

How Does FERC Select Venue Under FPA Sections 31(d)(3) and 317?

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Historically very few Federal Energy Regulatory Commission (FERC) investigations have resulted in federal district court proceedings pursuant to an investigative target's election to proceed under the provisions in Section 31(d)(3) of the Federal Power Act (FPA).¹ In the last few years, however, FERC has filed six such separate actions in four different federal district courts as of the date of this writing.² This increased frequency is not surprising given the higher stakes now involved.³ Particularly when coupled with the recent changes to FERC's substantive authority, however, the increasing number of judicial proceedings is exposing some novel and significant issues.

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While there has been extensive industry commentary on due process considerations,⁴ jurisdictional issues,⁵ and the substantive limits of FERC's antimanipulation authority,⁶ little attention has been paid to FERC's choice of venue and its interpretation of what constitutes an "appropriate" venue under the FPA. Nevertheless, the importance of venue should not be ignored.

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APPROPRIATE VENUES FOR DISTRICT COURT ACTIONS UNDER SECTION 31(D)(3)

Although FERC, as the plaintiff in proceedings filed pursuant to Section 31(d)(3), is able to select the venue, its venue options are statutorily limited.

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Section 31(d) of the FPA provides that upon issuance of a FERC order to show cause why civil penalties should not be assessed under the FPA, an investigative target may elect the procedures of Section 31(d)(3) instead of proceeding to trial before a FERC administrative law judge.⁷ Upon such an election, FERC is required to promptly assess any civil penalties and, if such penalties are not paid within 60 days, "institute an action in

the appropriate district court of the United States for an order affirming the assessment of [a] civil penalty.”⁸

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Thus, Section 31(d) makes clear that any federal district court proceedings shall be initiated by FERC. As the plaintiff in any such proceedings, FERC is entitled to select among “appropriate” forums subject to any motion to transfer. However, FERC is not the master of what specific forums are “appropriate” ones; that is a matter of statute.

FERC is not the master of what specific forums are “appropriate.”

Section 317 of the FPA provides that venue is appropriate (1) “in the district wherein the defendant is an inhabitant” or (2) in districts where an “act or transaction constituting the violation occurred.”⁹ Whereas the “inhabitant” prong of Section 317 appears relatively non-controversial,¹⁰ it is foreseeable that controversy may arise with respect to the “act or transaction constituting the violation” prong given that FERC has advanced a broad interpretation of an “act or transaction constituting the violation.”¹¹ Rather than address the viability of FERC’s broad interpretation and the shape of the legal landscape, it is of more interest to examine what FERC’s recent choices of forum do and do not tell us about where they may choose to file actions in the future.

FERC’S APPROACH TO VENUE SELECTION

As in any civil litigation, the government’s choice of venue can be influenced by a broad array of factors.¹² It is impossible to step into FERC’s shoes and attempt to identify the specific calculus that FERC is applying with respect to its choice of venue in its recent dis-

trict court actions. Nevertheless, a review of these actions does suggest some patterns that may be helpful in determining where FERC is likely to file future actions.

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Harmful Effects

As a preliminary matter, in each of its recent filings, FERC has asserted that alleged harmful effects were felt within the district in support of FERC’s choice of venue. Analyzing that position is beyond the scope of this article.¹³ Nevertheless, a harmful effects analysis could significantly expand FERC’s potential venue options in market manipulation cases.

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As discussed below, in each of FERC’s recent market-manipulation proceedings, it has not rested solely on assertions that mere alleged harmful effects within that district are sufficient to support its choice of venue. Instead, in each of these matters FERC has asserted some other basis for venue and, in nearly all of them, FERC has included such additional bases in its initial petition. Whether FERC chooses to double down on this position by filing some future action in a venue based solely on the presence of alleged harm is yet to be seen.

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In the meantime, as shown below, although FERC has always asserted additional

grounds for venue in each of its recent matters, FERC has not relied on any single additional basis. Instead, FERC has relied on a number of additional grounds.

RTO Location

In a number of recent cases, FERC has alleged conduct involving manipulation of the regional transmission operator (RTO) markets as an additional ground for venue beyond mere harmful effects.¹⁴ In some of these cases, FERC alleges that the defendants used the independent system operator (ISO) or RTO systems in connection with their manipulative scheme,¹⁵ and that those systems are located at ISO or RTO headquarters. As such, FERC has filed several such cases where the pertinent RTO is headquartered and asserted that venue is proper within that district on that basis.¹⁶

FERC has alleged conduct involving manipulation of the regional transmission operator (RTO) markets.

