



## **FERC Proposes \$2.4 Million Civil Penalty for CAISO Power Trading Activities**

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Reading Time : **3 min**

### **The Allegation**

The OE Staff Report appended to the OSC details OE's allegations with respect to ETRACOM's virtual trading activities. OE alleges that in May 2011, ETRACOM submitted virtual supply offers at the New Melones intertie in CAISO in order to affect power prices to benefit ETRACOM's CRRs at that location. Virtual transactions allow a market participant to make financial sales or purchases of energy in the day-ahead market, with the requirement that they buy back (or sell back) that energy in the real-time market (making or losing money based on the day-ahead/real-time price differential). CRRs are a financial product offered by CAISO which settles off the difference in the day-ahead congestion costs between two locations (a source location and a sink location). The New Melones intertie is located in eastern central California and connects a hydroelectric generating resource located in the SMUD/WAPA balancing authority area with CAISO. In 2011, only WAPA could submit bids for physical imports or exports at New Melones, but CAISO still allowed for virtual bidding at the intertie.

OE states that ETRACOM's CRR positions sourced at New Melones were very profitable in early May, but on May 8 began to experience a decline in profitability due to unexplained export congestion at New Melones. OE alleges that between May 14 and 31 – in response to that decline in profitability – ETRACOM submitted and cleared uneconomic virtual supply offers with the intent to benefit its New Melones-sourced CRRs by creating import congestion and lowering the day-ahead price at New Melones. OE claims that ETRACOM's virtual supply transactions during the relevant time consistently lost money, but that ETRACOM's profits on its New Melones CRR positions more than doubled. According to OE, ETRACOM's virtual trading activities lost \$42,481, but enabled ETRACOM to earn an estimated

\$315,072 in unjust profits related to its CRR positions. OE states that ETRACOM ceased trading virtual supply at New Melones on May 31, and that its June CRR positions were substantially smaller.

## **Next Steps**

ETRACOM and Rosenberg have 30 days to respond to the OSC and the allegations set forth in the OE Staff Report. The OE Staff Report notes that ETRACOM has previously argued that the virtual trading strategy at issue was not manipulative, but rather was intended to profit from a hydroelectric runoff event it anticipated would occur in late May 2011. In the Staff Report, OE dismisses this explanation as inconsistent with the evidence. The Staff Report notes that ETRACOM has also argued that flaws in CAISO's administration of the New Melones node were responsible for the market price outcomes – a defense OE Staff dismisses as a post hoc rationalization not reflective of ETRACOM's intent at the time of its trading. ETRACOM will likely raise these and other defenses when it responds to the OSC.

## **Federal District Court Litigation in California Possible**

The OSC directs ETRACOM and Rosenberg to make a procedural election under section 31(d) of the Federal Power Act within 30 days. Under section 31(d), ETRACOM and Rosenberg can elect either to have a hearing before an administrative law judge prior to the Commission issuing an order assessing civil penalties (with such order being subject to traditional appellate review procedures for agency orders) or, alternatively, to have the Commission assess any civil penalties immediately, without an agency hearing. If ETRACOM and Rosenberg elect to have the Commission assess any civil penalties immediately, without an agency hearing, the Commission can only enforce the penalty by initiating an action in federal district court, where the district court has authority to review the matter *de novo*.

If ETRACOM and Rosenberg elect the district court *de novo* review procedural option (as all other subjects of electricity market manipulation cases have done to date) rather than an agency hearing, and the Commission assesses a civil penalty, it is likely that FERC will consider filing its district court enforcement action in the United States District Court for the Eastern District of California, which is where CAISO is located. FERC has obtained several favorable rulings from that court in its pending enforcement action against Barclays Bank involving allegations of electricity market manipulation in the western U.S. during the 2006-2008 time period. In a May 2015 order denying Barclays' motion to dismiss, the court found in FERC's favor on several issues relating to, among other things, manipulation law, venue, jurisdiction

and FERC's authority to penalize individuals. The court in the Barclays case has also ruled that the statutory *de novo* review of FERC's civil penalty assessment does not necessarily require a trial – a finding Barclays is presently seeking to appeal to the Ninth Circuit. While FERC has brought similar enforcement cases in federal district courts in Massachusetts, Virginia and the District of Columbia, those courts have not yet addressed these threshold substantive and procedural issues. Thus, it would not be surprising if FERC seeks to avail itself of the favorable decisions it has obtained in the Barclays case, particularly since this case involves the CAISO market.

## Categories

Energy Regulation, Markets & Enforcement

Hydroelectric

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