order assessing penalty, assuming this order issued promptly after the alternate option was chosen. Chen has 90 days from the date of the Fourth Circuit's decision to appeal to the U.S. Supreme Court.

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[1] Crown Coat Front Company v. United States, 386 US 503 (1967).

[2] 28 U.S.C. § 1491.

[3] See, e.g., Chambers v. United States, 417 F.3d 1218 (Fed. Cir. 2005).