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FERC Approves Settlement of Alleged Market Manipulation Suit

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On April 10, 2018, the Federal Energy Regulatory Commission ("FERC" or the "Commission") approved a stipulation and consent agreement (the "Settlement Agreement") between FERC's Office of Enforcement ("Enforcement") and ETRACOM LLC and Michael Rosenberg[1] ("Respondents"). The Settlement Agreement brings to an end three years of litigation before FERC and a U.S. federal district court concerning FERC's allegations that the Respondents manipulated the California Independent System Operator Corp. ("CAISO") market by placing uneconomic virtual transactions for the purpose of benefitting Congestion Revenue Rights ("CRR") held by the company.[2]

In the Settlement Agreement, the Respondents neither admit nor deny that they violated the Federal Power Act or the prohibition on market manipulation, but agree that ETRACOM will pay $1.9 million in disgorgement, interest, and civil penalties to settle the allegations against the Respondents. More specifically, under the Settlement Agreement, ETRACOM agrees to pay civil penalties of approximately $1.5 million and to pay approximately $400,000 in disgorgement and interest. In addition, ETRACOM agrees to engage outside counsel to assist with development and implementation of a regulatory compliance program and to provide annual compliance reports to Enforcement for two years.[3]

It is worth noting that the monetary penalties agreed to in the Settlement Agreement represent a significant decrease from the amount of civil penalties initially sought by FERC. In its order assessing civil penalties against the Respondents, FERC directed ETRACOM to pay a civil penalty of $2.4 million—approximately $900,000 more than the amount specified in the Settlement Agreement. FERC also had assessed a civil penalty of $100,000 against Rosenberg in his individual capacity; the Settlement Agreement, in contrast, does not provide for civil penalties or any monetary penalty against Rosenberg.

The Settlement Agreement with ETRACOM is the most recent example of FERC agreeing to a substantial reduction in civil penalties to settle an outstanding market manipulation claim. Notably, in November 2017, FERC issued an order approving a settlement agreement between Enforcement and Barclays Bank PLC ("Barclays") and certain of its traders. In that case, FERC agreed to settle the accusations against Barclays in exchange for payment of a civil penalty of $70 million—a reduction of $365 million from the $435 million civil penalty initially sought by FERC.

The significance of FERC's willingness to settle these matters with a significant reduction in civil penalties remains to be seen. It is possible that the manner in which these matters were resolved may signal a shift in FERC's priorities under the Trump administration. However, given that ETRACOM represents the first settlement that FERC has approved resolving allegations of market manipulation since Chairman McIntyre assumed his position, it may be premature to draw any firm conclusions in that regard. The orders may also reflect a new willingness on the part of FERC to settle due to a number of significant losses in recent district court actions where the courts have found that FERC's actions were barred by the statute of limitations set out in 28 U.S.C. § 2462 and rejected FERC's attempt to limit court review of FERC's penalty assessments.

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[1] Michael Rosenberg is the majority owner and primary trader at ETRACOM LLC.

[2] ETRACOM LLC, 153 FERC ¶ 61,314 (2015); ETRACOM LLC, 155 FERC ¶ 61,284 (2016); FERC v. ETRACOM LLC and Michael Rosenberg, Case No.2:16-cv-01945-SB (E.D.Ca. 2016).

[3] *Id*. at P 14.