

FERC At 40: How It Became An Enforcement Agency

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In 1977, the Federal Power Commission was replaced by the Federal Energy Regulatory Commission, and the U.S. energy system entered a new era. As an independent regulatory agency within the U.S. Department of Energy, FERC regulates the transmission and wholesale sale of electricity and natural gas, and the transportation of oil by pipeline, in interstate commerce.

This article is the third in a series taking stock of FERC's past, present and future, on the occasion of its 40th anniversary. In this installment, David Applebaum and Todd Brecher of Akin Gump Strauss Hauer & Feld LLP, both veterans of FERC's Office of Enforcement, examine how, after the Western energy crisis of 2000-2001, FERC transformed itself into a robust enforcement agency. They also consider how FERC has an opportunity to ensure that its important efforts to deter conduct in violation of federal law do not overregulate or unnecessarily increase market participants' costs.



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The changes to the wholesale electric and natural gas markets that have occurred since FERC was created — changes to the markets themselves as well as to how the federal government regulates them — are as dramatic as they are consequential. Whether it's the unbundling of natural gas and electric sales, the creation of Regional Transmission Organizations (RTOs), federal regulation of electric reliability, deregulation of wholesale natural gas prices, transmission planning or the integration of renewables into the nation's electric grids, it would be hard to overstate how much has changed over the past forty years.

But no change has been more striking than the transformation of FERC into an enforcement agency. Although here we are talking about just over ten years — not forty. This fact alone is significant. FERC has accomplished a great deal in a short amount of time in terms of building an enforcement program, but its relative youth as an enforcement agency is reflected in the widespread view — held by many within FERC as well as industry — that there is more work to be done over the next five to ten years to ensure that enforcement policy promotes rather than hinders the growth and efficiency of energy markets.

The Western Energy Crisis — and Congress' Response

Few events in the history of energy regulation have been as thoroughly analyzed as the Western energy crisis of 2000-2001, including energy trading schemes carried out by Enron and other market participants. This article won't touch upon that history, except to note two key points important to understanding both the history of FERC enforcement and how it approaches its work today.

First, before and during the crisis, FERC lacked the staff expertise to understand how market manipulation schemes were occurring in real time, and lacked the legal authority to effectively respond to those schemes.[1] This was FERC's view at the time — and it quickly became Congress' view.

FERC did take several steps within its existing authority to respond to the crisis from an enforcement perspective,[2] but Congress deemed them insufficient, and in the Energy Policy Act of 2005 (EPAAct 2005) decided to grant FERC significant enforcement authority. EPAAct 2005 had many wide-ranging provisions going well beyond enforcement issues, but the two main provisions that gave FERC real enforcement power were the expanded \$1 million per violation per day civil penalty authority and the broad anti-fraud and manipulation statute patterned on the Securities Exchange Act.[3]

The second point is that the Western energy crisis was not simply or even primarily a crisis about market manipulation, but one of poor market design. Commentators differ on how to weigh the relative importance of market design versus manipulation to the market and regulatory failures that led to and prolonged the crisis, but the events of 2000-2001 underscore that market design and enforcement policy are inherently related.

Many within FERC and the industry would agree that you cannot create a regime of complex market rules without thinking about how best to effectively, reasonably and fairly enforce those rules. Nor can you have good enforcement policy without thinking about the effect of enforcement cases on how markets work, and about what lessons market participants should, and will, take away from those cases.

FERC has had to confront these issues since EPAAct 2005, and, as noted below, the agency should think even harder about the interplay between market rules and enforcement policy over the coming years.

FERC's Implementation of EPAAct 2005

With a good deal of bipartisan support across presidential administrations, within congressional leadership and among commissioners themselves, FERC quickly moved to create a robust enforcement agency soon after EPAAct 2005 was passed. This included the following milestones:

Drafting and enacting the Anti-Manipulation Rule

FERC did this in January 2006 through its landmark Order No. 670.[4] The rule, modeled on the Securities and Exchange Commission's Rule 10b-5, remains the rule underlying all of FERC's natural gas and electric market cases since that time. Unlike the SEC and the Commodity Futures Trading Commission(CFTC), both of which have several anti-fraud rules, FERC's Anti-Manipulation Rule is the only FERC rule governing fraud and manipulation cases.

