

CLIENT ALERT

FERC Loses Yet Another Ruling on the Scope of *De Novo* Review in Federal Court

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On December 28, 2017, the United States District Court for the Eastern District of Virginia ruled that, under the *de novo* review provision in Section 31(d)(3) of the Federal Power Act (“**FPA**”), the defendants, Powhatan Energy Funds, LLC, Houlian “Alan” Chen, HEEP Fund, Inc., and CU Fund, Inc. (collectively, the “**Defendants**”), are entitled “to a trial *de novo* governed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence.”¹ This is the sixth district court opinion that has ruled against the Federal Energy Regulatory Commission’s (“**FERC**”) claim concerning the meaning of the phrase “review *de novo* of the law and the facts” under Section 31(d)(3) of the FPA.

In every manipulation case brought under the FPA during the past several years, FERC has argued that once it issues a civil penalty assessment, the district courts effectively must operate like courts of appeals and show deference to FERC’s factual determinations. FERC repeatedly has asserted that the phrase “review *de novo* of the law and the facts” allows the court “to craft the procedure that will best facilitate its review” and “that ‘the concept of a review is incompatible with [a] plenary trial proceeding.’”² The Defendants in *Powhatan* and every other *de novo* review proceeding argued that *de novo* review requires a plenary trial.³

¹ *Federal Energy Regulatory Commission v. Powhatan Energy Fund, LLC*, No. 3:15-cv-45, 2 (E. Dist. Va. Dec. 28, 2017) (“**Opinion**”).

² **Opinion** at 8, 15 and 18.

³ **Opinion** at 16.

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The court undertook a two-part analysis to determine the scope of *de novo* review under the FPA. First, the court concluded that “*de novo* review” requires “consideration of an issue as if it had not been decided previously,” and that the court “must make its own determination about the law and the facts involved.”⁴

Second, the court interpreted the term “the law and the facts involved” to mean that the relevant facts and law must be considered in “an ordinary civil action governed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence.”⁵ FERC had argued that the court is limited to reviewing the factual and legal findings in the FERC order assessing civil penalties and the administrative record developed by FERC.⁶ The Defendants countered that no administrative record existed in this case because they had elected to have the action proceed in federal district court.⁷ The court concluded that the case should be treated as an ordinary civil action because:

- The differences in the two alternate procedures under the FPA for review by the federal courts “indicate[d] that Congress intended the district court’s *de novo* review to be a plenary trial;”⁸
- When the Defendants elected to proceed directly to the district court (in lieu of a proceeding before an Administrative Law Judge), no administrative record was created; and
- There was a potential for due process violations if the court “did not conduct its *de novo* review as an ordinary civil action.”⁹

The court’s most important admonitions are set forth in its analysis of potential due process violations if the district court did not conduct a *de novo* review governed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Rejecting FERC’s argument that the Defendants “had sufficient opportunity to present their case” in the proceedings before FERC, the court held that the Defendants did not have an “opportunity to engage in their own independent discovery which, if denied without a knowing and intelligent waiver by [Defendants], could implicate their due process right to be heard ‘in a meaningful manner.’”¹⁰ Further emphasizing the potential for due process violations, the court held that FERC’s interpretation of *de novo* review posed “serious procedural deficiencies.”¹¹

⁴ Opinion at 16 and 17.

⁵ Opinion at 18.

⁶ Opinion at 17.

⁷ Opinion at 17.

⁸ Opinion at 18.

⁹ Opinion at 18.

¹⁰ Opinion at 27 and 29.

¹¹ Opinion at 29.

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The court's decision joins the chorus of other federal district court decisions that have raised significant statutory and fairness concerns about FERC's position concerning the scope of *de novo* review. In the face of six consecutive losses, FERC's position on *de novo* review is no longer tenable. The clear takeaway from the courts is that when a party opts for an immediate penalty assessment, FERC must ultimately prove its allegations in a contested evidentiary proceeding before an impartial trier of fact.

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