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Statute of Limitations Bars FERC Penalty in Preeminent Market Manipulation Case

October 2, 2017

By: ***Michael W. Brooks***

On Friday, the U.S. District Court for the Eastern District of California handed the Federal Energy Regulatory Commission ("FERC" or "Commission") a significant defeat by concluding that FERC's action against a former trader of Barclays Bank PLC accused of participating in a scheme to manipulate western energy markets***[1]*** was barred by the statute of limitations. For now, the related allegations against Barclays, which is facing a $435 million civil penalty plus $34.9 million in disgorgement, and against three other traders remain intact. However, this dismissal, which comes on the heels of other significant ***wins for respondent's rights***, has potentially significant implications for the remaining defendants and for FERC's enforcement practices more broadly.***[2]***

On September 29, 2017, Judge Nunley issued an order granting Mr. Ryan Smith's Motion for Judgment on the Pleadings, agreeing with Mr. Smith that the action was time-barred by the five-year statute of limitations found in 28 U.S.C. § 2462. Framed as a "contractual interpretation question," the order focused on two key questions: (1) whether the agreement Mr. Smith entered into tolling the statute of limitations in his case ("Tolling Agreement") terminated according to its terms on October 31, 2012 – the date FERC issued its Order to Show Cause and Notice of Proposed Penalty ("OSC");***[3]*** and (2) if so, did the five-year statute of limitations continue to run until FERC filed its action with the court in the Eastern District of California on October 9, 2013? Because the court concluded that the answer to both questions was yes, Mr. Smith's motion was granted. Although none of the other individual traders named in this case have filed similar motions to date, each individual trader, as well as the company, has raised the statute of limitations as a defense during the course of the instant action.***[4]*** It may be that applying the findings made here to the remaining defendants could significantly limit their exposure, drastically cutting FERC's case down in size.

Court Finds FERC's Arguments Against Application of Statute of Limitations Unpersuasive

FERC presented three arguments as to why the OSC did not terminate the Tolling Agreement; however, the court found them all unpersuasive. In particular:

1. First, FERC argued that the investigation had not actually terminated when the OSC was issued. In response, the court determined that the operative question was whether Mr. Smith was given "written notice" within the meaning of the Tolling Agreement "that the investigation had terminated *irrespective of whether it actually did.*" To this end, the court focused on whether the words of the OSC provided the required notice to Mr. Smith.

2. Second, FERC argued that the OSC, if anything, constituted "implied notice" and the Tolling Agreement's terms did not provide for implied notice as an acceptable means to terminate the agreement. The court determined that had FERC wished to apply some specialized meaning to the words "written notice" requiring the use of special words or a particular form, the parties would have had to indicate so when entering into the agreement. As a matter of federal common law, there were "no magic words" required by the Tolling Agreement.

3. Finally, FERC argued that even if the OSC did constitute "written notice" of the investigation's termination, the notice was not "from Enforcement." FERC asserted that Enforcement did not issue the OSC; rather, the Commission issued it. With respect to this third argument, the court found it "irreconcilable with FERC's pleading in [the] case and FERC's own policy" that Enforcement staff was "somehow caught by surprise when [Mr.] Smith received the OSC." As the "proponent of the [OSC]," Enforcement staff could not now argue that because the Commission issued the OSC, it served as insufficient written notice "from Enforcement" that the investigation had terminated. In this context, the court viewed the technical source of the notice a distinction without a difference.

As a whole, the court determined that the meaning of the words in the OSC were *"inescapable"* and there was no satisfactory explanation for why they did not clearly communicate that the investigation had terminated. As a result, the court found that the Tolling Agreement terminated on October 31, 2012.

