Power Market Manipulation:

Whatever the Gentleman Speaking Doesn’t Like?

May 31, 2012
Anti-manipulation Statute as Fraud “Catch-all”

- The anti-manipulation statute is a “catch-all” provision. FERC Order No. 670 at P 25.
- Model for anti-manipulation statute is Securities Rule 10(b), which “is aptly described as the catchall provision, [but] what it catches must be fraud.” *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980) (emphasis added).
Related Positions “Fraud”

- Moving prices in one market to benefit positions in a related market
- This may be an exercise of market power, but how is it fraud?
- Establishing price impact is very complicated, and FERC will seek to simplify that task in ways that greatly magnify potential liability.
Side Payments “Fraud”

- RTO/ISO tariffs thousands of pages long (and supplemented by a similar volume of manuals) almost invariably contain countless specialized provisions that provide payments, such as transmission loss credits or uplift, to market participants in pre-defined circumstances.
- Is it fraud for a market participant to consciously seek to harvest revenue sources that are expressly authorized by the tariff?
FERC’s “Non-Fraud Fraud”

- “The Commission defines fraud generally, that is, to include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market.”
Judge Kozinski on “Non-Fraud Fraud”

• There are places where, until recently, “everything which [was] not permitted [was] forbidden .... [W]hatever [was] permitted [was] mandatory .... Citizens were shackled in their actions by the universal passion for banning things.” Yeltsin Addresses RSFSR Congress of People’s Deputies … Fortunately, the United States is not such a place, and we plan to keep it that way. If the government wants to forbid certain conduct, it may forbid it. If it wants to mandate it, it may mandate it. But we won’t lightly infer that in enacting 18 U.S.C. § 371 Congress meant to forbid all things that obstruct the government, or require citizens to do all those things that could make the government’s job easier. So long as they don’t act dishonestly or deceitfully, and so long as they don’t violate some specific law, people living in our society are still free to conduct their affairs any which way they please.

• *United States v. Caldwell*, 989 F.2d 1056, 1061 (9th Cir. 1993)