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# CHRONOLOGY OF CFTC/FERC CONCURRENT JURISDICTION

*by Robert Zwirb*

## Introduction

The creation of the Commodity Futures Trading Commission in 1974 immediately created jurisdictional conflict with the Securities Exchange Commission (“SEC”) and various state regulatory authorities. No doubt the historical preoccupation with the jurisdictional ambitions of the SEC in particular was well founded. Indeed, much of the legislative history of the 1974 amendments relates to efforts to carve out appropriate regulatory space for that agency. But while the focus was on the SEC and its efforts to thwart the development of financial futures, the decision to vest the CFTC with exclusive jurisdiction was designed to address “a far broader problem.”<sup>1</sup> As Philip Johnson observed: “Congress had to consider the real possibility that scores of other agencies at every level of government might attempt to regulate futures trading in the absence of preemption.”<sup>2</sup>

Ironically, the possible intrusion of regulatory authorities even in the energy area was foreseen to pose a threat to the new regulatory vision. As Philip Johnson summed up the threat at the time: “The possibility of futures trading in petroleum also was known to Congress. Potential regulators of that contract could range from the Federal Energy Administration to the state agencies controlling crude oil production.”<sup>3</sup> The chronology that follows describes the history of cooperation and jurisdictional conflict between the Federal Energy Regulatory Commission (“FERC”) and the CFTC.

**March 27, 1996**—Consistent with its historical position that it does not have jurisdiction over financially-settled contracts, the Federal Energy Regulatory Commission (“FERC”) issues an order at the request of the New York Mercantile Exchange (“NYMEX”) confirming that FERC does not have jurisdiction over electricity futures contracts that NYMEX proposes to offer, but notes that it would have jurisdiction if such contracts goes to delivery.

**2001-2005**—In the aftermath of Enron and trading scandals in the energy sector, the Commodity Futures Trading Commission (“CFTC”) initiates a broad investigation into possible price manipulation in the energy markets, including an investigation into the events leading to the

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<sup>1</sup> Philip F. Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 Vand. L. Rev. 1, 25 (1960) (quoting the Chairman of the Chicago Board of Trade). Johnson, at 25.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

collapse of Enron. At the same time, FERC orders its staff to investigate whether any entity, including Enron, manipulated or otherwise exercised undue influence over wholesale prices for electric energy or natural gas in the West. Increasingly, the agencies' enforcement efforts begin to overlap with concurrent investigations involving both agencies having access to and sharing the same information and ultimately bringing separate enforcement actions for the same conduct.

**August 21, 2001**—CFTC issues a “speaking order” in *Avista Energy* finding that in 1998, Avista’s traders engaged in a scheme to manipulate the settlement price electricity futures on NYMEX to increase the value of Avista’s cash-settled OTC derivatives positions.

**December 28, 2001**—U.S. Court of Appeals for the D.C. Circuit rules that the CEA does not preclude Federal Trade Commission from investigating deceptive marketing practices by a firm marketing instruction on futures trading; that CEA’s exclusive jurisdiction provision does not apply to practices of firms that sell not futures themselves, but rather instruction on futures trading. This case would later be cited by the Federal Energy Regulatory Commission in support of its enforcement action against the hedge fund *Amaranth* for its trading on the NYMEX exchange.

**December 19, 2002**—In *Nevada Power v. Enron*, a FERC Administrative Law Judge rules that FERC retains jurisdiction over *financially-settled* power forward contracts, the first indication that FERC appears to be taking a broader view of the scope of its jurisdiction.

**February 5, 2003**—The CFTC and the Federal Energy Regulatory Commission hold a joint conference on “Credit Issues in the Energy Market: Clearing & Other Solutions” that explores the feasibility of utilizing clearing to address the credit issues that exist in the energy markets.

**November 17, 2003**—In the wake of false reporting cases in natural gas brought by the CFTC, FERC adopts rules governing transaction reporting information to price index publishers, expressly prohibiting a number of manipulative practices, including wash trading; submitting false information; creating “artificial congestion;” and colluding for the purpose of market manipulation. In particular, Market Behavior Rule 2 prohibits actions taken without a “legitimate business purpose” that are “intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products.”

