



FERC Releases Annual Report on Enforcement

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On November 16, 2023, the Federal Energy Regulatory Commission (FERC or the Commission) released its annual Report on Enforcement.¹ The Enforcement Report, which Commissioner Clements highlighted as demonstrating that the FERC Office of Enforcement (OE) “continues to implement strong and effective auditing, surveillance and enforcement programs,”² provides a review of OE’s activities over the past fiscal year. The Enforcement Report and, in particular, its discussion of both public and non-public audits, investigations and enforcement actions also serves as a useful informational tool for market participants navigating compliance issues and assessing enforcement risk.

The 2023 Enforcement Report underscores OE’s focus on fraud and market manipulation, serious violations of Reliability Standards, anticompetitive conduct, threats to the nation’s energy infrastructure and associated impacts on the environment and surrounding communities and conduct that threatens the transparency of regulated markets. While potential market manipulation related violations are the source of a significant portion of the investigations described in the Enforcement Report, the report also highlights a number of instances in which market participants were investigated for failing to provide a product they had committed to provide or otherwise fulfilling their performance obligations. The Enforcement Report—along with the comments made by Commissioners at the November open meeting—also makes clear that market misconduct during extreme weather events was a particular area of focus and concern for OE and is likely to remain so going forward.³ The Enforcement Report’s disclosure of a number of enforcement actions related to demand response further suggests that market participants offering demand response or participating

in demand response programs, including as a sponsoring utility, must be careful to comply with all applicable market rules.⁴

Fiscal Year 2023 Review

During the 2023 fiscal year, OE opened 19 new investigations, closed nine pending investigations without further action, and negotiated 12 Commission approved settlements for a total of approximately \$52.54 million in civil penalties and disgorgement.⁵ The majority of settlements approved were related to market manipulation, false statements, tariff violations and market behavior regulation.⁶ Commission staff received 702 self-reports—the bulk of which were for tariff violations—during the fiscal year with the “vast majority” of such reports resulting in no further enforcement action.⁷ Commission staff also reviewed 23 referrals from the market monitoring units (MMU) of regional transmission organizations or independent system operators (ISO) with 11 of those referrals leading to FERC Division of Investigations’ (DOI) investigations.⁸ Of the 241 Enforcement Hotline calls that OE staff received during the prior fiscal year, 230 were “promptly resolved.”⁹

In the past fiscal year, FERC’s Division of Audits and Accounting (DAA) completed nine audits that resulted in 68 findings of noncompliance, 332 recommendations for corrective action and approximately \$33 million in refunds and other recoveries.¹⁰ The audits were performed on public utility, natural gas and oil companies and, according to the Enforcement Report, covered a “wide array of topics.”¹¹ DAA also assisted with 218 rate, pipeline certificate, merger and acquisition and debt and security issuance proceedings and analyzed over 3,000 electric quarterly reports (EQRs).¹²

FERC’s Division of Analytics and Surveillance (DAS) reviewed 566,933 electric surveillance screen trips resulting in 43 electric surveillance inquiries with six referred to DOI, 25 closed with no referral and 12 of which remain under DAS’s analytical review.¹³ DAS staff also reviewed over 2.6 million transactions by market-based rate sellers via submitted EQRs.¹⁴ DAS reviewed 23,769 natural gas surveillance screen trips resulting in 27 natural gas inquiries with three resulting in DOI referrals, 21 being closed without referral and five remaining under further review.¹⁵ DAS was also responsible for conducting enhanced surveillance related to Winter

Storm Elliot and the Winter 2022/2023 Western Energy Price Spike, both of which are ongoing but have resulted in referrals to DOI.¹⁶

Key Takeaways from Settlements, Self-Reports, and Investigations

A helpful feature of the Enforcement Report is its discussion of incidents that resulted in Commission approved settlements and mitigating factors that resulted in previously non-public self-reports or investigations being closed without Commission action. These incidents provide market participants with examples of both steps to proactively take to avoid a compliance issue in the first place and steps to mitigate the effects of a violation once it has occurred.

Failure to Fulfill Market Obligations – A common theme that appeared in a number of MMU referrals was the failure of a resource to provide a product it had committed to provide or otherwise fulfill its performance obligations. For instance, FERC staff closed an investigation, based on a lack of evidence and material harm, related to an MMU's allegation that a market participant had misrepresented its available capacity and/or failed to comply with its must-offer obligations.¹⁷ Relatedly, following a referral from an MMU, FERC staff evaluated whether three battery storage systems had violated an ISO's tariff by failing to turn on their automatic generation control mode—which is necessary for these systems to receive and respond in real-time to ISO instructions—despite receiving regulation service awards that required them to respond to ISO instructions within four seconds.¹⁸ FERC staff elected to take no further action after finding that the battery storage units were older units that, at the time of the referred conduct, were only able to switch to automatic generation control mode manually but had since completed a process to allow them to automatically switch modes and thus respond to the ISO's instruction in the time frame required by the tariff to be eligible to receive regulation awards.