In two recent district court proceedings, however, FERC has not filed in a district where an interested RTO or ISO was located despite alleging that the defendants manipulated the RTO or ISO markets. In both the *City Power* and *Powhatan* matters, discussed later, FERC alleged that the defendants manipulated certain markets controlled by PJM Interconnection, headquartered within the Eastern District of Pennsylvania, but chose not to file in that venue.

Misrepresentations or Omissions

In *City Power*, FERC chose to file *not* where the pertinent RTO was headquartered (the Eastern District of Pennsylvania in that case) but instead where the alleged misrepresentations were received (the US District Court for the District of Columbia).¹⁷ Unlike all but one of the other recent district court cases, the *City Power* petition included a claim for an alleged violation of the duty of candor imposed by FERC's Market Behavior Rules. Specifically, FERC alleged that the

defendants “willfully obstruct[ed FERC’s] investigation” by making certain misrepresentations or omissions to FERC directly in connection with FERC’s investigation into the underlying conduct.¹⁸ Thus, in addition to alleging that purported harmful effects were felt within the district, FERC also alleged in *City Power* that venue was proper because the defendants allegedly gave or sent “false and misleading” answers or statements and “omitted material information” in testimony or sworn submissions to FERC in Washington, DC.¹⁹

In *City Power*, FERC chose to file *not* where the pertinent RTO was headquartered but instead where the alleged misrepresentations were received.

In *Maxim*, FERC also alleged similar violations of its Market Behavior Rules based on alleged misrepresentations or omissions.²⁰ But there, unlike in *City Power*, the alleged misrepresentations were to the ISO Market Monitor, *not* to FERC itself.²¹ Thus, in *Maxim*, the location of the receipt of the alleged misrepresentations and omissions was simply another purported basis for venue in addition to the location of the alleged harm and the defendants’ alleged use of RTO systems within the district.²²

Residence

Similarly, the *Powhatan* matter was also *not* filed where the pertinent RTO was headquartered (the Eastern District of Pennsylvania in that case).²³ Unlike *City Power*, *Powhatan* does not involve any purported misrepresentations or omissions in violation of FERC’s Market Behavior Rule. However, the matter was filed where at least one of the defendants allegedly resided, the Eastern District of Virginia.²⁴ In addition to the alleged residence of at least one defendant, FERC also asserted other grounds for venue in *Powhatan*, including, as in all of the other recent cases, that alleged harmful effects were felt within the district.²⁵

In the *Maxim* cases, FERC also alleged the location of at least one defendant supported

its choice of venue. However, in that case, FERC also asserted that venue was proper based on (1) the location of the RTO headquarters and systems; (2) purported misrepresentations or omissions made to the RTO within that district; and (3) as in each of these recent matters, that the residents of the district were allegedly harmed.²⁶

These two actions are the only matters FERC has recently filed where any defendant allegedly resides. It is not entirely clear why FERC decided to file the *Powhatan* petition in the Eastern District of Virginia, but as more such matters are filed by FERC in federal district court, a clearer pattern may emerge.

CONCLUSION

Analyzing FERC's recent district court proceedings thus reveals some patterns and issues.

First, in cases involving alleged manipulation of an RTO market, FERC has—more often than not—brought any resulting district court action where the relevant RTO is headquartered. Second, where a matter involves alleged misrepresentations or omissions in violation of FERC's Market Behavior Rules, FERC tends to file the action where the alleged misrepresentations or omissions were received. Third, in some matters FERC has also brought an action in a defendant's or defendants' alleged venue of residence.

FERC has—more often than not—brought any resulting district court action where the relevant RTO is headquartered.

Finally, regardless of which of the above grounds FERC asserts in support of its choice of venue, in each of the recent cases FERC has filed, FERC has also alleged that the venue was proper because purported harmful effects were felt within the district. While it is not clear if such harmful effects are sufficient to satisfy Section 317's "act or transaction constituting the violation" clause, FERC continues to assert this as an additional ground for venue. At some point, FERC may choose to test this approach

and rely solely on alleged harmful effects in support of its choice of venue.