**December 4, 2003**—In a speech before the Energy Bar Association, Commissioner Sharon Brown-Hruska criticizes the “knee-jerk” call to increase the CFTC’s regulatory authority the energy area, including imposing a wide range of regulatory prescriptions on OTC markets and proposals for increased market transparency, arguing that the proposals will impose high costs and interfere with the markets for information.

**July 19, 2004**—CFTC enters into a consent agreement permanently enjoining Enron from violating the Commodity Exchange Act (“CEA”) for engaging in a manipulative scheme to buy an extraordinarily large amount of natural gas using Enron’s former web-based electronic trading platform. FERC will settle its charges against Enron the following year.

**August 30, 2004**—CFTC announces completion of a seven-month investigation of the sharp upward movement in prices in the natural gas market in late 2003. The investigation, which is conducted in full cooperation with FERC, does not uncover evidence that any entity or

individual engaged in activity with an intent to cause an artificial price in natural gas in late 2003.

**November 17, 2004**—In remarks delivered to the International Swaps and Derivatives Association, Acting CFTC Chairman Sharon Brown-Hruska warns against re-imposing regulatory prescriptions on OTC energy markets “that would provide little protective benefit . . . while imposing high costs,” and that “would turn back elements of [the CFTC’s] smart and progressive regulatory approach.” In particular, Brown-Hruska criticizes congressional proposals to prohibit manipulation strategies that would “prescriptively regulate” OTC energy markets and that create “potential overlap of authority” between the CFTC and FERC.

**January 31, 2005**—In *CFTC v. Reed*, the CFTC begins to test the outer boundaries of its jurisdiction, arguing that it includes *all* cash market activity in interstate commerce even if it has *no* impact on the futures market; that it applies to conduct associated with transactions that are expressly exempted from the CEA by Sections 2(g) and 2(h)(1) of the Act; and that it even applies to commodities in which a futures market does not presently exist, but in which a futures market “might develop in the future.”

**2005**—FERC Commissioner Joseph T. Kelliher authors article in *Energy Law Journal* calling for “the same [anti-manipulation] enforcement tools” as other federal regulators. In *American Electric Power* and *Coral Energy Resources*, separate settlements are reached with each respondent, with the *Coral Energy* proceeding arising out of information provided by the CFTC to the FERC that suggests that Coral’s responses to FERC’s investigators are not sufficient.

**July 25, 2005**—With the CFTC’s blessing, Senate bill 1566 is circulated with language empowering the CFTC to sanction anyone that manipulates or attempts to manipulate “the price of any commodity” regardless of whether there is any connection to futures markets or futures pricing.

**August 8, 2005**—The Energy Policy Act of 2005 (“EPAAct”) is signed into law. The law, characterized as “the most significant increase in Commission regulatory authority in 70 years,” amends the Natural Gas Act and the Federal power Act to prohibit fraud and manipulation in connection with the purchase of natural gas, electric energy, or transportation or transmission services subject to the jurisdiction of FERC, provides FERC with new enforcement tools and enhanced civil penalty authority, and gives it authority to issue rules to prevent market manipulation in its regulated markets. The EPAAct also expressly prohibits FERC from construing its authority so as to limit “or affect” the CFTC’s exclusive jurisdiction. Notwithstanding this limitation, FERC begins to interpret its authority as empowering it to exercise enforcement authority over financial counterparties in the financial derivatives markets. At the same time, the CFTC’s enforcement activities in energy arena increasingly focus on manipulative behavior occurring in the physical cash market.

**October 12, 2005**—The CFTC and the Federal Energy Regulatory Commission enter into a Memorandum of Understanding regarding the sharing of information and the confidential treatment of proprietary energy trading data, pursuant to the Energy Policy Act of 2005. The agencies’ respective oversight and enforcement staffs are authorized to exchange information

concerning ongoing oversight, investigative, and enforcement activities to determine whether and when they have a mutual interest in matters.

**November 15, 2005**—FERC settles with Enron for all claims arising out of its investigation of the Western energy markets for alleged misconduct occurring from 1997 through 2003 for \$1.5 billion, including \$600 million in civil penalties.

