

CLIENT ALERT

Truth or Consequences: FERC Pursues Duty of Candor Violations

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On June 22, 2023, the Federal Energy Regulatory Commission (“FERC” or the “Commission”) approved a Stipulation and Consent Agreement (“Consent Agreement”) between the Office of Enforcement (“OE”) and Entergy Arkansas, LLC (“EAL”).¹ The Consent Agreement resolves OE’s investigation into whether EAL violated Section 40.2.5.e of the Midcontinent Independent System Operator (“MISO”) Energy and Operating Reserve Markets Tariff (“Tariff”) and 18 C.F.R. §§ 35.41(a) and (b) by submitting erroneous offers for its Hot Springs generation facility (“Hot Springs”). EAL agreed to pay a civil penalty of \$52,000 and to be subject to compliance monitoring for at least two years. EAL stipulated to the facts set forth in Section II of the Consent Agreement, but neither admitted nor denied the alleged violations set forth in Section III.

Background

EAL’s Hot Springs facility is a combined cycle gas turbine. Hot Springs has supplemental duct-firing capability that increases the facility’s output from between approximately 465 MW and 495 MW to a maximum of between approximately 565 MW and 605 MW.² EAL operates Hot Springs with the assistance of its affiliate, Entergy Services, LLC, which provides services

¹ *Entergy Arkansas, LLC*, 183 FERC ¶ 61,207 (2023) (“Order”).

² Consent Agreement at P 4.

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related to Hot Springs' operation and participation as a generation resource in MISO.³ Personnel operating the Hot Springs facility relied on internal guidelines for the operation of the facility while in duct-firing mode (the "DFR Guidelines").⁴

On four days in 2020 (April 21, July 14, and September 17 and 18) (the "Relevant Period"), dispatchers were relying on the DFR Guidelines when operating the Hot Springs facility into or out of duct-firing range. During this Relevant Period, Hot Springs' real-time offers into MISO indicated that the facility was in a "control mode" that would respond to MISO's dispatch instructions.⁵ However, "Hot Springs did not follow MISO's dispatch instructions in a timely manner."⁶ Dispatchers did not adjust the facility's real-time offers during the Relevant Period to submit accurate offers and disregarded MISO's dispatch instructions or "at times raised Hot Springs' Economic Minimums ("EcoMin") or lowered Economic Maximums ("EcoMax") in order to 'block' or 'pin' the unit (i.e., to restrict MISO's ability to dispatch the unit)."⁷

Notably, the Consent Agreement stated that EAL did not financially benefit from blocking or pinning the Hot Springs facility through the real-time offers during the Relevant Period.⁸

Alleged Violations and Remedies

OE concluded that EAL violated Section 40.2.5.e of the MISO Tariff by submitting EcoMin and EcoMax values that restricted MISO's ability to dispatch Hot Springs, and by maintaining a control mode that indicated the facility was available for dispatch when it was not.⁹ MISO Tariff Section 40.2.5.e states that "[t]he values in Offers representing the non-price information [] shall reflect the actual known physical capabilities and characteristics of the Generation Resources"¹⁰ Further, OE found that EAL violated Section 35.41(a) of the Commission's regulations, which states that Sellers in a Commission-approved organized market must "operate and schedule generating facilities . . . and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable market."¹¹

In addition, OE concluded that EAL violated the Commission's Duty of Candor rule, 18 C.F.R. § 35.41(b), which states:

³ *Id.* at P 5.

⁴ *Id.*

⁵ *Id.* at P 7. There are four control modes, two of which require resources to respond to MISO's dispatch instructions. Hot Springs' dispatchers set the control mode. *Id.* at 6.

⁶ *Id.*

⁷ *Id.* at P 8. EcoMin and EcoMax designate the minimum and maximum energy available in MW from a resource, which affects the commitment and dispatch of the unit in the Day-Ahead, Real-Time, and Operating Reserves Markets.

⁸ *Id.* at P 9.

⁹ *Id.* at PP 10–11.

¹⁰ *Id.* at P 11.

¹¹ *Id.* at P 12.

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A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.¹²

OE determined that EAL's submission of inaccurate offers to MISO during the Relevant Period, which represented that Hot Springs would respond to MISO dispatch instructions when it would not, violated Section 35.41(b).¹³

As part of the Consent Agreement EAL agreed to pay a \$52,000 civil penalty and submit compliance monitoring reports for two years, which OE may extend for one additional year at its sole discretion.¹⁴ The compliance monitoring reports must generally (1) identify known violations of the MISO Tariff or Commission regulations, (2) describe all compliance measures EAL instituted or modified related to compliance with the MISO Tariff and Commission regulations, and (3) describe all MISO and Commission-related compliance training.¹⁵

Takeaways

There are three key takeaways from this settlement.

First, the settlement reflects a trend in which OE has alleged a violation of the Duty of Candor rule for conduct that was not tied to fraud or market manipulation. Historically, enforcement actions alleging violations of Section 35.41(b) have been associated with manipulation or the intentional submission of false information. However, OE has increasingly brought enforcement actions alleging violations of Section 35.41(b) for market participants' inadvertent, rather than intentional, submission of false information. In fact, in this case, not only is there no indication that EAL intentionally or manipulatively submitted false offers to MISO, but the Consent Agreement also acknowledged that EAL did not financially benefit from the activity alleged to have violated Section 35.41(b).¹⁶

A quantitative analysis of enforcement actions in the last 10 years demonstrates this trend. In the last five years (2018–2023 to date), there were 11 enforcement actions alleging violations of Section 35.41(b) that were not also associated with manipulative activity. In contrast, in the previous five years (2012–2017), there were only three enforcement actions alleging violations of Section 35.41(b) that were not also associated with alleged manipulative activity.

¹² 18 C.F.R. § 35.41(b).

¹³ Consent Agreement at P 12.

¹⁴ *Id.* at PP 15–16.

¹⁵ *Id.* at P 17.

¹⁶ *Id.* at P 9.

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Second, Section 35.41(b) does not require scienter (an intent to defraud), though due diligence is a defense. In the absence of due diligence, even an inadvertent submission of inaccurate information or the omission of material information by a Seller is technically a violation. Market participants should be increasingly alert to OE's willingness to pursue Section 35.41(b) violations that are not tied to manipulative or intentionally misleading activity. Accuracy in representations to the Commission and to the RTOs/ISOs is critical, particularly with respect to offers being made into the market. (Section 35.41 only applies to entities with market-based rate authority.)

Third, here, EAL apparently did not make a self-report. Had it done so, it would have been in a better position to argue for a declination. OE has often exercised its discretion to decline matters where there was no wrongful intent, no market harm or financial gain, remediation to prevent future violations, and a prompt self-report. If OE continues to expand the scope of its Section 35.41(b) investigations, the decision on whether or not to self-report a violation may become increasingly important, so as to potentially avoid the cost, burden, and distraction of dealing with a FERC investigation, which can take years to conclude.

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