

GLOBAL COMPETITION REVIEW

The Guide to Energy Market Manipulation

Editor

Gordon Kaiser, JAMS

GCR 
GLOBAL COMPETITION REVIEW

Part II

Enforcement Practices

9

FERC Practice and Procedure

David A Applebaum, Todd L Brecher and J Porter Wiseman¹

Introduction

Much of the practice and procedural knowledge you need to effectively represent clients in a FERC Office of Enforcement (Enforcement) matter – especially involving potential market manipulation – cannot be found in the sparse rules governing investigations set forth in the Code of Federal Regulations. Not even policy statements, writings from FERC Enforcement staff or orders in enforcement cases will fill in all the gaps. As with other investigations led by government agencies, whether the Department of Justice, the Commodity Futures Trading Commission (CFTC), or the Securities and Exchange Commission (SEC), if you or your client get a call from FERC Enforcement staff regarding conduct in electricity or natural gas markets, it is important to work with practitioners with first-hand experience of how agency investigators work up a case from a data preservation directive all the way through a federal district court complaint (and the stages in between). The discussion below is therefore necessarily an overview, though we highlight some of the key aspects of practice that subjects in market manipulation cases will need to consider.

As of the date of this publication, though, FERC Enforcement practice finds itself at the beginning of what we expect will be a series of significant procedural changes to be initiated over the coming year. These changes will flow from recent federal court rulings in market manipulation cases, concerns raised by market participants about the investigative process, and the imprint that a newly constituted Commission will undoubtedly place on the enforcement process. We (very briefly) touch on some of these potential changes below.

¹ David A Applebaum is a partner, Todd L Brecher is a counsel and J Porter Wiseman is a senior counsel at Akin Gump Strauss Hauer & Feld LLP in Washington, DC.

Practice and procedure at the investigations stage

Before summarising the principal stages of a FERC Enforcement market manipulation investigation, it is useful to list key sources of procedural guidance.

Federal regulations

The rules governing FERC investigations are set forth in Part 1B of FERC's regulations.² They were promulgated in the 1970s and modelled on the investigative rules of other similar federal enforcement agencies.³ They cover such topics as powers of investigators, subpoenas, witness rights and confidentiality. While it is important to understand the rules, they ultimately tell a practitioner little about how an investigation proceeds.⁴

General policy statements

After Congress invested FERC with significant new enforcement authority in 2005,⁵ FERC issued policy statements to provide guidance on how FERC Enforcement would do its work. In its 2005 Policy Statement on Enforcement,⁶ FERC described how it intended to exercise its new authority, including how it would decide to bring enforcement actions, determine remedies, and assess credit for compliance programmes, self-reporting and cooperation. In its 2008 Revised Policy Statement, which superseded the 2005 statement, FERC provided a more detailed explanation of the investigation and enforcement process and its approach to determining remedies.⁷ The 2008 policy statement remains in effect but as a practical matter has limited value at this point; it is nearly a decade old, and FERC's current enforcement process and approach to assessing penalties are better reflected in more recent guidance through Enforcement Staff's 2014 *Energy Law Journal* article and FERC's 2010 Penalty Guidelines (discussed below).

Energy Law Journal article on the FERC enforcement process and other staff guidance

In 2014, FERC enforcement attorneys published an article in the *Energy Law Journal* on FERC's enforcement process.⁸ This article was not published by the Commission itself and thus does not constitute official policy. Nevertheless, it is the most comprehensive description of FERC's investigation and enforcement process from staff's perspective. The article explains each stage of the process, including inception of the investigation, fact gathering,

2 18 C.F.R. Part 1b (2017).

3 Rules Relating to Investigations, 43 Fed. Reg. 27,174, 27,175 (23 June 1978).

4 FERC, unlike for example the SEC, has not expanded upon these rules with additional manuals. See, e.g., Sec. & Exch. Comm'n, Div. of Enf't, Enforcement Manual (2016), <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

5 The history and significance of this important development is beyond the scope of this chapter, but is discussed elsewhere in this book.

6 Enforcement of Stats., Orders, Rules, and Regs., 113 FERC Paragraph 61,068 (2005).

7 Enforcement of Stats., Regs., and Orders, 123 FERC Paragraph 61,156 (2008).

8 Allison Murphy, Todd Hettenbach, & Thomas Olson, The FERC Enforcement Process, 35 *Energy Law Journal* 283 (2014), <http://www.felj.org/sites/default/files/docs/elj352/15-283-321-Murphyetal-final-11.1.pdf?v=3>.

preliminary findings, settlement negotiations and the order to show cause process.⁹ Other staff guidance includes speeches and testimony from Enforcement officials.¹⁰

Penalty Guidelines

In 2010, FERC adopted Penalty Guidelines to guide its determination of civil penalties for corporations (but not individuals).¹¹ Modelled on the Federal Sentencing Guidelines, the Penalty Guidelines provide a formulaic approach for determining civil penalty ranges. The Penalty Guidelines provide for FERC to determine an initial, base penalty range. In market manipulation cases, the primary drivers of the base penalty range are the harm to the market and the duration of the violation. The base range is then multiplied by a ‘culpability’ score to determine the final penalty range.¹² The culpability score can lead to increases or decreases from the base range, and is impacted by mitigating factors (such as having an effective compliance programme) and aggravating factors (such as prior violations).¹³

Notice of alleged violations

In 2009, FERC introduced a policy providing for accelerated public disclosure of investigations and their subjects through a notice of alleged violations (NAV).¹⁴ Under the NAV policy, FERC now publicises investigations and their subjects once the subject ‘has had the opportunity to respond to staff’s preliminary findings’ – but before staff finalised findings or the Commission itself has issued an order addressing the matter.¹⁵

9 The article also responds to various critiques and proposed changes regarding FERC’s investigation and enforcement process and substantive approach to defining and combating market manipulation. While it is helpful to understand staff’s views of these topics, it is ultimately the Commission, not staff, that sets policy and determines whether to make substantive or procedural changes to its enforcement programme. Nevertheless, the article remains a useful source of guidance on how the current investigation and enforcement process works.