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If FERC does so, and such an approach is approved, a large number of potential venue options could be opened to FERC. Thus, FERC arguably has at least some motivation to test this approach at some point in time.²⁷ Accordingly, although FERC's recent matters suggest some patterns that investigative targets can consider in determining where FERC is likely to file any district court enforcement action, until a court specifically rejects FERC's harmful-effects approach as a proper basis for venue, investigative targets that elect for judicial proceedings under Section 31(d)(3) could find themselves in a wide array of potential venues. ○

NOTES

1. 16 U.S.C. § 823b(d)(3). See Lincoln Paper and Tissue, LLC's Memorandum of Law Concerning the Contours of the Trial at 3, *FERC v. Lincoln Paper & Tissue, LLC*, No. 1:13-cv-13056 (D. Mass. May 9, 2014), ECF No. 46 (noting that as of that date, "[t]he only court to interpret Section 31(d)(3)" was *FERC v. MacDonald*, 862 F. Supp. 667, 672 (D.N.H. 1994)).
2. See Petition for an Order Affirming the Federal Energy Regulatory Commission's July 16, 2013, Order Assessing Civil Penalties Against Barclays Bank PLC, et al., *FERC v. Barclays Bank PLC*, No. 2:13-cv-02093 (E.D. Cal. Oct. 9, 2013), ECF No. 1 (Barclays Petition) (petition to enforce penalty assessment following defendant's election for district court proceedings pursuant to Section 31(d)(3) of the Federal Power Act, 16 U.S.C. § 823b(d)(3)); Petition for an Order Affirming the Federal Energy Regulatory Commission's August 29, 2013, Order Assessing Civil Penalty Against Lincoln Paper and Tissue, LLC, *FERC v. Lincoln Paper & Tissue, LLC*, No. 1:13-cv-13056 (D. Mass. Dec. 2, 2013), ECF No. 1 (Lincoln Paper Petition) (same); Petition for an Order Affirming the Federal Energy Regulatory Commission's August 29, 2013, Orders Assessing Civil Penalties Against Richard Silkman and Competitive Energy Services, LLC, *FERC v. Silkman*, No. 1:13-cv-13054 (D. Mass. Dec. 2, 2013), ECF No. 1 (Silkman Petition) (same); Petition for an Order Affirming the Federal Energy Regulatory Commission's May 1, 2015 Order Assessing Civil Penalties Against Maxim Power Corp., et al., *FERC v. Maxim Power Corp.*, No. 3:15-cv-30113 (D. Mass. July 1, 2015), ECF No. 1 (Maxim Petition) (same); Petition for an Order Af-

