GLOBAL COMPETITION REVIEW

The Guide to Energy Market Manipulation

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Perspectives on FERC's Enforcement Programme as it Relates to Energy Market Manipulation

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For more than a decade, the Federal Energy Regulatory Commission (FERC) has vigorously enforced the laws and regulations using new tools authorised by Congress in 2005 governing the wholesale electricity and natural gas markets in the United States subject to its jurisdiction. FERC's Office of Enforcement focuses its efforts on four principal areas: (1) fraud and market manipulation; (2) serious violations of mandatory reliability standards; (3) anticompetitive conduct; and (4) conduct threatening the transparency of FERC-regulated markets.[2] In this chapter, we provide perspectives on FERC's enforcement programme as it relates to fraud and market manipulation and highlight key issues based on our experience as counsel prosecuting and defending clients in FERC investigations, proceedings and litigation. We conclude by identifying certain helpful resources.

The Federal Energy Regulatory Commission and its jurisdictional markets

FERC is an independent, bipartisan US regulator formed in 1977 during a reorganisation of the federal Department of Energy. It is led by a chairman and four commissioners, each appointed by the president and confirmed by the Senate. Jurisdiction for most of FERC's enforcement activities stems from either the Federal Power Act (FPA) or Natural Gas Act (NGA).[3] In addition to its enforcement activities, FERC considers and rules on rates, terms and conditions for interstate sales and transportation of energy products (primarily electricity and natural gas) by approving tariffs or contracts. FERC also considers and rules on a range of energy infrastructure projects, including the construction and operation of

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2 Federal Energy Regulatory Commission, Office of Enforcement, 2017 Report on Enforcement (16 November 2017), available at: https://www.ferc.gov/legal/staff-reports/2017/11-16-17-enforcement.pdf.

3 Federal Power Act, 16 U.S.C. Section 791 et seq; Natural Gas Act, 15 U.S.C. Section 717 et seq.

interstate gas pipelines and hydroelectric facilities, and approves changes in the ownership and control of certain energy industry participants.[4]

The FPA charges FERC with ensuring 'just and reasonable rates'.[5] Since the 1990s, FERC has fulfilled this mandate by encouraging competition in interstate electricity markets, allowing wholesale prices to be based on market-based rates and generally the lowest cost resources needed to meet demand reliably. These markets are administered largely by FERC-approved regional transmission operators (RTOs) and independent system operators (ISOs), with territories collectively covering more than two-thirds of the US population. The RTOs and ISOs run complex markets for electric energy (both day-ahead and real-time), a variety of ancillary services to ensure reliable electric delivery (e.g., frequency regulation and reserves) and adequate levels of installed generation capacity (in some regions). The transition to competitive markets resulted from a major restructuring of the US electricity sector, moving away from a model where all utilities were essentially guaranteed recovery of their costs of providing electric service. FERC issued landmark rulemakings to restructure the electric industry in 1996 and 2000[6] and previously issued landmark rulings to restructure the natural gas industry in the 1980s and 1990s.

In the United States there are also bilateral and exchange-cleared sales of electricity, transmission capacity, and financial products derivative of electricity outside these wholesale markets. Natural gas and related liquids do not have organised wholesale markets comparable to the RTO and ISOs for electricity. Gas and liquid products, as well as pipeline transportation, storage capacity and financial products derivative of natural gas, are traded bilaterally or on commodities exchanges. For both the electric and natural gas sectors, FERC closely monitors the trades of all physical energy commodities and related financial products under its jurisdiction, whether or not the trading activity occurs in an organised market, for potentially fraudulent market manipulation.

FERC's Office of Enforcement has approximately 130 full-time employees.[7] Enforcement's Division of Investigations (DOI) is staffed with approximately 45 attorneys who investigate and prosecute potential violations of the federal laws and regulations under FERC's jurisdiction, as well as violations of the Commission's orders and market tariffs under its purview. Enforcement also includes auditors who ensure compliance with the Commission's financial accounting and other regulations, and a Division of Analytics and

4 Federal Energy Regulatory Commission, Strategic Plan for FY2014-FY2018, available at: https://www.ferc.gov/about/strat-docs/FY-2014-FY-2018-strat-plan.pdf.