10 See, e.g., *Regulating Financial Holding Companies and Physical Commodities: Hearing before the S. Subcomm. on Fin. Insts. and Consumer Prot., 113th Cong. (2014)* (statement of Norman Bay, then Director, FERC Office of Enforcement); Responses to Questions for the Record Submitted to FERC Chairman Nom. Norman Bay for the S. Comm. on Energy and Nat. Res. (4 June 2014).

11 Enforcement of Stats., Orders, Rules, and Regs., 132 FERC Paragraph 61,216 (2010).

12 FERC uses the Penalty Guidelines to determine civil penalty amounts whether assessed through a settlement or adjudication (though settlement is a factor that lowers the range). The Commission also has authority to depart from the guidelines, either upwards or downwards, but almost never does so.

13 As noted above, one of these factors is whether the subject has an effective compliance programme. While the Penalty Guidelines’ guidance on how this factor will be assessed remains valid, it has been supplemented by more detailed guidance on compliance programmes. Enforcement recently provided in a white paper focused on energy trading. See Fed. Energy Reg. Comm’n, Office of Enft Staff, *White Paper on Effective Energy Trading Compliance Practices* (2016), <https://www.ferc.gov/legal/staff-reports/2016/tradecompliancewhitepaper.pdf>.

14 Enforcement of Stats., Regs., and Orders, 129 FERC Paragraph 61,247 (2009), clarified by 134 FERC Paragraph 61,054 (2011).

15 *Id.* at p. 6.

Brady policy

In 2009, FERC issued a policy statement requiring Enforcement staff to disclose exculpatory materials to investigation subjects. This policy is referred to as the Commission's 'Brady' policy since it is modelled on the Supreme Court's 1963 decision in *Brady v. Maryland*, which held that the Constitution requires disclosure of exculpatory evidence 'material . . . to guilt or to punishment' known to the government but unknown to the defendant in criminal cases.¹⁶

With these sources in mind, along with the authors' experience in prosecuting and defending market manipulation investigations, here is an overview of the key stages of an investigation.

Opening the investigation

FERC Enforcement's Division of Investigations (DOI) initiates investigations based on information obtained from various sources. Internal sources include Enforcement's Division of Analytics and Surveillance (DAS), which monitors electricity and gas markets for anomalous trading or other activities that may warrant investigation, as well as other FERC offices such as the Office of Energy Market Regulation, which may discover potential violations through their review of regulatory filings. External sources include referrals from ISO/RTO electricity market operators¹⁷ and market monitors, calls to FERC's Enforcement hotline, and referrals from other government agencies. Market manipulation investigations frequently arise from DAS referrals, ISO/RTO market monitor referrals, and hotline calls.

An investigation subject often first learns of the investigation when Enforcement sends a data preservation directive. The directive contains little information about the investigation, and the scope of the directive may be broader than the actual inquiry. Investigation subjects often find this to be frustrating as a broad preservation directive imposes more burden on the subject and makes it difficult to home in on the focus of the investigation to begin ascertaining facts and preparing to respond to the investigation. It is often not until FERC sends data requests – which can occur weeks and even months later – that the subject can gain more insight into the investigation's focus.¹⁸

Fact-finding

The first phase of an investigation is fact-finding. Enforcement staff obtains information through two primary methods – data requests and testimony – and can seek information from both subjects and third parties.

16 373 U.S. 83, 87 (1963).

17 In many parts of the US, independent system operators (ISOs) and regional transmission organisations (RTOs) operate the transmission grid and wholesale electricity markets.

18 The exception to this is investigations that arise from DAS referrals. DAS's practice is generally to conduct its own inquiry – often consisting of phone interviews with energy traders and informal data requests – before deciding to refer a matter to the DOI for investigation. In most of these cases, subjects know the focus of the investigation at the time the DOI initiates it.

Data requests

Data requests can seek a range of information, such as trade data, communications (emails, instant messages, voice recordings, etc.) and business documents. They can also seek written explanations relating to the conduct at issue (akin to interrogatories in civil litigation). Depending on the investigation and the staff, data requests can come in omnibus fashion (i.e., a lengthy list of requests sent at the same time) or through smaller sets of requests over time.

Data requests can often be negotiated. Enforcement staff is generally willing to work with subjects and defence counsel to reach reasonable modifications – particularly when subjects and counsel have been cooperative and dealt with staff in good faith during the investigation. Even if staff ultimately does not agree, there is no downside to proposing reasonable modifications.

Testimony

Enforcement staff also obtains information through live testimonies of witnesses, which are, in effect, depositions, but are governed by FERC's investigation rules rather than the Federal Rules of Civil Procedure (FRCP). Unlike litigation, where depositions generally occur after at least some document discovery, enforcement attorneys may take testimony soon after the investigation begins. In these cases, enforcement will often decide to take additional testimony of certain employees later in the investigation, after documents have been produced and analysed.

As with depositions in litigation, FERC testimony often involves questioning the witness about relevant documents. In market manipulation investigations, enforcement attorneys often question traders about contemporaneous communications from the time of the trading, particularly if the communications appear relevant to the trader's intent. It is also common for enforcement attorneys, along with DAS analysts, to question traders about trade data through charts created by staff. Staff-created charts can be difficult for witnesses for several reasons: they have never seen them before; the data is presented in a format that might not accurately reflect how they actually view trading positions; they may not know what data sources were used to prepare the chart (or what data sources were omitted); and they may not have confidence that the data and its presentation is accurate. Responding to such charts is an essential part of preparation for testimony in any market manipulation investigation.

