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CLIENT MEMORANDUM

Another Federal Court Rejects FERC's Narrow View of the Scope of *De Novo* Review Under the Federal Power Act

January 31, 2017

AUTHORS

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On January 26, 2017, the United States District Court for the District of Maine ruled that the scope of *de novo* review under the Federal Power Act extends beyond what FERC describes as the "administrative record" and that the case will proceed under the Federal Rules of Civil Procedure like any ordinary civil action. *FERC v. Silkman*, No. 1:16-cv-00205 (Jan. 26, 2017). Although the Maine court sought to tailor its holding to the facts before it, and thereby avoid a "grand pronouncement," *id.* at 2, much of its reasoning applies equally to other FPA *de novo* review proceedings. The holding also is consistent with two other recent district court decisions that ruled against the Commission on the *de novo* issue. *See FERC v. City Power Marketing*, No. 15-1428 (Aug. 10, 2016); *FERC v. Maxim Power*, No. 3:15-cv-30113 (July 21, 2016). These three consistent decisions in the last six months signal that a consensus is emerging among the courts about the proper scope of *de novo* review—especially because no judge who has squarely decided the issue has yet adopted FERC's position that *de novo* review should be limited to the administrative record.

The following excerpts are among the most noteworthy quotes from the *Silkman* decision:

- "In addition to its prior statements about the FPA, FERC's past practices under the FPA indicate that the Commission previously accepted that Option 2 [review *de novo*, as opposed to an administrative hearing (Option 1)] required a ***trial*** de novo." *Silkman* at p. 37 (emphasis added).

- "The Court thus concludes that its task under Option 2 is not limited to an appellate review and that the Court is therefore free to look beyond the administrative record in the performance of its de novo review." *Id.* at 42.

- "***The Court shares the Respondents' concerns that the Commission's procedures deprived the Respondents of an adequate opportunity to present their case and defend against Enforcement's accusations***. Although FERC insists that the Respondents had an opportunity to submit evidence to the agency, it does not appear that FERC's procedures afforded the Respondents a full opportunity to obtain it." *Id.* at 48 (emphasis added).

- "The Court concludes that the Respondents did notify the Commission of their need for more documents, and thus the Respondents have not waived their rights to discovery." *Id.* at 50.

- "***The Court's discomfort with the agency's procedures***, combined with the high stakes of the penalties and the potential complexity of the energy program at issue, cause the Court to expand the scope of its review and determine that the Federal Rules apply." *Id.* at 49 (emphasis added).

The court concluded that it would treat *Silkman* as "an ordinary civil action governed by the Federal Rules." *Id.* at 49. Accordingly, it ordered the parties to submit a discovery plan for the court's approval that balances "the Respondents' need for discovery with the goals of avoiding duplicative efforts." *Id.* at 52-53. The court did not reach the question whether FERC's procedures violated the respondents' due process rights.

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