

[Securities Regulation Daily Wrap Up, COMMODITY FUTURES—5th Cir.: CFTC order means ‘lights out’ for electricity manipulation suit, \(Feb. 25, 2016\)](#)

Securities Regulation Daily Wrap Up

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The Fifth Circuit has affirmed dismissal of claims by two energy trading firms that a power producer and its subsidiaries manipulated the Texas electricity market in violation of the Commodity Exchange Act (CEA). The suit required dismissal because a final CFTC order exempted transactions in the relevant energy market from private rights of action and the defendants' conduct fell within the scope of that order ([Aspire Commodities, L.P. v. GDF Suez Energy North America, Inc.](#), February 25, 2016, per curiam).

Economic withholding. The plaintiffs, Aspire Commodities, L.P. and Raiden Commodities, L.P., alleged that GDF Suez Energy North America, Inc. had unlawfully manipulated prices on the electricity grid overseen by the Electric Reliability Council of Texas (ERCOT). According to the complaint, GDF Suez accomplished this scheme by creating artificial scarcity through “economic withholding.” For example, GDF Suez was accused of making its electricity unavailable for purchase by dramatically increasing the prices of its offer curves far above the Locational Marginal Price (LMP), a market price that ERCOT constantly adjusts to balance supply and demand at various nodes on the grid.

The plaintiffs claimed that GDF Suez's behavior violated the CEA because it had no rational economic or physical explanation, other than manipulating LMPs and prices on derivatives markets in order to profit on its trades on the Intercontinental Exchange (ICE). The district court dismissed the complaint, however, ruling that a final order issued by the CFTC exempted ERCOT transactions from the CEA except for certain enumerated provisions. The district court reasoned that the order barred the lawsuit because 7 U.S.C. § 25, which authorizes private rights of action for violations of the CEA's anti-manipulation provisions, was not one of the enumerated CEA provisions still applicable to ERCOT transactions.

No private right of action. On appeal, Aspire argued that, despite its text, the CFTC order did not exempt ERCOT transactions from the CEA's private right of action provision. As support for this argument, Aspire cited a proposed order from the CFTC potentially exempting a different applicant, the Southwest Power Pool (SPP), from certain CEA provisions. In the proposed SPP order, the CFTC had included a preamble expressing its interpretation of the final order concerning ERCOT and concluding that the final order did not prevent private causes of action for fraud and manipulation under the CEA, even though 7 U.S.C. § 25 was not included in the enumerated list of still-applicable provisions.

The Fifth Circuit declined to address the merits of Aspire's interpretive argument, as this argument had not been raised before the district court. And even if it were to consider them, the appellate court stated that it did not find the CFTC's statements in the proposed SPP order persuasive as they directly contradict the plain language of the final order.

The appellate panel also rejected Aspire's claims that the final order could not exempt manipulation occurring on the ICE market from private lawsuits because the final order only exempts ERCOT transactions. While Aspire complained that the effects of GDF Suez's manipulation occurred in the ICE market, all of GDF Suez's allegedly improper activity occurred in the ERCOT market. Accordingly, the final order applied to GDF Suez's activities, and the claims were properly dismissed.

The case is [No. 15-20125](#).

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