FERC ISSUES 2021 ENFORCEMENT REPORT

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U.S. Energy, Infrastructure, and Resources Alert

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On 18 November 2021, the Federal Energy Regulatory Commission's (FERC or Commission) Office of Enforcement (Enforcement) released its 2021 Annual Report on Enforcement (FY2021 Report). The FY2021 Report provides an overview of Enforcement's priorities. It summarizes actions taken by the three divisions within Enforcement: Division of Investigations (DOI), Division of Audits and Accounting (DAA), and Division of Analytics and Surveillance (DAS).

FY2021 PRIORITIES REMAIN UNCHANGED, WITH AN ADDITION

In FY2021, Enforcement's priorities stayed almost the same as in 2020:

- Fraud and market manipulation;
- Serious violations of Reliability Standards;
- Anticompetitive conduct; and
- Conduct that threatens the transparency of regulated markets.

This year, however, Enforcement added a new priority related to matters involving threats to the nation's energy infrastructure and associated impacts on the environment and surrounding communities.

INCREASED INVESTIGATIONS UNDER CHAIRMAN GLICK

During the November 2020 Commission open meeting, then-Commissioner Glick criticized the Commission's enforcement efforts, which he perceived as lacking. In 2020, the Commission opened only six new investigations and reached three settlements totaling US$553,376. Commissioner Glick became Chairman of the Commission in January 2021 and announced shortly thereafter that vigorous enforcement would be one of his priorities. For 2021, Enforcement reported that it opened 12 new investigations and negotiated settlements in eight investigations totaling US$6.4 million, illustrating the implementation of Chairman Glick's priority.

In FY2021, seven of the 12 new investigations opened arose from referrals by ISO and RTO Market Monitoring Units (MMUs). MMUs typically collaborate with Enforcement and make confidential referrals when they believe that a market violation occurred. The Commission received 14 new MMU referrals (some of which involved more than one type of violation or multiple subjects), of which two involved potential market manipulations, 11 involved potential tariff violations, and five involved potential misrepresentations prohibited by the Commission's Duty of Candor rule.

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WINTER WEATHER EVENT ANALYSIS

DOI and DAS staff spent significant efforts on the impacts of the February 2021 extreme winter weather event associated with winter storm Uri (Winter Weather Event) that affected portions of ERCOT, SPP, and MISO. DOI prepared briefs and reports related to the Winter Weather Event, while DAS conducted a comprehensive review of wholesale natural gas and electricity market activity to determine if market participants engaged in market manipulation or other violations.

EFFECTIVE COMPLIANCE PROGRAMS ARE KEY

In 2010, the Commission issued revised penalty guidelines allowing an organization to reduce its culpability score through favorable factors, including a compliance program. Out of the eight approved settlements in FY2021, six included compliance monitoring requirements indicating the importance of a comprehensive compliance program. DAA administers Enforcement's audit, accounting, and forms administration and compliance programs. DAA indicates the most robust compliance programs:

- Equip staff and management with sufficient training, education, tools, and other resources to detect issues promptly to correct or prevent noncompliance;
- Have effective lines of communication and notify staff of standards through well-publicized policies and procedures;
- Stay abreast of compliance trends by reviewing Commission orders and audit reports and incorporate these trends and other developments in the industry;
- Have a designated compliance officer and compliance committee charged with development and oversight of compliance activities and metrics that assess program effectiveness;
- Actively involve senior management and provide for the allocation of funds necessary for compliance programs;
- Actively involve internal audit and monitoring functions to routinely assess compliance with tariff provisions and Commission rules, orders, and regulations, to foster a strong and sustainable culture of commitment to compliance on an enterprise-wide basis; and
- Seek guidance from the Commission as necessary to ensure compliance, including an effective process to self-report noncompliance identified through internal oversight activities.

These recommendations are consistent with the Staff White Paper on Effective Energy Trading Compliance Practices that Commission Staff issued in November 2016.