One difference between FERC testimony and civil litigation depositions involves witness representation. While it is common in litigation for a company's counsel to represent the company's employees in depositions, FERC's regulations require that a witness's counsel represent the witness in his or her individual capacity – regardless of whether the witness is a subject of the investigation.¹⁹ There is no prohibition on a company's counsel also representing witnesses individually (so long as the counsel can ethically do so).²⁰

¹⁹ See 18 C.F.R. Part 1b.16.

²⁰ Id. Part 1b.16(b) (requiring counsel to explain potential conflicts of interest to each client). A related issue is attendance at testimony. While some enforcement attorneys are flexible on this point, many take the position that only the witness's own counsel can attend. In investigations where company witnesses do have separate counsel, this means that the company's counsel cannot attend the testimony.

Another difference is that FERC testimony often involves multiple questioners. While there is generally one FERC attorney who leads the testimony, other FERC attorneys may also ask questions. And in market manipulation investigations, it is common for DAS staff to ask clarifying and follow-up questions on technical points about trade data.

As in civil litigation, a witness's counsel can object and instruct the witness not to answer questions that call for information that is legally privileged. However, FERC attorneys expect deposition objections generally to be limited to privilege, and take issue with objections they perceive as having the effect of 'coaching' a witness. One exception to this can be objections that seek to clarify questions or the record, which are often welcomed by FERC staff.

Third-party discovery

Fact-finding usually focuses on investigation subjects, although FERC frequently seeks information from third parties as well. In market manipulation cases, FERC might seek information from third parties, such as other market participants who observed or may have been harmed by the conduct, ISO/RTO market operators, and other trading platforms and exchanges (e.g., the Intercontinental Exchange (ICE) on which many natural gas transactions occur).

While Enforcement staff expect cooperation from subjects during investigations and prefers not to have to issue subpoenas to obtain information, it can do so when necessary. Even if the subject is cooperating, subpoena authority may be necessary to obtain information from third parties unwilling to provide information voluntarily. To issue subpoenas, Enforcement staff must obtain an order of investigation from the Commission, which makes the investigation 'formal' instead of 'preliminary' under FERC's regulations.²¹ The Commission has been liberal in issuing orders of investigation when Enforcement staff explain why they need subpoena authority. Orders of investigation are non-public (but can be reviewed by the subject)²² and contain minimal detail about the investigation other than describing its general subject matter.

Preliminary findings

Once substantial fact-finding has been completed, Enforcement staff make a preliminary determination of whether a violation has occurred. If staff preliminarily conclude there was a violation, it provides the subject with an explanation of its legal theory and assessment of the facts. This can be done in writing, through a 'preliminary findings' letter, or orally. Enforcement staff has taken the view that a subject can elect to receive preliminary findings in writing if desired. This is an important decision for subjects and there are sometimes overlooked strategic considerations. In many cases there can be value in having staff set out its case in writing. This may provide the subject greater insight and detail regarding the case, and the process of putting together a detailed, written factual and legal analysis can cause staff to recognise weaknesses in its theory. On the other hand, an oral presentation

21 'Formal' and 'preliminary' investigations generally proceed the same way. The only practical difference is that in 'formal' investigations, staff has the ability to issue subpoenas. See 18 C.F.R. Part 1b.5 (formal investigations); id. Part 1b.6 (preliminary investigations).

22 Id. Part 1b.16(a).

can facilitate a productive back-and-forth dialogue. And if a subject has already decided it wants to explore settlement, conducting the preliminary findings process orally can save time and money.

Regardless of how preliminary findings are presented, subjects have the opportunity to respond to them. Often subjects will respond in writing, particularly if staff presented its findings in writing. Written responses often contain detailed factual and legal analysis to rebut staff's findings and demonstrate that no violation occurred or that staff has misstated the nature and scope of the violation. Enforcement staff evaluates the response and may modify its findings.

Settlement

If staff, following the preliminary findings process, still thinks a violation occurred and that a civil penalty is appropriate, it seeks settlement authority from the Commission. Staff prepares a memorandum explaining the case and requesting authority to settle in a certain range. Staff provides the Commission with the subject's written preliminary findings response, if applicable. The Commission grants settlement authority to staff informally rather than through an order. While staff cannot enter a settlement before receiving settlement authority, staff may be willing to negotiate settlement details in advance of receiving settlement authority.

Settlements are heavily negotiated. Civil penalty and disgorgement dollar amounts are significant, but issues also often arise regarding how subjects and their conduct are described in settlements. Key non-monetary issues include who is named and what evidence is presented. For example, corporate subjects often do not want their individual employees named in the settlement. While FERC often names individual subjects when it initiates enforcement proceedings, the list of individual subjects (if any) can be negotiated as a condition of settlement. Similarly, while an order to show cause appends an enforcement staff report that describes the conduct and evidence in detail (including potentially damaging or embarrassing communications), subjects can negotiate what evidence will be described in a settlement. Another issue is what, if any, non-monetary remedies the subject will agree to. FERC often seeks commitments from subjects to implement certain compliance protocols and to make compliance reports to Enforcement staff for a certain period. In market manipulation cases, FERC also has sought 'trading bans' in which individual traders agree not to transact in FERC-regulated markets for a certain period.²³

Key investigation policies and issues

Below we discuss a few consequential, and in some cases controversial, policies relevant to market manipulation investigations.

²³ FERC does not have statutory authority to impose either of these types of remedies in an adjudicatory proceeding (although, in natural gas cases, FERC can seek a trading ban through a separate injunction proceeding filed in federal court, see 15 U.S.C. Sections 717s(a),(d)) (2012)). However, FERC has sought such remedies from subjects 'voluntarily' through settlements.

