

CLIENT ALERT

# Hidden Insights in the FERC 2021 Report of Enforcement

November 29, 2021

## AUTHORS

**Norman C. Bay** | **Paul J. Pantano, Jr.** | **Thomas R. Millar** | **Serge B. Agbre**  
**Alexandra Calabro**

On November 18, 2021, the staff of the Federal Energy Regulatory Commission's Office of Enforcement ("OE" or "Staff") issued its 2021 Report on Enforcement (the "Report") for the Commission's fiscal year ending September 30, 2021.<sup>1</sup> In short, the metrics reported by OE appear consistent with Chairman Glick's statement during the Commission's open meeting on November 18, 2021 that "[t]he cop is back on the street and we will aggressively pursue wrongdoing."<sup>2</sup>

The Commission requires OE to prepare the Report in order to inform the public of the activities of OE and its three Divisions: the Division of Investigations ("DOI"); the Division of Analytics and Surveillance ("DAS"); and the Division of Audits and Accounting ("DAA").<sup>3</sup>

<sup>1</sup> Available [here](#). All references to yearly totals in this document refer to FERC's fiscal year ending September 30, 2021. The Commission's fiscal year begins October 1 and ends September 30 of the following year.

<sup>2</sup> Ethan Howland, *FERC Investigates Possible Market Manipulation During Winter Storm Uri*, UTILITY DIVE (Nov. 19, 2021).

<sup>3</sup> *Enforcement of Statutes, Regulations and Orders*, 123 FERC 61,156 at P 12 (2008).

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OE explained that its priorities had expanded from the prior year to include threats to infrastructure and related environmental and community impacts. This is significant because it represents the first new priority added to OE's list since OE began issuing a Report. OE's 2021 fiscal year priorities were:

- (i) fraud and market manipulation;
- (ii) serious violations of the Reliability Standards;
- (iii) anticompetitive conduct;
- (iv) threats to the nation's energy infrastructure and associated impacts on the environment and surrounding communities; and
- (v) conduct that threatens the transparency of regulated markets.<sup>4</sup>

Below are our key insights based on the Report.

### More Investigations and Settlements Than in Fiscal Year 2020

In the 2021 fiscal year, DOI opened 12 new investigations.<sup>5</sup> It negotiated nine settlement agreements, including eight investigations and a federal district court matter, totaling approximately \$7.9 million in civil penalties and disgorgement.<sup>6</sup> Several sources referred the new investigations to Staff, including RTO/ISO market monitors, DAS, and DAA.

By comparison, in fiscal year 2020, DOI staff opened only six new investigations and settled three investigations totaling approximately \$553,376 in civil penalties and disgorgement.<sup>7</sup>

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<sup>4</sup> Report at 6.

<sup>5</sup> *Id.* at 6, 8.

<sup>6</sup> *Id.* at 6.

<sup>7</sup> See OFF. OF ENF'T, FED. ENERGY REGUL. COMM'N, 2020 REPORT ON ENFORCEMENT at 7 (2020) ([available here](#)) ("2020 Report").

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Notably, however, the number of new investigations DOI opened in the 2021 fiscal year is still much lower compared to the 2013-2018 period, as reflected in the following table:

Fiscal Year	Number of New Investigations	Number of Settlements
2013	24	11+ <sup>8</sup>
2014	17	8
2015	19	9
2016	17	6
2017	27	5
2018	24	6
2019	12	2
2020	6	3
2021	12	9

### DOI Closed Four Market Manipulation Investigations Because of Insufficient Evidence

DOI closed four pending investigations this fiscal year without recommending charges after Staff found there was insufficient evidence to conclude a violation had occurred. All four were investigations into potential market manipulation, and one investigation also examined tariff violations as well as misrepresentations prohibited by the Duty of Candor rule. RTOs/ISOs referred three of the four investigations, while DAS referred the other.<sup>9</sup>

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<sup>8</sup> The 2013 Report on Enforcement did not specify the number of settlements, but listed 11 example matters that settled in 2013.

<sup>9</sup> Report at 40–41.