5 16 U.S.C. Section 824d.

6 Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Order No. 888, FERC Stats. & Regs. Paragraph 31,036 (1996), 61 Fed. Reg. 21,541 (1996); Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. Paragraph 31,089, 65 Fed. Reg. 809 (2000). The paradigm may be threatened, however, by a notice of proposed rulemaking that FERC is currently considering, in which the Secretary of Energy directed FERC to consider a return to cost-of-service rates for certain coal and nuclear generating facilities. Grid Reliability and Resilience Pricing, Docket No. RM18-1-000 (28 September 2017).

7 Federal Energy Regulatory Commission, Fiscal Year 2016 Annual Performance Report, available at: https://www.ferc.gov/about/strat-docs/2017/FY18-Budget-Request.pdf.

Surveillance (DAS), which monitors market activity including real-time surveillance of trading data in wholesale electricity markets[8] and collaborates closely with the DOI.

Statutory authority for serious violations

The Energy Policy Act of 2005 (the EPAct 2005), the latest comprehensive energy legislation passed by the US Congress, greatly expanded FERC's enforcement authority and gave the agency powerful tools to protect the integrity of competitive energy markets.[9] This expansion was largely a reaction by Congress to the Western Energy Crisis of 2000–2001, during which FERC was largely unable to prevent or punish widespread gaming in California's nascent electric market by power traders, which led to extreme price volatility and electric supply interruptions.[10]

Before the EPAct 2005, FERC had a small enforcement staff as part of its Office of General Counsel, but was limited in its efforts to police markets under its jurisdiction because its civil penalties were capped at relatively small dollar amounts under the federal statutes the agency enforces, including the FPA and NGA, and there was no statutory prohibition on market manipulation. FERC now can impose civil penalties under the FPA and NGA of up to approximately US$1.2 million per violation per day. FERC also got broad authority from Congress, via amendments to the FPA and NGA, to prevent and deter fraud in energy markets by prosecuting 'any manipulative or deceptive device or contrivance' executed in contravention of FERC rules and regulations.[11]

In 2010, FERC sought to make its civil penalty assessment process more transparent by implementing Penalty Guidelines for companies modelled closely on the sentencing guidelines long applied by federal courts to criminal matters. The Penalty Guidelines provide a detailed, formulaic view into how enforcement staff evaluate particular violations and quantify various aspects of an alleged violator's culpability, with credit given for the entity self-reporting wrongdoing or having an effective compliance programme in place.[12]

Although the Penalty Guidelines have served a generally useful purpose, there is some controversy over implementation. For example, in a dissent by FERC Commissioner Cheryl LaFleur to an enforcement order in 2013, she expressed her view that it is improper to increase a civil penalty based on both the duration and magnitude of alleged violations (each is among the factors outlined in the Penalty Guidelines) when the total monetary loss allegedly caused by the conduct was a direct function of how long the fraud persisted, and therefore the magnitude penalty increase already accounted for duration.[13]

8 Federal Energy Regulatory Commission, Office of Enforcement homepage, available at: https://www.ferc.gov/enforcement/enforcement.asp.

9 EPAct 2005 amended Section 222 of the FPA, 16 U.S.C. Section 824v, and Section 4A of the NGA, 15 U.S.C. Section 717c-1.

10 See, e.g., James Sweeney, The California Energy Crisis (2002); Gary Taylor et al., Market Power and Market Manipulation in Energy Markets (2015).

11 Supra note 9.

12 Revised Policy Statement on Penalty Guidelines, 132 FERC Paragraph 61,216 (2010).

13 *Lincoln Paper and Tissue*, LLC, Order Assessing Civil Penalty, 144 FERC Paragraph 61,162 (2013) (Commissioner LaFleur, dissenting).

