

CLIENT ALERT

When Does the Clock Start Ticking on FERC Enforcement?

Feb.19.2020

The Federal Energy Regulatory Commission (FERC) must issue a show cause order within five years of alleged wrongdoing, according to the Fourth Circuit in *FERC v. Powhatan Energy Fund, LLC*, but as a result, FERC's administrative enforcement process can linger almost indefinitely thereafter, particularly if the respondent opts to have its case heard *de novo* in district court.

FERC enforcement matters under the Federal Power Act (FPA) typically begin with a staff-level, nonpublic investigation and a resulting penalty recommendation. FERC will then publicly issue a show cause order that describes the alleged misconduct, gives notice of a proposed penalty, and, pursuant to the FPA, gives the respondent 30 days to choose either to have (i) its case adjudicated by a FERC administrative law judge (the "ALJ Process"), or (ii) FERC issue a penalty assessment order without a hearing and, if unpaid, institute an action to affirm the penalty subject to *de novo* review in district court (the "Alternate Process").

Such enforcement actions are subject to a five-year statute of limitations (28 U.S.C. § 2462) before which FERC must commence any penalty enforcement proceedings, but while the Fourth Circuit found in *Powhatan* that FERC must issue the show cause order within five years of the alleged misconduct under both the ALJ and Alternate Processes, it found that under the Alternate Process, FERC also has up to five years after penalties are assessed and unpaid to bring a district court penalty enforcement action.

Consequently, FERC can reach back in a show cause order only to alleged wrongdoing within the previous five years. Yet, a respondent that elects to have the merits of its case heard *de novo* in district court could wait indefinitely to have its day in court, because after it issues the show cause order, FERC is under no deadline to issue its penalty assessment order. The second five-year limitation clock for FERC to initiate an enforcement proceeding in district court does not start ticking until the respondent fails to pay the assessed penalty, according to the Fourth Circuit.

While FERC has a statutory obligation to "promptly" issue the penalty assessment order, that term is not defined and imposes no definitive deadline, leaving respondents without recourse if FERC delays except, as the Fourth Circuit suggests, possibly spending additional resources to bring suit in court seeking to compel FERC to act. FERC, therefore, is obligated under *Powhatan* to take the initial step of issuing a show cause order within five years of any alleged misconduct or else be time-barred, but there is no requirement and little incentive for swift agency action thereafter under the Alternate Process.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Deborah A. Carpentier

Senior Counsel – Washington, D.C.

Phone: +1 202.624.2857

Email: dcarpentier@crowell.com

Diana A. Jeschke

Counsel – Washington, D.C.
Phone: +1 202.624.2619
Email: djeschke@crowell.com