
FERC Ramps Up Investigations Amid Leadership Change

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On November 16, 2017, the Office of Enforcement (OE) at the Federal Energy Regulatory Commission (FERC or the Commission) released its annual Report on Enforcement. The report contains data on investigative and enforcement activities conducted by OE's four divisions—Investigations, Audits and Accounting, Energy Market Oversight, and Analytics and Surveillance. [View the full report.](#)

OE's top priorities remained unchanged from last year and are expected to continue into FY 2018.¹ OE will focus on (1) fraud and market manipulation, (2) serious violations of Reliability Standards, (3) anticompetitive conduct, and (4) conduct that threatens the transparency of regulated markets.

Highlights

Key statistics highlighted in the report include:

- *New Investigations.* In a marked increase from last year, OE opened 27 new investigations in FY 2017 as compared with 17 in FY 2016. Of the new investigations (some of which cover multiple violations or subjects), 15 involve potential market manipulation, 16 involve potential tariff violations, four involve potential violations of a Commission order, and two involve potential violations of a Commission filing requirement.
- *Closed Investigations.* FERC closed 16 **pending** investigations in FY 2017 either with no action or through Commission-approved settlements (up from 11 last year). In 11 out of 16 investigations, FERC staff found either no violation or insufficient evidence to proceed. Settled cases netted \$52 million in civil penalties and over \$42 million in disgorgement. One large settlement accounted for around \$40 million of civil penalties and disgorgement. These figures are higher than [last year](#), when FERC recovered \$12.25 million in civil penalties and \$5.7 million in disgorgement.
- *Litigation.* In FY 2017, excluding matters that settled, OE litigated five matters in federal court to enforce penalty assessments under the Federal Power Act (FPA). On November 7, 2017, shortly after FY 2017 ended, one of those matters ended in a settlement.
- *Notices of Alleged Violations.* Five Notices of Alleged Violations were issued in FY 2017 relating to anti-manipulation rules, tariff requirements, the Natural Gas Act, and FPA

Sections 203 and 205.

- *Auditing and Accounting.* The Division of Audits and Accounting completed 11 audits of oil pipeline, public utility, and natural gas companies covering a wide array of topics. These audits led to 301 recommendations for corrective action. All recommendations were accepted and resulted in \$13.3 million in refunds and recoveries.
- *Self-Reporting.* OE received 80 new self-reports in FY 2017, bringing the total number received since 2013 to over 450. This year, as is typically the case, most self-reports came from regional transmission organizations and independent system operators (RTOs/ISOs) that violated their own rules. The vast majority resulted in no enforcement action.
- *Orders to Show Cause/Orders Assessing Civil Penalties.* No such orders were issued in FY 2017.

Analytics and Surveillance: Many Alerts, Few Referrals

The Division of Analytics and Surveillance (DAS), which oversees markets for anomalous activities, carried out approximately 50 investigations in FY 2017. Most investigations focused on allegations of manipulation in natural gas and electricity markets or violations of tariff provisions. Out of 4,744 alerts produced by DAS natural gas surveillance screens, staff conducted 17 inquiries and initiated two investigative referrals to the Division of Investigations. Out of 314,824 alerts produced by DAS electric surveillance screens, 31 inquiries were conducted, and four investigative referrals were made.

Self-Reporting: Greater Insight Into FERC Decision-Making

To offer added guidance and transparency, the Report contains 20 anonymized examples of self-reports and surveillance findings that OE investigated but did not pursue after clarification. OE included such examples for the first time this year to provide the public with more information regarding the nature of its nonpublic enforcement activities.

Self-reported violations included overcharging customers, failing to file proper paperwork, violating tariff provisions and standards of conduct, electricity trading errors, RTO/ISO non-compliance with their own rules, and other irregularities. In each case, OE did not pursue the case after weighing the factors outlined in FERC's Revised Policy Statement on Enforcement.²

Among its 20 examples, FERC included instances of longstanding noncompliance, some lasting two years. The Report emphasizes that in those cases, parties remedied harms soon after discovering them and took significant preventive steps such as instituting internal review of procedures, new compliance measures, and enhanced staff training. OE may also refrain from enforcement actions if violations are isolated and inadvertent, and do not result in significant harm.

These examples confirm that FERC values rapid and complete harm remediation, proactive assessment of why violations occurred, and implementation of procedural changes. These priorities reiterate themes from FERC's 2016 white papers on "lessons learned" in anti-market manipulation enforcement (found [here](#)) and effective energy trading compliance programs (found [here](#)).

