

Energy Update

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FERC Announces Enforcement Priorities for 2010 And Significantly Alters Its Enforcement Policies And Investigation Procedures

On December 17, 2009, the Federal Energy Regulatory Commission (“FERC”) issued an Order and a Policy Statement related to enforcement procedures. Both issuances have the potential to result in significant changes to FERC’s investigation procedures. On the same day, FERC issued its 2009 Report on Enforcement, announcing its enforcement priorities for 2010.

Changes to FERC’s Enforcement Procedure Accelerates Public Notice of Confidential Enforcement Investigations (Docket No. PL10-2-000)

The FERC Secretary will issue a public “Staff’s Preliminary Notice of Violations” (“Notice of Violation”) upon request from the Director of the FERC Office of Enforcement under the new policy.¹ The Notice of Violation will be issued once Enforcement Staff has notified the subject of the investigation and has given it an opportunity to respond to Enforcement Staff’s preliminary determination. The Notice of Violation will provide sufficient information to inform members of the public of the basic facts surrounding the investigation. Specifically, the Notice of Violation will disclose:

- the identity of the entity that is the subject of the investigation;
- the place and time of the alleged conduct;
- the rules, regulations, statutes, or orders that the entity allegedly violated; and
- a description of the alleged wrongful conduct.

Previous to this Order, if the Office of Enforcement had concluded that the subject of the investigation had violated one or more FERC requirements, Enforcement Staff would have sent the subject a letter outlining the bases for the preliminary determination, awaited the subject’s response, and based on that response, Enforcement Staff would have re-evaluated its analysis. Prior to the recent adoption of a change in investigation procedures, investigations were generally not made public until either a settlement was reached or FERC issued an order to show cause, *i.e.* after Enforcement Staff had concluded its investigatory efforts.

FERC states that it is issuing this Order to inform the public and the regulated community about the views of the Office of Enforcement, which could contribute to a better understanding of compliance obligations. In the event Enforcement Staff decides to terminate an investigation after a Notice of Violation has been issued, FERC authorizes its Secretary, upon direction of the Director of the Office of Enforcement, to issue a public notice of termination of the investigation.

The change in FERC’s enforcement policies and procedures may require a company to publicly disclose the alleged misconduct, even if the subject is later found not to be in violation, causing undue embarrassment and adversely impacting its public image and investor relations. The Notice of Violation policy could also expose FERC-

1. *Order Authorizing Secretary to Issue Staff’s Preliminary Notice of Violations*, 129 FERC ¶ 61,247 (2009).

jurisdictional entities to third party complaints pursuant to Section 306 of the Federal Power Act and Section 13 of the Natural Gas Act. While the Notice of Violation process does not provide third parties with a right to intervene in FERC investigations, the specific information in the Notice of Violation may be sufficient to create a foundation for third parties to file complaints against the subject of the investigation.

FERC Formalizes its Policy on Disclosure of Exculpatory Materials (Docket No. PL10-1-000)

The Policy Statement on Disclosure of Exculpatory Materials (“Policy Statement”)² formalizes FERC’s policy regarding the disclosure of potentially exculpatory materials to parties under investigation under Section 1b of FERC’s regulations or administrative enforcement actions under Part 385 of its regulations. Exculpatory evidence is evidence that may be favorable to a subject of an investigation or respondent in an enforcement proceeding. Though this policy is voluntary and is not required of regulatory agencies, FERC explained that it is promulgating its policy to eliminate uncertainty regarding FERC’s position on this issue and set forth a procedural framework within which exculpatory disclosures will be made. This policy is consistent with the practice of other administrative agencies, including the Securities and Exchange Commission and the Commodity Futures Trading Commission, that also provide exculpatory evidence to respondents in their administrative enforcement proceedings.

During the course of an investigation conducted under Section 1b of FERC’s regulations, Enforcement Staff will scrutinize materials it receives for exculpatory information that would be required to be disclosed. FERC will provide

the subject of the investigation any materials or information that is not known to be in the subject’s possession. In addition, after FERC has set an enforcement matter for administrative hearing, Enforcement Staff will provide the presiding administrative law judge with an affidavit stating whether exculpatory materials were provided to the respondent(s). The Policy Statement also offers guidance as to what is not required of Enforcement Staff. Specifically, since the disclosure obligation applies only to evidentiary material rather than opinions, FERC explained that the adoption of this policy does not entitle a respondent to disclosure of Enforcement Staff’s strategies, legal theories, or evaluations of evidence.

FERC Announces Enforcement Priorities for 2010 (Docket No. AD07-13-002)

The *2009 Report on Enforcement* highlights the Office of Enforcement’s activities related to investigations, audits, financial regulation and energy market oversight. Compared to 2008, 2009 saw more self-reports, more settlements, and increased civil penalty payments. In 2010, FERC will focus on matters involving: (1) fraud and market manipulation; (2) serious violations of the electric Reliability Standards; (3) anticompetitive conduct; and (4) conduct that threatens transparency in regulated markets.

FERC has indicated that it will give highest priority to cases involving harm to the public or significant gains to the violator or losses to the victims of the misconduct. With regard to reliability, Enforcement Staff will focus on cases resulting in actual harm, either through the loss of load or through some other means, cases involving repeat violations of the Reliability Standards, and violations of standards that carry a high risk to the Bulk Power System. ■

2. 129 FERC ¶ 61,248 (2009).

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