CLIENT ALERT

Hidden Insights in the FERC 2019 Report of Enforcement

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On November 21, 2019, the staff of the Federal Energy Regulatory Commission's Office of Enforcement ("OE" or "Staff") issued its 2019 Report on Enforcement (the "Report") for the Commission's fiscal year ending September 30, 2019.[1] The Commission requires OE to prepare the Report in order to inform the public of the activities of the Office of Enforcement and its four Divisions: the Division of Investigations ("DOI"); the Division of Analytics and Surveillance ("DAS"); the Division of Audits and Accounting ("DAA"); and the now-realigned Division of Energy Market Oversight ("DEMO").[2]

OE announced that its priorities remained unchanged in 2019. It continued to focus on:

- fraud and market manipulation;
- serious violations of the Reliability Standards;
- anticompetitive conduct; and
- conduct that threatens the transparency of regulated markets.

We summarize below the key insights that can be gleaned from the Report.

[1] *Available* here. All references to yearly totals in this document refer to FERC's fiscal year ending September 30, 2019.
[2] Enforcement of Statutes, Regulations and Orders, 123 FERC 61,156 at P 12 (2008).

Division of Investigations Activity Has Slowed

As of the end of 2019, Staff was seeking to recover a total of approximately $76 million in civil penalties (down from $317 million in the 2018 Report) and $9 million in unjust profits (down from $20 million in the 2018 Report).[3] Staff requested that the Commission issue only one new Order to Show Cause ("OSC") in 2019.[4]

In the DOI section of the Report, Staff has in the past focused on OSC proceedings and litigations. This year, with only one new OSC proceeding, Staff took the unusual step of reporting its participation in the joint preparation of a cold weather report. DOI dedicated as much space to reporting its participation in preparing a joint report with NERC on extreme weather as it did to reporting its active cases.[5] Six individuals from OE participated alongside 28 other cold weather team members from different FERC offices, NERC and the regional entities.[6] OE's representatives included a paralegal, an economist, an energy industry analyst and three attorney-advisors.[7]

Fewer New Investigations and Fewer Settlements

DOI reduced the number of new investigations it opened in 2019 by half relative to 2018 figures and more than half when compared to the 2017 numbers.[8] The number of new investigations in 2019 is almost half the six-year average from 2013-2018.

Report Year	Number of New Investigations	Number of Settlements
2013	24	11+[9]
2014	17	8
2015	19	9
2016	17	6
2017	27	5
2018	24	6
2019	12	2

3 Report at 11.
4 *Id.*
5 *Id.* at 17.
6 *See* 2019 FERC and NERC Staff Report: The South Central United States Cold Weather Bulk Electric System Event of January 17, 2018 at page 103 of 153 (listing the January 17, 2018 Cold Weather Inquiry Joint Team Members), *available* here.
7 *Available* here.
8 Report at 32. As in 2017 and 2018, however, the majority of the investigations arose from referrals by ISO/RTO market monitors and DAS.
9 The 2013 Report did not specify the number of settlements, but listed 11 example matters that settled in 2013.

New Guidance on FERC Internal Processes

Staff added a footnote to its overview of the DOI section, explaining its internal processes in greater detail. Staff explained that there are instances when DOI finds that an investigation should terminate, but broader market issues warrant attention. Staff gave as examples the possibility that the investigation brought to light "vague or ambiguous market rules that appear to undermine, distort, or otherwise inject uncertainty into market performance and participant obligations."[10] Staff indicated that it has a process to escalate such issues within OE and across the Commission's other Offices to explain "how the issues may be resulting in poor or inefficient market outcomes."[11]

Still No Decision in BP

Regarding the *BP America Inc.* administrative litigation, Staff reported that after what has been almost two years, BP's motion for rehearing or to dismiss remains pending.[12] BP argued that the Commission's claim was time-barred based on a decision in *FERC v. Barclays* holding that a Commission order to show cause does not initiate a "proceeding," as required by the relevant statute of limitations, 28 U.S.C. § 2462. 2017 WL 4340258 (E.D. Cal. Sept. 29, 2017). BP also argued that it cannot be ordered to repay alleged unjust profits because the same statute of limitations applies to actions for disgorgement under *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). There is no indication when the Commission might rule on the motion.

Investigations that Find a Violation But Are Closed without Action Are Up Significantly

In our Hidden Insights publication last year, we observed that Staff very rarely closes an investigation where it finds a violation. That changed in 2019. Staff reported that approximately 25% of all the investigations closed in 2019 were in matters where Staff found that a violation had been committed, but no sanctions were imposed.[13] That category of investigation closure accounted for a very small fraction of the investigations closed in prior years.[14]

Staff Received Self-Reports for Potential Market Manipulation, a First since at Least 2015

Staff received 137 self-reports in 2018 and 149 in 2019. The vast majority of self-reports continue to be for tariff violations. However, in 2019 Staff reported receipt of a greater variety of types of self-reports, including self-reports for

10 *Id.* at 9, n.8.
11 *Id.* at 9, n.8.
12 *Id.* at 17.
13 *Id.* at 33.
14 *Id.* at 33-36.

market manipulation violations. The Report indicates that Staff received no self-reports for market manipulation from 2015 to 2018. Staff did not report pre-2015 data on this topic.

