

## INSIGHTS

## FERC Responds to Barclays Motion to Dismiss as Without Merit and so Aggressive That if Granted it Could "Eviscerate" FERC's Ability to Regulate Wholesale Power Markets

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On July 16, 2013, the Federal Energy Regulatory Commission ("FERC") issued an order finding Barclays Bank PLC ("Barclays"), Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith (together with Barclays, "Defendants") in violation of FERC's anti-manipulation regulations and assessed significant penalties.<sup>[1]</sup> The Defendants chose to have the validity of the order tried *de novo* in federal district court, and on December 16, 2013, filed a Motion to Dismiss the FERC action.<sup>[2]</sup> On February 14, 2014, FERC filed an Opposition to the Motion to Dismiss previously filed by the Defendants. This case represents the first time a FERC electric market manipulation claim is being adjudicated in a federal district court.<sup>[3]</sup> The court's ruling could have significant implications for FERC's jurisdiction in a manipulation action that involves financial transactions and its authority with regard to wholesale power markets. In its Opposition, FERC states that the scope of the attack on its authority made in the Motion to Dismiss is such that a holding in favor of the Defendants would "*eviscerate the regulation of wholesale electricity markets contemplated in the [Federal Power Act].*"<sup>[4]</sup> In addition, FERC maintains that such a holding would create a massive regulatory gap as there is no state regulation of wholesale electricity transactions and would dramatically alter the federal energy regulatory framework enacted by Congress. FERC asserts in its Opposition that the Defendants' arguments in support of dismissal of the case are without merit and that their motion should be denied in full. Specifically, with respect to the various attacks on its jurisdiction in the Motion to Dismiss, FERC argues that: **Physical Delivery Requirement-Defendants Contend Unless Physical Power is Transmitted or Delivered, FERC Has No Jurisdiction** FERC responds to the Defendants by explaining that it has jurisdiction over the Defendants' alleged manipulation of regulated wholesale energy markets: "entities such as Barclays (known as power marketers) who buy and sell electricity at wholesale, but do not physically generate or transmit it, fall squarely in the Commission's jurisdiction."<sup>[5]</sup> FERC points out that the Defendants have consistently acknowledged FERC's jurisdiction over their wholesale transactions and that FERC's jurisdiction over wholesale electric markets is plenary and exclusive. **CFTC Exclusive Jurisdiction-Defendants Contend That Because Futures are a Component of the Alleged Scheme, FERC Has No Jurisdiction** FERC responds that the CFTC does not have exclusive jurisdiction over the Defendants' alleged manipulations. First, FERC argues that the courts have found FERC only

to be without jurisdiction over manipulative schemes involving CFTC-regulated futures markets, not FERC-jurisdictional physical markets such as those at issue in this case. Second, FERC asserts that the financial swaps utilized by the Defendants in this case are not futures contracts and are specifically exempted from the CFTC's exclusive jurisdiction. Finally, FERC notes that in a letter to the FERC Office of Enforcement, the CFTC specifically acknowledged and assented to FERC's jurisdiction in this case. **Open Market Transactions-Defendants Contend That Transactions Taken in an "Open Market" Cannot Be Manipulative** FERC responds that uneconomic or otherwise manipulative trading to benefit related positions, regardless of whether it is conducted on the open market, is unlawful under the FPA. FERC argues that it has found in various cases that money-losing transactions used to benefit financial positions are unlawful regardless of whether they occurred in an "open market."<sup>[2]</sup> FERC notes that in accord with its determination under its anti-manipulation authority, securities law also bans uneconomic open market trading for an external manipulative purpose. Finally, FERC asserts that the Defendants have failed to state a case that supports the position that open market trades are a safe harbor under Section 10(b)-5 in securities law (the statutory provision that FERC's anti-manipulation authority is modeled on) and, further, courts have expressly rejected the existence of such a safe harbor. **Individuals are Not Entities-Defendants Contend That Individuals Are Not Subject to FERC Jurisdiction for Manipulation** FERC responds that the individual traders are subject to FERC's jurisdiction because the use of "any entity"<sup>[3]</sup> in Section 222 of the FPA includes individuals. FERC asserts that a plain reading of the text in the context of the statute shows Congress' intent to include individuals within the meaning of "entity."<sup>[4]</sup> Provisions of the FPA clearly provide for penalties for "individuals"<sup>[5]</sup> and "persons,"<sup>[6]</sup> which FERC says supports the interpretation that the use of "entity"<sup>[7]</sup> in the statute was meant to include individuals such as the Barclays traders. FERC also cites to precedent in which "entity"<sup>[8]</sup> includes individuals. Moreover, FERC notes that in a rulemaking it previously interpreted the term "any entity"<sup>[9]</sup> to include individuals. FERC characterizes the Defendants' argument as: "Congress sought to provide the Commission with \$1,000,000 a day civil penalty authority against all "persons'-*except* those who actually commit market manipulation-and further Congress sought to make individuals subject to *criminal* but not civil penalties under the FPA."<sup>[10]</sup> In addition to these legal arguments in response to the Defendants' claims in its Motion to Dismiss, FERC notes that the "*Chevron* doctrine is conspicuously missing from the [Defendants'] brief."<sup>[11]</sup> FERC asserts that Congress, in enacting the FPA, gave the Commission law-making authority and that therefore *Chevron* deference applies to its legal determinations.

<sup>[1]</sup> *Barclays Bank PLC*, Order Assessing Civil Penalties, 144 FERC ¶ 61,041 (July 16, 2013).

<sup>[2]</sup> For more information, see David Perlman, Bob Pease, and Jennifer Lias, [Barclays Motion to Dismiss Raises Significant Issues About FERC Jurisdiction, Energy Legal Blog](#) (Jan. 6, 2014).

<sup>[3]</sup> Petitioner's Opposition to Respondents' Motion, *FERC v. Barclays Bank PLC et al.*, No. 2:13-cv-02093-TLN-DAD (E.D. Cal. Feb. 14, 2014).

<sup>[4]</sup> Petitioner's Opposition to Respondents' Motion, *supra* note 3 at 12.

<sup>[5]</sup> Petitioner's Opposition to Respondents' Motion, *supra* note 3 at 5.

<sup>[6]</sup> Petitioner's Opposition to Respondents' Motion, *supra* note 3 at 33.

[\[7\]](#) Petitioner's Opposition to Respondents' Motion, *supra* note 3 at 24.