Manipulation of Electricity Markets: What is the State of the Law?

Robert A. Weishaar, Jr.
777 N. Capitol Street, NE, Suite 401
Washington, DC 20002-4292
202-898-5700
rweishaa@mwn.com
CURRENT PATCHWORK OF REGULATORY OVERSIGHT OF ENERGY MARKETS (A "MIX AND MATCH" QUIZ)

A. Physical Natural Gas
B. Bilateral Transactions
C. Natural Gas Derivatives
D. Physical Electricity
E. Pool Transactions
F. Electricity Derivatives

1. Federal Energy Regulatory Commission (FERC)
2. Commodity Futures Trading Commission (CFTC)
3. State Regulators (PUCs)
4. Regional Transmission Organizations (RTOs)
5. Federal Trade Commission (FTC)
6. Department of Justice (DOJ)
7. Independent Market Monitors (IMMs)
8. North American Electric Reliability Council (NERC)

Hint: There is no right answer!
BARRIERS TO CUSTOMERS ENSURING THEY ARE PROTECTED – THE "WIZARD OF OZ" PROBLEM

Ability to Get Information Is Limited

- Customers generally not permitted to intervene in FERC investigations or in dockets in which FERC approves an Office of Enforcement Settlement
- IMMs' reports to Enforcement, and Enforcement investigations, are not made public
BARRIERS TO CUSTOMERS ENSURING THEY ARE PROTECTED – THE "WIZARD OF OZ" PROBLEM

- Customers have no ability to obtain evidence after-the-fact

Ability To Get Refunds Is Extremely Limited

- Contracts, and possibly even settlements involving tariff rates, are generally protected by Mobile-Sierra/Morgan Stanley
BARRIERS TO CUSTOMERS ENSURING THEY ARE PROTECTED – THE "WIZARD OF OZ" PROBLEM

- Refunds are not generally permissible under FPA Section 206 or NGA Section 5
- FERC's general reluctance to entertain "ripple claims"
- FERC's general reluctance to "undo" cleared market results
  - Issue: If action by one bad actor increases a market-clearing price, should all suppliers refund their portions of the "overcharge"? If so, how?
BARRIERS TO CUSTOMERS ENSURING THEY ARE PROTECTED – THE "WIZARD OF OZ" PROBLEM

• The "one-two punch":
  • FERC's generally exclusive jurisdiction over customer refunds/reparations
  • Judicial precedent: FERC's discretion "is at its zenith . . . when fashioning . . . remedies and sanctions."
RECENT TRENDS IN ENFORCEMENT (FROM THE CUSTOMER PERSPECTIVE)

- Failure to adhere to Commission-approved tariff and market rules is primary area of focus
- Outright fraud is a primary area of focus
- Expansion into demand response activities
- Maintaining and exercising market power (e.g., through "offer creep") appears NOT to be a primary area of focus
RECENT TRENDS IN ENFORCEMENT (FROM THE CUSTOMER PERSPECTIVE)

- Almost exclusive focus on traders and public utilities that are NOT vertically integrated
  - Virtual traders seem to be a frequent target
- Analysis of market distortions, causing prices to go UP OR DOWN
TOP 5 AREAS FOR IMPROVEMENT

1. Consolidate energy market monitoring and enforcement in a single agency (FERC?)
2. Clearly define the standards against which conduct will be judged
3. Specify clearly, in each case that becomes public, the market impact of the conduct
4. Provide adversely affected customers (and any adversely affected suppliers) with opportunity to seek full redress

5. Shift remedial emphasis from penalties to refunds/disgorgement