Demand Response – In the 2023, fiscal year, the Commission approved a number of settlements related to demand response offers or programs. For instance, after opening an investigation into whether a company engaged in a fraudulent scheme to register demand response resources without those resources knowledge and clear capacity that would not have performed had it been dispatched in potential violation of the anti-manipulation rule and Midcontinent Independent System Operator, Inc. (MISO) tariff, FERC accepted a settlement in which the co-owner of the company agreed to disgorge \$525,451.93.¹⁹ FERC also

approved a settlement for over a \$100,000 in civil penalties and disgorgement with two demand response aggregators that were investigated for whether they bid into the California Independent System Operator Corporation's day-ahead and real time markets despite not having sufficient demand response resources to match the bids.²⁰ And, in the most significant settlement related to demand response, the Commission approved a \$27 million settlement with a steel company that failed to reduce its load despite receiving demand response bonuses from MISO and utility that acted as the steel company's sponsoring utility.²¹ These settlements indicate that the Commission views market participants that offer demand response no differently than other resources that fail to comply with market rules.

Communications with FERC – The Commission approved a settlement requiring a natural gas pipeline company to pay a \$1.2 million civil penalty related to its failure to fully and timely advise the Commission of its abandonment of a 19.5 mile pipeline pursuant to the Natural Gas Act.²² The pipeline company was alleged to have represented in its abandonment application and communications with the Commission facts related to the abandonment of the pipeline as if they had not yet occurred when in fact the abandonment activities had already been completed. The company's activities were investigated for failing to both seek prior Commission approval for the abandonment and fully advise the Commission of the nature of its abandonment request underscoring the importance of candor when communicating with the Commission.

Reliability Based Violations – Following the issuance of an order to show cause to a transmission owner regarding why it should not be assessed a \$42 million civil penalty for failing to establish and maintain transmission line ratings, the Commission approved a settlement for \$4.4 million.²³ As part of the settlement, \$2.5 million of the settlement amount would be invested by the transmission owner in reliability enhancements that went above and beyond what was required by the Reliability Standards. The proceeding underscores the significance of potential penalties for reliability related violations.

Failure to Receive Prior Authorization – The Enforcement Report highlights a number of self-reports by generators related to their failure to obtain certain approvals under the Federal Power Act (FPA) prior to engaging in transactions. For instance, a solar project reported that it had failed to obtain prior authorization from the Commission under FPA Section 204—an issue that commonly arises when projects inadvertently become subject to FERC jurisdiction too early in the project development process—to enter into a construction financing

agreement.²⁴ FERC staff closed the report without further action because there was no apparent market harm and the project owner implemented procedures to prevent the event from reoccurring. Similarly, a renewable energy power producer failed to timely file non-material change in statuses as required by its entities' market-based rate authorizations.²⁵ Based on the producer's filing of the non-material change in statuses within 10 days of discovery of the issue, adoption of internal compliance measures, and the lack of economic harm, FERC staff closed the matter without further action. FERC staff also closed a number of matters related to the failure to timely obtain FERC authorization for transactions under FPA Section 203.²⁶

Information to Support Market Positions – The Enforcement Report notes a number of potential violations that ultimately resulted in no further Commission action based, at least in part, on the relevant market participant providing information to FERC staff supporting the market positions that were the subject of a referral. For example, FERC staff closed an investigation into whether a market participant engaged in fraudulent trading to benefit the market participant's congestion position after reviewing substantial documentation and internal communications demonstrating that the trading was supported by market signals and did not significantly deviate from prior trading patterns.²⁷ The Commission also closed an inquiry into whether a generator made false and misleading statements to an ISO related to its minimum operating level based on available information demonstrating that the generator's minimum operating level was either accurate or that the generator exercised due diligence in developing it.²⁸

Enforcement Outlook

The 2023 Enforcement Report reflects a level of FERC enforcement that is largely consistent with the past several years. While we expect that fiscal year 2024 will likely bring a similar level of enforcement, the findings of the Enforcement Report and Commissioners' statements indicate that certain areas, such as demand response and market manipulation during extreme weather events, may be a priority for OE in the coming years. In addition, FERC continues to use its enforcement powers to police purported violations of certificates of public convenience and necessity by pipeline operators.

Please contact the Akin energy regulatory team for more information regarding developing FERC compliance programs, engaging in self-reports or responding to FERC investigations.

¹ FERC Office of Enforcement, 2023 Report on Enforcement (Nov. 16, 2023), *available at*:

<https://www.ferc.gov/news-events/news/ferc-releases-2023-enforcement-report> (Enforcement Report).

² FERC Commission Meeting (Nov. 2023), *available at*: <https://www.youtube.com/watch?v=baG3pmy3QTo>.

³ Enforcement Report at 7, 79-80.

⁴ *Id.* at 9, 23, 25.

⁵ *Id.* at 6-7.

⁶ *Id.* at 21.

⁷ *Id.* at 27-28.

⁸ *Id.* at 44. Nine of these referrals remain pending.

⁹ *Id.* at 45-46.

¹⁰ *Id.* at 7.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 41-42.

18 *Id.* at 45.

19 *Id.* at 23.

20 *Id.* at 23-24.

21 *Id.* at 25.

22 *Id.* at 25-26.

23 *Id.* at 26.

24 *Id.* at 31.

25 *Id.* at 29.

26 *Id.* at 32, 33.

27 *Id.* at 42.

28 *Id.* at 45.

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