- firming the Federal Energy Regulatory Commission's May 29, 2015, Order Assessing Civil Penalties Against Powhatan Energy Fund, LLC, et al., *FERC v. Powhatan Energy Fund, LLC*, No. 3:15-cv-0452 (E.D. Va. July 31, 2015), ECF No. 1 (Powhatan Petition) (same); Petition for an Order Affirming the Federal Energy Regulatory Commission's July 2, 2015 Order Assessing Civil Penalties Against City Power Marketing, LLC and K. Stephen Tsingas, *FERC v. City Power Mktg., LLC*, No. 1:15-cv-01428 (D.D.C. Sept. 1, 2015), ECF No. 1 (City Power Petition) (same).
3. Section 1284 of the Energy Policy Act of 2005 increased FERC's remedial authority by raising the maximum civil penalty FERC could assess under the Federal Power Act from \$10,000 per day to \$1 million per violation per day. See Energy Policy Act of 2005, Pub. L. No. 109-58, tit. XII, § 1284(e)(2), 119 Stat. 594, 980 (2005) (codified at 16 U.S.C. § 825o-1(b)).
 4. See Scherman, W., Johnson, B., & Fleischer, J. (2014). The FERC enforcement process: Time for structural due process and substantive reforms. *Energy Law Journal*, 35, 101-149; Murphy, A., Hettenbach, T., & Olson, T. (2014). The FERC enforcement process. *Energy Law Journal*, 35, 283-321.
 5. See Pease, R., Perlman, D., & Lias, J. (2014, January 6). Barclays motion to dismiss claims raises significant issues about FERC (Federal Energy Regulatory Commission) jurisdiction. *The National Law Review*. Retrieved from <http://www.natlawreview.com/article/barclays-motion-to-dismiss-claims-raises-significant-issues-about-ferc-federal-energy>.
 6. See *FERC v. Powhatan Energy Fund, LLC: Legal Materials, Independent Expert Opinions, and More* (compiling expert opinions questioning the validity of FERC's allegation that certain up-to congestion trading constituted market manipulation). Retrieved from <http://ferclitigation.com>.
 7. The Natural Gas Act (NGA) does not include a provision analogous to Section 31(d)(3), however, and thus does not appear to allow investigative targets the option to elect for federal district court proceedings or simply proceed to a hearing before a FERC administrative law judge. In a recent case filed in a Texas federal district court, however, some defendants have asserted that any potential charges and penalties under the NGA must be determined by a federal court, not FERC. See Complaint for Declaratory Relief, *TOTAL Gas & Power N. Am., Inc. v. FERC*, No. 7:16-cv-00028 (W.D. Tex. Jan. 27, 2016), ECF No. 1.
 8. 16 U.S.C. § 823b(d)(3)(B).
 9. 16 U.S.C. § 825p; see also *Miss. Power & Light Co. v. Fed. Power Comm'n*, 131 F.2d 148, 150 (5th Cir. 1942).
 10. Although the term "inhabitant" is not specifically defined in the FPA, and although there does not appear to be any case law directly construing the term in the context of the FPA, there does not appear to be much dispute at this time with respect to the scope of this prong of the FPA. It appears that the term "inhabitant" derives from language found in a prior version of the general federal venue statute, and thus, as with that language, is synonymous with residence. See 28 U.S.C. § 1391 (2012) (noting in the historical and revision notes that the "[w]ord 'reside' was substituted for 'whereof he is an inhabitant' for clarity inasmuch as 'inhabitant' and 'resident' are synonymous").
 11. Only one court thus far appears to have specifically addressed the "act or transaction constituting the violation occurred" clause of Section 317. See *FERC v. Barclays Bank PLC*, 105 F. Supp. 3d 1121, 1133-36 (E.D. Cal. 2015) (denying defendant's motion to dismiss for improper venue). That district court decision, however, is still subject to appellate review and, more importantly, the court did not directly address a number of venue issues, including, for example, whether mere harmful effects alone are sufficient to render venue proper under Section 317. *Ibid.*
 12. Cf. Maloy, R. (2005). Forum shopping? What's wrong with that? *Quinnipiac Law Review*, 24, 25-62 (discussing permissible—and impermissible—methods of forum shopping); Algero, M. (1999). In defense of forum shopping: A realistic look at selecting a venue. *Nebraska Law Review*, 78, 79-112 (discussing various factors that may influence a plaintiff's choice of forum).
 13. See, generally, *Premium Plus Partners, L.P. v. Davis*, No. 04 C 1851, 2005 WL 711591, at **9-10 (N.D. Ill. Mar. 28, 2005) (interpreting the venue provisions of the Commodity Exchange Act (CEA), 7 U.S.C. § 25(c), which are virtually identical to the FPA venue provisions, and finding that the alleged harmful effect of a purported CEA violation is not "an act or transaction constituting the violation" within the meaning of the CEA's venue provision but, instead, "a purported consequence of the alleged violation").
 14. See, e.g., Lincoln Petition; Maxim Petition; Silkman Petition.
 15. *Ibid.*
 16. See, e.g., Lincoln Paper Petition ¶18 (alleging that defendants communicated with ISO New England Inc. Massachusetts headquarters with respect to the alleged manipulative scheme in support of venue); Maxim Petition ¶22 (same); Silkman Petition ¶19 (same).
 17. See City Power Petition.
 18. *Ibid.*, ¶5.
 19. *Ibid.*, ¶15.
 20. See Maxim Petition ¶11.
 21. *Ibid.*
 22. *Ibid.*, ¶22.
 23. See Powhatan Petition.
 24. *Ibid.* ¶ 22.
 25. See Powhatan Petition ¶ 20. In addition, and more uniquely, FERC also alleged in *Powhatan* that defendants had waived any objection to venue on the basis of a forum selection clause contained within a purportedly relevant agreement that required all disputes between the parties to be filed in Virginia, which also waived any objection to venue or jurisdiction within Virginia. *Ibid.*, ¶ 21.
 26. See Maxim Petition ¶22.
 27. If FERC does decide to test this issue, it will likely do so in a case that has a long time remaining on the statute of limitations in order to avoid any risk that the matter is dismissed based on improper venue and the statute of limitations is held to have run and expired during the matter's pendency. See, e.g., *Cont'l Ins. Co. v. M/V Orsula*, 354 F.3d 603, 608 (7th Cir. 2003) (holding that the lower court did not abuse its discretion in dismissing instead of transferring action where information sufficient to determine the appropriate venue was not elusive "despite the heavy cost of losing the right to sue because of statute of limitations considerations") (citation omitted).