FERC's Updated Settlement Policy Comes With Risks For Cos.

By **Norman Bay, Paul Pantano and Vivian Chum** (March 13, 2024)

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The Federal Energy Regulatory Commission recently granted more discretion to the Office of Enforcement in a new policy statement on enforcement settlements, which became effective Feb. 26.[1]

The policy statement allows the Office of Enforcement to negotiate settlements without securing prior settlement authority from the commission. During February's open meeting, Chairman Willie L. Phillips announced the issuance of the policy statement:

> The reforms … enhance both enforcement staff's and investigative subjects' ability to negotiate settlements and speed up the time it takes to reach resolution by settlement. Under today's policy statement, the Office of Enforcement will no longer need to seek settlement authority from the Commission prior to engaging in settlement negotiations. Rather, the director of OE will have the discretion to authorize staff to begin such negotiations.[2]

The policy statement applies to entities being investigated pursuant to Title 18 of the Code of Federal Regulations, Part 1b, or subjects, including investigations that relate to violations of the mandatory reliability standards.[3]

The policy statement is intended to promote efficiency, a streamlined enforcement process and more effective use of government resources.[4]

In cases with straightforward facts, clear violations and a subject that prefers to settle, the revised process may resolve investigations more quickly. This, in turn, could reduce litigation costs and promote finality.[5] In other cases, however, the change may increase a subject's potential regulatory risk.

Background

Seeking settlement authority from the commission was never a check-the-box exercise for the Office of Enforcement.

In 2008, the FERC issued its revised policy statement on enforcement, which outlined the commission's policies and procedures on investigations, and established the commission's preference for resolving enforcement investigations through settlements, rather than through litigation.[6]

The 2008 policy statement required the Office of Enforcement to request settlement authority from the commission prior to any formal settlement negotiations with the subject of an investigation.

As part of the request, the Office of Enforcement would provide the commission with its

findings to date and seek authority to negotiate within a penalty range plus disgorgement, if applicable.[7] The Office of Enforcement would typically include its preliminary findings and the subject's response to the preliminary findings.[8]

Senior staff from other FERC offices would have reviewed the request before it went to the commission.[9] The commission would then decide whether to approve, modify or deny the Office of Enforcement's request for settlement authority, or provide an alternative approach to how to proceed with the investigation.[10]

The commission's review served as a prophylactic against prosecutorial overreach. A subject could safely assume that the commission had reviewed the case and approved staff's legal theory and proposed settlement range.

According to the 2008 policy statement, the requirement to obtain settlement authority ensured that "the Commission, not staff, determines the appropriate range of remedies for purposes of settlement."[11] This meant that the Office of Enforcement's positions, including the appropriate settlement range, aligned with those of the commission.

This could be especially important when the investigation turned on untested legal theories or a novel reading of the penalty guidelines.[12] Ultimately, if the parties reached a settlement, the director of the Office of Enforcement and the subject executed a stipulation and consent agreement,[13] which the office then submitted to the commission for voting.[14]

Takeaways

The new approach described in the policy statement removes a significant check on the Office of Enforcement's prosecutorial discretion.

While the commission must still review and approve a proposed settlement, the new policy defers the commission's involvement until later in the investigative process. The policy statement notes that the Office of Enforcement must submit an offer of settlement to the commission:

> Enforcement staff will submit the Offer of Settlement to the Commission for voting, along with any other information that might aid the Commission's determination as to whether to accept the Offer of Settlement, including for example, details about the specifics of the alleged violation(s), facts developed by the investigation to date, and/or the relevant law. Enforcement staff will also submit the subject's response to any preliminary findings issued by Enforcement staff, when available. The Offer of Settlement will be executed by the subject of the investigation, and will remain non-public unless and until it is approved by the Commission.[15]

This may very well streamline the settlement process and be helpful for entities seeking to settle.

But crucially, the new policy indicates that in all cases — including the most complex and contentious investigations — the commission will no longer weigh in until after the subject has made an offer that enforcement staff considers to be a "viable settlement offer from the subject."[16]

In defining "viable," the policy statement grants the Office of Enforcement increased authority. As the commission explains, "[b]y 'viable' we mean a settlement offer that

Enforcement staff, in its considered discretion, believes is sufficient to recommend to the Commission for approval based on Commission precedent, the facts of the case, and review of the Penalty Guidelines."[17]

Under the new process, subjects run the risk of negotiating against themselves. Under pressure to resolve an investigation, subjects may expend significant amounts of time and resources into settling with the Office of Enforcement, only to be told by the commission to start over.