Issuance of NAVs

As noted above, the current NAV policy provides for early public disclosure of investigations and investigation subjects, with the goal being to provide greater transparency by giving third parties the ability to provide relevant information during an investigation. But the policy has been controversial from its inception due to the potential reputational harm caused to subjects prior to the Commission determining they should be subject to enforcement proceedings.²⁴

Access to transcripts

Investigation subjects often seek to obtain copies of their deposition transcripts shortly after the testimony. Among other things, prompt access to transcripts is important to ensure that the transcript accurately reflects the witness's testimony and to identify areas where testimony may need to be clarified. FERC's regulations allow such access, but provide that staff can deny access to a transcript for good cause.²⁵ Enforcement staff has told Congress that it provides deposition transcripts immediately upon request in the vast majority of cases and good cause to deny transcripts is limited to witness-specific issues such as a concern that the witness 'may use the transcript to help develop false testimony'.²⁶ But practitioners in some instances have found that staff has not consistently applied the policy in this manner, and has withheld transcripts without providing an explanation of good cause.

Timing and substance of Brady disclosures

As noted above, FERC adopted a Brady policy governing disclosure of exculpatory materials. There are questions as to whether Enforcement staff has applied the policy in a manner that best adheres to its letter and spirit and the Commission's objective of promoting fairness. Specifically, there are questions as to the timing of Brady disclosures (i.e., staff's practice of making disclosures near the end of investigations rather than at the time evidence is discovered), and the scope of disclosures (i.e., concerns that staff has taken a narrow view of what constitutes Brady material).

Disclosure of trade data

Enforcement staff has access to significantly more relevant data than the subject. For example, in natural gas trading investigations involving trading on ICE, the subject generally has records of its own ICE trades, but not those of other market participants or the subject's unconsummated bid and offer data – which are important to analysing the trading activity. FERC's typical practice is not to share this data with the subject until after fact-finding, including testimony, has occurred. Many in the defence bar view this practice as unreasonable and unfair. Often this data can be viewed as Brady material (for example, if it shows

24 A recent article (by two of the authors here) published in the *George Washington Journal of Energy & Environmental Law* discusses this issue in depth and argues that FERC should rescind the policy. See David A. Applebaum, Todd L. Brecher et al., FERC Should Rescind its Notice of Alleged Violations Policy, 8 *Geo. Wash. J. Energy & Envtl. L.* 87 (2017), https://gwujeel.files.wordpress.com/2017/04/applebaum_final.pdf.

25 18 C.F.R. 1b.12. Note that when staff denies access to a transcript, the subject is nevertheless entitled to 'inspect' the transcript, which generally involves the subject's counsel reviewing the transcript at FERC's offices.

26 See Responses to Questions for the Record, *supra* note 10, at 39.

non-manipulative trading such as attempting to buy or sell at favourable prices). But even if not subject to Brady, many believe this information should be provided to subjects at the outset, as a matter of basic fairness and because it would help subjects explain their activities more accurately.

CFTC coordination

The CFTC has broad jurisdiction to investigate manipulation in commodity markets, including natural gas and electricity markets. The CFTC historically has not exercised its anti-manipulation authority over electricity markets, but it does investigate manipulation in natural gas markets. While FERC has been more aggressive than the CFTC in natural gas manipulation enforcement in recent years (in terms of the number of investigations and size of penalties), the agencies' enforcement staff typically coordinate their efforts when a case is of interest to both. In a joint investigation, defence counsel will need to cooperate with and advocate before both the CFTC and FERC at the same time – and look for ways to minimise the inevitable additional burden and cost.

Criminal liability

Market manipulation under both the Federal Power Act (FPA) and Natural Gas Act (NGA) carries potential criminal liability. While such criminal prosecutions are extremely rare,²⁷ it is important to understand the potential for such liability. Moreover, FERC's decision to refer cases for potential criminal prosecution is discretionary. This highlights the importance of working with staff in good faith during the investigation, even when putting forward a vigorous defence of the conduct at issue. If FERC thinks a subject or its counsel is not defending the investigation in good faith or is otherwise being dishonest, a criminal referral is more likely. Further, knowingly false statements to FERC during an investigation, or conduct obstructing investigations, can create potential criminal liability on that basis alone.²⁸

We end this section with two key practice pointers we have found to be important in market manipulation investigations – from our perspective both as former agency investigators and now defence counsel. First, in most market manipulation investigations, we think it often makes sense to engage an expert in a consulting role early in the investigation. In manipulation investigations, experts are often economists with substantial experience in the relevant markets and the ability to conduct complex data analysis. They can help analyse trade data and other data similar to FERC's in-house analysts, including exploring data trends and potential anomalies. The ability to do this analysis early on is invaluable (ideally, before witnesses are questioned on the record, although that is not always possible). Experts

²⁷ There has only been one criminal prosecution under the Federal Power Act. See U.S. Att'y's Office for the Dist. of Mass.'s Information, *U.S. v. Power Plant Mgmt. Servs. LLC*, No. 3:16-cr-30021-MGM (D. Mass. Mar. 30, 2016); see also Plaintiff's Plea Agreement, *U.S. v. Power Plant Mgmt. Servs. LLC*, No. 3:16-cr-30021-MGM (D. Mass. Mar. 30, 2016).

²⁸ See 18 U.S.C. Section 1001 (criminalising false statements to government officials); id. Section 1621 (criminalising perjury); id. Section 1505 (criminalising obstruction).

can also be useful in reviewing and critiquing FERC's analysis informally, when responding to preliminary findings, and during settlement negotiations.

