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Paper Company, Arguing that FERC Lacks Jurisdiction over Demand Response, Files Motion to Dismiss FERC Manipulation Action

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On December 2, 2013, FERC filed a Petition for an order affirming its assessment of a civil penalty in the District of Massachusetts against Lincoln Paper and Tissue, LLC ("Defendant"), alleging that the Defendant engaged in a manipulative scheme as a retail customer in the electricity market in order to receive additional profits in a "demand response" program run by ISO New England, Inc ("ISO-NE")[1] As in *FERC v. Barclays*, the court's resolution of this case may significantly affect the scope of FERC's anti-manipulation enforcement authority going forward. On February 14, 2014, the Defendant filed a Motion to Dismiss the case arguing that FERC lacks jurisdiction over its participation in the "demand response" program[2] The "demand response" program initiated by ISO-NE was a FERC authorized program with the purpose of reducing energy prices by reducing overall consumption of (i.e. demand for) electricity. Therefore, to participate in the "demand response" program, the Defendant had to reduce its retail consumption"”i.e. to forego retail purchases of electric energy. It is not settled whether demand response should be considered a wholesale electricity transaction or transmission service subject to FERC's jurisdiction. The Defendant argues that demand response is effectively a determination to not make a retail purchase of electricity. Such a retail purchase would be subject to state, not FERC, regulation. Accordingly, the Defendant contends that such a "retail non-purchase" is not FERC-jurisdictional. Conversely, FERC has asserted that it has jurisdiction over the Defendant's decision to not make a retail purchase because it affects wholesale rates. The Defendant responds that FERC has no jurisdiction regardless of whether the non-purchases indirectly have an effect on the wholesale market and that any other holding would allow FERC to improperly "do indirectly what it may not do directly."[3] As FERC, under former Chairman Wellinghoff, aggressively moved to implement demand-response programs, a finding that such programs are beyond FERC's jurisdiction would have a significant impact.

[1] Petition for an Order Affirming the Federal Energy Regulatory Commission's August 29, 2013 Order Assessing Civil Penalty Against Lincoln Paper and Tissue, LLC, *FERC v. Lincoln Paper and Tissue, LLC*, No. 1:13-cv-13056-DPW (D. Mass. Dec. 2, 2013).
[2] The Defendant also argues that the case should be dismissed because the action is time barred; the Defendant was not given proper notice that its conduct was improper; and FERC

has failed to state a claim with enough specificity as required under the Federal Rules of Civil Procedure.

[3] Internal quotations and citations omitted.