Because the rule is broad and general in nature, its meaning — in terms of how FERC interprets it — can only be found in the details set forth in settlements and enforcement-related orders. And now, for both

electric and natural gas market cases, the rule may soon be further defined through federal court decisions, as several enforcement cases are (finally) approaching the merits phase.[5]

Hiring the right number of staff with the right expertise

During the Western energy crisis, FERC only had a staff of 20 devoted to enforcement, but now has a staff of approximately 200 in that role.[6] It has remained around 200 for a number of years, reflecting that the agency has concluded this is about the right number of people to handle a nationwide scope of often highly-technical investigations.

Equally important as the numbers, FERC has thought hard about what type of staff to hire — and what skills are needed. The Division of Investigations (DOI), housing the attorneys who investigate and litigate cases, has hovered around 50 staff, which reflects an important point about the Office of Enforcement: most staff are not lawyers, but economists, accountants, mathematicians, statisticians, computer scientists, former traders and other industry analysts.

FERC has thought, and many in the industry agree, that having a relatively large group of analysts has been important to understanding the conduct underlying investigations — conduct that occurs within highly-complex markets (which, if anything, are only becoming more complex). Even 200 is an undercount, though, as Enforcement staff often coordinates with staff in other offices — particularly the Office of Energy Market Regulation, the Office of Energy Policy and Innovation and the Office of the General Counsel (on cases involving tariff and market issues) and the Office of Electric Reliability (which is always involved in electric reliability investigations).

Determining how to assess civil penalties

As noted, EAct 2005 caps penalties at \$1 million (adjusted for inflation) per violation per day, for conduct in violation of the Federal Power Act, the Natural Gas Act or the Natural Gas Policy Act.[7] But very few cases will ever justify reaching the cap or coming anywhere close to it.

So FERC had to think about how it would apply civil penalties across the wide range of matters subject to investigations and potential penalties. After starting with an approach that listed various penalty-related factors,[8] FERC shifted (controversially) to an approach patterned on the U.S. Sentencing Guidelines, culminating in the Revised Penalty Guidelines issued in September 2010.[9]

Policy decisions on how to give guidance about enforcement issues despite their non-public nature

This is an ongoing process, of course, but FERC made some decisions soon after EAct 2005 about how it would communicate to the public on enforcement policy issues outside of cases — given that enforcement investigations are non-public until resolved (assuming the investigations aren't closed without further action, in which case they generally remain non-public).

FERC, in part modeling itself on other federal government enforcement agencies, decided it would issue policy statements on enforcement policy and compliance;[10] issue lengthy, annual reviews on enforcement developments for the previous year;[11] and authorize Enforcement staff to talk about enforcement issues at industry and bar events.

Whether and how to surveil FERC-regulated natural gas and electric markets

One of the more consequential developments in FERC's history is its creation of in-house screens to surveil conduct occurring in FERC-regulated natural gas and electric markets. This began with the creation of the Office of Enforcement's Division of Analytics and Surveillance (DAS) in February 2012. It is well-known that these screens allow DAS to analyze trading patterns, but they now go beyond speculative trading and include analysis of activities in RTOs such as bidding behavior and receipt of out-of-market payments.

Starting in 2012, Enforcement, already privy to a large amount of information from annual and other market participant filings, pushed for rulemakings, entered into information sharing agreements with trading platforms and the CFTC, and obtained additional data from third-party vendors for the purpose of: gathering additional natural gas and electric market transactional data, integrating that data into in-house surveillance screens, monitoring anomalous transactions, communicating with market participants about those transactions, referring matters to DOJ and working with DOJ attorneys on investigations and enforcement actions.

Through DAS, Enforcement now has the ability to identify and understand transactions occurring in its markets in a way that simply didn't exist five years ago, much less when EAct 2005 was passed.

