

INSIGHTS

Scope of Trial De Novo Debated in Barclays Electricity Manipulation Case

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After almost eight years since the Federal Energy Regulatory Commission (FERC) commenced its investigation against Barclays Bank PLC (Barclays) and four of its traders, Scott Connelly, Daniel Brin, Karen Levine and Ryan Smith, for allegedly manipulating the California electricity markets, Barclays filed its answer in federal district court. As expected, Barclays denied all of FERC's substantive allegations and asserted that the District Court should give no merit to FERC's findings of fact or legal conclusions. FERC, according to Barclays and the individual traders, must prove its case before an independent arbiter and cannot rely on anything that happened at the agency level. FERC is seeking a \$435 million civil penalty against Barclays; \$15 million against Connelly; and \$1 million each from Brin and Levine. Last month we [reported](#) on Judge Nunley's decision denying Barclays motion to dismiss the FERC action in the Federal district court in Eastern District of California. [\[1\]](#) The court did not rule on the merits of the manipulation claim but found that FERC has jurisdiction to bring the action and that individuals could be subject to civil penalties. Because Barclays lost its motion to dismiss the case will now go forward and Barclays had to answer FERC's complaint. In its answer, Barclays and the traders argue that the court under the "plain" language of the Federal Power Act, must hear the case *de novo* as to the facts and the law, giving no deference to FERC's purported findings. The bank said that FERC bears the burden of proof going forward and what happened at the administrative level is irrelevant. Levine went further in her answer stating that "any investigation done prior to the Complaint was one-sided and does not bear on this action" | what the Plaintiff [FERC] may have done prior to the Complaint does not bear on what it must prove at trial." Barclays also asked the court to provide it with full discovery rights. Barclays continued to argue that the court lacks subject matter jurisdiction, that venue in California is improper and that the Commodity Futures Trading Commission, and not FERC, has exclusive jurisdiction over the trading at issue because the trading involves futures transactions. Judge Nunley previously rejected all of those arguments in denying the motion to dismiss. FERC, on the other hand, has asked the court to affirm the agency's findings of fact and conclusions of law and that the court should only be concerned with the appropriate amount of the civil penalty. Unlike Barclays, FERC has a much narrower view of what constitutes *de novo* review by the district court. Further, in their answers, Levine and Smith argued that they cannot be held individually responsible because they were acting under the supervision of the Barclays' compliance staff. Levine claimed that she "reasonably relied on Barclays' institutional processes to ensure adequate oversight of her

trading, and acted at all times within the scope of her employment and for the benefit of her employer, and she cannot be held liable for alleged failings of oversight of her trading." Smith repeated the same argument in his answer. Assuming the case goes forward to a full trial, the next step in this long process is discovery. While FERC has been investigating Barclays for nearly eight years, Barclays has not had an opportunity to conduct discovery of its own. During a FERC investigation, FERC does not permit respondents to submit data requests or to depose FERC staff and experts. Barclays will now have an opportunity to explore and challenge FERC's allegations. Judge Nunley has not set a trial date for this matter. There has only been one other FERC matter we are aware of that has gone to court under the *de novo* standard of review. Bracewell's [Robert Pease](#) was lead counsel for FERC in that case. Pease advanced the same arguments that FERC is making before Judge Nunley. In that case the judge would have none of it. He cut off any argument that would limit the scope of the trial stating that "I will give no deference to FERC's decision. Instead, he found he would make a "fresh, independent determination of the matter at stake." See *FERC v Macdonald*, 862 F. Supp. 667 (D.N.H. 1994) We would not be surprised to see Judge Nunley make a similar ruling. Finally, in a related development, on July 23 the Merced Irrigation District filed a class action against Barclays to recoup losses caused by Barclays alleged manipulation of electricity prices in California. [1] <http://www.energylegalblog.com/archives/2015/05/21/6239>