**November 17, 2005**—The International Swaps and Derivatives Association and other interested parties file comments with FERC regarding its proposed anti-manipulation rule, urging FERC not to adopt a rule based upon a securities law construct, pointing out the incongruity of applying such a standard designed to protect individual investors to govern the operation of wholesale energy trading markets.

**January 19, 2006**—FERC finalizes rulemaking pursuant to the EAct, entitled “Prohibition of Energy Market Manipulation, that amends the Federal Power Act and the Natural Gas Act to bar “any entity” subject to FERC’s jurisdiction from engaging in fraud “in connection with” the purchase or sale of natural gas or electricity. In a news release accompanying issuance of the rule, FERC affirms that it intends to adopt analogous securities case law precedents in this area “as appropriate to specific facts, circumstances, and situations that arise in the energy industry.”

**January 26, 2006**—FERC issues an interpretation of the EAct declaring that it views its new anti-manipulation authority as giving it “broad jurisdiction over the entities [such as hedge funds] that engage in certain conduct *affecting* our subject matter jurisdiction.” FERC further declares that the term “any entity” is “deliberately inclusive” reaching any person or organization whether or not it is directly regulated by FERC.”

**September 25, 2006**—In a letter to the Senate Agricultural Committee, the Industrial Energy Consumers of America (“IECA”) suggests that the lack of regulation of over-the-counter markets represents a regulatory gap and that “neither sufficient government oversight nor penalties are in place to deter manipulation.” The IECA further suggests that “Wall Street traders are increasing the volatility of the market and are laying off their risks on us.”

**February 21-22, 2007**—In response to queries from the Chairman Senate Committee on Energy and Natural Resources, both the Chairmen of the CFTC and FERC provide assurances that they are actively monitoring markets *outside* their regulatory jurisdiction. While the CFTC reassures Congress that it has requested and received daily position data regarding firms’ activities in the OTC markets, FERC notes that it has been monitoring the last 30 minutes of trading in both OTC and futures markets when those contracts expire.

**May 24, 2007**—The enforcement directors of FERC and the CFTC jointly discuss regulatory coordination at a forum sponsored by the Futures Industry Association in New York. The directors emphasize that their access to information from each other is “extremely broad,” and that they intend to share and refer information regarding suspicious activities to each other.

**June 4, 2007**—In an article appearing in *Financial Times*, FERC Chairman Kelliher notes that FERC intends to look into the activities of those “engaged solely in financial transactions because we recognize there is a relationship between physical gas sales and financial gas sales.”

**July 25, 2007**—The CFTC files a civil enforcement action in the U.S. District Court for the Southern District of New York charges against hedge fund Amaranth Advisors, L.L.C. and its former head energy trader, Brian Hunter, alleging that defendants attempted to manipulate the price of natural gas futures in violation of the CEA. The following day, FERC issues an order to show cause in the same matter alleging that defendants manipulated the settlement price of natural gas futures contracts. Although acknowledging that futures trading comes within the “exclusive province” of the CFTC, the Show Cause Order argues that such trading comes within its jurisdiction when it “affects” a FERC-jurisdictional transaction, and that *both* agencies have jurisdiction where “these [regulated] markets are interconnected.”

**July 26, 2007**—The CFTC charges Energy Transfer Partners, L.P. (“ETP”) and three of its subsidiaries with attempting to manipulate the price of physical natural gas at the Houston Ship Channel (HSC) delivery hub during September and November 2005 and with attempting to manipulate the price of physical natural gas and the index prices of natural gas published by Platts in its Inside FERC’s Gas Market Report (Inside FERC). The CFTC alleges that the conduct was designed to benefit basis swap positions established on the Intercontinental Exchange (ICE). On the same day, FERC issues an order to show cause in the same matter alleging that ETP manipulated the wholesale natural gas markets and unduly discriminated against non-affiliated shippers.

**July 31, 2007**—In an interview discussing the *Amaranth* and *ETP* market manipulation cases, FERC Chairman Joseph Kelliher declares that “the law is clear, based on securities precedent” that FERC has authority to bring an enforcement action against Amaranth for activities that take place on a CFTC-regulated exchange. Kelliher also states that the CFTC is “acting in concert with us” on both matters.