As an institutional matter, it may be easier for the commission to reject a proposed settlement when the commission has not previously reviewed a matter and approved a settlement range. Moreover, once a subject has made a settlement offer, there may be the perception at the commission that the subject has tacitly acknowledged culpability.

Similarly, where staff has taken a particularly aggressive view, the Office of Enforcement could conceivably extract higher settlements by refusing to deem a settlement offer viable. In other words, the policy statement gives the Office of Enforcement greater latitude to push the envelope in settlement discussions, even if it turns out that office's views do not necessarily reflect those of the commission.

Once presented with a proposed settlement, the commission is unlikely to reject it for being too high, since the commission is likely to view the settlement as the product of an arm's-length negotiation between sophisticated parties.

In an investigation, the balance of power generally tips in favor of the Office of Enforcement and against subjects, which prefer not to have a contentious relationship with their regulator.

The cost and burden of an investigation can be significant, as the subject must respond fully, accurately, and promptly to the Office of Enforcement's myriad requests or risk being penalized for noncooperation, misrepresentations, omissions or even obstruction.

By deferring the commission's involvement in the matter, the policy statement shifts this balance of power even more in the Office of Enforcement's favor. The Office of Enforcement also controls the narrative further into the enforcement process.

Because of the confidential, enforcement-related nature of office's investigative work, the Office of Enforcement can be siloed from the rest of the agency. Even with the existing requirement to seek settlement authority from the commission, it has not been uncommon for subjects to be investigated for years before the case is presented to the commission.

The settlement authority requirement has, until now, set important limits on how long an investigation can proceed without input from the commission. Without the requirement to seek prior commission authorization, a settlement may be largely baked before the commission ever weighs in on the merits of the underlying allegations, the appropriateness of the remedies, or the settlement range.

In addition to being cognizant of these potential risks, there are a number of measures that the entities may consider taking to protect themselves in light of the recent policy changes.

First, entities should periodically assess their compliance program and mitigate any weaknesses. In the regulatory world, as in life, an ounce of prevention can be worth a pound of cure. A strong compliance program can prevent violations from occurring in the

first place, which minimizes the risk of an Office of Enforcement investigation.

And even if there is an investigation, a culture of compliance may limit the extent of the violation, help persuade the Office of Enforcment to decline the matter, or lead to a smaller penalty.

Second, even with the policy statement in place, subjects retain the option of sending written communications to the commission, though the decision to exercise this option will be a nuanced one. The 2008 policy statement notes:

> The Commission's regulations provide that "any person may, at any time during the course of an investigation, submit documents, statements of facts or memoranda of law for the purpose of explaining said person's position or furnishing evidence which said person considers relevant regarding the matters under investigation." The Commission clarifies that nothing in our regulations prohibits the submission of such written information directly to the Commission. Such a submission may be made at any time during an investigation, up to the point at which our procedures regarding Orders to Show Cause come into play.[18]

Subjects retain the right to communicate with the commission in writing at every stage of an investigation prior to the issuance of an order to show cause and may find this option useful, particularly where the subject and the Office of Enforcement hold sharply divergent views on a case.[19]

The subject may find it necessary to urge the commission to provide its oversight and guidance prior to engaging in settlement discussions. However, as the Office of Enforcement no longer needs to obtain settlement authority before proceeding, it is unclear whether a subject's proactive efforts to obtain the commission's involvement will succeed or will only serve to irritate staff.

Third, the new policy does not change the Office of Enforcement's practice of sharing preliminary findings with subjects. While subjects can make offers of settlement before the Office of Enforcement shares its preliminary findings, subjects may wish to wait until after they have received the office's findings.

Preliminary findings may offer subjects important insights into how staff views the record and the likely settlement range. This can provide valuable insights for subjects seeking to make viable offers of settlement.

Fourth, subjects would do well to familiarize themselves with the penalty guidelines.[20] Understanding the penalty guidelines and whether certain adders or mitigators apply will be critical in discussions with staff on whether a settlement offer is viable. If a subject can convince staff that a settlement offer is reasonable, staff's recommendation of the offer will likely go a long way toward gaining commission acceptance.

