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# FERC Denies Request for Discovery by Respondent in FERC Enforcement Case

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On May 6, 2016, the Federal Energy Regulatory Commission ("FERC" or the "Commission") issued an ***order denying*** ETRACOM LLC ("ETRACOM") and Michael Rosenberg's Motion to Require Disclosure of Certain Materials and Information or, in the Alternative, for Issuance of Subpoena. The motion sought certain data from the California Independent System Operator Corp. ("CAISO") to support ETRACOM's defense that CAISO "market flaws" are at the bottom of the matter, not market manipulation as alleged by FERC staff. The Commission denied the motion on three grounds: (1) the data is unnecessary; (2) the request is untimely; and (3) ETRACOM has elected *de novo* review in federal court rather than an administrative hearing.

**Unnecessary**. The Commission noted that ETRACOM already has submitted a comprehensive Joint Answer to the Commission's order to show cause in this matter. ETRACOM's "arguments regarding the alleged existence and import of CAISO 'market flaws' and software errors are discussed at length and in detail in the Joint Answer [and in]… prior submissions during the investigation." According to the Commission, because ETRACOM was able to provide details and their explanation based on the existing record, the additional information sought from CAISO is unnecessary.

**Timing**. The Commission also faults ETRACOM for providing "no explanation or rationale for the timing" of its motion. FERC staff had hypothesized in opposition to the motion that ETRACOM *might* be attempting to delay a penalty assessment while the statute of limitations runs. Although the Commission did not address this argument directly, it noted that ETRACOM requested disclosures from FERC staff and the CAISO on September 8, 2015, and was denied access to the information on September 11, 2015, and October 30, 2015, respectively, but that ETRACOM then waited more than four months after the denials and two weeks after responding to the show cause order to seek discovery through the Commission.

**Federal Court Election**. The Commission also concluded that the motion "lacks merit because [ETRACOM] elected to forgo discovery in an administrative hearing at the Commission before an administrative law judge." Pursuant to section 31(d) of the Federal Power Act ("FPA"), respondents may elect *de novo* review by a federal district court of both the law and the facts at issue rather than undergoing the default administrative law process, which is subject to review by the U.S. court of appeals only after "a determination of violation has been made on the record after an opportunity for an agency hearing." The Commission found that ETRACOM gave up the right to discovery at the agency when it elected *de novo* review by a federal court. Meanwhile, the Commission has taken the position in federal court that respondents electing

*de novo* review are stuck with the administrative record developed at the Commission except to the extent that the federal district court decides additional, *limited* discovery is necessary.

In the end, the Commission's decision in ETRACOM appears to limit discovery to FERC staff in cases where the respondent has elected *de novo* review by a federal district court. Specifically, the Commission stated, "Respondents cannot seek both the perceived benefits of [*de novo* review in federal court] and the discovery rights afforded to litigants in administrative proceedings at the Commission." As a result, the record upon which FERC's decision will be made invariably will be incomplete.

Although this decision may increase the likelihood that a federal court will reopen the record, evidence will continue to erode and risk destruction as time passes. As such, and at least until the scope of discovery under the process outlined in FPA section 31(d) is resolved by the federal courts, the denial of discovery in ETRACOM furthers the Commission's apparent goal of forcing respondents to submit themselves to the agency process when facts are in dispute rather than have the opportunity to have those disputed facts decided by an independent fact-finder. The Commission's decision, however, leaves open the question as to whether the Commission would entertain discovery efforts earlier in the process (e.g., prior to responding to a show cause order).

If you have any questions about the information contained in this post, or any other general questions, please contact: ***Michael Brooks***, ***Catherine McCarthy***, ***David Perlman***, ***Bob Pease***, ***Stephen Hug*** or ***Serena Rwejuna***.