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### Staff Continues to Be Focused on Energy Project-Related Violations

During the 2021 fiscal year, Staff entered into two settlements alleging violations of the Natural Gas Act (“NGA”) and related Commission orders regarding energy projects.<sup>10</sup> To put this in context, there was only one other enforcement action in connection with an energy project in the five preceding years.<sup>11</sup> As we have observed in a previous client alert, OE appears increasingly focused on violations related to energy projects, including violations of Commission orders and certificates.<sup>12</sup>

In total, during the 2021 fiscal year, the nine settlement agreements approved by the Commission resolved matters concerning many different types of violations, including the Duty of Candor rule (18 C.F.R. § 35.41(b)), the Anti-Manipulation Rule (18 C.F.R. §§ 1c.1 and 1c.2), ISO/RTO tariffs, and Commission orders “related to the construction of natural gas and LNG facilities under NGA Sections 3 and 7(e).”<sup>13</sup>

### Self-Reporting

Staff received 146 self-reports in fiscal year 2021, slightly more than the 126 received in fiscal year 2020.<sup>14</sup> ISOs and RTOs made most of the self-reports regarding tariff violations. Other entities tallied the second-highest number of self-reports regarding regulatory filing violations, such as failure to file an accurate FERC Form 552 and errors in Electric Quarterly Reports.<sup>15</sup>

Consistent with past reports, OE briefly summarized self-reports that it closed with no further action. OE’s examples illustrate how penalties sometimes can be avoided if market participants self-report and remediate possible FERC violations promptly upon their discovery. Below, we highlight illustrative self-reports discussed by OE:

- *Federal Power Act Sections 203 and 205 Violations.* Staff explained that it closed multiple self-reports of Federal Power Act (“FPA”) 203 and 205 violations with no further action. Generally speaking, upon discovering the violation, the entities immediately self-reported, implemented corrective measures, and did not financially benefit from the violation. In addition, the violations were inadvertent and did not cause market harm. Staff also

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<sup>10</sup> *Id.* at 19–23.

<sup>11</sup> See Paul J. Pantano, Jr. & Thomas R. Millar, *FERC Penalizes Gas Pipeline Company for Violating Project Certificate: Time to Revisit Project Certificate Compliance?* (Jan. 10, 2019) (available [here](#)).

<sup>12</sup> See Paul J. Pantano, Jr. & Thomas R. Millar, *Energy Project Enforcement Actions at FERC: A New Trend?* (Feb. 2, 2021) (available [here](#)).

<sup>13</sup> Report at 19.

<sup>14</sup> *Id.* at 25; 2020 Report at 20.

<sup>15</sup> See Report at 25–26, 28–34.

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emphasized the significance of the violators' robust internal compliance procedures (or efforts to develop them) in its decision to close the self-reports with no further action.<sup>16</sup>

- *Interlocking Directors.* A public utility and investment fund self-reported a violation regarding interlocking directorates after the appointment of common officers and directors without obtaining Commission approval. After discovering the violation, the entities removed certain individuals from positions and appointed others, and implemented procedures to prevent the appointment of individuals to positions with both entities. Because of this, Staff closed the self-report with no further action.<sup>17</sup>
- *Natural Gas Prohibition on Buy/Sell Transactions.* A public utility self-reported that two affiliates had engaged in prohibited buy/sell transactions; however, the affiliates did not design the transactions to circumvent the Commission's capacity release rules, but for balancing purposes. Immediately upon discovery, the utility self-reported, took immediate action to stop the prohibited transactions from recurring, provided retraining to relevant employees, and restructured its operations to reduce the number of affiliates engaged in the purchase, sale, and transportation of natural gas. Because of these actions, and because the transactions took place on only two consecutive days and did not result in any market harm, Staff closed the self-report with no further action.<sup>18</sup>
- *Tariff and Capacity Release Violations (Gas).* A gas local distribution company ("LDC") self-reported its violations of an interstate pipeline's tariff, as well as the Commission's shipper must have title and capacity release rules. After identifying the violations, the LDC worked quickly to ensure compliance. Staff noted that because the LDC did not benefit from the violations and promptly remediated them, Staff closed the self-report with no further action.<sup>19</sup>
- *Regular Reporting Requirements.* OE discussed several self-reports of failures to comply with regulatory filing requirements, including Electric Quarterly Reports, FERC Form No. 552, FERC Form No. 556, and a Triennial Report.<sup>20</sup> Staff closed these self-reports with no further action because, in general, the entities self-reported and corrected the violation immediately upon discovery and implemented internal policies to prevent similar future violations.