Second, we think subjects should start developing their affirmative case at the outset. Based on our experience on both the government and defence side, we tend to agree with the adage that 'the best defence is a good offence'. Too often, in our experience, subjects defend investigations in an overly reactive manner – providing as little information as possible to the government, and not offering much in the way of a substantive explanation for the conduct until staff has completed most of its fact-finding and presented preliminary findings. Engaging staff on the merits earlier in the process makes sense in many cases – you can educate staff, clarify and correct misconceptions and analytical errors, and explain the relevant conduct while staff is still forming its views rather than after its views have solidified.

Practice and procedure at the enforcement or litigation stage

Enforcement cases that continue beyond the investigation stage and do not settle are subject to adjudication either at FERC or in federal court. While the FPA and NGA provide different procedures for adjudication, enforcement cases under either statute begin the same way, through an order to show cause and notice of proposed penalty (OSC).²⁹ FERC issues an OSC if it agrees with Enforcement staff's recommendation to initiate an enforcement action. When making this recommendation, staff provides the Commission with a detailed report laying out the case and relevant evidence in great detail. This staff report is then appended to the OSC and made public. The OSC directs the subject to file an answer explaining why the Commission should not find a violation and assess the proposed penalty. Enforcement staff – which becomes a litigant following the OSC – can file a reply.³⁰

Once FERC issues an OSC, the FPA and NGA provide for different adjudication procedures. Under the FPA, the subject has the choice of electing traditional agency adjudication procedures (which often involves a hearing before a FERC administrative law judge (ALJ)), or having FERC determine liability and penalties without a hearing, with any penalty subject to de novo review in a US federal district court.³¹ Under the NGA, however, there is no election; all enforcement cases are subject to traditional agency adjudication procedures.³²

Agency hearing procedures

Natural gas cases under the NGA, and electricity cases under the FPA in which a subject declines to elect district court procedures, follow traditional FERC adjudication procedures. Under these procedures, the Commission itself decides questions of law and determines liability and remedies. However, when the Commission determines there are genuine issues of material fact, it will set the matter for trial-type hearing before an ALJ.

29 18 C.F.R. Section 385.209(a)(2).

30 Once Enforcement staff becomes a litigant, it can no longer have off-the-record communications with the Commission or its advisory staff. See *id.* Sections 385.2201, 385.2202.

31 16 U.S.C. Section 823b.

32 *Id.* Section 717t-1.

The recent BP natural gas manipulation case provides a good example of how the process plays out. FERC issued an OSC directing BP to show cause why it should not be found to have violated the Anti-Manipulation Rule and required to pay civil penalties and disgorgement.³³ BP responded by moving to dismiss the case on the basis that FERC did not have jurisdiction over the alleged misconduct and that the OSC and Staff Report failed to sufficiently state a claim for market manipulation.³⁴ BP also substantively answered the OSC's allegations. FERC issued an order deciding threshold questions of law but determined there were factual questions that could not be decided based on the paper record. Therefore, FERC set the matter for hearing and directed the ALJ to determine several issues, including whether BP's conduct satisfied the elements of the Anti-Manipulation Rule.³⁵

ALJ hearings are not unique to enforcement proceedings; FERC has a long history of conducting administrative hearings, particularly in challenges to regulated rates. But many contested FERC matters implicate legal or policy questions that FERC can resolve without a hearing, unless there are material facts in dispute. Enforcement cases, by contrast, will almost always be set for hearing. Market manipulation cases in particular are fact-intensive due to the scienter element of a violation, which requires proof that the subject acted with fraudulent intent. Since the question of intent is often heavily disputed, and relevant evidence (e.g., speaking documents, testimony, etc.) is subject to competing interpretations, the Commission has thus far ordered an ALJ hearing in every market manipulation case subject to traditional adjudication procedures.³⁶

Further, enforcement hearings tend to be more trial-like. All hearings before FERC ALJs are governed by the adjudication rules set forth in Part 385 of the Commission's regulations. Although Part 385 provides for depositions and subpoenas, these traditional litigation tools often play a relatively minor role in FERC hearings. Non-enforcement hearings tend to involve rate-making issues, where much of the relevant evidence includes financial and accounting data and expert economic analysis. Expert analysis is also key in enforcement cases, though (unlike in traditional agency hearings) mainly for the purpose of analysing the intent behind, and market impact of, the energy trading at issue. Manipulation cases also involve more fact witnesses (e.g., company employees (such as other traders) who worked with the employees accused of wrongdoing, supervisors and compliance officers) and more testimony and cross-examination of them. Similarly, there tends to be more fact

33 BP Am. Inc., 144 FERC Paragraph 61,100 (2013).

34 See BP Am., Inc., et al., Answer and Motions to Dismiss, FERC Docket No. IN13-15-000 (Oct. 4, 2013).

35 BP Am. Inc., 147 FERC Paragraph 61,130 (2014).

36 See *id.*; *Energy Transfer Partners, L.P.*, 123 FERC Paragraph 61,168 (2008); *Amaranth Advisors L.L.C.*, 124 FERC Paragraph 61,050 (2008). Subjects in all electricity market manipulation cases have elected district court *de novo* review procedures instead of an agency hearing. In *Kourouma*, an enforcement case brought under the FPA involving an alleged violation of the Commission's 18 C.F.R. Section 35.41(b) prohibition on false statements (not the Anti-Manipulation Rule), the subject elected agency hearing procedures instead of *de novo* review procedures. There, the subject had admitted to submitting false information to FERC and an ISO for the purposes of concealing the true ownership and management of his company. Enforcement staff and the subject agreed there were no material facts in dispute, and the Commission decided the case on summary judgment – finding a violation and assessing a penalty – without setting it for hearing. *Moussa I. Kourouma d/b/a Quantum Energy LLC*, 135 FERC Paragraph 61,245 (2011). The D.C. Circuit upheld FERC's decision, finding that FERC need only hold a hearing when there is a 'genuine issue of fact material to the decision of the proceeding.' *Kourouma v. FERC*, 723 F.3d 274, 277 (D.C. Cir. 2013) (citing 18 C.F.R. Section 385.217(b)).