SIGNIFICANT TAKE-AWAYS AND ENFORCEMENT PRIORITIES

The FY2021 Report shows Chairman Glick's prioritization of enforcement among the Commission's duties. There are several key take-aways highlighted in the report, as well as the types of investigations which the Commission opened, and self-reports they highlighted.

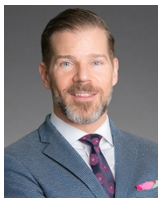
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- *Self-reporting remains significant*. The report highlights 146 new self-reports which Enforcement received over the past year and notes that detection and remediation of violations remain hallmarks of successful compliance programs. Enforcement closed the majority of self-reports with no action because the company promptly self-reported, corrected the mistake, and provided refunds in some instances.
    - *Electric Tariff/OATT violations*. Several companies self-reported tariff violations where the utility inadvertently reported inaccurate generation data to an ISO/RTO or when it inadvertently scheduled generation quantity to an ISO/RTO that was in excess of the resource's transmission capacity.
    - *Regulatory filing violation*. Several entities made errors in their regulatory filings, violating Commission regulations. For example, a natural gas company self-reported it failed to file an accurate FERC Form No. 552 and a power marketer self-reported errors in its Electric Quarterly Reports.
- *Renewable resources and capacity market participants received scrutiny*. Several self-reports and settlements highlight Enforcement's close attention to compliance with capacity supply obligations and market offers. Renewable resources were not exempted from such scrutiny.
    - *Terra-Gen, LLC, Docket No. IN21-7-000*. The Commission approved a settlement with Terra-Gen, LLC (Terra-Gen) after Enforcement investigated whether Terra-Gen submitted false or misleading information to CAISO about the capabilities of its wind-powered electric generation facility and whether Terra-Gen violated the CAISO tariff by deviating its wind farms' output from CAISO's dispatch instructions.
    - *Federal Power Act Section 205 violation*. The owner of several wind projects self-reported its failure to self-certify a project as a Qualifying Facility (QF) before making wholesale power sales. The owner submitted a FERC Form No. 556, certifying the project as a QF and paid refunds on revenues collected on the wholesale power sales made during the period when the project was not certified as a QF. Staff closed the self-report without further action because the violation was unintentional, and the owner paid refunds.
- *Several older cases remain in court*. Enforcement staff continues to litigate several older cases which will provide judicial precedent on the scope of Enforcement's jurisdiction and authority. These include:
    - *FERC v. Powhatan Energy Fund LLC (E.D. Va.)*. In 2015, the Commission assessed civil penalties of almost US$30 million against Powhatan Energy Fund LLC, an individual trader and two affiliated funds for violating the Commission's anti-manipulation rule by engaging in allegedly fraudulent Up-To Congestion trades in the PJM Interconnection, LLC market. Shortly thereafter, Enforcement staff filed a petition in the U.S. District Court for the Eastern District of Virginia to enforce the Commission's order. On 11 February 2020, the Fourth Circuit upheld the District Court's opinion recognizing that Congress conditioned FERC's right to bring an action in federal district court after statutorily mandated measures, and the statutory limitation period commences only after those actions take place. The Fourth Circuit remanded the case to the District Court which set a trial date for 22 August 2022.
    - *FERC v. Vitol Inc. and Federico Corteggiano, (E.D. Cal.)*. In 2019, the Commission assessed penalties of US$2.5 million against Vitol Inc. and an individual trader for violating the Commission's anti-manipulation rule and Section 222 of the FPA after selling physical power at a loss in the CAISO

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day-ahead market to potentially benefit CRR positions. On 6 January 2020, Enforcement staff filed in the U.S. District Court for the Eastern District of California to enforce the Commission's order. The parties have filed various motions that remain pending with the Court.

KEY CONTACTS



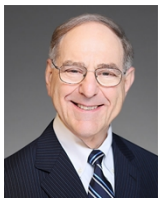
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