Sources of enforcement investigations and litigation

Investigations involving alleged market manipulation can result from sources both internal and external to FERC, including: referrals from market monitors; anonymous hotline tips; self-reports; market surveillance; or at enforcement staff's own initiative.

Each of the RTO and ISO regions has a market monitor appointed – either an external contractor or independent function within the RTO and ISO – to ensure that markets function properly and that market participants comply with applicable rules. The market monitors are required by FERC's regulations to refer potential violations to enforcement. In certain regions, market monitors have fulfilled this obligation quite aggressively, making frequent referrals to FERC. The Commission has noted that 'effective market monitoring requires close collaboration between Market Monitoring Units, RTOs, ISOs, and the Commission's Office of Enforcement' and that a close working relationship and exchange of non-public information between enforcement staff and market monitors is 'vital to the Commission's enforcement policies'.[14] FERC allows for a market monitor to continue investigating wrongdoing after it makes a referral, in parallel with an enforcement investigation.[15] Even absent such an express direction, market monitoring staff work with investigators to develop proof of alleged violations and respond to defences raised by the targets of investigations.

FERC operates an enforcement hotline that any member of the public can call or email to report suspected violations of laws or regulations. Several significant FERC investigations over the past decade have resulted from hotline tips, including by market participants who suspected manipulative trading behaviour by others. While FERC's regulations allow it to grant hotline whisteblowers anonymity, FERC does not have the authority to offer financial awards to whistleblowers, nor can FERC offer strong guarantees of whistleblower confidentiality.[16]

The Commission has consistently encouraged, but not required, voluntary self-reporting of violations, and energy companies routinely use this option to resolve minor lapses, such as inadvertent failure to comply with market rules or failures to file required forms with FERC. The Commission closes nearly all self-reports without any civil penalty or other public enforcement action.

Enforcement's DAS has significantly expanded FERC's in-house capabilities to screen electricity and natural gas market activity for suspicious and potentially unlawful behaviour. DAS is staffed with a team of analysts, economists and others with powerful tools, most notably a large volume of electricity market data pushed directly from RTO and ISOs[17] and the ability to access commodities trading data in the CFTC's Large Trader Report to

14 Southwest Power Pool, Inc., 137 FERC Paragraph 61,046, at P 20 & n.24 (2011) (authorising RTO and ISOs and MMUs to share non-public referral and investigative information).

15 18 C.F.R. Section 35.28(g)(iv)(E).

16 18 C.F.R. Section 1b.21. By contrast, the US Commodity Futures Trading Commission (CFTC) has had whistleblower protections and monetary award authority since 2010, and paid one whistleblower more than US$10 million after information led to a successful enforcement action. See http://www.cftc.gov/PressRoom/PressReleases/pr7351-16.

17 Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electronic Delivery of Data from Regional Transmission Organizations and Independent System Operators, Order No. 760, FERC Stats. & Regs. Paragraph 31,330 (2012).

identify potential financial incentives that might relate to a manipulative scheme. When DAS detects potentially manipulative behaviour, such as outsized market concentration or anomalous trading patterns, its analysts can enquire of market participants directly or refer potential violations to the DOI.

Principles-based market manipulation rule

In a public rulemaking following the EPAct 2005, FERC implemented a landmark rule in 2006 that set forth the elements of its Anti-Manipulation Rule in new provisions of the Code of Federal Regulations for both electric and natural gas market participants.

Under the Rule, the Commission will take enforcement action in cases where an entity: (1) uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter (intentional or reckless conduct); (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission.[18]

FERC has consistently framed its Anti-Manipulation Rule as a 'principles-based' enforcement regime, without bright-line rules for liability and relieving the agency of the need to enumerate each and every activity that could constitute fraud. As such, FERC followed in the footsteps of the US Securities and Exchange Commission (SEC), which has long enforced a sweeping, principles-based prohibition on securities fraud in its Rule 10b-5. FERC also explicitly incorporated into its market manipulation framework the case law interpreting the SEC's Rule 10b-5, and enforcement staff frequently quote securities law precedent noting that 'the methods and techniques of manipulation are limited only by the ingenuity of man'.[19]