discovery in enforcement proceedings, particularly involving depositions and discovery of third parties.³⁷

Although enforcement hearings are trial-like, there are differences in the rules governing ALJ hearings versus federal court proceedings. ALJ hearings are governed by the Part 385 rules, whereas federal court proceedings are governed by the Federal Rules of Civil Procedure (FRCP). There are key differences between the two, including rules regarding discovery, motion practice, and live hearing procedures. FERC also does not have codified evidentiary rules like the Federal Rules of Evidence (FRE). While ALJs may look to the FRE for guidance, evidentiary rules in FERC proceedings are more flexible.³⁸

Following a hearing, the ALJ makes his or her factual finding through an initial decision (ID) – a lengthy opinion with extensive cites to the hearing record.³⁹ The parties then file briefs (called ‘exceptions’) addressing the ID, in which they agree or disagree with the ALJ’s findings. FERC then issues an order on the ID adopting or modifying the ALJ’s factual findings, deciding remaining legal issues and determining remedies. FERC’s order is then subject to requests for rehearing, which is essentially an internal appeal in which parties ask FERC to reconsider some or all of its decision. If FERC issues a final order on rehearing in which it finds a violation and assesses penalties, the subject can appeal the order to an appropriate US Circuit Court of Appeals.⁴⁰

Procedures for district court election

When the subject of an electricity market enforcement case under the FPA elects the de novo review district court procedures, the agency process is limited. The subject still files an answer to the OSC. However, FERC cannot set the matter for hearing, and instead decides whether to find a violation and assess a penalty based on the OSC pleadings. While the pleadings can provide a record on which FERC can decide legal questions, they are necessarily less extensive than the factual record created through an agency hearing. FERC’s basis for finding a violation and assessing penalties therefore tends to rest heavily on Enforcement staff’s own findings. Once FERC finds a violation and assesses a penalty under these procedures, the subject has 60 days to pay it. If the subject does not pay the penalty, FERC can initiate an enforcement action in the federal district court.⁴¹

While the federal court procedures for such cases are beyond the scope of this chapter, district courts deciding such cases have recently determined that these cases will proceed as

37 See, e.g., Order Granting Enforcement Staff’s Application for the Issuance of a Subpoena Ad Testificandum to Michael Berry, Docket No. IN15-13-000 (Mar. 20, 2015); Order Granting Enforcement Staff’s Application for the Issuance of a Subpoena Ad Testificandum to James A. Parker, Docket No. IN15-13-000 (Mar. 9, 2015).

38 For example, any evidence that is ‘probative’ tends to be admissible in FERC proceedings, even if it would be inadmissible hearsay in federal court. See *Mo. Interstate Gas, LLC*, 144 FERC Paragraph 61,220, at n.53 (2013) (citing *Old Dominion Elec. Coop.*, 119 FERC Paragraph 61,253, at 62,426 (2007)).

39 See, e.g., *BP Am. Inc.*, 152 FERC Paragraph 63,016 (2015).

40 Appellate courts review FERC’s orders under the ‘arbitrary and capricious’ standard of the Administrative Procedure Act and uphold FERC’s factual findings if supported by ‘substantial evidence’. *Sacramento Mun. Util. Dist. v FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010).

41 16 U.S.C. Section 823b(d)(3).

ordinary civil actions under the FRCP.⁴² This makes it important for the subjects in these cases to consult with experienced litigators familiar with federal court practice.

Likely policy changes for FERC enforcement practice

We expect FERC – at both the Commission and staff levels – to consider several changes to investigation and enforcement policies in the coming months and years. Some changes will reflect the continued maturation of the agency’s enforcement programme, some will reflect the newly constituted Commission taking a fresh look at enforcement policies, and some will result from federal court decisions.

First, we expect the Commission to reassess the more controversial enforcement policies relating to fairness and subjects’ (and witnesses’) rights – in particular, those discussed above. This could include the NAV policy, testimony-related policies (including transcripts and representation), Brady disclosures, and other elements of transparency and information sharing (including producing ICE data).

Second, we expect the Commission to reconsider its approach to investigations from a timing and efficiency standpoint. There has long been a view among defence counsel and many at FERC that investigations take too long to complete (even if they may not agree on why).⁴³ In particular, recent federal court decisions may cause FERC to rethink its approach to investigations and require investigations to be completed more quickly.

As noted above, multiple federal district courts recently determined that FPA cases proceeding under the de novo review procedures will be treated as ordinary civil actions rather than agency review proceedings. Since these cases will not be limited proceedings involving review of FERC’s penalty assessment order or any ‘administrative record’, FERC may not see the need to issue as detailed a penalty assessment order as it has previously. Once FERC knows it intends to move forward and has sufficient evidence to support a complaint that can withstand a FRCP Rule 12 motion,⁴⁴ it may determine it should at

