In the United States Court of Appeals
For the Fourth Circuit

FEDERAL ENERGY REGULATORY COMMISSION	)	On Petition for Permission to Appeal from the United States District Court for the Eastern District of Virginia
Plaintiff-Respondent,	)	
vs.	)	No. 18-353
	)	C/A No.: 3:15cv452
POWHATAN ENERGY FUND, LLC, ET AL.,	)	Hon. M. Hannah Lauck
Defendant-Petitioners.	)	

FEDERAL ENERGY REGULATORY COMISSION'S ANSWER TO JOINT PETITION FOR PERMISSION TO APPEAL DISTRICT COURT ORDER PURSUANT TO 28 U.S.C. § 1292(b)

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Dated: October 15, 2018

INTRODUCTION

The Federal Energy Regulatory Commission ("FERC" or "the Commission") does not oppose the Joint Petition by Powhatan Energy Fund, LLC, Houlian Chen, HEEP Fund Inc., and CU Fund, Inc. (collectively, the "Joint Petitioners") seeking permission to appeal the United States District Court for the Eastern District of Virginia's September 24, 2018 Order in *Fed. Energy Regulatory Comm'n v. Powhatan Energy Fund, LLC*, Civ. Action No. 3:15cv452 (ECF No. 108) ("Order"). Although FERC believes that the district court reached the correct decision in denying the Joint Petitioners' Motion to Dismiss, the Commission respects that the district court has *sua sponte* certified its Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The question presented is straightforward: whether, for purposes of the five-year statute of limitations set forth in 28 U.S.C. § 2462, FERC's claim "accrued" at the time FERC was permitted by the Federal Power Act ("FPA") to file a complaint in the district court. *See* Slip Op. at 20.

FERC notes that while cases involving the Commission typically reach this Court via petitions for direct review of final Commission orders, this case was commenced as an original action in district court by FERC, as required by 16 U.S.C. § 823b(d)(3)(B). The framework of 28 U.S.C. § 1292(b) therefore governs Joint Petitioners' request, and the general prohibition on interlocutory appeals of non-final administrative agency action does not control. *See, e.g.*, *Berkley v.*

Mountain Valley Pipeline, LLC & FERC, 896 F.3d 624, 630 (4th Cir. 2018) (holding that Congress gave "exclusive" jurisdiction to the appropriate federal court of appeals to review FERC decisions, "but only after going through the review process with FERC") (citing 15 U.S.C. § 717r); *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 196-97 (3d Cir. 2018) (same). Because there is no pending FERC proceeding related to the action that FERC filed in the district court here, there is no statutory bar to this Court accepting interlocutory review now—especially when the district court has concluded that interlocutory appellate review would be helpful.

I. Legal Standard

Interlocutory appeal is appropriate under 28 U.S.C. § 1292(b) when, as the district court certified here, an order: (1) "involves a controlling question of law as to which there is substantial ground for difference of opinion"; and (2) "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See* Order at 1; *see also Smith v. Murphy*, 634 Fed. Appx. 914, 915 (4th Cir. 2015) (granting interlocutory appeal when such grounds were present); *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 340–41 (4th Cir. 2017); *Ahrenholz v. Board of Trustees of the University of Illinois*, 219 F.3d 674, 676 (7th Cir. 2000) ("question of law' as used in § 1292(b) has reference to a question of the meaning of a statutory or constitutional

provision, regulation, or common law doctrine. . . ."). Even where these factors are met, the decision to grant a petition for interlocutory appeal is within the Court's discretion. *See Smith*, 634 Fed. Appx. at 915; *see also Kennedy v. Bowser*, 843 F.3d 529, 536 (D.C. Cir. 2016).

Although FERC agrees with the district court's conclusion here, it acknowledges that other courts have reached different conclusions. The fact that there is both substantial disagreement among the district courts and limited case law is grounds for an interlocutory appeal in this instance. Slip Op. at 12 (characterizing the state of the law as "[n]o clear answers exist"); *see also Lewis v. Pension Benefit Guar. Corp.*, 901 F.3d 406, 409 (D.C. Cir. 2018) (citing "dearth of controlling precedent" as grounds for interlocutory appeal).

Three district courts have opined on the issue of when the statute of limitations accrues under § 31(d)(3) of the FPA, 16 U.S.C. § 823b(d)(3). Two courts—the district court here and the court in *Fed. Energy Regulatory Comm'n v. Silkman*, 177 F. Supp. 3d 683 (D. Mass. 2016)—have held that under 16 U.S.C. § 823b, FERC's claim did not accrue until a respondent failed to pay a civil penalty assessment within 60 days of the issuance of an order; another has rejected this position. *See Fed. Energy Regulatory Comm'n v. Barclay's Bank PLC*, No. 2:13-cv-02093-TLN-DB, 2017 WL 4340258, at *8 (E.D. Cal. Sept. 29, 2017). No circuit court of appeals has yet opined on the applicability of the statute of

limitations under the FPA, *see Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1695 (2015) (interlocutory appeal can be appropriate when a pure question of law has divided courts), and there is no Fourth Circuit precedent on the broader, related question of when a claim to enforce an administrative penalty accrues under other statutes.[1]

For these reasons, FERC does not oppose the Joint Petition.