Enforcement has emphasised that it makes fact-specific determinations based on the unique circumstances of each investigation. However, enforcement has delineated three general categories of manipulative market activity based on the cases it has brought during the past decade: (1) cross-product manipulation schemes (trading in one market with the intent to move prices in a particular direction to benefit related physical or financial positions in another market); (2) gaming of market rules, which featured prominently in the Western Energy Crisis of 2000–2001 (deceptively circumventing or taking unfair advantage of market rules and conditions in a way that harms the proper functioning of the market, such as by exploiting perceived loopholes); and (3) misrepresentations (submission or omission of false or misleading material facts).[20]

18 Prohibition of Energy Mkt. Manipulation, Order No. 670, FERC Stats. & Regs. Paragraph 31,202, at P 49–50 (2006), reh'g denied, 114 FERC Paragraph 61,300 (2006)(defining fraud generally as any action, transaction or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market).

19 See *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971).

20 FERC, *Staff White Paper on Anti-Market Manipulation Enforcement Efforts Ten Years After EPAct 2005* (Nov. 2016) at 18–32, available at: https://www.ferc.gov/legal/staff-reports/2016/marketmanipulationwhitepaper.pdf.

FERC investigation procedures

FERC enforcement has broad authority to open investigations relating to any matter subject to the Commission's jurisdiction, and to obtain documents and testimony as part of the investigation.[21] Most investigations are non-public and preliminary (directed by enforcement); occasionally the Commission makes an investigation formal (which affords investigators subpoena authority) or publicly directs enforcement to conduct an investigation of a particular entity or subject matter. In most circumstances, enforcement must treat as confidential information and documents obtained during the course of an investigation.[22]

Many defence counsel have often expressed concerns that FERC's investigation rules are not drafted or applied in a manner that best protects the due process rights of investigative subjects. Controversial practices identified by defence counsel include: investigations routinely stretching on for multiple years (often with long delays without any contact or activity); delayed access to investigative testimony transcripts; inadequate searches for, and production of, exculpatory evidence; inability of a subject to conduct discovery during an investigation; and a one-sided ability of enforcement staff to select and compile materials for an 'administrative record' in federal district court litigation. Defence counsel also have expressed concerns regarding enforcement's policy of publicly issuing a notice of alleged violations early in the process, including disclosing the names of individuals involved in alleged wrongdoing.

Although FERC's aggressive pursuit of suspected market manipulators accounts for the bulk of its enforcement resources and has attracted the most attention from the energy industry, energy legal practitioners and the public, FERC also ensures compliance with a wide variety of strict liability regulations under its jurisdiction,[23] many of which are investigated along with allegations of market manipulation.

Inter-agency cooperation

FERC sometimes investigates potential market manipulation jointly with, or in close cooperation with, other agencies with overlapping enforcement jurisdiction.

In 2010, the Dodd–Frank Wall Street Reform and Consumer Protection Act expanded the CFTC's authority to pursue intentional or reckless manipulation of swaps, cash commodities, or futures contracts in interstate commerce.[24] Since Dodd–Frank, the CFTC is the regulator FERC works with most often for market manipulation cases because

21 18 C.F.R. Part 1b.

22 18 C.F.R. Section 1b.19.

23 FERC has jurisdiction over subjects other than market manipulation including: violations of the mandatory reliability standards for the electric industry under Section 215 of the FPA, violations of the terms and conditions of Open Access Transmission Tariffs, failures to timely file for Commission approvals or make requisite reports of data and information, and undue affiliate preference or other violations of the Standards of Conduct applicable to providers of transmission service.

