

INSIGHTS

For Those Keeping Tally, Another Win for Defendants' Rights: Exploring De Novo Review and Burdens of Proof

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On March 30, 2017, the U.S. District Court for the Eastern District of California issued an order denying, without prejudice, the Federal Energy Regulatory Commission's ("FERC" or the "Commission") Motion to Affirm Civil Penalties against Barclays Bank PLC and four individuals ("Defendants").^[1] As an initial matter, the court agreed with every other federal court that has opined on the issue of whether defendants are entitled to conduct discovery under the Federal Rules of Civil Procedure.^[2] Notably, though, the court went further than any other court in rejecting arguments raised by FERC with respect to procedural matters and the rights afforded defendants when seeking *de novo* review under Option 2, an alternative procedural route that provides relief in lieu of an administrative hearing before an ALJ. The court addressed, and dismissed, a number of arguments presented by FERC:

- The court agreed with the Defendants' assertion that "[t]here is a fundamental difference between forcing a party to rely on and develop its defenses based entirely on the discovery taken by its opponent and allowing that party to engage in its own independent discovery in support of its own defenses." The court further found it would "def[y] notions of fairness and common sense" for the court to deny the Defendants the opportunity to provide evidence that they assert could refute the charges against them.
- The court also rejected FERC's argument that the proceeding should be restricted to the "administrative record." The court highlighted that the record was incomplete and further flagged the fact that FERC failed to identify any statute, regulation or policy that staff followed when creating the record. The court pointed out that the record does not include the entire investigative record compiled by staff. "FERC offers no explanation for why Enforcement did not present the omitted documents, data, and transcripts, nor does it explain why this Court should not consider them." The court concluded: "Such an 'administrative record' cannot be the basis for a neutral 'adjudication' by FERC or by this Court."
- Similarly, the court shot down FERC's argument that "issue exhaustion" bars the Defendants from introducing new arguments or evidence. FERC took the position that the court's review should be limited to the evidence and arguments contained in its administrative record – maintaining that "issue exhaustion" should bar the Defendants from introducing new arguments or evidence as the civil action proceeds. The court

concluded that FERC's penalty assessment was not a final agency decision and, therefore, the doctrine of issue-exhaustion was inapplicable.

- The court distinguished its role “as neutral decision-maker of the conflict between FERC and Defendants” from that of FERC when it was deciding whether to civilly prosecute the Defendants. The court found FERC's argument that it should decide the case based solely upon the administrative record FERC purported to rely upon in assessing civil penalties unpersuasive because there was no real showing that FERC had compiled a proper administrative record or actually based its determination upon such record. Furthermore, the court highlighted the fact that “there is nothing prohibiting FERC from deciding to prosecute based entirely on evidence presented by its Enforcement staff, ex parte presentations made to it by Enforcement staff urging it to file suit, and even its own desire to ‘push the envelope’ or to make new law on what constitutes market manipulation in the energy markets.”
 - The court also stated that, if Defendants' assertion that the Intercontinental Exchange found that Defendants “did not engage in any improper conduct,” depriving the Defendants of the opportunity to compel production of that allegedly exculpatory report “might work an injustice on Defendants.”
- In discussing the burden of proof, the court pointed out that normal civil actions require the plaintiff to “prove” its case. “Such proof involves subjecting the evidence presented by both sides to give and take of the adversarial system. This has not happened thus far.” FERC has yet to “prove that [Defendants] broke the law, or that Defendants had a true opportunity to defend themselves.”

With the court's decision to reject FERC's restrictive interpretation of the rights afforded to Defendants under the Federal Power Act – consistent with every other court that has addressed the issue – it appears increasingly well-settled that the requirement that a district court review FERC's decision *de novo* requires the opportunity for a trial, with discovery rights for defendants.

[\[1\]](#) Case No. 2:13-cv-2093 TLN DB. The Motion to Affirm was denied without prejudice to its renewal as a dispositive motion at an appropriate time.

[\[2\]](#) See *FERC v. Maxim Power Corp.*, 196 F. Supp. 3d 181 (D. Mass. 2016); *FERC v. City Power Marketing, LLC*, 199 F. Supp. 3d 218 (D.D.C. 2016); *FERC v. Silkman*, 2017 WL 374697, 2017 U.S. Dist. LEXIS 10902 (D. Me. 2017); *FERC v. ETRACOM LLC*, 2017 WL ___, 2017 U.S. Dist. LEXIS 33430 (E.D. Cal. 2017).