The Report encourages parties to self-report and underscores that FERC's 2010 Penalty Guidelines³ provide credit for self-reporting that can significantly mitigate any penalties.

New FERC Leadership and Priorities

FERC will soon have a full slate of commissioners, with a new chairman and three new members confirmed since August 2017.

FERC's current commissioners include:

- **Richard Glick (term expires June 30, 2022).** Mr. Glick, a Democrat, was general counsel for the Senate Committee on Energy and Natural Resources and served as Vice President for Government Affairs at a renewable energy company.
- **Neil Chatterjee (term expires June 30, 2021), Chairman.** Mr. Chatterjee, a Republican, has worked for the National Rural Electric Cooperative Association and as a policy advisor to Senate Majority Leader Mitch McConnell (R-KY).
- **Robert Powelson (term expires June 30, 2020).** Mr. Powelson, a Republican, served on the Pennsylvania Public Utility Commission from 2008 to 2017.
- **Cheryl LaFleur (term expires June 30, 2019).** Ms. LaFleur, a Democrat and former senior executive at a major electric utility in the Northeast, is the only commissioner who was appointed during the Obama Administration.

Kevin J. McIntyre, a Republican energy lawyer, was confirmed as chairman on November 2, 2017 (term expires June 30, 2023). Until Mr. McIntyre is sworn in, Mr. Chatterjee will serve as chairman.

It remains to be seen what the departure of former Chairman Norman Bay—who resigned in January 2017 after President Trump named Ms. LaFleur as acting chairwoman, leaving FERC without a quorum of commissioners—will mean for FERC's approach to enforcement. Mr. Bay was a former federal prosecutor who had been the head of OE before becoming FERC chairman.

At an [October 2017 conference](#), Chairman Chatterjee stated, “FERC's enforcement responsibilities are a critical part of our mission and that the electricity markets work best when investors, operators and the public have confidence that everyone is playing by the rules.”

Chairman Chatterjee also strongly implied that FERC should revise its stance on the “de novo” review standard that applies to certain enforcement proceedings under the FPA.⁴ Noting that five federal courts in 2016-2017 have rejected FERC's view that “de novo” review can proceed based on the so-called administrative record alone,⁵ he stated: “The courts have spoken, and I, for one, am listening.” He added that “the proper scope of de novo review is a matter my colleagues and I need to examine so we can chart a new course that is fair and legally defensible.”

Key Takeaways

- Given the wide range of new and open investigations being pursued by FERC, OE's information-gathering capabilities, and recent statements by Chairman Chatterjee, enforcement is unlikely to decline in the short term.
- FERC continues to encourage self-reporting and the development of robust compliance

programs and practices. Regulated parties should focus on fully remedying any violations and taking steps to address shortcomings in internal processes.

- The legal battle over “de novo” review may be coming to an end, with FERC likely reconsidering the restrictive interpretation it has unsuccessfully advanced in the last two years. Parties challenging enforcement actions therefore are likely to be able to engage in more extensive fact development, rather than being confined to what FERC has deemed the administrative record.

¹ FERC's fiscal year runs from October 1 to September 30.

² *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156, at ¶ 25 (2008).

³ *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216, at ¶ 127 (2010).

⁴ Parties that receive a notice of proposed penalty from FERC have the option to choose either (a) an administrative hearing before an administrative law judge at the Commission prior to the assessment of a penalty, or (b) an immediate penalty assessment by the Commission. In the latter case, if the penalty is not paid within 60 days, FERC may institute an action in federal district court for an order affirming the assessment of the civil penalty, in which case the court has the authority to review “de novo” the law and the facts involved, and to determine whether the penalty should be enforced, modified, or set aside.

⁵ See *FERC v. Barclays Bank PLC*, No. 2:13-cv-2093 (E.D. Cal. Mar. 30, 2017); *FERC v. ETRACOM LLC*, No. 2:16-cv-01945-SB (E.D. Cal. Mar. 7, 2017); *FERC v. Silkman*, 2017 WL 374697, 2017 U.S. Dist. LEXIS 10902 (D. Me. 2017); *FERC v. City Power Mktg., LLC*, F. Supp. 3d 218 (D.D.C. 2016); *FERC v. Maxim Power*, 196 F. Supp. 3d 181 (D. Mass. 2016).

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