42 See *FERC v. Barclays Bank PLC*, 247 F.Supp. 3d 1118 (E.D. Cal. 2017); *FERC v. City Power Mktg., LLC*, 199 F. Supp. 3d 218, 230–32 (D.D.C. 2016); *ETRACOM LLC*, 2017 U.S. Dist. LEXIS 33430; *FERC v. Silkman*, 233 F. Supp. 3d 201 (D. Me. 2017); *City Power Mktg., LLC*, 199 F. Supp. 3d; *FERC v. Maxim Power Corp.*, 196 F. Supp. 3d 181 (D. Mass. 2016). FERC had argued that its enforcement actions should be more limited proceedings in which the court reviews FERC’s penalty assessment order and the agency record to determine whether the penalty should be affirmed, rejected, or modified. Given that each court to address the issue has rejected FERC’s position, it seems unlikely FERC will continue to take this position in future enforcement cases filed in federal court. See also FERC Chairman Neil Chatterjee Statement at Energy Bar Association 2017 Mid-Year Energy Forum (Oct. 16, 2017), <https://www.ferc.gov/media/statements-speeches/chatterjee/2017/10-17-17-chatterjee.asp#.Wgsr79F0yZ1> (noting that ‘the courts have rejected FERC’s interpretation of de novo review five times under the[FPA]’ and that ‘the proper scope of de novo review is a matter [the Commission] need[s] to examine . . .’).

43 FERC staff has at times attributed the length of investigations, at least in some cases, to obstructive or non-cooperative conduct by certain defence counsel and subjects. Defence counsel often attributes delays to unnecessarily broad and burdensome discovery (which takes a long time to produce and for staff to review) and internal bureaucracy, among other things.

44 Under Fed. R. Civ. P. 12(b)(6), the district court must dismiss a complaint if it ‘fail[s] to state a claim upon which relief can be granted.’ Rule 12(b)(6) motions will be granted when the factual allegations in the complaint, even if true, are insufficient to entitle the plaintiff to relief.

that point simply authorise Enforcement staff to file an action – knowing that additional discovery can occur in federal district court.⁴⁵

In addition, a recent district court decision will likely force FERC to complete investigations more quickly. A federal court in California deciding FERC's electricity market manipulation case against Barclays determined that, for purposes of the five-year statute of limitations governing FERC enforcement actions, FERC brings its claim in a de novo review case when it files a federal court action.⁴⁶ FERC had taken the position that it need only issue the OSC within five years. Under the *Barclays* ruling, FERC must now complete its investigation, initiate an OSC proceeding, issue a penalty assessment order, and then – after waiting at least 60 days – file its federal court action, all within five years of the date of the misconduct. Doing all this within five years of the conduct will require FERC to complete investigations more quickly.⁴⁷

45 To date, no subjects of electricity market manipulation cases have elected agency hearing procedures over de novo – and we expect that trend to continue. Many perceive federal courts to be more neutral forums for enforcement cases since, in an agency adjudication, a subject is asking an ALJ and the Commission to rule against FERC's Enforcement staff. Moreover, to the extent a subject's defence involves legal arguments, by the time the case reaches the adjudication stage, the Commission has already considered (and arguably rejected) those legal arguments both informally (i.e., when raised in the context of staff seeking settlement authority) and formally (i.e., when issuing an OSC). These factors and others generally lead subjects to elect de novo review procedures.

46 *FERC v. Barclays Bank PLC*, No. 2:13-cv-02093-TLN-DB, 2017 WL 4340258, at 9-14 (E.D. Cal. Sept. 29, 2017).

47 One other court has reached a different conclusion on the statute of limitations issue, see *FERC v. Silkman*, 177 F. Supp. 3d 683, 698-701 (D. Mass. 2016), so this issue has not yet been resolved in federal court. Nonetheless, we expect FERC to take a conservative approach going forward given the potential for a court to follow the *Barclays* ruling. Further, in the large majority of instances, especially if certain changes are made to increase the efficiency of investigations, it should not be difficult for FERC to file a petition in federal court within five years of the conduct.

Appendix 4

About the Authors

David A Applebaum

Akin Gump Strauss Hauer & Feld LLP

David Applebaum co-chairs Akin Gump Strauss Hauer & Feld LLP's energy regulation, markets and enforcement practice. Mr Applebaum's practice focuses on energy regulatory enforcement before the Federal Energy Regulatory Commission (FERC) and other agencies, as well as complex civil litigation, government enforcement, and internal investigations on behalf of energy and other clients.

Mr Applebaum is a six-year veteran of FERC and represents a variety of clients in the electric and natural gas industries on business, regulatory, enforcement, compliance and policy matters. In addition to his FERC enforcement work, Mr Applebaum handles civil litigation and internal investigations for clients in the energy industry (and other industries). He also brings valuable background and experience to energy companies subject to Commodity Futures Trading Commission (CFTC) market manipulation investigations and enforcement actions.

Todd L Brecher

Akin Gump Strauss Hauer & Feld LLP

Todd L Brecher focuses his practice on energy regulatory, litigation, enforcement and transactional matters. Mr Brecher represents clients in a broad range of regulatory, litigation, enforcement and transactional matters relating to the electricity, natural gas and oil markets, including matters before the Federal Energy Regulatory Commission (FERC), the Commodity Futures Trading Commission (CFTC), and federal and state courts.

Prior to joining Akin Gump, Mr Brecher served for more than four years in FERC's Office of Enforcement, where he was substantially involved in some of FERC's most significant enforcement matters. Mr Brecher's enforcement experience at FERC included both electricity and natural gas-related matters, and involved alleged violations of FERC's market manipulation regulations, jurisdictional tariffs and other FERC rules and regulations.

In addition to conducting investigations and administrative proceedings at FERC, Mr Brecher also represented FERC in litigation before federal courts, including the first and largest energy market manipulation case filed in federal district court. Mr Brecher's work at FERC frequently involved collaboration and coordination with the CFTC's Division of Enforcement.

