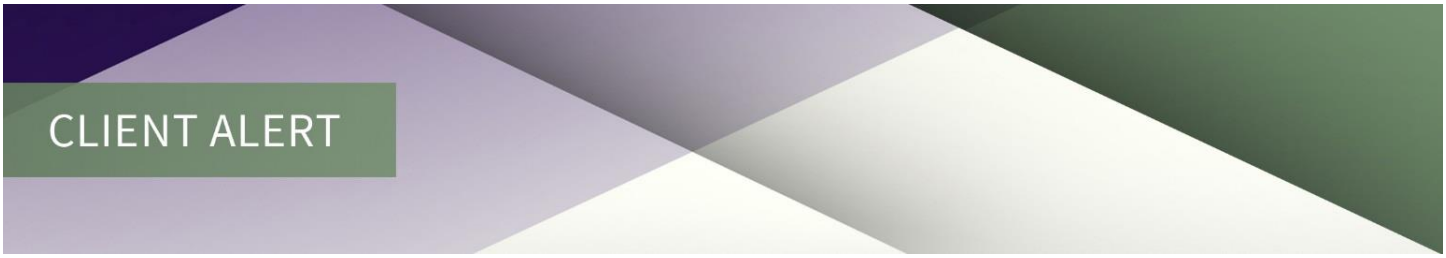

Federal Court Allows FERC's Case in *Silkman* to Proceed—Is a Circuit Split Brewing?

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Introduction

On January 4, 2019, the United States District Court for the District of Maine held that the Federal Energy Regulatory Commission's (FERC) enforcement action against Richard Silkman and his energy consulting company (Respondents) was not time-barred.[1] In the lawsuit, FERC seeks to enforce its assessment of almost $9 million in civil penalties and disgorgement against the Respondents. Relying on what it characterized as controlling First Circuit precedent, the court concluded that FERC's claim is not barred by the five-year statute of limitations applicable to civil penalty and disgorgement actions.

The Maine District Court joined its sister court in Massachusetts in applying First Circuit precedent to reach a conclusion different from that of the Eastern District of California in *Barclays* on the same statute of limitations issue.[2] In contrast to all these decisions, the Eastern District of Virginia sided with the Commission in *FERC v. Powhatan Energy Fund* but, of

[1] *FERC v. Richard Silkman, et al.*, 1:16-cv-00205, Order on Motions for Summary Judgment (D. Me. Jan. 4, 2019) (hereinafter "Order" or, where referring to the case, "*Silkman*"); *FERC v. Silkman, et al.*, 177 F. Supp. 3d 683, 700–01 (D. Mass. 2016) (holding that there are two applicable statute of limitations periods—a five-year period from the date of the conduct for FERC to initiate administrative proceedings and another five-year period to enforce the penalty in district court if respondent fails to pay the assessed penalty) (hereinafter "Silkman MA").

[2] *FERC v. Barclays Bank PLC, et al.*, Case No. 2:13-cv-02093, 2017 WL 4340258, at *12 (E.D. Cal. Sept. 29, 2017).

its own accord, certified the case for interlocutory appeal on the issue.[3] The *Powhatan* case will be heard by the Fourth Circuit later this year, setting up the potential for an additional variety of opinions on the statute of limitations issue, and even a circuit split. That could mean greater uncertainty for FERC and litigants as they seek to navigate the Commission's unusual penalty assessment process under the Federal Power Act.

De Novo *Review*

These courts were asked to decide how to apply the relevant statute of limitations, 28 U.S.C. § 2462, on *de novo* review of a FERC civil penalty assessment. When FERC issues an Order to Show Cause initiating the procedures for imposing a civil penalty, Section 31(d) of the Federal Power Act provides a respondent with a choice of forum to adjudicate liability. 16 U.S.C. § 823b(d). The respondent may elect to proceed with an administrative adjudication before an Administrative Law Judge and receive the procedural and discovery rights afforded in an adjudicatory hearing under the Administrative Procedure Act. Or, alternatively, a respondent may opt for *de novo* review in federal court, in which case the Commission must immediately assess civil penalties and, if the respondent does not pay within 60 days, institute an action in federal court for "review *de novo* [of] the law and facts involved." *Id.* at 823b(d)(3)(B). The court has jurisdiction to enter a judgment enforcing, modifying or setting aside in whole or part FERC's penalty assessment.

***The Statute of Limitations and Issues in* Silkman**

In *Silkman*, the Maine District Court explained that the voluminous cross-motions for summary judgment boiled down to a "single issue":

> whether the five-year statute of limitations for the enforcement of civil penalties, 28 U.S.C. § 2462, as applied to the civil penalties FERC assessed against the Respondents, accrued at the time the Respondents committed the alleged violation or at the time FERC assessed the penalty.

