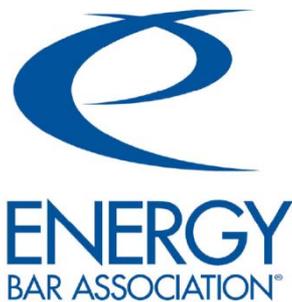


# Welcome to the Energy Bar Association Houston Chapter Luncheon:

*FERC Enforcement: Effectively Defending Investigations, Recent Developments, and Key Issues Facing the New Commission*

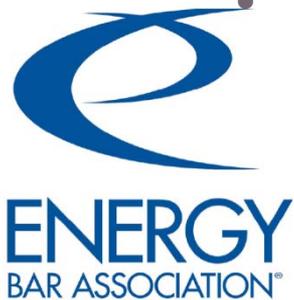
*October 26, 2017  
12:00pm to 1:30pm*



# Energy Bar Association's Mission Statement

EBA has approximately 2,600 member and promotes the professional excellence and ethical integrity of its members in the practice, administration, and development of energy laws, regulations and policies by providing:

- superior educational programming,
- networking opportunities, and
- information resources.

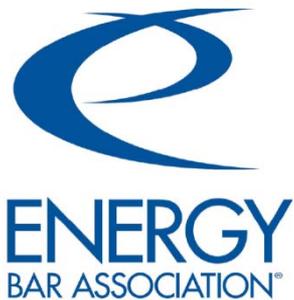


# How Does an EBA Membership Enrich You?

- discounts for Continuing Legal Education and On-Demand programs
- access to federal and state regulatory officials who impact your clients
- two major annual meetings and other networking opportunities with peers and counterparts that enhance your career aspirations, as well as regional focused programs closer to home
- knowledge sharing events and print and digital content that keep you informed about what matters to you
- Volunteer leadership opportunities that allow you to establish yourself as a thought leader in the energy field

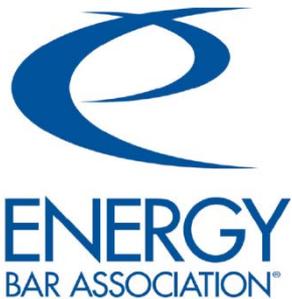
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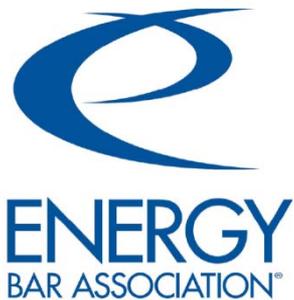


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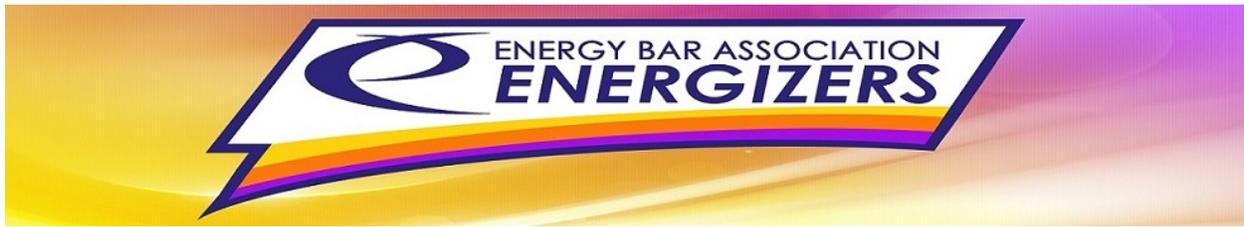
A purple-tinted banner featuring a night view of the US Capitol building and a bridge. The Energy Bar Association logo is at the top, followed by the event title and dates.

