

LEGAL UPDATES

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FERC Assesses \$453 Million in Civil Penalties Against Barclays for Western Power Market Manipulation

In the latest sign that it is taking its expanded enforcement authority seriously, the Federal Energy Regulatory Commission (FERC) this week assessed a record \$453 million in civil penalties against Barclays Bank PLC and four of its traders for manipulating Western energy markets in and around California from November 2006 to December 2008. FERC also directed Barclays to disgorge \$34.9 million in unjust profits, plus interest, to the Low Income Home Energy Assistance Programs of Arizona, California, Oregon, and Washington.

FERC determined that Barclays and its traders violated the Federal Power Act's prohibition on the use of a deceptive or manipulative device in connection with the purchase or sale of electric energy or transmission service and violated the commission's anti-manipulation rule. FERC found that, at the four then-most liquid trading points in the Western United States, Barclays and its traders fraudulently built substantial monthly physical electric power index positions and then "flattened" these positions (i.e., achieved zero net physical obligations at the end of every trading day) in order to manipulate electric power index prices and benefit Barclays' financial swap positions.

The commission adopted the recommendations of its enforcement staff that Barclays should pay \$435 million in civil penalties based on application of FERC's penalty guidelines. FERC also agreed with its enforcement staff that Barclays should disgorge \$34.9 million in unjust profits, calculated by multiplying Barclays' open interest in its physical and financial positions for each day against the estimated price differential that resulted from Barclays' trading on that day. And confirming that individual traders will not escape punishment, FERC adopted the enforcement staff's recommendations

regarding Barclays' traders, assessing \$15 million in civil penalties against the trader FERC determined directed Barclays' market manipulation scheme and \$1 million in penalties against each of the other three traders.

Barclays said it would challenge FERC's order, and, if it did, FERC was expected to pursue recovery of the penalties in federal district court. Barclays will likely raise the U.S. Court of Appeals' recent decision in *Hunter v. FERC*, 711 F.3d 155 (District of Columbia Circuit, 2013), to argue that FERC is powerless to assess penalties against Barclays' alleged manipulation. In the *Hunter* case, the court found that FERC lacked jurisdiction to charge trader Brian Hunter with manipulation of natural gas futures contracts because the Commodity Futures Trading Commission (CFTC) has exclusive jurisdiction over all transactions involving commodity futures contracts. FERC has attempted to distinguish its enforcement action against Barclays from *Hunter*, emphasizing that Barclays' scheme affected the price of *physical* electricity and that the manipulative trading occurred in the physical markets.

What This Means to You

The *Barclays* order is significant for reasons that go beyond the size of the penalties involved. It signals that FERC does not intend to put on the brakes after the *Hunter* decision and that individual traders are going to remain firmly in FERC's crosshairs. Soon after FERC issued the *Barclays* order, news outlets were disseminating stories that JPMorgan Chase & Co. was working toward settling an investigation for its alleged manipulation of electricity markets in California and the Midwest, reportedly including a possible fine of nearly \$1 billion.

Over the past year, FERC has approved market manipulation settlements with Gila River Power LLC (civil penalty of \$2.5 million, disgorgement of \$911,553, plus interest); Deutsche Bank Energy Trading LLC (civil penalty of \$1.5 million, disgorgement of \$172,645, plus interest); Oceanside Power LLC (civil penalty of \$51,000, disgorgement of \$29,563, plus interest); Rumford Paper Co. (civil penalty of \$10 million, disgorgement of \$2.83 million); and Enerwise Global Technologies Inc. (civil penalty of \$780,000, improvements in demand-response technology of \$500,000, and disgorgement of \$20,726, plus interest).

Contact Information

For additional information, concerning this or other issues affecting energy regulations, please contact your Husch Blackwell attorney or one of our Energy attorneys.