

CLIENT ALERT

# Fifth Circuit Decision Affirming Dismissal of Total Declaratory Judgment Action Contains Language FERC May Frequently Cite

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## Introduction

A panel of the United States Court of Appeals for the Fifth Circuit (the “Fifth Circuit” or the “Court”), on August 16, 2017, issued its mandate with respect to its decision in *Total Gas & Power North America, Inc. v. Federal Energy Regulatory Commission*, No. 16-20642 (5th Cir. July 10, 2017) (the “Opinion”), ordering the plaintiff-appellants to pay to defendant-appellees the costs on appeal. On *de novo* review, the Fifth Circuit affirmed the Southern District of Texas’s dismissal of the appellant-plaintiffs’ declaratory judgment action, which sought a judgment that the Natural Gas Act (the “NGA”) provides federal district courts—not the Federal Energy Regulatory Commission (“FERC” or the “Commission”)—with exclusive authority to adjudicate violations of the NGA and assess civil penalties. The Fifth Circuit held that the claims brought by Total Gas & Power N.A., Inc., Aaron Hall and Therese Tran (collectively, “Total”) were unripe because the proceeding before the Commission remained (and remains) pending. Because the Commission still has not made any determination that Total violated the NGA, nor assessed any penalty, the Fifth Circuit regarded Total’s district court claims for declaratory judgment as mere “speculations about future events.”<sup>1</sup>

<sup>1</sup> Opinion at 16.

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## Fifth Circuit Decision Affirming Dismissal of Total Declaratory Judgment Action Contains Language FERC May Frequently Cite

The Fifth Circuit's Opinion is noteworthy not because of the holding, which was the most likely result from the outset, but because of the language in the Opinion that the Commission could rely on in its enforcement actions against market participants.

### Background

In November of 2015, the Commission's Office of Enforcement ("OE") notified Total, pursuant to 18 C.F.R. § 1b.19, of its intent to recommend that the Commission initiate enforcement proceedings against Total for allegedly violating the NGA's prohibition on market manipulation, 15 U.S.C. § 717c-1 (the "1b.19 Notice").<sup>2</sup> After receiving the 1b.19 Notice, on January 27, 2016, Total filed a declaratory judgment action in federal district court in the Southern District of Texas. The declaratory judgment action and FERC proceeding then proceeded in parallel.

On April 28, 2016, the Commission issued an Order to Show Cause against Total, alleging that Total engaged in a scheme to trade monthly fixed price physical natural gas during bidweek in order to manipulate natural gas index prices and increase the value of other Total natural gas positions tied to the allegedly manipulated natural gas indices.<sup>3</sup> The Commission directed Total to respond and explain why it should not be found to have violated the NGA by manipulating prices and why it should not have to disgorge \$9 million in alleged unjust profits and be assessed over \$216 million in civil penalties.<sup>4</sup>

In district court, while the administrative proceeding remained pending, the Commission moved to dismiss Total's claims under Federal Rule of Civil Procedure 12(b)(1) for, in relevant part, lack of subject matter jurisdiction because the claims were unripe.<sup>5</sup> Days later, Total moved for summary judgment. On July 15, 2016, the Southern District of Texas granted the Commission's motion to dismiss Total's declaratory judgment action and denied the summary judgment motion as moot.<sup>6</sup> The district court explained that "the issues [Total] seek[s] to address through [its] claims are largely anticipatory. Indeed, the Amended Complaint is nearly devoid of allegations specific to the parties' dispute and focuses instead on FERC's procedures in the abstract. [Total] raise[s] hypothetical challenges based on an alleged pattern of past FERC

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<sup>2</sup> See 18 C.F.R. § 1b.19 (2015).

<sup>3</sup> Bidweek is the last five business days of a month, during which time physical natural gas trading information is used to develop natural gas index prices. The Fifth Circuit's Opinion, however, stated that the "details of Total's alleged NGA violations are largely irrelevant to this appeal."

<sup>4</sup> Opinion at 9.

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.*

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## Fifth Circuit Decision Affirming Dismissal of Total Declaratory Judgment Action Contains Language FERC May Frequently Cite

practices in other, unrelated cases.”<sup>7</sup> Total next moved for reconsideration of the district court’s judgment and the district court denied the motion. Total timely appealed.<sup>8</sup>

### The Appeal

On appeal, Total sought a declaration that the Commission lacked the authority to adjudicate violations of the NGA and assess corresponding civil penalties through in-house administrative proceedings because the NGA vested such authority exclusively in federal district courts.<sup>9</sup> According to Total’s reading of the NGA, the Commission could recommend a finding of a violation of the NGA and propose a penalty to the federal district courts, but could not make any such findings nor impose any such penalties itself. The Opinion, penned by Circuit Judge Carolyn King and joined by Circuit Judge Edward C. Prado, deemed Total’s argument unripe.<sup>10</sup> Judge E. Grady Jolly concurred.

The Fifth Circuit assessed Total’s appeal of the district court’s dismissal of its declaratory judgment action under the Declaratory Judgment Act, which states that any federal court “may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”<sup>11</sup> Making such a declaration, the Fifth Circuit held, requires a ripeness determination. An action is ripe for adjudication only where an “actual controversy,” as a matter of law, exists. The Opinion further explained that finding whether an actual controversy exists requires a court to determine on a case-by-case basis whether there exists a “substantial controversy of sufficient immediacy and reality between parties having adverse legal interests.”<sup>12</sup>

It probably was not lost on the Court that the primary attorneys for Total also represented Energy Transfer Partners (“ETP”) in that proceeding, but the Court did not say so in its Opinion. It did, however, observe that its “decision in *Energy Transfer Partners* controls [its] resolution of Total’s appeal and dictates that [it] dismiss [the appeal] for lack of ripeness,”

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<sup>7</sup> *Total Gas & Power North America, Inc., Aaron Trent Hall and Therese Nguyen Tran v. Federal Energy Regulatory Commission*, Civil Action No. 4:16-1250, at 19 (S.D. Tex. 2016).

