

FERC Issues Final Anti-Manipulation Regulations

January 26, 2006

On January 19, the Federal Energy Regulatory Commission (FERC) issued a Final Rule, Order No. 670, implementing the prohibition on market manipulation contained in the Energy Policy Act of 2005 (EPA 2005). The new anti-manipulation regulations are effective January 26, 2006.

In EPA 2005, Congress amended the Federal Power Act (FPA) and Natural Gas Act (NGA) “to prohibit the use or employment of manipulative or deceptive devices or contrivances (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 . . .)” in connection with any FERC-jurisdictional transaction. The Final Rule implements this new prohibition.

Elements of Violation

In setting forth the elements of a violation under the new anti-manipulation regulations, FERC stated that it will act in cases where an entity:

- uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity;
- with the requisite scienter (intent or recklessness);
- in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission.

Scope of Prohibition

Although FERC states that the Final Rule is not intended to expand the types of transactions subject to the Commission’s jurisdiction under the FPA or NGA, the new regulations do apply to “any entity” – including traditionally non-jurisdictional entities – engaging in manipulative or fraudulent conduct “in connection with” a FERC-jurisdictional transaction. The Final Rule indicates, for example, that a non-jurisdictional entity (*e.g.*, a municipal utility) engaging in a transaction through a Commission-regulated RTO or ISO market with intent to affect the single price auction clearing price would be engaging in conduct “in connection with” a jurisdictional transaction, and thus would be subject to the new anti-manipulation rules.

No New Disclosure Requirement

FERC’s rules are modeled on Rule 10b-5 of the Securities and Exchange Commission (SEC), but the FERC recognized that it does not have a duty to protect purchasers through a disclosure regime. FERC therefore clarified that its new

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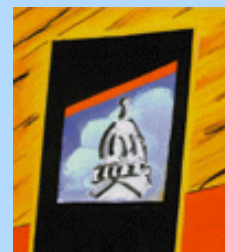
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regulations create no new affirmative duty of disclosure. FERC “intends to recognize, on a case-by-case basis, that the roles of the Commission and the SEC are not identical in determining whether it is appropriate to adopt securities precedents to specific energy industry facts, circumstances, or situations.”

Relationship to Market Behavior Rules

Potential changes to FERC’s current Market Behavior Rules are being addressed in separate dockets (Docket Nos. EL06-16-000 and RM06-5-000) and, until revised or repealed, are still part of all FERC-approved electric market-based rate tariffs and natural gas blanket sales certificates. FERC reiterated that it will not seek duplicative sanctions for conduct that violates both the Market Behavior Rules and the Final Rule adopted in Order No. 670.

For Additional Information

For further information concerning the requirements of the Final Rule or related compliance matters, please contact Cheryl Feik Ryan, Doug Smith or any member of Van Ness Feldman’s Electricity or Natural Gas practice groups at (202) 298-1800.

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