Energy Regulatory Alert

March 15, 2013

Federal Court Rules FERC has no Authority to Police Natural Gas Futures Trading

On March 15, 2013, the U.S. Court of Appeals for the D.C. Circuit held that the Federal Energy Regulatory Commission (FERC) exceeded its authority when it imposed a $30 million fine on an employee of hedge fund Amaranth for manipulating natural gas futures contracts to affect prices in FERC-regulated physical gas markets. The court held that the Commodity Futures Trading Commission (CFTC) has exclusive jurisdiction over all transactions involving commodity futures contracts, even if those transactions impact prices in physical markets that are regulated by FERC. In an unusual move, CFTC intervened in the proceeding on the side of the trader.

Following revelations of Enron's widespread gaming of U.S. electricity markets, Congress enacted the Energy Policy Act of 2005, which amended the Natural Gas Act (NGA) to prohibit market manipulation "in connection with" the purchase or sale of natural gas or the purchase or sale of transportation services subject to FERC jurisdiction. It also authorized FERC to assess civil penalties for violations of the NGA of up to $1 million per day for the duration of each violation. FERC has taken an aggressive approach under this new authority. Since 2008, FERC's Office of Enforcement has more than doubled its budget and hired former prosecutors and law enforcement agents to investigate and prosecute allegations of market manipulation. In the past two years, FERC has taken particular aim at financial institutions with high-profile prosecutions involving hundreds of millions of dollars in potential penalties. The proceeding against Amaranth's trader was the first fully litigated proceeding involving FERC's enhanced enforcement authority under § 4A of the NGA.

FERC's emergence as a major enforcement arm in financial markets has increased regulatory uncertainty, both because the agency's Office of Enforcement has a relatively short track record and because FERC's market manipulation rules lack specificity. FERC's expansive interpretation of its enforcement jurisdiction has resulted in simultaneous prosecutions by FERC and CFTC. The D.C. Circuit's decision establishes a bright line rule, eliminating FERC's ability to police natural gas futures trading.

For a complete copy of the court's order, click here.

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