<sup>8</sup> *Id.*

<sup>9</sup> Specifically, Section 24 of the NGA provides: “The District Courts of the United States . . . shall have exclusive jurisdiction of the violations of [the NGA] . . . and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, [the NGA] . . .” 15 U.S.C. § 717u.

<sup>10</sup> Total also raised a number of Constitutional arguments that the Court never reached. Total argued, among other things not relevant here, that (1) allowing an Administrative Law Judge (“ALJ”) to preside over a hearing that resulted in a “binding” order would violate the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, because the manner in which FERC appoints ALJs does not comport with the Appointments Clause’s requirements for the appointment of “inferior officers;” (2) an ALJ proceeding would deprive the Total appellants of their Seventh Amendment rights to jury trials in an Article III tribunal, U.S. Const. amend. VII; and (3) such a proceeding would also violate the Fifth Amendment Due Process Clause’s guarantee of an impartial tribunal because OE staff who assisted in the investigatory stage are permitted to advise the ALJ and FERC commissioners during the enforcement stage.

<sup>11</sup> See 28 U.S.C. § 2201(a).

<sup>12</sup> Opinion at 13.

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## Fifth Circuit Decision Affirming Dismissal of Total Declaratory Judgment Action Contains Language FERC May Frequently Cite

emphasizing that “[o]ur ripeness analysis in this case fits squarely under our ripeness analysis in *Energy Transfer Partners*.”<sup>13</sup> The Fifth Circuit further observed that “Total makes an identical argument to that made by ETP—only with the addition of related constitutional arguments that are similarly predicated on uncertain future events—and the underlying Commission proceeding against Total has made even *less* progress than that against ETP had made at the time of our decision in that case.”<sup>14</sup>

ETP argued, as did Total, that Section 24 of the NGA grants district courts exclusive jurisdiction over adjudication of NGA violations and imposition of civil penalties, precluding any such adjudication by the Commission. As with Total, the Fifth Circuit considered ETP’s petition before the relevant matter had been heard by an ALJ and before the Commission had issued a final order. In each case, the Commission neither issued a final determination nor imposed civil penalties, rendering each complaint speculative and premature.

The Fifth Circuit disposed of Total’s efforts to distinguish *ETP* in short order, holding that the proposed distinctions failed to “avoid the crux of *Energy Transfer Partners*’ holding: A challenge to FERC’s authority to impose civil penalties under the NGA is not ripe until ‘when and if [FERC] determines that the NGA has been violated and assesses a penalty.’”<sup>15</sup> The Court made similarly short work of Total’s argument that the harm that makes its claim ripe is ongoing because the company is being subjected to additional litigation expenses. The Court countered with “one simple fact: Total . . . concedes that FERC is authorized to conduct a proceeding regarding the alleged violation and penalty *prior* to any action being brought in the district court.”<sup>16</sup> It was therefore “undisputed that, under either party’s interpretation of the NGA, Total would have to undergo a proceeding conducted by FERC prior to any district court proceeding” and was therefore “not being forced to undergo an ‘additional’ proceeding.”<sup>17</sup>

The Fifth Circuit acknowledged that there may come a time when Total would have the opportunity to raise its arguments, but “resolution must await when and if [FERC] determines that the NGA has been violated and assesses a penalty.”<sup>18</sup>

### Consequences of the Opinion

The Opinion is likely to be cited by the Commission and rarely, if ever, by defendants to Commission enforcement actions. For example, the Fifth Circuit included language in its Opinion designed to emphasize the significance of the process afforded by the Commission—and how early Total was in the process. The Court spent four pages articulating a

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<sup>13</sup> *Id.* at 16 (discussing *Energy Transfer Partners, L.P. v. FERC*, 567 F.3d 134 (5th Cir. 2009) (“ETP”).

<sup>14</sup> *Id.* (emphasis in original).

<sup>15</sup> *Id.* at 20 (quoting *Energy Transfer Partners*) (bracketed language in original).

<sup>16</sup> *Id.* at 17.

<sup>17</sup> *Id.* at 21.

<sup>18</sup> *Id.* at 16 (internal quotation marks omitted).

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## Fifth Circuit Decision Affirming Dismissal of Total Declaratory Judgment Action Contains Language FERC May Frequently Cite

“comprehensive,” “14-step procedure” used by the Commission for assessing civil penalties under the NGA.<sup>19</sup> This language provides the Commission with ammunition to use in its other cases, including in other contexts where defendants have, for example, raised due process and other Constitutional arguments.

The Fifth Circuit also supported its decision by emphasizing the discretion that the Commission enjoys in framing its enforcement program, another point that will be used by the Commission in other cases. The Court explained that “the NGA affords FERC wide latitude to dictate the terms of the civil penalty process, requiring only that it involve ‘notice and opportunity for public hearing.’”<sup>20</sup> In addition to citing this statement in the NGA context, the Commission and OE may seek to analogize that language to the Federal Power Act (the “FPA”) context, even though the civil penalty process under the FPA differs in important ways.

Although the Total action resolved by the Fifth Circuit never reached the merits either at the district or appellate level and is therefore distinguishable by other litigants in other matters for that reason, the Commission and OE are likely quite pleased to have this 2017 Fifth Circuit decision to cite.

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

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<sup>19</sup> *Id.* at 13.

<sup>20</sup> *Id.* at 22.