J Porter Wiseman

Akin Gump Strauss Hauer & Feld LLP

J Porter Wiseman focuses her practice on regulation and competition issues in the energy industry. Ms Wiseman has represented electric utilities and other energy clients in proceedings before the Federal Energy Regulatory Commission (FERC), including merger proceedings, rate proceedings, and other wholesale rate and tariff filings. Ms Wiseman also has experience with issues related to natural gas pipeline safety, and has performed due diligence related to the sale of generation facilities, including nuclear and hydropower stations. In addition, she has advised vertically integrated investor-owned utilities regarding FERC's regulations governing affiliate transactions. Ms Wiseman has also represented a major oil company in securities class action litigation.

Ms Wiseman also has represented clients on antitrust and telecommunications matters before the courts and the Federal Communications Commission, including a major international telecommunications litigation involving allegations of anticompetitive behaviour. She has researched and analysed antitrust and competition issues involving transactions and conduct in various industries, including next-generation wireless broadband, cable television and programming, and cross-ownership in cellular service in a developing nation. Ms Wiseman also has advised clients in international arbitrations and represented clients pro bono in the fields of immigration, tenants' rights, international human rights and voting rights.

Akin Gump Strauss Hauer & Feld LLP

1333 New Hampshire Avenue, NW

Washington, DC 20036-1564

United States

Tel: +1 202 887 4000

Fax: +1 202 887 4288

dapplebaum@akingump.com

tbrecher@akingump.com

jwiseman@akingump.com

www.akingump.com

The Guide to Energy Market Manipulation

Editor

Gordon Kaiser

Reproduced with permission from Law Business Research Ltd
This article was first published in February 2018
For further information please contact Kieran.Hansen@lbresearch.com

GCR |
GLOBAL COMPETITION REVIEW

Published in the United Kingdom
by Global Competition Review

Law Business Research Ltd
87 Lancaster Road, London, W11 1QQ, UK
© 2018 Law Business Research Ltd
www.globalcompetitionreview.com

First edition

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information in this is accurate as of February 2018, be advised this is a developing area. Appendix 1 is a reproduction of a US federal document in the public domain to which Law Business Research does not purport to assert copyright.

To subscribe contact subscriptions@globalcompetitionreview.com

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@globalcompetitionreview.com

ISBN 978-1-78915-092-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following contributors' for their learned assistance throughout the preparation of this book:

AKIN GUMP STRAUSS HAUER & FELD LLP

ALBERTA UTILITIES COMMISSION

ALLEN & OVERY LLP

AUSTRALIAN ENERGY REGULATOR

BIRD & BIRD LLP

BLAKE, CASSELS & GRAYDON LLP

BORDEN LADNER GERVAIS LLP

CHARLES RIVER ASSOCIATES

COMPETITION AND MARKETS AUTHORITY

JAMS

MCCARTHY TÉTRAULT LLP

MORRISON & FOERSTER LLP

NEXTERA ENERGY, INC

OFGEM

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

QUEEN'S UNIVERSITY

ST. LAWRENCE BARRISTERS LLP

STIKEMAN ELLIOTT LLP

Contents

Energy Market Manipulation: A New Regulatory Regime 1
Gordon E Kaiser

Foreword.....11
Joseph T Kelliher

Part I: Legislation & Jurisprudence

1 Perspectives on FERC's Enforcement Programme as it Relates to Energy
Market Manipulation..... 15
Robert S Fleishman and Paul C Varnado

2 Commodity Futures Trading Commission Enforcement..... 26
Anthony M Mansfield

3 Compliance and Enforcement in the Ontario Electricity Sector..... 34
Glenn Zacher

4 Investigating Energy Market Activity in Ontario 49
George Vegh

5 Energy Market Manipulation in Alberta..... 58
Randall W Block QC, John D Blair QC and Laura M Poppel

6 REMIT Energy Market Manipulation..... 72
Peter Willis

Contents

7	Testing Energy Market Manipulation in Great Britain.....	80
	<i>James Jamieson and Nenad Njegovan</i>	

8	Australia	87
	<i>Peter Adams, Kate Murphy and Jeremy Llewellyn</i>	

Part II: Enforcement Practices

9	FERC Practice and Procedure.....	99
	<i>David A Applebaum, Todd L Brecher and J Porter Wiseman</i>	

10	Energy Market Manipulation in the EU: Practice and Procedure	113
	<i>Mark J Mills</i>	

11	Fines, Sanctions and Settlements	122
	<i>JP Mousseau</i>	

12	Private Actions in the United States, Canada and Europe	131
	<i>Randall Hofley, Justine Johnston and Joseph J Bial</i>	

Part III: The Regulatory Process

13	Administrative Law Principles.....	147
	<i>David J Mullan</i>	

14	The Use of Expert Evidence	161
	<i>M Philip Tunley</i>	

15	Economic Evidence of Market Power and Market Manipulation in Energy Markets	178
	<i>Robin Cohen, David Hunger, Brian Rivard and Christopher Russo</i>	

	Staff White Paper on Anti-Market Manipulation Enforcement Efforts: Ten Years After EPAAct 2005, November 2016	193
--	--	-----

	Table of cases	225
--	----------------------	-----

	Reports and guidelines	227
--	------------------------------	-----

	About the Authors	229
--	-------------------------	-----

	Contributing Law Firms' Contact Details.....	241
--	--	-----

The Guide to Energy Market Manipulation is a survey of the law on market manipulation in the energy sector across nations that reflects the collective wisdom and real-life experiences of 30 distinguished practitioners from 18 different organisations.

Part I looks at legislation and jurisprudence where laws have been applied, most notably North America, but also Europe, the UK and Australia. Part II shines a light on enforcement practices, including negotiating with regulators and private actions. Part III looks at the regulatory process itself: administrative law, evidence and the use of expert evidence.

Visit globalcompetitionreview.com
Follow @gcr_alerts on Twitter
Find us on LinkedIn

ISBN 978-1-78915-092-6