Fifth, the policy statement "grant[s] the Director of Enforcement the authority to authorize Enforcement staff to commence settlement negotiations and/or respond with counteroffers to settlement negotiations initiated by a subject."[21]

This new authority does not supplant the director of enforcement's "existing discretion to engage with the Commission for feedback prior to authorizing staff to engage in such settlement negotiations on any particular investigation."[22] The director of enforcement must ensure that settlements align with the law and policy, so the link between the director

and the commission is more important than ever.

Subjects may wish to ask staff whether the Office of Enforcement has received any feedback from the commission on a proposed settlement amount.

The policy statement also raises a number of unanswered questions.

First, if the commission rejects a settlement offer, does the offer expire? This seems logical under basic contract law and as a matter of fundamental fairness, but the policy statement says only that the offer "will remain non-public unless and until it is approved by the Commission."[23]

Second, because the subject must submit a formal offer of settlement, if the commission rejects the offer, should the commission disclose the vote and the basis for the rejection in a nonpublic order?

Third, to the extent that the offer of settlement is intended to replace the stipulation and consent agreement that is now used, the commission may wish to make that clear. Finally, will any entity seek rehearing or clarification of the policy statement?

There is precedent for such a request. For example, the commission revised the penalty guidelines after requests for rehearing.[24] Requests for rehearing or clarification of the policy statement are due by March 18.

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[1] Policy Statement on Process for Resolving Investigations By Settlement, 89 FR 13975 (Feb. 26, 2024) (cross-referenced at 186 FERC ¶ 61,109 (2024)) ("Policy Statement").

[2] FERC, February 2024 Open Meeting (Feb. 15, 2024), https://www.ferc.gov/news-events/events/february-15-2024-open-meeting-02152024.

[3] "The reforms … do not change the process by which parties to a docketed proceeding pending before the Commission or set for hearing submit settlements to the Commission for consideration, nor do they affect the process by which the Commission reviews proposed penalties (including those agreed to by settlement) imposed by NERC and/or the Regional Entities for violations of the Reliability Standards." Policy Statement, 186 FERC ¶ 61,109 at P 24.

[4] Id. PP 15-17.

[5] Id.

[6] Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156, at P 33 (2008) ("2008 Policy Statement").

[7] Id. P 34.

[8] Allison Murphy, Todd Hettenback, & Thomas Olson, The FERC Enforcement Process, 35 ENERGY L.J. 283, 293 n.58 (2014) ("In some cases, investigative subjects express an interest in resolving a matter through a negotiated settlement and prefer to expedite the process through oral preliminary findings (with either an oral or written response). In those instances, staff frequently meet at length with the subject to explain its findings, often using a power point presentation.").

[9] Murphy, supra note 8, at 294 n.63 ("Before Enforcement staff's request for settlement authority goes to the Commission, the request is also reviewed by senior staff from other FERC offices, including the Office of General Counsel, the Office of Energy Market Regulation, and the Office of Energy Policy and Innovation. In matters involving potential reliability violations, Enforcement staff also works closely with FERC's Office of Electric Reliability and the North American Electric Reliability Corporation (NERC). For matters involving gas pipeline certificates or hydropower, Enforcement staff consults the Office of Energy Projects.").

[10] Policy Statement, 186 FERC ¶ 61,109, at P 8.

[11] Id. P 7 (quoting 2008 Policy Statement, 123 FERC ¶ 61,156 at P 34).

[12] See Revised Policy Statement on Penalty Guidelines, 132 FERC ¶ 61,216 (2010) ("Penalty Guidelines").

[13] Policy Statement, 186 FERC ¶ 61,109, at P 21 n.33.

[14] Id.

[15] Id.

[16] Id. P 2.

[17] Id. P 21 n.32.

[18] 2008 Policy Statement, 123 FERC ¶ 61,156 at P 27.

[19] See id.

[20] See Penalty Guidelines, 132 FERC ¶ 61,216.

[21] Policy Statement, 186 FERC ¶ 61,109 at P 20.

[22] Id.

[23] Id. P 21.

[24] Penalty Guidelines, 132 FERC ¶ 61,216, at P 1.