Manipulation Self-Report Closed with No Action Illustrates Staff's Expectations

Staff described an instance where a company self-reported a potential anti-manipulation rule violation and Staff closed the matter without action.[15] Summarizing the company's response serves to illustrate Staff's high expectations of market participants. A curtailment service provider operating in an RTO/ISO self-reported that some of its sales managers and employees made false statements to its demand resource customers in connection with the customers' demand response contracts. It is not clear from Staff's summary what was false about the statements or what the statements were about, but the company's response suggests that the false statements were significant. The company conducted an internal investigation, issued sanctions to its sales staff (including terminating the sales managers and several senior sales staff), notified its customers, paid the affected customers refunds and updated its training. Staff indicated that it closed the self-report without action because the company took timely and effective remedial measures to address the potential violation and to prevent a reoccurrence.

Referrals from the Division of Analytics and Surveillance Held Steady

Created by the Commission in 2012, DAS develops surveillance tools, conducts surveillance, and analyzes transactional and market data to detect potential manipulation, anticompetitive behavior, and other anomalous activities in the energy markets. It focuses on three areas: (1) natural gas surveillance; (2) electric surveillance; and (3) analytics for reviewing market participant behavior. DAS employs "screens" or algorithms in the natural gas and electric markets to identify conduct appropriate for referral to DOI. In 2019, DAS narrowed 7,629 natural gas screen trips to 20 in-depth inquiries to one referral to DOI. DAS referred one natural gas matter to DOI based on this process in 2018. On the electric side, DAS narrowed 369,230 screen trips to 23 in-depth inquiries to five referrals. DAS referred four electric matters to DOI in 2018. In presenting the Report to the Commission at the November 21, 2019 open meeting, Staff explained that each month it runs 83 electric surveillance screens as well as monthly, hourly and intra-hour sub-screens and reports for more than 37,000 hub and pricing nodes within the six ISO/RTOs.

Realignment of DEMO's Functions Increases DAS's Role in Investigations

In a September 2019 realignment, the Commission reassigned key responsibilities of the Division of Energy Market Oversight to the Commission's Office of Energy Policy and Innovation, DAA and DAS. The realignment enhances the role that DAS plays in investigations, both in detecting market anomalies and in providing analytical support to DOI.

[15] *Id.* at 27.

District Court Actions

Staff represented the Commission in three cases, each of which remains pending. The status of each case as reported by Staff is summarized below:

- ***FERC v. Silkman, et al., No. 1:13-cv-13054 (D. Me.).*** Trial is scheduled for April 27, 2020 in Bangor, Maine.

- ***FERC v. Powhatan Energy Fund LLC, et al., No. 3:15-cv-00452 (E.D. Va.).*** On October 4, 2018, Respondents petitioned the United States Court of Appeals for the Fourth Circuit to review the district court's order denying their motion to dismiss on statute of limitations grounds. The Commission did not oppose the appeal. The Fourth Circuit granted the petition for review on November 5, 2018. Following briefing, the Fourth Circuit has scheduled oral argument for December 11, 2019. The district court action has been stayed pending resolution of the appeal.

- ***FERC v. Coaltrain Energy L.P., et al., No. 2:16-cv-00732 (S.D. Ohio).*** Initial and rebuttal expert reports were exchanged by both sides in September and November 2019. Motions for summary judgment are scheduled to be filed in early 2020. Trial is not yet scheduled.

Administrative Matters

Staff reported on four administrative matters at the Commission:

- ***Vitol Inc. and Federico Corteggiano, Docket No. IN14-4.*** On July 10, 2019, the Commission issued an Order to Show Cause to Vitol Inc. and Federico Corteggiano. Respondents and Staff submitted their papers. On October 25, 2019, the Commission issued an order assessing civil penalties against both respondents. The Report states that if the penalty assessment is not paid within 60 days of the order, the Commission will file a civil action in federal district court.

- ***Footprint Power LLC, Footprint Power Salem Harbor Operations LLC, Docket No. IN18-7.*** At the end of 2018, Staff filed a reply brief with the Commission in which it admitted erring in its original recommendation that the Commission issue an Order to Show Cause and reversed its recommendation. The Commission agreed with Staff's assessment and issued an order terminating the OSC proceeding on February 25, 2019.

- ***Total Gas & Power North America, Inc., et al., Docket No. IN12-17.*** Before the Commission issued an Order to Show Cause, the Total respondents filed a lawsuit in the Western District of Texas, challenging the Commission's authority to assess penalties for violations of the Natural Gas Act. After the case was transferred to the Southern District of Texas, the court dismissed the case. Respondents appealed and lost before the Fifth Circuit. They then appealed to the Supreme Court. The docket at FERC shows no progress in the administrative adjudication of the matter since the Supreme Court's denial of certiorari on June 18, 2018.

- ***BP America Inc., et al., Docket No. IN13-15.*** As we indicated above, the Commission has not ruled on the motions despite the fact that briefing was completed almost two years ago.

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