

INSIGHTS

FERC Assesses Record Civil Penalty But the Story Is Just Beginning

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By: [David M. Perlman](#)

By Order dated July 16, 2013 the Federal Energy Regulatory Commission (FERC) assessed civil penalties against Barclays Bank Plc. and four of its traders – Daniel Brin, Scott Connelly, Karen Levine and Ryan Smith (Order). The Order is notable for its size and scope. Barclays was fined \$435 million, the largest in FERC’s history. Connelly was fined \$15 million dollars and Levine and Smith were each fined \$1 million. Barclays was also ordered to disgorge \$34.9 million in profits.

Beyond the size and scope of the Order, this matter is notable for the procedural path it is on. Rather than representing a full adjudication of the facts and law, this matter is postured to move from FERC to a *de novo* trial in U.S. Federal District Court. Under the Federal Power Act (FPA) Section 31(d)(3)(A), Barclays had the option (in the event the FERC did not dismiss the matter) to have an administrative hearing before an administrative law judge or seeking a FERC determination of a penalty subject to a *de novo* review by the U.S. District Court. Barclays elected under of the FPA to go the penalty/*de novo* review route, and now has 30 days to pay the penalty. If Barclays fails to pay the penalty, FERC must institute an action in Federal District court to enforce the Commission’s penalty assessment. The Federal District Court will then have *de novo* review over the proceeding.

While the statute is unclear as to the scope of the review that the Federal District Court is to undertake in its *de novo* hearing, it is logical that the Court must consider the evidence in order to evaluate the legitimacy of the penalties determined by FERC. The statute specifically provides that

“[t]he court shall have the authority to review *de novo* the law and facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.”

If the entirety of the underlying evidence is to be considered in the District Court proceeding, it will be akin to an evidentiary trial of FERC’s manipulation allegations. This trial could include not only the evidence but FERC’s application of its anti-manipulation rule, including whether recklessness alone without specific intent is sufficient to satisfy the scienter requirement.

It is also important to recognize that while FERC has established virtually identical anti-manipulation rules for both electricity and natural gas, the ability for a person alleged to have engaged in a manipulation violation may only elect to pursue a District Court *de novo* review for

allegations related to electricity. This is because the statutory basis for such election exists in the F P A but does not exist in the Natural Gas Act.

The further litigation of this matter will be very instructive in creating a precedent for the potential for electricity manipulation claims to be litigated in District Court. It will define the scope, process and burden that must be met by the litigants in such a forum.

In this court challenge, Barclays also may invoke the specter of the Hunter decision, *Brian Hunter*, 135 FERC ¶ 61,054, order denying reh'g, 137 FERC ¶ 61,146 (2011), rev'd sub nom. *Hunter v. FERC*, 711 F.3d 155 (2013), to argue that FERC lacks subject matter jurisdiction because part of the alleged manipulative scheme involved the swaps market on the Intercontinental Exchange (ICE). The bank may also question whether fraud can occur in an open, liquid and transparent market.

It is our observation that Barclays elected this process because of concerns it had regarding the objectivity that FERC may bring to anti-manipulation cases of this nature. The District Court is designed to conduct trials while FERC is structured to act as a policy making body as well as a quasi-judicial forum. Further, FERC adjudications are subject to a standard administrative law review on appeal (based on substantial evidence; not arbitrary and capricious), whereas a District Court review should be more detailed while providing less deference to the agency.

We will continue to follow this matter and provide updates as it progresses.