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<sup>16</sup> *Id.* at 32–33.

<sup>17</sup> *Id.* at 32.

<sup>18</sup> *Id.* at 34.

<sup>19</sup> *Id.* at 30.

<sup>20</sup> *Id.* at 31–32.

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### **DAS Closed Potential Manipulation Inquiries Without Further Action After Finding Legitimate Purposes for Transactions**

DAS closed numerous market manipulation surveillance inquiries without further action because it discovered legitimate reasons for transactions that had been flagged for further review. As background, DAS conducts surveillance and analyzes transactional and market data to detect potential market manipulation, anticompetitive behavior, and other anomalous activities in the energy markets. The Commission receives, and DAS analyzes, a combined eight gigabytes of data from each of the six organized wholesale power markets. Staff noted in the Report that its surveillance screens flagged a number of trading patterns as potentially manipulative; however, after Staff conducted further review, including interviewing relevant traders, the surveillance inquiries were closed because DAS found there were legitimate reasons for the flagged trading activity.<sup>21</sup>

### **Completed DAA Audits Yielded Refunds for Utility Customers**

During the 2021 fiscal year, DAA completed 12 audits of public utility, natural gas, and oil companies, which required audited companies to refund transmission customers and to revise accounting policies in some circumstances.<sup>22</sup> One of the audits conducted by DAA included an evaluation of whether Evergy, Inc. and its public utility subsidiaries (“Companies”) complied with the conditions established in the Commission’s 2018 order authorizing the merger of Great Plains Energy Incorporated and Westar Energy, Inc.<sup>23</sup> The audit found that, among other things, the Companies failed to file necessary FPA Section 205 filings. As a result of the audit, the Companies were directed to make refunds to wholesale transmission customers and to revise their accounting policies.<sup>24</sup>

### **Staff Reported on the Status of Significant Matters**

#### **District Court Litigation**<sup>25</sup>

- *FERC v. Silkman, et al.*, No. 1:16-cv-00205 (D. Maine). Following mediation in February 2020 and July 2020, the parties reached a settlement, which was approved by the Commission on November 25, 2020. Under the settlement, Defendants agreed to pay \$1,475,000 over seven years.
- *FERC v. Powhatan Energy Fund LLC, et al.*, No. 3:15-cv-00452 (E.D. Va.). On February 11, 2020, the United States Court of Appeals for the Fourth Circuit affirmed the United States District Court for the Eastern District of

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<sup>21</sup> *Id.* at 78, 82–83.

<sup>22</sup> *Id.* at 7.

<sup>23</sup> *Id.* at 67.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 10–14.

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Virginia's conclusion that the Commission had met the statute of limitations when it filed an amended complaint. On April 17, 2020, the district court set a trial date of August 22, 2022. Moreover, on October 29, 2021, the Commission approved a settlement with Defendants Dr. Houlian Chen, HEEP Fund, Inc., and CU Fund, Inc., wherein Defendants agreed to pay \$600,000 and Dr. Chen agreed to a two-year trading ban in FERC jurisdictional markets. Dr. Chen also agreed to participate as a witness in the Commission's lawsuit against Powhatan.<sup>26</sup>

- *FERC v. Coaltrain Energy L.P., et al.*, No. 2:16-cv-00732 (S.D. Ohio). On November 20, 2020, the United States District Court for the Southern District of Ohio denied Defendants' motions to dismiss the Commission's claims. The district court also granted the Commission's motion for summary judgment on Defendants' affirmative defenses and on its claim that Coaltrain violated Section 35.41(b) of the Commission's regulations. Currently pending before the court is Defendants' motion seeking a ruling that under the FPA the Commission has no ability to (a) require disgorgement of unjust profits, (b) impose joint and several liability for disgorgement, or (c) impose joint and several liability for penalties.
- *FERC v. Vitol Inc. and Federico Corteggiano*, No. 2:20-cv-00040 (E.D. Cal.). Defendants' motions to dismiss remain pending with the United States District Court for the Eastern District of California after the court held a status conference and hearings on the motions on August 27, 2020.