II. The Question Presented for Appellate Review

In FERC's view, the question presented to this Court is simple: whether, for purposes of the five-year statute of limitations set forth in 28 U.S.C. § 2462, FERC's claim "accrued" at the time FERC was permitted by the FPA to file a complaint in the district court, or five years from when the conduct first occurred.

[1] *See, e.g., United States v. Meyer*, 808 F.2d 912, 914 (1st Cir. 1987) ("Outside of the Fifth Circuit, no court has ever held that, in a case where an antecedent administrative judgment is a statutory prerequisite to the maintenance of a civil enforcement action, the limitations period on a recovery suit runs from the date of the underlying violation as opposed to the date on which the penalty was administratively imposed. All of the analogous authority appears to concur with the general rule that '[i]f disputes are subject to mandatory administrative proceedings [before judicial action may be taken], then the claim does not accrue until their conclusion.") (footnote and citations omitted); *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) (citing *Meyer* in holding that § 2462 applies to administrative proceedings); *SEC v. Mohn*, 465 F.3d 647 (6th Cir. 2006) (following *Meyer*); *United States Dep't of Labor v. Old Ben Coal Co.*, 676 F.2d 259 (7th Cir. 1982) (similar to *Meyer*). *But see United States v. Core Labs., Inc.*, 759 F.2d 480 (5th Cir. 1985) (holding that the limitations period had begun to run at the time of the violation).

This is consistent with the district court's framing of the question presented in its Order. Slip Op. at 20-21 ("The Court must determine how 28 U.S.C. § 2462 applies to this action: it must decide what occurrence constituted the "action, suit[,] or proceeding for the enforcement of any civil fine, penalty, or forfeiture" contemplated in the statute, and when the "claim first accrued" for statute-of-limitation purposes.").

Joint Petitioners believe that the statute of limitations commenced earlier. They contend that the question presented to this Court is whether the statute of limitations accrues at "the time of the alleged violation or at a later point that is wholly within the government's control and may stretch to infinity without statutory limitation." Joint Petition at 6. But the district court's Order nowhere mentions "infinite" delay.

Specifically, as the district court found, the Commission's action was timely brought pursuant to the unambiguous text of its governing statute. Slip Op. at 45. Under the FPA, the Commission is charged with policing the nation's energy markets and investigating allegations of wrongdoing. Should the Commission determine that wrongdoing has occurred, 16 U.S.C. § 823b requires it to "assess" a "penalty" "by order," analyzing statutorily prescribed factors. If the penalty is not paid within 60 days, this order then forms the basis for a district court action, as the FPA instructs the Commission to "institute an action in the appropriate district

court of the United States for an order affirming the assessment of the civil penalty." 16 U.S.C. § 823b(d)(3)(B). The district court, in turn, "shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in [p]art, such assessment." *Id*.

The conduct at issue here occurred from June 1 to August 3, 2010, and the Commission began an investigation in August 2010. Joint Petitioners were well aware of the investigation over the ensuing four years, when they responded to multiple requests for documents and testimony and submitted several written statements and briefs to the Commission's Office of Enforcement. On December 17, 2014, the Commission issued an Order to Show Cause, which provided the statutorily-required notice under 16 U.S.C. § 823b and began an adversarial agency proceeding . The proceeding culminated with the Commission determining that Joint Petitioners violated the FPA and issuing a penalty assessment order required by 16 U.S.C. § 823b on May 29, 2015. Immediately upon non-payment, following the 60 day period prescribed by the FPA, FERC filed the action below seeking review and affirmance of the penalty assessment order.

FERC agrees with the district court's conclusion that under the "plain, ordinary, and contemporary meaning" of the language of 16 U.S.C. § 823b, "the instant cause of action accrued when [Joint Petitioners] failed to pay the

Commission's penalty assessment order within 60 days of its issuance." Slip Op. at 45. To hold otherwise would require the Commission to file a district court action prior to the completion of necessary statutory prerequisites, namely the Commission's assessment of a penalty order and Joint Petitioner's failure to pay the penalty assessed in that order. Nonetheless, we also agree with the district court's conclusion that an immediate appeal may materially advance the ultimate resolution of the case.

CONCLUSION

For these reasons, the Commission does not oppose Joint Petitioners' request that the Court exercise its discretion by accepting the interlocutory appeal.

Dated: October 15, 2018

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CERTIFICATE OF SERVICE

I hereby certify that, on October 15, 2018, a copy of the foregoing was filed electronically and served on all parties through the Court's electronic filing system or, where applicable, by U.S. mail.

_____/s/_____

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