

INSIGHTS

Another Win for Respondents' Rights: District Court Opines on the Scope of De Novo Review

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On March 8, 2017, the U.S. District Court for the Eastern District of California issued an order affirming that ETRACOM LLC and its owner (the "Respondents") are entitled to a full trial on the merits and discovery rights in an action brought by the Federal Energy Regulatory Commission ("FERC" or the "Commission") seeking to enforce an order assessing civil penalties against the Respondents for alleged market manipulation in the California energy market. The primary issue at stake was the meaning of the Federal Power Act's ("FPA") reference to "*de novo* review" in a civil action brought by FERC seeking enforcement of a civil penalty in federal district court. FERC had argued that courts reviewing a FERC penalty assessment *de novo* need only review the administrative record developed by the agency. The Respondents, in contrast, argued that the reference to *de novo* review entitled them to a trial on the merits in accordance with the Federal Rules of Civil Procedure ("FRCP"), including full discovery rights, and without deference to the agency's findings or the administrative record.

In the March 8 Order, the court agreed with the Respondents and held that the FRCP apply to FERC's action seeking enforcement of its prior civil penalty assessment. The court explained that the FRCP apply to all civil actions before U.S. District Courts except where there is "a clear expression of congressional intent to exempt actions from the FRCP." Parsing the language of the FPA, the court explained that the reference to an "action" in district court is generally interpreted to require the full procedural protections typically afforded in a court of law. The court also explained that the legislative history of other federal statutes providing for *de novo* review supported a finding that congress intended the FRCP to apply to actions brought by FERC to enforce its civil penalty assessments. Finally, the court noted that the federal district courts in Massachusetts, Maine, and the District of Columbia that have considered the same issue have reached the same conclusion.

The March 8 order represents a significant victory for subjects of FERC enforcement actions wishing to challenge the Commission's allegations in a court of law. As noted in the March 8 order, at this point, federal district courts have consistently rejected FERC's arguments respecting the meaning of *de novo* review and have found that respondents are entitled to a fresh review of the facts at issue, including the opportunity to seek discovery. While there are a number of federal district courts still evaluating the proper scope of review in an action seeking enforcement of FERC's civil penalty assessments, it appears increasingly well established that such matters should proceed as ordinary civil actions with full due process rights for the respondents. As this and other threshold procedural issues become settled, it is possible that we will see cases moving more quickly towards the substantive merits of the dispute, providing

a glimpse into the courts' view of the bounds of FERC's anti-manipulation authority.