Order at 81. Resolution of that issue, the court explained, turned on "whether the First Circuit's decision in *Meyer* is superseded [by *Gabelli v. SEC*, 568 U.S. 442 (2013) or *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)] or, in the alternative, distinguishable, as the Respondents contend." *Id.* The court quickly rejected FERC's threshold arguments. First, Respondents did not, as FERC argued, waive their statute of limitations defense by failing to raise it during the agency-level proceeding. *Id.* at 80-81. Second, contrary to FERC's arguments and consistent with our assessment in an earlier

[3] *FERC v. Powhatan Energy Fund, LLC*, No. 3:15-cv-452, Mem. Opinion (E.D. Va. Sept. 24, 2018) (stating in the docket text of its Order that the decision involved "a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this Order would materially advance the ultimate termination of the litigation.").

Client Alert analyzing *Kokesh*, "the entire penalties assessed by FERC, including disgorgement, are subject to the statute of limitations under § 2462."[4] Order at 81 (discussing *Kokesh*, 137 S. Ct. 1635).

Silkman began its analysis with the statute. Section 2462 provides that "an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462. Applying this statute in *United States v. Meyer*, the First Circuit held that "§ 2462 affords an additional five-year period following final administrative assessment of a civil penalty during which the government may sue to enforce the action." Order at 84; *see United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987). The court determined that if *Meyer* controlled, FERC's case would be within the statute of limitations.

Two issues remained: (1) whether *Meyer* had been superseded by controlling law; and (2) whether *Meyer* was distinguishable. The court answered both questions in the negative.

As to the first question, the court held that neither *Gabelli* nor *Kokesh* superseded *Meyer*. Order at 88. According to the court, *Meyer* remains good law because those Supreme Court cases did not resolve the issue in *Meyer* : "whether the claim accrues at the time of the violations, or at the time a claim is brought to enforce a penalty order." Order at 88. Since the issues were different and the Supreme Court did not "formally alter" *Meyer*, the Maine court determined that *Meyer* was not superseded. Order at 89. It therefore proceeded to assess whether *Meyer* was distinguishable. Order at 89.

Respondents argued that *Meyer* was distinguishable because it involved an "adjudicatory administrative proceeding" whereas, according to *Barclays*, the FERC administrative process where *de novo* review is elected "amounted to a decision to prosecute." *Id.* at 89 (discussing 2017 WL 4340258, at *12). *Silkman* rejected the argument that the FERC proceeding was comparable to a decision to prosecute and called Respondents' analogy to criminal prosecution "distracting and unhelpful." *Id.* at 92 n.132. Echoing the District Court in Massachusetts, it found that FERC had "conducted an adjudication." *Id.* at 93 (quotation omitted); *Silkman MA*, 177 F. Supp. 3d at 700.

Contrasting Views

The *Silkman* decision stands in contrast to *Barclays*, where the Eastern District of California characterized FERC's *de novo* review procedures as "simply a mechanism for getting the case into district court." 2017 WL 4340258, at *13. *Barclays* held that the administrative process employed by FERC did not constitute a "proceeding" as that term is used in 28 U.S.C. § 2462. As a result, FERC failed to initiate a "proceeding" as required by the statute until, outside the limitations period, it filed the *de novo* review action in federal court.

[4] *See* Pantano, *et al.*, Supreme Court Holding that SEC Disgorgement is Subject to Five-Year Limitations Period Portends Significant Consequences for SEC, CFTC, and FERC Enforcement Regimes (June 6, 2017), available here.

Ninth Circuit precedent did not compel a different result. Thus, *Barclays* construed the Section 2462 limitations period as first accruing at the time of the alleged violation and required that a proceeding be initiated within five years of that date as opposed to *Silkman's* view that "the claim . . . accrued when FERC brought an action in court to enforce the penalties it assessed against the Respondents." Order at 93 (applying *Meyer*); *Barclays*, 2017 WL 4340258, at *6 (accepting petitioner's view that the limitations period accrues at the time of the underlying violation).

Silkman further explained that the comparison in *Meyer* between the "mandatory administrative adjudication" at issue there and other cases involving "prosecutorial decision making" was not "meant to carve out an exclusion to its holding, but to distinguish *Meyer*" from other precedent. Order at 91-92. The court held, however, that even if the dispositive issue in *Meyer* was the nature of the proceeding afforded to the respondents at the agency level, "FERC's proceeding [was] closer to the adjudication in *Meyer* than to a prosecutorial determination or charging letter." Order at 92. *Silkman* held that even though there could have been greater procedural safeguards that did "not transform the FERC proceeding into a discretionary decision to prosecute." Order at 92-93.

Conclusion

Because *Silkman* held that *Meyer* controlled, it concluded that FERC's claim accrued when FERC brought an action in court to enforce the penalties that it assessed against the Respondents. Therefore, FERC's action was not time-barred. The decision to allow the case to proceed stands in contrast with the conclusion in *Barclays*, not only because First Circuit precedent controlled the *Silkman* decision and not the California court, but also because the courts appear to have fundamentally different takes on the process afforded by FERC when *de novo* review is elected. As issues relevant to FERC's process in assessing civil penalties continue to arise, conflict among federal district court rulings will create additional uncertainty for both FERC and litigants as each seeks to navigate the penalty assessment process. This uncertainty will inevitably lead to additional appellate litigation and potential circuit splits that may ultimately require resolution by the Supreme Court.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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