**August 2007**—In an interview with the energy trade publication, *The Desk*, FERC Chairman Joseph Kelliher states that the coordinated announcements of two federal enforcement actions by the CFTC and FERC on consecutive days were “completely deliberate.” Kelliher stresses the joint actions were “intended to make plain that FERC and the CFTC do coordinate their enforcement actions and that there is no conflict between the agencies . . . [and that] [i]n a lot of (our) investigations, there is seamless cooperation between the two agencies.”

**August 7, 2007**—In a speech before the American Public Gas Association, CFTC Commissioner Michael Dunn calls for expanding the CFTC’s role in the energy markets by removing the Section 2(h)(3) exempt markets provision from the CEA and by imposing record keeping and reporting requirements on energy derivative swaps dealers. Criticizing the CFMA for leaving a “regulatory hole” that prevents the CFTC from regulating energy markets, Dunn also calls for Congress to “direct the CFTC to review its legal definition of manipulation and harmonize it with the FERC and SEC approach.”

**September 20, 2007**—Reps. John Dingell and Joe Barton issue a letter to the chairmen of FERC and the CFTC supporting FERC’s exercise of jurisdiction in *Amaranth*, stating “[w]e do not view these regulatory jurisdictions as conflicting or duplicative but rather as complementary.” In an interview with *Reuters*, FERC Chairman Kelliher warns that a “regulatory gap” will be created if FERC’s jurisdiction in *Amaranth* is successfully challenged. Kelliher stresses that during the months preceding the announcements, in which both agencies jointly investigated

Amaranth, the CFTC did not raise any concerns with respect to jurisdiction and expresses surprise that the CFTC is just now raising concerns about jurisdiction: “Presumably they (CFTC officials) did not feel at the time that FERC was pre-empted from sanctioning manipulation in futures markets that affected FERC-jurisdictional customers.” He also states: “To me, really the question at hand is, will the CFTC reverse its position” on supporting FERC’s authority. “We have no lust over CFTC jurisdictional futures.”

**September 21, 2007**—Senators Dianne Feinstein, Maria Cantwell, and Ron Wyden send a letter to Acting CFTC Chairman Walt Lukken urging him to avoid a turf battle with FERC over separate investigations into natural gas trading, asserting that “[t]he American people need both FERC and CFTC to fight market manipulators, not each other.”

**September 26, 2007**—At a hearing on reauthorizing the CFTC, Rep. Bob Etheridge, Chairman of a House Agriculture subcommittee express fears that “recent FERC actions may be encroaching upon the CFTC’s exclusive jurisdiction over the futures markets,” and “[f]or the CFTC to fail to assert” such jurisdiction, “when appropriate, would equal a failure to uphold the will of Congress.”

**September 27, 2007**—In a letter to the Acting Chairman of the CFTC, the leadership of the House Agriculture Committee urges the CFTC to protect its exclusive jurisdiction from “confusion caused by two separate federal regulators,” asserting that a failure to do so “will ignore the singular vision Congress intended for the CFTC.”

**September 28, 2007**—CFTC files Memorandum of Law with the U.S. District Court for the Southern District of New York setting forth its views regarding the legal authority for its exclusive jurisdiction. Arguing that the CEA does not permit “concurrent regulatory jurisdiction” with respect to futures trading, the CFTC concludes that the general authority provided FERC in the EPCA “is insufficient to carve out an implicit exception to the exclusive jurisdiction” of the CEA. At the same time, however, the CFTC urges the court to allow FERC “to interpret the new mandate that Congress has give it . . . in light of the exclusive jurisdiction that Congress granted in CEA Section 2(a)(1)(A) with respect to futures trading on NYMEX.”

**October 24, 2007**— CFTC delivers to Congress a report that includes recommendations to increase the oversight of some trading activity on electronic trading facilities known as Exempt Commercial Markets (ECMs), extending its reach to areas that the CFMA had just seven years previously sought to keep free from regulation. In a little noticed passage buried in the CFTC Report on Exempt Commercial Markets, the CFTC suggests that in considering the appropriate level of regulation, it may take into account “competitive considerations,” that “unfairly advantage ECMs” due to restrictions and responsibilities placed on DCMs that do not apply to ECMs.