24 Dodd–Frank amended Section 6(c)(1) of the Commodity Exchange Act, 7 U.S.C. Section 9(1) to prohibit manipulation. The CFTC implemented the prohibition in its Rule 180. Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41,398, 41,401 (July 14, 2011) (codified at 17 C.F.R. Part 180). Like FERC's Anti-Manipulation Rule, the CFTC is a broad principles-based rule prohibiting, among other things, 'any act that would operate as a fraud or deceit.' Id.

many products under the CFTC's manipulation jurisdiction relate to markets for electricity or natural gas. For example, in December 2015 the CFTC settled with Total Gas & Power North America, Inc and one of its traders for US$3.6 million to resolve charges of attempted manipulation by its trades of natural gas during monthly settlement periods known as 'bid-week' to influence the published index prices at four major trading hubs.[25] In April 2016, FERC issued an order to show cause based on substantially the same conduct, but alleging that the company, its global affiliates and two traders each violated the Anti-Manipulation Rule and seeking civil penalties totalling more than US$216 million and disgorgement of more than US$9 million in allegedly unjust profits.[26]

If FERC enforcement uncovers criminal activity during the course of an investigation, it can make criminal referrals to the US Department of Justice. In one investigation settled during 2016, a US Attorney's Office referred several civil violations to FERC in the course of an investigation of a Massachusetts power plant operator's crimes under the Clean Air Act and FPA.[27] In addition, it has been publicly reported that at least two companies have been the subject of criminal investigations in cases involving alleged market manipulation. Neither the FPA nor NGA provide private rights of action for manipulation of energy markets or other violations. However, FERC enforcement actions have prompted ancillary litigation in recent years by parties alleging harm from the conduct at issue.[28]

Certain contested legal issues related to market manipulation

Open market manipulation

Defendants have argued that it is not possible as a matter of law to defraud other participants in an open market merely by placing transparent bids and offers, absent any false or misleading statements or deceptive practices. FERC disagrees, contending that otherwise legal conduct undertaken with manipulative intent can violate its Anti-Manipulation Rule, citing securities law precedent in which courts found liability for transactions conducted for the purpose of benefiting other positions rather than in response to legitimate supply and demand indicators.[29]

In a corollary to its 'open market manipulation' theory, FERC enforcement argues that it need not prove an actual, quantifiable impact on market prices to prove market

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25 CFTC Press Release, CFTC Files and Settles Charges against Total Gas & Power North America, Inc. and Therese Tran for Attempted Manipulation of Natural Gas Monthly Index Settlement Prices (Dec. 7, 2015), available at: www.cftc.gov/PressRoom/PressReleases/pr7289-15.

26 *Total Gas & Power North America, Inc.*, 155 FERC Paragraph 61,105 (April 28, 2016).

27 See *Berkshire Power Company LLC and Power Plant Management Services LLC*, 154 FERC Paragraph 61,259 (March 30, 2016).

28 See, e.g, *Merced Irrigation District v. Barclays Bank Plc*, No. 15-04878 (S.D.N.Y.) (class-action suit with antitrust and unfair competition claims stemming from Barclays' alleged manipulation of electricity market prices) (fact discovery ongoing); *Woolsey et al. v. J.P. Morgan Energy Ventures Corp. et al.*, No. 3:15-cv-00530 (S.D.Ca.) (class action suit with Racketeer Influenced and Corrupt Organizations Act (RICO) claims stemming from J.P. Morgan's allegedly fraudulent bidding strategies in electric markets, dismissed by district court as wholly dependent on non-compliance with a regulatory statute affording administrative remedies (the FPA), dismissal affirmed by Ninth Circuit Court of Appeals).

29 See, e.g., *Barclays Bank PLC, et al.*, Order Assessing Penalties, 144 FERC Paragraph 61,041 (2013), citing *Markowski v. SEC*, 274 F.3d 525 (D.C. Cir. 2001).

manipulation. Showing the exact effect of one participant's bids and offers – and simulating what market prices would have been but for that activity – can be prohibitively burdensome and inexact, particularly in wholesale electricity markets cleared by complex software algorithms.