**ENERGY**  
BAR ASSOCIATION

2018 Annual Meeting  
& Conference

May 7-8 | Renaissance Downtown Hotel, Washington, DC





**Energy Bar Association  
Houston Chapter**  
*presents*

***FERC Enforcement: Effectively Defending Investigations, Recent Developments, and Key Issues Facing the New Commission***

**October 26, 2017**

**12:00pm– 1:30pm**

**Akin Gump Strauss Hauer & Feld LLP  
Houston, TX**

## **Program Summary**

As FERC continues to investigate and litigate enforcement cases against natural gas and electric market participants, the panelists, both veterans of FERC's Office of Enforcement, will discuss strategies for effectively defending FERC investigations and navigating FERC's enforcement process. The panelists will also review recent enforcement developments from settlements and ongoing litigation, with an eye towards what these developments mean for market participants (and their counsel) moving forward. Finally, the panelists will preview key enforcement issues likely to be confronted by the new Commission.

## **Speakers**

Moderator: Kathy Patton, Director, Trading Compliance, Calpine Corp  
David A. Applebaum, Partner, Akin Gump  
Todd L. Brecher, Counsel, Akin Gump

# FERC Enforcement: Effectively Defending Investigations, Recent Developments, and Key Issues Facing the New Commission

October 26, 2017

Houston, Texas

David Applebaum

Todd Brecher

Akin Gump Strauss Hauer & Feld LLP

## Recent Developments—Litigation

### ■ De novo review

- Courts have rejected FERC's position that district court proceedings entail review of admin record with limited discovery
- FERC likely to abandon position going forward
  - "I believe that the proper scope of de novo review is a matter my colleagues and I need to examine so we can chart a new course that is fair and legally defensible" (Chairman Chatterjee)
- Could impact FERC's investigation and administrative processes going forward (discussed later)

## Recent Developments—Litigation

### ■ Statute of limitations

- Inconsistent rulings
- Significant effect of *Barclays* decision
  - on *Barclays* case
  - on other pending cases
- FERC likely to take conservative approach going forward—  
which might impact FERC's approach to cases
- Disgorgement
  - Supreme Court case, *Kokesh v. SEC*

## Recent Developments—Litigation

### ■ **Scope of discovery**

- Subjects have discovery rights in court—but questions remain
- One issue so far has been discovery of FERC
  - internal FERC documents
  - 30(b)(6) deposition

### ■ **Manipulation theories**

- FERC won important victories on motions to dismiss, in both “gaming” and price manipulation cases
- But no merits decisions yet

## Recent Developments—Settlements

### ■ 2017 Settlements

#### ● Anti-Manipulation Rule

- *City Power* - \$10.4m civil penalties, \$1.3m disgorgement (PJM Up-to Congestion Trades)
- *GDF Suez* - \$41m civil penalty, \$40.8m disgorgement (Lost Opportunity Credits in PJM)

#### ● Other FERC Rules

- *American Transmission Co.* - \$205k civil penalty (FPA 203 and 205 filing obligations)
- *Westar* - \$180k civil penalty (inaccurate cost inputs and targeting make whole payments in SPP)
- *Covanta Haverhill* - \$36k civil penalty failing to provide required metered power output data to ISO-NE)

## Key Issues Facing the New Commission

### ■ Process

- Penalty assessment process (i.e., OSC) and investigative approach in light of court rulings on de novo review and statute of limitations
  - significance of penalty assessment orders going forward
  - FERC's need to complete investigations and administrative process more quickly
- Closing cases more quickly

## Key Issues Facing the New Commission

### ■ **Process (cont.)**

- Investigation policies regarding fairness and subjects' rights
  - NAVs
  - Transcripts of testimony
  - *Brady* Policy materials
  - other disclosures

## Key Issues Facing the New Commission

### ■ Substance

- Approach to market manipulation cases
  - gaming, price manipulation, outright fraud
- Penalty amounts and the Penalty Guidelines
  - excessive penalty amounts not calibrated to gains
  - insufficient credit for cooperation, self-reporting, etc.
  - follow CFTC's lead?