### **United States Court of Appeals Matters**<sup>27</sup>

- *BP America Inc., et al.*, Docket No. IN13-15. After the Commission denied BP's motion for rehearing or to dismiss, BP paid the civil penalty and disgorgement under protest and filed a petition for review with the United States Court of Appeals for the Fifth Circuit on January 19, 2021. BP filed its opening brief, and the Commission responded. Oral argument is tentatively scheduled for the week of January 3, 2022.

### **Administrative Matters**<sup>28</sup>

- *GreenHat Energy, LLC, et al.*, Docket No. IN18-9-000. On May 20, 2021, the Commission issued an order to show cause ("OSC") directing GreenHat Energy, LLC and certain individuals to explain why they should not be required to disgorge \$13.1 million in wrongful gains from an alleged scheme to manipulate PJM's Financial Transmission Rights market, as well as directing GreenHat to explain why it should not pay a civil penalty of \$179

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<sup>26</sup> See Paul J. Pantano, Jr., Thomas R. Millar & Alex Calabro, *Powhatan Update: Disgorgement but No Penalty in Chen Defendants Settlement, Leaving Powhatan as Sole Remaining Defendant* (Nov. 3, 2021) (available [here](#)).

<sup>27</sup> Report at 15.

<sup>28</sup> *Id.* at 16–18.

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million based on the same allegations. The Commission also directed John Bartholomew and Kevin Ziegenhorn to explain why they should not pay a civil penalty of \$25 million each based on the same allegations. On November 5, 2021, the Commission issued an Order Assessing Civil Penalties (“Penalty Assessment”).<sup>29</sup> The Commission found that GreenHat and the named individuals violated Section 222 of the FPA and Section 1c.2 of the Commission’s regulations. The Report noted that the docket remains active “because of a pending motion and the Commission continues to maintain the wall between decisional and non-decisional staff.”<sup>30</sup>

- *PacifiCorp*, Docket No. IN21-6-000. On April 15, 2021, the Commission issued an OSC directing PacifiCorp to show cause why it should not assess a civil penalty of \$42 million against PacificCorp for violating FPA Sections 215(b)(1) and 39.2(b) of the Commission’s regulations regarding an alleged failure to comply with a Reliability Standard. PacificCorp filed its answer on July 16, 2021, and Staff responded on September 14, 2021.
- *Rover Pipeline, LLC and Energy Transfer Partners, L.P.*, Docket No. IN19-4-000. On March 18, 2021, the Commission issued an OSC directing Rover Pipeline, LLC and Energy Transfer Partners, L.P. to show cause why they should not be found to have violated 18 C.F.R. § 157.5 for misleading the Commission in their Application for a Certificate of Public Convenience and Necessity and attendant filings. The OSC specified \$20,160,000 in civil penalties. Rover and Energy Transfer Partners filed their answer on June 21, 2021, and Staff responded on July 21, 2021. Rover and Energy Transfer Partners filed a proposed supplemental answer on September 15, 2021.
- *Boyce Hydro Power, LLC, et al.*, Docket Nos. P-10809-050. On December 9, 2020, the Commission issued an OSC to Boyce Hydro Power, LLC directing it to show cause why the Commission should not assess a civil penalty of \$15 million for alleged violations of numerous FERC dam safety orders and license provisions. Later, the Commission issued an order assessing a \$15 million penalty against Boyce Hydro, citing the seriousness of the violation and Boyce Hydro’s lack of effort to remedy the alleged violation.

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<sup>29</sup> See Norman C. Bay, Paul J. Pantano, Jr., Thomas R. Millar & Serge B. Agbre, *FERC Imposes Substantial Penalties and Disgorgement in GreenHat Case Over Forceful Dissent of Commissioner Danly* (Nov. 18, 2021) (available [here](#)).

<sup>30</sup> Report at 17, n.14. The pending motion is the Expedited Motion to End Enforcement Action Against The Estate of Andrew Kittell, to Ban Steven Tabackman and Thomas Olson from Future Involvement, and for an Investigation by Other Offices Within the Commission. The Estate of Andrew Kittell filed the motion in response to a notice issued by Staff in the docket disclosing that an OE litigation attorney and a member of the Commission’s Decisional Staff had exchanged emails regarding a matter related to the proceeding. In its Penalty Assessment, the Commission noted that it had referred the matter disclosed in Staff’s notice to the Commission’s designated agent in the Department of Energy’s Office of the Inspector General (“OIG”). As such, the Commission stated in the Penalty Assessment that it would wait to address the merits of the still-pending motion until after the OIG concludes its consideration of the matter. See *GreenHat Energy, LLC, John Bartholomew, Kevin Ziegenhorn, and Luan Troxel, in her capacity as Executor of the Estate of Andrew Kittell*, Order Assessing Civil Penalties, 177 FERC ¶ 61,073 at P 27 (Nov. 5, 2021).