Individual liability

Over the past several years, FERC has consistently investigated, charged and named individuals (including traders, supervisors, consultants and principals) alongside the companies it accuses of market manipulation. FERC in its Anti-Manipulation Rule included natural persons as entities subject to the rule, and enforcement leadership has argued that individual liability has a strong deterrent effect on potential wrongdoing in the energy industry. Individual defendants have argued that FERC's practice is unlawful because the plain meaning of the term 'entity' in the manipulation provisions of the FPA and NGA do not include natural persons, and that FERC's Penalty Guidelines and other enforcement processes do not contemplate, or provide fair notice of, individual liability factors. This issue has yet to be resolved by a reviewing court.

Market flaws and errors

A significant portion of FERC manipulation cases involve trading that occurred in the context of market design flaws and software errors in RTO and ISO electricity markets. FERC argues that 'gaming' of these flaws is manipulative. Enforcement has pursued violations from trades it characterises as exploiting known loopholes for 'free money', for example by entering offsetting pairs of energy transactions solely to garner revenues from payment of an ancillary credit in an RTO or ISO market without actually flowing energy or providing any benefit to the market.[30]

Of the three categories of market manipulation, defence counsel are particularly troubled by enforcement's aggressive pursuit of gaming behaviour, as compared to cross-product schemes and misrepresentation schemes. The concern is that enforcement attempts to severely punish market participants where they did not have fair notice and the ability to identify with ascertainable certainty that their activity would be prohibited. In some instances, enforcement has alleged manipulation from activities that were explicitly reviewed by ISO or RTO and market monitoring staff. Subjects of investigations have also pointed out that market design flaws and software errors had distorted the signals their trades were responding to, and in some cases set prices in ways that cause the RTO or ISO to violate its own tariff.

Proof of scienter

With respect to the scienter element of a manipulation claim, FERC often supports its allegation that a subject intentionally or recklessly manipulated markets by pointing to

30 See, e.g., *Houlian Chen*, 151 FERC Paragraph 61,179, at p. 64 (2015). FERC has stated that 'one of its core responsibilities is detecting, preventing, and appropriately sanctioning the gaming of energy markets.' *JP Morgan Ventures Energy Corporation*, Order Approving Stipulation and Consent Agreement, 144 FERC Paragraph 61,068, at P 87 (2013).

circumstantial evidence, such as contemporaneous speaking documents (i.e., instant messages, voice recordings or emails) that it argues support an inference of manipulative intent. FERC also argues manipulative intent based on data by analysing a company or individual's trading patterns as compared to their usual practices or other market participants. On one occasion, FERC enforcement alleged an intentional violation of the Anti-Manipulation Rule without pointing to a single contemporaneous speaking document or any witness testimony suggesting intent to manipulate.[31]

Another contested issue is whether FERC is required to prove that market trading activity was deliberate or intentionally manipulative. Defence counsel have urged the Commission not to adopt the legal principle that establishing mere recklessness satisfies the scienter element of the Anti-Manipulation Rule in all contexts.[32] The Commission has affirmed its rule that recklessness generally satisfies the scienter requirement,[33] but a reviewing court has not yet addressed this issue.

False or misleading statements

Enforcement aggressively pursues alleged violations of the duty of candour in FERC's market behaviour rules that requires sellers of electricity at market-based rates to 'provide accurate and factual information and not submit false or misleading information, or omit material information' to the Commission, RTO or ISOs, or market monitors.[34] FERC has taken the position that an entity can be liable for violating the duty of candour without any showing that it intended to do so.[35] Enforcement has consistently alleged violations of this rule for conduct it also alleges violated the Anti-Manipulation Rule, drawing criticism that its use of the market behaviour rule is cumulative and often used as leverage in settlement negotiations.

Statute of limitations

Alleged violations of the FPA and NGA are subject to the general federal statute of limitations, 28 USC Section 2462, which requires an enforcement suit for civil penalties to be 'commenced within five years from the date when the claim first accrued'.[36] In the context of securities enforcement, the Supreme Court has ruled that the five-year clock 'begins to tick when the fraud occurs, not when it is discovered'.[37] FERC has argued that this five-year period is in addition to a separate five-year statute of limitations clock that runs during the investigation and administrative assessment of a civil penalty (and that the earlier

31 See *FERC v. ETRACOM*, No. 2:16-cv-01945-SB (E.D. Ca.) The authors are counsel for ETRACOM and its individual owner.

32 E.g., see *Barclays Bank PLC, et al.*, Answer of Daniel Brin to Order to Show Cause and Notice of Proposed Penalties, at PP 38-40, Docket No. IN08-8-000 (2012).

