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July 24, 2024

FERC Enforcement Authority After SCOTUS Jarkesy Decision



On June 27, 2024, in *SEC v. Jarkesy*, the Supreme Court of the United States held that a respondent to a U.S. Securities and Exchange Commission (SEC) securities fraud action seeking civil monetary penalties is entitled to a jury trial under the Seventh Amendment.

Accordingly, the SEC may no longer bring fraud cases in its internal tribunal structure and must litigate such cases in federal court.

The Seventh Amendment guarantees that in "[s]uits at common law . . . the right of trial by jury shall be preserved." The question before the Court, therefore, boiled down to whether a securities fraud claim is sufficiently akin to a suit at common law. The remedy sought by the SEC—monetary penalties—was critical for the Court, which held that monetary relief is a "prototypical common law remedy" because, unlike an equitable remedy that is designed to compensate the victim, monetary relief is intended to "punish and deter." The Court further found that the cause of action itself (securities fraud) is akin to fraud claims routinely found in common law. On that basis, the Court also rejected the SEC's argument that securities fraud actions implicate "public rights" that do not require a jury trial under the Seventh Amendment and that Congress may permissibly direct to agency adjudication. The Court reasoned that the analysis of whether a public right is implicated turns on the cause of action itself, and not whether Congress assigned the matter to an agency by legislation. The Court's reasoning in *Jarkesy* is explained more fully [here](#). Although the federal agency at issue in *Jarkesy* was the SEC, the decision is likely to have significant implications for other agencies that seek to impose civil penalties for other fraudulent acts. That includes the U.S. Federal Energy Regulatory Commission (FERC), whose anti-manipulation rule is modeled after the SEC's own Rule 10b-5.

FERC's Existing Process To Assess Civil Penalties

FERC is authorized under its enabling statutes to assess civil penalties against persons who violate those statutes, as well as regulations and orders thereunder. In particular, FERC's enforcement program focuses on: "fraud and market manipulation, anticompetitive conduct, serious violations of the electric reliability standards, threats to the nation's energy infrastructure and associated impacts on the environment and surrounding communities, and conduct that threatens the transparency of regulated markets."^[1] Under both the Federal Power Act (FPA) and the Natural Gas Act (NGA), FERC is empowered to investigate and impose civil penalties on entities that commit fraud or market manipulation in connection with the purchase or sale of electric energy, natural gas, and transmission or transportation services.^[2] Generally, FERC has modeled its anti-market manipulation regulations on the SEC's Rule 10b-5 precedents.^[3] In contrast, while the Natural Gas Policy Act (NGPA) empowers FERC to investigate and impose civil penalties for violations of that statute and FERC's rules, regulations, and orders thereunder, the NGPA does not have an anti-fraud or anti-manipulation provision. FERC has the authority to assess civil penalties of up to \$1,544,521 per day per violation of rules, regulations, and orders issued under the NGA, NGPA, and Part II of the FPA that relates to FERC's jurisdiction over the transmission grid and wholesale electric markets.^[4]

FERC provided guidance on its process by which civil penalties may be assessed in its 2006 Statement of Administrative Policy.^[5] Under the Statement, FERC recognized key distinctions among the statutory texts of the FPA, NGA, and NGPA that led FERC to adopt different procedures for assessing civil penalties under each of these statutes.

Under the FPA, regulated entities are given a choice between *de novo* review in district court or an administrative law judge (ALJ) proceeding. Prior to assessing a civil penalty, FERC issues a notice of the proposed penalty along with a statement of material facts found to constitute the violation. In that notice, FERC gives the regulated entity a choice between an immediate penalty assessment or a hearing before a commission ALJ prior to assessment.^[6] A district court would conduct a *de novo* review of the law and facts involved where (1) the regulated entity selects an immediate penalty assessment, and (2) the regulated entity does not pay the assessed penalty within 60 days.^[7] District courts have concluded that such *de novo* review shall be treated "as an ordinary civil action governed by the Federal Rules of Civil Procedure that culminates, if necessary, in a jury trial."^[8] The one exception to this process under the FPA occurs if the alleged violation is of a final compliance order under section 31(a) of the FPA, related to FERC's enforcement authority over hydroelectric licenses. Regulated entities in that instance do not have the ability to choose *de novo* district court review and, instead, are entitled only to an administrative hearing before an ALJ.

