

# Open Issues in Energy Sector Market Manipulation Cases

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## I. Substance

### A. Various Types of Manipulation

1. Fictitious transactions and information-based strategies;
2. Corners, squeezes and other market power manipulation strategies; and
3. So-called "open-market" manipulation (market power can be an ingredient). This category is ill-defined.

### B. Legitimate Business Purpose: What Qualifies?

### C. Who Has What Jurisdiction? FERC? CFTC? DOJ? FTC?

### D. "Fair Notice": Are the Rules Allegedly Violated Sufficiently Clear in Advance?

## II. FERC Process

A. Separation of Functions (see *Ex Parte Contacts and Separation of Functions*, 125 FERC ¶ 61,063 (2008)): The new rules are better but still perceived as unfair.

B. Should the Federal Rules Apply, at least More Closely by Analogy? Compare *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Fed. R. Evid. 702 with *Energy Transfer Partners, L.P.*, 123 FERC ¶ 61,168 at P 17 (2008). No "gatekeeper function" means concerns about the quality of expert testimony in complex cases.

C. There Are Related Concerns about Economic Expertise Underlying Enforcement Actions.

D. Exculpatory Evidence under *Brady*: An Unanswered Question (see *Energy Transfer Partners, L.P.*, Docket No. IN06-3-003 (June 9, 2009) (Order Confirming Rulings)).

E. Discovery: The Deliberative Process Privilege.

F. *De Novo* Review under the NGA: An Unanswered Question (see *Energy Transfer Partners, L.P. v. FERC*, 567 F.3d 134 (5th Cir. 2009)).

G. A Lengthy Time Line (both *ETP* and *Amaranth* took roughly two years to move from the show cause order stage to trial).