33 Order No. 670 at P 45, 53.

34 18 C.F.R. Section 35.41(b). There is no analogous rule applicable to natural gas sellers.

35 *Moussa I. Kourouma*, Order on Show Cause Response, 135 FERC Paragraph 61,245, at p. 20 (2011) upheld by D.C. Circuit.

36 28 U.S.C. Section 2462.

37 *SEC v. Gabelli*, 133 S. Ct. 1216, 1217 (2013).

clock stops when the Commission initiates an administrative proceeding with an order to show cause).[38] One federal district court has agreed with FERC's interpretation.[39]

As part of its market manipulation cases, FERC routinely orders entities to disgorge allegedly unjust profits in addition to payment of any civil penalty, and enforcement staff has contended that it can order disgorgement going back further than five years. The Supreme Court recently held, however, that the disgorgement remedy in SEC enforcement actions is a 'penalty' for purposes of the statute of limitations,[40] suggesting that FERC too will be limited to five years for any disgorgement remedy.

Many FERC investigations have languished for years, with multiple rounds of detailed document requests and investigative testimony from witnesses. In recent litigation with Barclays Bank and its former traders to enforce a FERC penalty assessment of more than US$450 million for market manipulation, a federal court found that certain FERC claims were time-barred, in part, by the five-year statute of limitations in 28 USC Section 2462.[41] The investigation of Barclays began over a decade ago in 2007 and was settled just recently.[42] Given that many of enforcement's investigations last for multiple years, statute of limitations is a potential impediment to the agency's recovery of civil penalties and will likely continue to be a contested issue.

De novo review

The FPA provides a dual-option procedure for review of FERC civil penalty assessments: either (1) a hearing before a FERC administrative law judge; or (2) election to have an immediate penalty assessment by the Commission that a United States district court is authorised to review de novo.[43] Defendants in litigated FERC cases have argued that de novo review means a plenary adjudication of all issues of fact and law with no deference to FERC's earlier decision, while the agency has argued that the court need only summarily review the investigative record developed at the agency. Each federal district court to address the scope of de novo review has disagreed with FERC, and ruled that defendants are entitled to full discovery rights under the Federal Rules of Civil Procedure, including discovery and cross examination of witnesses.[44] There are no comparable election procedures in the NGA.

38 FERC cites *US v. Meyer*, 808 F.2d 912 (1st Cir. 1987) ('[F]inal assessment of an administrative penalty is a statutory prerequisite to the bringing of an action judicially to enforce such penalty. [T]he statute of limitations prescribed by 28 U.S.C. Section 2462 does not begin to run, so long as administrative proceedings have been seasonably initiated, until the same have been concluded and a final (administrative) decision has resulted.')

39 *FERC v. Silkman et al.*, No. 13-13054-DPW (D. Mass.), Apr. 11, 2016 Order (ECF No. 65).

40 *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

41 *FERC v. Barclays Bank PLC, et al.*,No. 2:13-cv-02093-TLN-DB (E.D. Ca.), Sept. 29, 2017 Order (ECF No. 234).

42 *Barclays Bank PLC et al.*, Order Approving Stipulation and Consent Agreement, 161 FERC Paragraph 61,147 (2017).

43 16 U.S.C. Section 823b(d). The NGA does not provide for such an election, and penalties assessed for natural gas activities are reviewed by a FERC ALJ.

44 E.g., see *FERC v. Maxim Power Corp.*, No. 15-30113-MGM, 2016 WL 4126378, at *11 (D. Mass. July 21, 2016); *FERC v. City Power Marketing*, No. 15-cv-01428-JDB, 2016 WL 4250233, at *10 (D.D.C. Aug. 10, 2016); *ETRACOM*; *Barclays*.

