Securities Regulation Daily Wrap Up, COMMODITY FUTURES—S.D.N.Y.: Natural gas buyers failed to plead actual damages due to alleged price manipulation, (Mar. 28, 2017)

Securities Regulation Daily Wrap Up

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By Elizabeth C. Pope, J.D.

Buyers of natural gas futures contracts failed to plead actual damages caused by alleged price manipulation in four regional natural gas hubs because the prices of those contracts were tied to natural gas prices in a hub that was separate from the hubs where the alleged manipulation had occurred. In addition, the buyers lacked antitrust standing and thus could not bring monopolization claims under Section 2 of the Sherman Act (*Harry v. Total Gas & Power North America, Inc.*), March 27, 2017, Koeltl, J.).

Price manipulation. Both the Commodity Futures Trading Commission (CFTC) and the Federal Energy Regulatory Commission (FERC) investigated suspected price manipulation by Total Gas & Power North America (TGPNA) of natural gas monthly index settlement prices for the physical natural gas at four regional delivery "hubs"—that is, the specific points where pipeline interconnections allow the transfer of gas from one pipeline to another—in Texas, New Mexico, and California. TGPNA entered into a $3.6 million dollar settlement with CFTC, while FERC issued a staff report alleging violations of the Commission's anti-manipulation rules. FERC's pending "notice of proposed penalty" sought over $9 million in unjust profits and $213 million in civil penalties.

Futures contract buyers. Individuals and other entities that bought and sold natural gas futures contracts between 2009 and 2012 ("buyers") filed a putative class action against TGPNA, essentially alleging that the same conduct penalized by the CFTC and FERC also violated the Commodity Exchange Act and Section 2 of the Sherman Act. The alleged price manipulation at the four regional hubs harmed the buyers, they argued, even though the price of their natural gas contracts was tied to natural gas prices at a separate hub, the "Henry Hub" in Louisiana. The Henry Hub is the dominant benchmark point in the physical natural gas market because of its strategic location, the buyers contended, such that manipulation occurring at the regional hubs inevitably affects prices at the Henry Hub.

The district court granted TGPNA's motion to dismiss both the CEA claims and the Sherman Act claims.

Sherman Act. The court concluded that the buyers lacked antitrust standing to bring a monopolization claim under Section 2 of the Sherman Act. First, the buyers failed to show that they had suffered an actual injury caused by TPGNA's alleged misconduct. Second, only those that participated in the market where the misconduct allegedly occurred could be said to have suffered an antitrust injury. In this instance, the alleged misconduct had occurred in the physical gas market at the four regional hubs, but the buyers had participated in a financial natural gas market whose prices were tied to a separate hub.

CEA claims. Under Section 22(a) of the CEA, a buyer has standing to bring a commodities manipulation action only if he has suffered "actual damages" as a result of the defendant's manipulation. The buyers failed to plead facts that would show that they had suffered an actual economic injury as a result of TGPNA's alleged manipulation of monthly index prices of physical natural gas at the regional hubs. No direct connection was shown between prices at the regional hubs and the price of the financial instruments purchased by the buyers, which was tied to prices at the separate Henry Hub. In addition, the buyers' failure to allege a single specific transaction that lost value as a result of TGPNA's alleged misconduct precluded a plausible allegation of actual injury.

Further, the buyers failed to plausibly allege under the CEA that TGPNA had specifically intended to manipulate the price of the commodity underlying the contracts entered into by the buyers. The court rejected the buyers'

contention that because the "underlying" commodity was natural gas in general, it was therefore unnecessary to allege that TGPNA intended to manipulate the price of either the physical natural gas at the Henry Hub or the derivative contracts tied to the Henry Hub. A plain reading of the CEA, the court explained, required the buyers to allege the intentional manipulation of the commodity underlying the individual contracts for which they claimed damages.

The case is No. 15-cv-9689 (JGK).

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Companies: Total Gas & Power North America, Inc.; Total SA

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