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### Winter Storm Uri Jolts Further Staff Inquiry

The cold snap associated with Winter Storm Uri in Texas and other states from February 8 through 20, 2021, resulted in generating units within the Balancing Authority and Reliability Coordinator footprints of the Electric Reliability Council of Texas, Southwest Power Pool, Inc. (“SPP”) and the Midcontinent Independent System Operator, Inc. to experience more than 4,000 outages, derates, or failures to start. In response to these widespread generation failures, the Commission initiated an inquiry into the outages and capacity issues, which was conducted jointly with the North American Electric Reliability Corporation (“NERC”) and all six of the relevant regional reliability entities. As part of the joint inquiry, Staff reviewed data and conducted interviews to determine the causes of generation loss. The inquiry’s final report was issued on November 16, 2021, and found that freezing issues caused by a failure to winterize generating units caused 44% of the generation losses.<sup>31</sup>

The final report made nine key recommendations that are summarized at a high level below:

- The NERC Reliability Standards should be revised as set forth in the final report;
- Generator owners should have the opportunity to be compensated for the costs of retrofitting their units to operate at specified temperatures;
- Prior to implementation of the revisions to the Reliability Standards approved in Order Approving Cold Weather Reliability Standards, 176 FERC ¶ 61,119 (2021), FERC, NERC, and the regional entities should host a technical conference to discuss winter-readiness of generating units;
- Generator owners should have winter preparedness plans that address specific concerns, like timelines for performing inspection and maintenance of freeze-protection measures;
- Congress, state legislatures, and regulatory agencies with jurisdiction over natural gas infrastructure should require those natural gas facilities to implement and maintain cold weather preparedness plans;
- Natural gas infrastructure facilities should implement measures to protect against freezing and other cold weather-related limitations;
- FERC should consider establishing a forum in which relevant legislative and regulatory representatives, as well as natural gas infrastructure entities, identify concrete actions to improve the reliability of the natural gas infrastructure system;

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<sup>31</sup> Report at 18–19.

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- To better provide balancing authorities with accurate information, generator owners and operators should identify full reliability risks related to obtaining natural gas and pipeline transportation; and
- Improvements should be made to publicly reported winter season anticipated reserve margin calculations and internal winter peak load forecasts.<sup>32</sup>

Notably, the Report stated that as part of its surveillance activities, DAS has been conducting a comprehensive review of the wholesale natural gas and electricity market activity during Winter Storm Uri to determine whether any market participants engaged in market manipulation or other violations.<sup>33</sup> According to the Report, there was a significant increase in the total number of natural gas screen trips and surveillance alerts during the cold snap. As a result, DAS conducted 10 inquiries into natural gas market participant behavior. DAS ultimately closed seven of these inquiries without further action, referred two matters for investigation by DOI, and continues to analyze one matter.<sup>34</sup> Additionally, DAS conducted four inquiries into electric market participant behavior. Ultimately, DAS closed three of the electricity market inquiries and continues to review the activity of one market participant in SPP.

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<sup>32</sup> FERC-NERC-REGIONAL ENTITY STAFF REPORT, THE FEBRUARY 2021 COLD WEATHER OUTAGES IN TEXAS AND THE SOUTH CENTRAL UNITED STATES (Nov. 16, 2021) ([available here](#)).

<sup>33</sup> Report at 7.

<sup>34</sup> *Id.* at 80.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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**Norman C. Bay**

202 303 1155

nbay@willkie.com

**Paul J. Pantano, Jr.**

202 303 1211

ppantano@willkie.com

**Thomas R. Millar**

202 303 1144

tmillar@willkie.com

**Serge B. Agbre**

202 303 1173

sagbre@willkie.com

**Alexandra Calabro**

202 303 1456

acalabro@willkie.com

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