### ■ Personnel

- management uncertainty
- little change in line staff

## Key Issues Facing the New Commission

- **Chairman and future Chairman say they are committed to strong enforcement—but specific priorities not yet known**
  - Chatterjee: “Market participants have to have faith that there is not manipulation and I will work to ensure that enforcement is effective, fair and transparent. The commitment of FERC to continue to actively combat market manipulation is essential. I believe that greater transparency produces stronger markets and that is also true in the enforcement context.”
  - McIntyre: “FERC’s role in enforcement is a very important one and I believe in a robust program of enforcement. . . . I would bring that view to my work at the FERC.”

## CFTC Developments

### ■ **New CFTC Chairman intends to be aggressive on enforcement**

- Giancarlo: “There will be no pause, let up or reduction in our duty to enforce the law and punish wrongdoing in our derivatives markets; the American people are counting on us”

### ■ **New Enforcement Director**

- Former SDNY prosecutor James McDonald

### ■ **Fresh look at enforcement practices and policies**

- Moved market surveillance functions from Division of Market Oversight to Enforcement
- New incentives for self-reporting and cooperation

## Effectively Defending Investigations

### ■ Key events of a FERC Investigation

- Fact-finding
  - data requests
  - testimony
- Preliminary findings
  - formal vs. informal
- Settlement negotiations
  - key issue often *how* company/individuals described
- OSC/Litigation

## Effectively Defending Investigations

### ■ Important considerations

- Early use of experts when appropriate
- Continuously assess case, facts, theories, and defenses
- Negotiate with staff and push back on overly broad or unreasonable requests
- Cooperation and communication key
- Don't wait too long to engage staff on merits—be proactive and go on offense when it makes sense

**David A. Applebaum**

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David Applebaum co-chairs Akin Gump Strauss Hauer & Feld LLP's energy regulation, markets and enforcement practice. Mr. Applebaum's practice focuses on energy regulatory enforcement before the Federal Energy Regulatory Commission (FERC) and other agencies, as well as complex civil litigation, government enforcement, and internal investigations on behalf of energy and other clients.

**Practice & Background**

Mr. Applebaum is a six-year veteran of FERC and represents a variety of clients in the electric and natural gas industries on business, regulatory, enforcement, compliance and policy matters. In addition to his FERC enforcement work, Mr. Applebaum handles civil litigation and internal investigations for clients in the energy industry (and other industries). He also brings valuable background and experience to energy companies subject to Commodity Futures Trading Commission (CFTC) market manipulation investigations and enforcement actions.

Mr. Applebaum served as director of the Division of Investigations in the Office of Enforcement at FERC, and, during his time at the agency, he held every type of attorney position in the Division, from line attorney to director. As director and deputy director of the Division, Mr. Applebaum was involved at the highest levels in every major legal, policy, investigation, settlement and litigation matter occurring at FERC related to enforcement from 2012 until he joined Akin Gump in mid-2016. He also served on the team led by FERC's Office of General Counsel preparing FERC's comment letters on CFTC-related Dodd-Frank rulemakings and was the FERC Division of Investigations liaison with the CFTC Division of Enforcement.

As FERC line attorney, Mr. Applebaum was lead attorney on natural gas and electric market manipulation investigations. He was on the team litigating an Order to Show Cause proceeding involving a "duty of candor" (Section 35.41) violation. See *Kourouma v. FERC*, 723 F.3d 274 (D.C. Cir. 2013). He was also on the team conducting an electric reliability inquiry involving transmission-related outages. To see the final report [Click here](#).

**Areas of Experience**

- Class Actions
- Complex Commercial Litigation
- Energy Litigation
- Energy Regulation, Markets and Enforcement
- Litigation
- Energy Enforcement
- Global Investigations and Compliance
- Antitrust Litigation
- Administrative and Regulatory Litigation
- Crisis Management
- Consumer Class Actions
- North America

**Education**

J.D., Vanderbilt University School of Law, 1999

B.A., University of Pennsylvania, *magna cum laude*, 1996**Clerkships**

Tennessee Supreme Court

U.S.D.C., Middle District of Tennessee

**Bar Admissions**

District of Columbia

New York

**Todd L. Brecher**

Counsel, Washington, D.C.