Attempted manipulation

FERC enforcement has taken the position that attempted manipulation violates its Anti-Manipulation Rule if the conduct at issue was undertaken with the requisite intent to manipulate, even if the entity was unsuccessful at doing so. Enforcement points to the Rule's prohibition of any act, practice or course of business that operates or would operate as a fraud or deceit upon any entity,[45] and the Commission has agreed.[46] Defendants have pushed back against this broad interpretation of the Rule, but one reviewing court has agreed with enforcement, holding that the Rule 'covers even unsuccessful schemes that harm no one'.[47]

Conclusion

In the decade since it implemented the significant authority and tools granted to it in the EPAct 2005, FERC's Office of Enforcement has established itself as a robust and forceful regulator and enforcer of trading behaviour in energy markets. In bringing a variety of cases under its Anti-Manipulation Rule, enforcement has raised a variety of legal controversies, several of which remain the subject of ongoing litigation. While a strong enforcement function has traditionally been non-partisan (with both Republicans and Democrats in Congress and the executive branch calling for vigilance and crackdowns on market manipulators), it remains to be seen whether and to what extent FERC enforcement will change under the Trump administration. Congress or the new leadership at the Commission could significantly change the agency's authority and priorities, including a reduction in the significant resources currently allocated to enforcement.[48]

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45 FERC, Staff White Paper on Anti-Market Manipulation Enforcement Efforts Ten Years After EPAct 2005 (Nov. 2016) at n.27, citing 18 C.F.R. Sections 1c.1(a)(3), 1c.2(a)(3) (2016).

46 *Maxim Power Corp.*, 151 FERC Paragraph 61,094, at n.5 (2015) ('[M]anipulation, fraud, and misrepresentations to market monitors are unacceptable in Commission-regulated markets even where such behavior is caught before it causes harm to consumers').

47 *FERC v. City Power Mktg.*, LLC, No. 15-1428, 2016 WL 4250233, at *13 (D.D.C. Aug. 10, 2016).

48 Readers may wish to consult the following helpful resources published by the Energy Law Journal: Hon. Joseph T. Kelliher, *Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission*, 26 Energy L.J. 1 (2005); Allan Horwich, *Warnings to the Unwary: Multi-Jurisdictional Federal Enforcement of Manipulation and Deception in the Energy Markets after the Energy Policy Act of 2005*, 27 Energy L.J. 363 (2006); J. Michel Marcoux, *Canaries in the Coal Mine: Facts From Securities Fraud Private Civil Actions Can Identify Intent to Manipulate Energy Markets*, 29 Energy L.J. 141 (2008); John S. Moot, *Compliance Programs, Penalty Mitigation and the FERC*, 29 Energy L.J. 547 (2008); William F. Demarest, Jr., *Traditional NGA Jurisdictional Limits Constrain FERC's Market Manipulation Authority*, 31 Energy L.J. 471 (2010); Theodore A. Gebhard, et al., *Prohibiting Fraud and Deception in Wholesale Petroleum Markets: The New Federal Trade Commission Market Manipulation Rule*, 31 Energy L.J. 125 (2010); Craig Pirrong, *Energy Market Manipulation: Definition, Diagnosis, and Deterrence*, 31 Energy L.J. 1 (2010); Shaun Ledgerwood, et al., *A Comparison of Anti-Manipulation Rules in U.S. and EU Electricity and Natural Gas Markets: A Proposal for a Common Standard*, 33 Energy L.J. 1 (2012); William Scherman, et al., *The FERC Enforcement Process: Time for Structural Due Process and Substantive Reforms*, 35 Energy L.J. 101 (2014); Allison Murphy, et al., *The FERC Enforcement Process*, 35 ENERGY L.J. 283 (2014); and Todd Mullins, Chris McEachran, *Adjudication of FERC Enforcement Cases: See You In Court?*, 36 Energy L.J. 261 (2015).