Under the NGA, FERC views its statutory authority as constrained to providing review via ALJ proceedings only and, thus, does not offer regulated entities the option of *de novo* review in district court.^[9] Because the only statutory guidance in the NGA is that FERC shall assess penalties for NGA violations "after notice and opportunity for public hearing[,]" FERC has concluded that there is no statutory authority to permit *de novo* review in federal court.^[10] If a regulated entity contests the violation and proposed assessment, FERC will conduct either a paper hearing or a hearing before an ALJ.^[11]

Finally, under the NGPA, regulated entities are only entitled to *de novo* review in district court; FERC does not provide an option of an administrative hearing before an ALJ. Thus, a regulated entity given notice of a violation and proposed penalty under the NGPA may either (1) pay the penalty or (2) contest the penalty.^[12] There is no provision for an on-the-record ALJ hearing under the statutory text of the NGPA.^[13] Instead, FERC simply assesses a penalty after consideration of the facts presented.^[14] If the regulated entity fails to pay the assessed penalty, FERC commences an action in district court, which exercises *de novo* review.^[15]

Frequently, FERC negotiates and resolves civil penalties under all three of the statutes through stipulation and agreement with the regulated entities. FERC imposes such stipulations and agreements by commission order

without litigation before an ALJ or district court.^[16]

Implications for FERC Enforcement Matters

While all three statutes provide for civil penalties, the difference in enforcement procedures may lead to different outcomes for parties seeking to rely on *Jarkesy* to contest a FERC penalty.

Natural Gas Act. As the NGA's anti-fraud and market manipulation provisions are modeled after the securities laws, the NGA is likely to be most directly affected by the *Jarkesy* ruling. And because FERC exclusively tries NGA anti-fraud actions before an ALJ, it is all but guaranteed that respondents to such actions will raise *Jarkesy*-backed arguments in short order. If FERC is required to try such cases before a federal jury—as is likely the case under a clear application of the holding in *Jarkesy*—this could deter FERC from bringing such enforcement cases, or at least potentially lead to a decline in the number of cases FERC brings. With federal litigation comes additional burdens on the agency, including more onerous discovery obligations, motion practice, limitations on the admissibility of evidence, and ultimately proving the agency's case to a jury, rather than a government-paid ALJ. These additional burdens could mean a cooling effect on FERC's enforcement under the NGA, given its limited resources and budget.

Federal Power Act. Electricity enforcement cases may not face the same challenge because respondents already have the option to go straight to federal court. *Jarkesy* does not limit a respondent's ability to waive its Seventh Amendment right to a jury trial and voluntarily choose to go forward before an ALJ. Moreover, an ALJ's initial findings are reviewed by FERC and can be appealed to federal court.

Natural Gas Policy Act. The Supreme Court's decision in *Jarkesy* does not address whether agencies may use administrative courts to impose civil penalties for violations that do not involve fraud. Accordingly, it is not clear what impact, if any, the decision will have on enforcement cases brought under the NGPA, which does not have an anti-manipulation or other fraud provision. The issue will be determined on a case-by-case basis, at least initially, depending on the claim at issue in each contested NGPA case. The determination of whether *Jarkesy* applies ultimately will turn on the nature of the claim (equitable vs. legal in nature) and the remedy sought.

Endnotes

[1] FERC, [Enforcement](#) (last visited July 5, 2024).

[2] 16 U.S.C. § 824v; 15 U.S.C. § 717c-1.

[3] *See Prohibition of Energy Mkt. Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (2006).

[4] Civil Monetary Penalty Inflation Adjustments, 89 Fed. Reg. 1806, 1807 (Jan. 11, 2024).

[5] *Statement of Admin. Pol'y Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,137 (2006) (Statement).

[6] Statement, P 5.

[7] *Id.*

[8] *FERC v. Maxim Power Corp.*, 196 F. Supp. 3d 181, 197 (D. Mass. 2016). Although there is no appellate court authority on this point, many district courts have concluded that the Federal Rules of Civil Procedure apply in this context and that *de novo* review proceeds "like any other civil lawsuit." *FERC v. Coaltrain Energy, L.P.*, No. 2:16-cv-732, 2018 WL 7892222, at *3 (S.D. Ohio Mar. 30, 2018).

[9] Statement, P 6.

[10] *Id.* Some practitioners take issue with FERC's interpretation of its statutory authority under the NGA and have posed alternative interpretations that would support *de novo* district court review under the NGA also. *See, e.g.,* Scherman, William et al., *The New FERC Enforcement: Due Process Issues in the Post-EPA Act 2005 Enforcement Cases*, 31 Energy Law Journal 55, at 63-67 (2023).

[11] *Id.*

[12] *Id.* P 12.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* P 2.

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