



BP Case Reflects FERC's Broad View of its Jurisdiction

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In affirming the Initial Decision, the Commission agreed with the ALJ's findings rejecting various legal and factual defenses. The Commission did, however, order BP to pay reduced civil penalty and disgorgement amounts from those proposed in the August 2013 Order to Show Cause (OSC) that initiated proceedings against BP. At the hearing before the ALJ, FERC's Office of Enforcement (OE) presented testimony alleging that BP's conduct had significantly less impact on the market—a key factor affecting FERC's civil penalty and disgorgement calculations—than what the OE had alleged in the OSC, resulting in reductions from the OSC's proposed \$28,000,000 civil penalty and \$800,000 disgorgement amounts.

While FERC's theory of manipulation in BP (i.e., a cross-product uneconomic trading scheme) is similar to what FERC has alleged in other recent enforcement cases, the BP case raises important legal questions about the boundaries of FERC's jurisdiction. BP argued to the ALJ and the Commission that FERC did not have jurisdiction to prosecute the conduct at issue because it principally concerned transactions that fell outside the Commission's ratemaking jurisdiction under the Natural Gas Act (NGA)—namely, transactions involving intrastate pipeline capacity, intrastate sales and “first sales” of natural gas. In its order affirming the Initial Decision, the Commission reaffirmed its broad view of its enforcement jurisdiction, which, according to FERC, necessarily extends beyond the limitations of its ratemaking jurisdiction under the NGA and the Federal Power Act (which contains the same market manipulation prohibition).

FERC had previously asserted that its antimanipulation authority—by proscribing manipulative conduct “in connection with” jurisdictional transactions—could potentially reach conduct involving nonjurisdictional transactions that “affected” FERC-jurisdictional markets. Further emboldened by a recent Supreme Court victory in *FERC v. Electric Power Supply*

*Association*¹ regarding the breadth of its authority to regulate conduct that affects jurisdictional rates, in the BP order, FERC described an expansive view of its statutory authority to prosecute market manipulation that is “in connection with” a FERC-jurisdictional transaction. Based on the notion that jurisdictional and nonjurisdictional markets “have become so intertwined,” FERC determined that, to effectuate Congress’ intent of adopting a “broad prohibition on market manipulation,” FERC must have authority to reach conduct outside of its jurisdictional markets that has a manipulative effect on jurisdictional markets:

The Commission’s “in connection with” authority is solely directed at protecting jurisdictional markets, but to do so effectively it must reach conduct that “directly affects” these jurisdictional markets—that is, there must be a nexus between the conduct and the matters within the Commission’s regulatory jurisdiction—and in so doing the Commission is not asserting any general regulatory jurisdiction over intrastate or first sale natural gas. This is wholly consistent with the Supreme Court’s determination that phrases such as “in connection with” are not to be read in a “hyperliteral” way but rather are read in a common sense way that requires there to be a nexus between the conduct and the jurisdictional market. As such, any impact on transactions involving non-jurisdictional natural gas is wholly incidental to the Commission’s duty to protect jurisdictional markets, and that sort of incidental effect—even if it turns out to be significant in scope—is allowable, as the Supreme Court recently addressed in *EPSA* [F]ar from being limited to reaching only jurisdictional transactions, the Commission’s anti-manipulation authority protects jurisdictional markets from manipulation, and this protective duty reaches manipulative transactions that directly affect jurisdictional markets—even if the manipulative instruments happen to involve non-jurisdictional natural gas.²

In applying this jurisdictional analysis, the Commission agreed with the ALJ’s decision and found that there were three bases for asserting jurisdiction over BP’s conduct: (1) that certain third-party jurisdictional sales were priced off of the index that BP allegedly manipulated, (2) that “cash-out” transactions³ were priced off of the index that BP allegedly manipulated and (3) that BP itself engaged in certain jurisdictional sales as part of the allegedly manipulative scheme. The first two bases for jurisdiction—which do not turn on BP itself engaging in jurisdictional transactions—depend on a broad view of FERC’s enforcement authority that extends beyond traditional jurisdictional boundaries.

The BP order also reflects a continued narrow reading of the D.C. Circuit’s 2013 decision in *Hunter v. FERC*, in which the court found that FERC did not have jurisdiction to prohibit manipulation of FERC-jurisdictional markets if the transactions used to effectuate the manipulation occurred in futures markets subject to the exclusive jurisdiction of the Commodity Futures Trading Commission (CFTC). Although parallels can be drawn between the *Hunter* case and the BP case in that both involved FERC asserting enforcement authority over nonjurisdictional transactions that allegedly had manipulative effects on FERC-jurisdictional markets, it is apparent that FERC views *Hunter* as reflecting only a narrow limitation on FERC’s “in connection with” jurisdiction, likely specific to markets subject to the CFTC’s exclusive jurisdiction.

While the scope of FERC’s enforcement jurisdiction will ultimately be determined by the courts, the BP order puts market participants on notice that FERC will not hesitate to investigate and prosecute manipulative conduct outside of its jurisdictional electricity and natural gas markets if FERC believes that such conduct affects FERC-jurisdictional markets.

¹ 577 U.S. ___, 136 S. Ct. 760 (2016).

² Order at P 313.

³ “Cash-out” transactions are imbalance charges reflected in interstate natural gas pipelines’ FERC-jurisdictional tariffs.

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