**November 1, 2007**—The U.S. District Court for the Southern District of New York denies Amaranth’s request to enjoin FERC’s Show Cause enforcement proceeding observing that “the CFTC has not taken the position that FERC is improperly treading into its territory,” and noting that “Congress intended the CFTC and FERC to coordinate their efforts.”

**November 30, 2007**—In an Order denying Amaranth’s challenge to its jurisdiction to bring an administrative enforcement action against the hedge fund for its trading activities on NYMEX, FERC reaffirms that it does not seek to regulate the “day-to-day” operation of futures exchanges, but reaffirms its view that where manipulation in one market affects the other, both agencies have an enforcement role.

**December 10, 2007**—A broad coalition of institutions and industry organizations composed of the Futures Industry Association, the CME Group, the New York Mercantile Exchange, the Managed Funds Association and the International Swaps and Derivatives Association files an *amicus* brief with the U.S. Court of Appeals in support of Amaranth’s emergency motion for a stay of FERC’s administrative proceeding. The brief argues that the court should grant Amaranth’s motion to stay an enforcement action undertaken by FERC, which if allowed to continue, will “imperil the public interests served by the CEA’s exclusive jurisdiction provision” by creating two separate legal standards for determining when trading on futures exchanges should be construed as market manipulation.

**December 12, 2007**—House Energy and Commerce subcommittee lawmakers chastise the CFTC for challenging FERC’s authority to pursue manipulative activities in the natural gas futures market, with Rep. John Dingell stating: “I am . . . disappointed to see the CFTC has challenged FERC’s authority to investigate [and] pursue the energy market manipulators, despite the Congress’s explicit grant of authority to FERC in the Energy Policy Act of 2005. . . I would hope that by the time we conclude this hearing [the] CFTC will have rethought its views on this issue.” Testifying at the hearing, FERC Chairman Kelliher states that FERC “stands by our position that Amaranth’s activities fall within our jurisdiction in so far as they [affected] physical sales of natural gas.” Kelliher also comments: “I consider this [the CFTC’s assertion of exclusive jurisdiction] to have been a significant change in the CFTC’s position.” Kelliher also testifies that Amaranth’s alleged wrongdoing on NYMEX was discovered only as a result of FERC’s monitoring, thus implicitly endorsing the concept of having both agencies monitor the energy trading sector. In his testimony, CFTC Acting Chairman Walt Lukken defends the CFTC’s exclusive jurisdiction over futures trading while insisting that he is committed to continuing the collaborative working relationship with FERC.

**December 13, 2007**—The U.S. Court of Appeals for the District of Columbia Circuit denies Amaranth’s request to stay FERC’s \$291 million order to show cause against the hedge fund.

**January 7, 2008**— The CFTC files motion for leave to intervene with the U.S. Court of Appeals for the District of Columbia Circuit to address the scope of the CFTC’s exclusive jurisdiction with respect to futures trading in connection with Amaranth’s appeal of FERC’s denial of its motion to stay FERC’s administrative proceeding against Amaranth.

**January 7, 2008**—In a response to the CFTC’s motion, FERC expresses no opposition to its participation in the appellate proceeding, but notes “the fact that the CFTC did not participate at all below before the FERC, much less present any of its jurisdictional arguments to the FERC.”

**January 18, 2008**—Speaking before a FERC Compliance summit, Acting CFTC Chairman Walt Lukken addressed the question of agency jurisdiction in connection with the *Amaranth* matter, acknowledging that FERC and the CFTC have a “difference of legal opinion on the CFTC’s

exclusive jurisdiction that will likely be resolved by the courts,” and noting that the exclusive jurisdiction of the CFTC is “based on important policy reasons.”

**February 1, 2008**—Two officials of NYMEX report that “[a]t the insistence of FERC, NYMEX changed its procedures for monitoring positions in excess of the expiration position limits in its expiring natural gas contract.” That procedural change results in a 40% loss of volume in natural gas contracts on NYMEX in the expiration month during the relevant closing range period. Brian Regan and De’Ana Dow, *Legislative and Regulatory Developments*, at 20.