FERC's OSC Likened to a Decision to Prosecute Rather than a Prosecution

With respect to the second question, Mr. Smith argued that, even after taking into account the period of time the statute of limitations was tolled by the Tolling Agreement, more than five years passed from the last date of his alleged misconduct before FERC filed an action in district court. Thus, the action against him was time-barred. FERC, however, argued that the statute of limitations was tolled from the date it issued the OSC because the OSC commenced a "proceeding" within the meaning of the applicable statute of limitations and, further, tolling would be appropriate because the purpose underlying the statute of limitations was adequately served by issuing the OSC.

FERC took the position that the Federal Power Act provides for a proceeding, the "Administrative Penalty Assessment Process," in advance of the provided-for action in federal district court for persons who elect *de novo* review under Option 2, an alternative procedural route that provides relief in lieu of an administrative hearing before an administrative law judge. FERC argued that its Administrative Penalty Assessment Process was a "proceeding" within the meaning of the applicable statute of limitations. The court disagreed. Relying on precedent out of the D.C. Circuit, the court concluded that a "proceeding" within the meaning of § 2462 must involve an "adversarial adjudication" in order to be tantamount to a "prosecution." FERC's Administrative Penalty Assessment Process does not meet the muster of an adversarial adjudication before a neutral decision-maker. In short, FERC's "Administrative Penalty Assessment Process is tantamount to a decision to prosecute rather than a 'prosecution.'"

In a due process win for defendants, the court emphasized that the Supreme Court has "jealously guarded" the Due Process right to an "impartial and disinterested tribunal in both civil and criminal cases." As a result, FERC's arguments failed and the court agreed with Mr.

Smith that the statute of limitations had run and ordered him dismissed from the action.

Will FERC's Procedural Processes Change?

The court's ruling that FERC's OSC is tantamount to a decision to prosecute, rather than a prosecution, is likely to lead to renewed calls for FERC to reconsider its enforcement procedures. Moreover, the failure of the OSC to toll the statute of limitations may now persuade FERC that it is in the agency's interest to reform its process. In the meantime, or in the absence of changes to the process, Enforcement staff is likely to seek to contract around this issue by negotiating more generous and explicit tolling agreements.

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[1] For a detailed history, visit our other Energy Legal Blog posts covering this case. Federal Energy Regulatory Commission v. Barclays Bank PLC, Docket No. 2:13-cv-02093, U.S. District Court for the Eastern District of California. *See e.g.*, ***FERC Assesses Record Civil Penalty But the Story Is Just Beginning*** (July 17, 2013); ***Barclays Motion to Dismiss Raises Significant Issues About FERC Jurisdiction*** (Jan. 6, 2014); ***FERC Responds to Barclays Motion to Dismiss as Without Merit and so Aggressive That if Granted it Could "Eviscerate" FERC's Ability to Regulate Wholesale Power Markets*** (Feb. 26, 2014); ***Federal District Court Denies Barclays Motion to Dismiss FERC Petition Which Alleges Manipulation and Assesses Significant Penalties*** (May 21, 2015); ***Scope of Trial De Novo Debated in Barclays Electricity Manipulation Case*** (June 24, 2015); ***For Those Keeping Tally, Another Win for Defendants' Rights: Exploring De Novo Review and Burdens of Proof*** (March 31, 2017).

[2] There are also larger implications for other active enforcement matters, including FERC's civil action against ETRACOM LLC, also being heard in the Eastern District of California, which raises similar statute of limitations defenses.

[3] The Tolling Agreement provided that the "tolling of the statute of limitations shall continue until Enforcement provides written notice to Mr. Smith that the investigation is terminated or, in the alternative, Mr. Smith elects to terminate the agreement by providing sixty (60) days written notice to the Director of Enforcement and Enforcement lead counsel prior to the effective date of termination."

[4] Remaining defendants Barclays, Daniel Brin, Scott Connelly and Karen Levine each raised statute of limitations as a defense in their respective Answers to FERC's Complaint. Further, defendant Karen Levine raises a statute of limitations argument in her Opposition to FERC's Motion to Affirm Civil Penalties.