

CLIENT ALERT

NYGT Settlement Shows that Getting Paid Can Cost You

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On February 8, 2021, the Federal Energy Regulatory Commission (“FERC” or the “Commission”) approved a Stipulation and Consent Agreement (“Settlement”) between the Office of Enforcement (“OE”) and Alliance NYGT LLC (“NYGT”).¹ The Settlement resolves OE’s investigation into whether NYGT violated Commission regulations and several provisions of the New York Independent System Operator (“NYISO”) Market Administration and Control Services Tariff (“MST”) when it submitted offers and information to NYISO that did not accurately reflect the fuel type used to run its generators, and failed to respond completely, accurately, and timely to NYISO’s subsequent inquiries. NYGT agreed to disgorge \$369,264.19 plus \$94,710.09 in interest, pay a civil penalty of \$420,000, and be subject to compliance monitoring. NYGT stipulated to the facts set forth in Section II of the Settlement and, notably, also admitted the violations of 18 C.F.R. §§ 35.41(a)-(b) and the provisions of the MST set forth in Section III.²

Background

The Settlement involved two of NYGT’s generators that were capable of operating on natural gas or kerosene. NYGT operated the generators exclusively on kerosene from approximately January 2009 to January 2012.³ In 2012, NYGT

¹ *Alliance NYGT LLC*, 174 FERC 61,086 (2021) (“Order”).

² Settlement at PP 1-2.

³ *Id.* at P 6.

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completed upgrades to the gas systems and began to transition the generators to gas usage.⁴ After January 2013, the generators operated primarily on gas to fulfill their awards.

Despite NYGT contacting NYISO to request information related to updating the generators' reference prices, the units' reference prices remained indexed to kerosene, which was more expensive than gas.⁵ Moreover, NYGT's responses to NYISO's subsequent inquiries about the generators' fuel types were "untimely, inaccurate, or incomplete."⁶ NYGT did not update its reference prices to reflect the generators' gas capabilities until March 2016, more than three years after switching fuel types.⁷ NYGT's failure to notify NYISO that its generators were operating on gas and correct the reference price resulted in NYGT receiving inflated make-whole payments based upon the more expensive kerosene reference price.⁸

Violations and Penalties

OE determined, and NYGT admitted, that NYGT violated 18 C.F.R. §§ 35.41(a) and (b), the Commission's candor rule, and certain provisions of NYISO's MST.⁹ Sections 35.41(a) and (b) required NYGT to:

- (a) "operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable market;" and
- (b) "provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the . . . Commission-approved independent system operators . . . unless Seller exercises due diligence to prevent such occurrences."¹⁰

NYISO's MST required NYGT to "monitor Generator reference levels and [] endeavor to timely . . . contact the ISO to request an adjustment to a Generator's reference level(s) when the Generator's fuel type or fuel price change." It also required NYGT to "timely report significant changes to the cost components used to develop their Generator's reference levels to the ISO in order to permit the revised costs to be timely reflected in the Generator reference levels."¹¹

⁴ *Id.* at P 7.

⁵ *Id.* at P 7.

⁶ *Id.* at P 8.

⁷ *Id.* at P 9.

⁸ *Id.* at P 14.

⁹ *Id.* at P 10 (quoting 18 C.F.R. §§ 35.41(a)-(b) (2020)).

¹⁰ *Id.* at P 11.

¹¹ *Id.* at P 13.

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For these violations, NYGT agreed to penalties, disgorgement and interest approaching \$1 million and to be subject to enhanced compliance requirements.¹² The Settlement requires NYGT to:

- conduct at least one training program relating to compliance with the Commission's regulations and the NYISO MST; and
- submit annual compliance monitoring reports to OE for two years.¹³

Each compliance monitoring report must:

- identify any known violations of Commission regulations or the MST that occurred during the applicable period, including a description of the nature of the violation and what steps were taken to rectify the situation; and
- describe the required Commission-related and MST-related compliance training that NYGT administered during the reporting period, including the dates such training occurred, the topics covered, and the procedures used to confirm which personnel attended.¹⁴

Each report must also include an affidavit executed by an NYGT representative stating that the report is true and accurate to the best of his or her knowledge.¹⁵

The Commission determined that the Settlement was fair and equitable in light of the nature and seriousness of the conduct.¹⁶ In doing so, the Commission observed that OE had appropriately considered the factors in the Revised Policy Statement on Penalty Guidelines, including the fact that NYGT admitted the violations. The Commission ordered that the disgorged funds be paid to NYISO for allocation in a manner consistent with OE's approval.¹⁷

¹² *Id.* at PP 16-20.

¹³ *Id.* at PP 19-20, 23. OE may, in its sole discretion, require NYGT to submit an additional third annual report. OE may also request from NYGT documentation supporting the contents of the reports.

¹⁴ *Id.* at P 21.

¹⁵ *Id.* at P 22.

¹⁶ Order at PP 19-20.

¹⁷ *Id.* at P 24.

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Conclusion

From 2015 to 2020, there were 11 OE enforcement actions that involved an alleged violation of 18 C.F.R. § 35.41, averaging about two actions a year. Since the start of 2021, the Commission has issued three settlements involving section 35.41. If this pace keeps up, it could indicate the beginning of an enforcement trend at FERC. Notably, section 35.41 does not require a showing of scienter, unlike market manipulation, making the burden of proof easier for FERC to meet. This underscores how it is essential always to communicate accurately with ISOs and RTOs. Although not all communications pose the same level of risk, the NYGT Settlement is a reminder of the importance of accurate communications with ISOs and RTOs when a company submits information on which an ISO or RTO will base energy or capacity market payments to that company. These are the sorts of communications that can lead to greater scrutiny and liability because overpayments cause market harm and trigger the need for disgorgement. Indeed, the Commission regularly imposes significant penalties under the anti-manipulation rule for schemes to extract payments from ISOs and RTOs that involve false communications. In hindsight, even an honest mistake might appear to OE to be part of such a manipulative scheme. Convincing OE otherwise can be difficult and costly. The best approach is for companies to implement the compliance measures necessary to ensure accurate communications with ISOs and RTOs, especially when the communications result in payments received by the company.

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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