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tbrecher@akingump.com

Todd L. Brecher focuses his practice on energy regulatory, litigation, enforcement and transactional matters.

**Practice & Background**

Mr. Brecher represents clients in a broad range of regulatory, litigation, enforcement and transactional matters relating to the electricity, natural gas and oil markets, including matters before the Federal Energy Regulatory Commission (FERC), the Commodity Futures Trading Commission (CFTC), and federal and state courts.

Prior to joining Akin Gump, Mr. Brecher served for more than four years in FERC's Office of Enforcement, where he was substantially involved in some of FERC's most significant enforcement matters. Mr. Brecher's enforcement experience at FERC included both electricity and natural gas-related matters, and involved alleged violations of FERC's market manipulation regulations, jurisdictional tariffs, and other FERC rules and regulations. In addition to conducting investigations and administrative proceedings at FERC, Mr. Brecher also represented FERC in litigation before federal courts, including the first and largest energy market manipulation case filed in federal district court. Mr. Brecher's work at FERC frequently involved collaboration and coordination with the CFTC's Division of Enforcement.

In addition to his enforcement-related work, while at FERC, Mr. Brecher provided counsel on a variety of complex, market-related matters, including matters relating to market design and the trading and marketing of energy and capacity products in organized electricity markets. Mr. Brecher also served as a staff liaison to an independent system operator's market monitoring division regarding market-related matters. Additionally, while at FERC, Mr. Brecher advised on matters involving the North American Electric Reliability Corporation's (NERC) physical and cybersecurity reliability standards and the FERC/NERC enforcement regime.

Mr. Brecher began his legal career in the Washington, D.C. office of a large international law firm, where he represented clients in complex litigation and government enforcement matters.

**Areas of Experience**

- Energy Regulation, Markets and Enforcement
- Energy
- Energy Enforcement
- Traditional Power
- Solar
- Natural Gas and Oil
- Renewable Energy Regulation
- Global Investigations and Compliance
- Administrative and Regulatory Litigation
- North America

**Education**

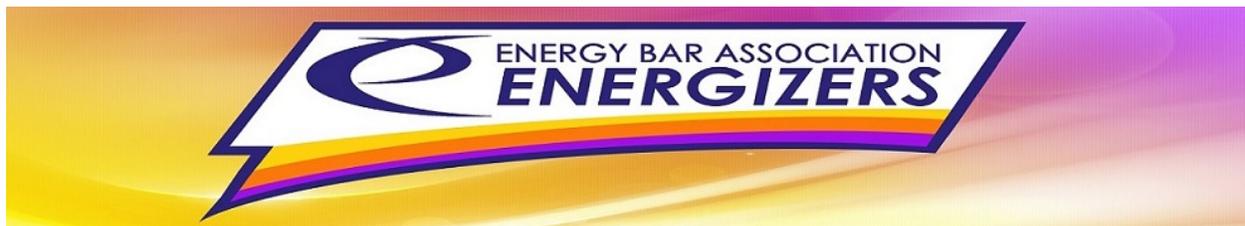
J.D., Vanderbilt University School of Law, 2008

B.S., Syracuse University, 2005

**Bar Admissions**

District of Columbia

New York



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Todd L. Brecher  
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James P. Cargas  
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Kim Craven  
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Taylor Ruffino	Kinder Morgan Inc.
Chris Russo	Southern Company Gas
Daniel W. Sanborn	Kinder Morgan
Susan M. Schwager	Enbridge Energy Co., Inc.
Jeffrey Seaton	Enbridge
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David Sladic	Dynegy, Inc.
Richard G. Smead	RBN Energy LLC
Mikhaela Marsel Stavrinou	South Texas College of Law
Sarah E. Tomalty	Koch Ag & Energy Solutions, LLC
Lisa D. Yoho	Enable Midstream Partners
Diane Zeiler	Shell Trading & Supply