How to work with RTO market monitors and other government agencies

As an ongoing process since EAct 2005, FERC Enforcement has had to think about how to interact with RTO market monitors — and has concluded that its interaction should be robust, informal and frequent. Attorneys and analysts throughout Enforcement regularly communicate and share information with market monitors (and vice versa) both at the surveillance stage and during the life of an investigation.

FERC has also had to think about how to work with other government agencies as part of its investigative work. The two most important agencies for FERC Enforcement are the CFTC and the U.S. Department of Justice (DOJ) (including U.S. Attorneys' Offices). FERC's relationship with the CFTC has not always been smooth sailing,[12] but for the most part staff at each agency share data and cooperate on investigations involving potential natural gas market manipulation (the CFTC has generally deferred to FERC on electric market cases, which makes cooperation less of an issue).

As for DOJ, FERC regularly shares information with federal criminal prosecutors, and vice versa.[13] Less common, but highly significant for investigation subjects, FERC (at the commission level) has the authority to formally refer matters to DOJ for potential prosecution — which it has done in the past and will likely continue to do.

FERC Enforcement has also worked and shared information with other agencies, including, for example, the Environmental Protection Agency, DOJ's Antitrust Division, the Federal Trade Commission (FTC), the Federal Reserve Board, and on occasion state government agencies.

This non-exhaustive list highlights only some of the key issues and decisions FERC has had to address over the course of its relatively short history following EAct 2005.

FERC's Enforcement Focus Goes Far Beyond Market Manipulation (Even Though That's What Often Gets the Most Attention)

No retrospective on FERC enforcement is complete without mentioning another animating factor behind EAct 2005, prompted in part by the 2003 blackout affecting the Northeast:[14] making electric

reliability a subject of FERC regulation and enforcement. This article won't touch on this complicated subject,[15] but it is important to note that FERC's Office of Enforcement has played a role in investigating grid disturbances and significant violations of the electric reliability standards.

Indeed, since as long as FERC has announced its enforcement priorities, "serious violations" of the electric reliability standards has been among them.[16] Most compliance and enforcement work on the electric reliability front has been led by the North American Electric Reliability Corporation (NERC) and its regional entities.

And the organization within FERC that, in effect, governs the relationship with NERC, is the Office of Electric Reliability (OER). But Enforcement has worked closely with OER on inquiries and investigations since EAct 2005 was passed, and it can be expected that this working relationship will continue from an enforcement perspective at least when there are significant reliability events.

Nor is it possible to discuss FERC enforcement without noting that a significant amount of work that occurs in Enforcement involves auditing market participants. FERC has stated on many occasions that the purpose of enforcement is to achieve compliance, not civil penalties, and the focus of Enforcement's Division of Audits has always been on achieving compliance.

While the auditing function is not new to FERC, EAct 2005, in effect, added a new dimension to auditing given the ability to refer matters to DOI — which on occasion has happened, leading to investigations that have resulted in civil penalties.

Finally, it is also impossible to discuss FERC enforcement without noting that the majority of the matters Enforcement staff analyzes throughout any given year are not market manipulation cases but rather tariff and regulatory violations — in all areas of FERC's jurisdiction, including on occasion oil pipeline and hydropower matters. This area of Enforcement's focus is not new: FERC has been analyzing tariff and regulatory violations since its very beginning, as had its predecessor, the Federal Power Commission.

What is new, however, is the need to think about such violations in the context of an enforcement program in which FERC has the ability to assess significant civil penalties. To its credit, FERC has generally taken a pragmatic approach to these cases in recent years — recognizing that companies are trying to do the right thing, but that compliance mistakes are inevitable in highly-regulated industries — and has therefore declined to open investigations or assess civil penalties in the vast majority of tariff cases (many of which involve self-reported violations).

What's Next for Enforcement Over the Coming Five to Ten Years

The title of this subheading is more ambitious than this brief response can hope to address. New commissioners and chairs, new senior agency staff and new congressional leaders will answer these questions over time — undoubtedly influenced by market developments and the views of market participants, economists, energy industry commentators and trade associations.

But there are a number of issues that FERC as an enforcement agency will have to think about and address over the coming years, and we pick four of the most important ones below.

More guidance on the meaning of FERC's Anti-Manipulation Rule

This is the first — and most obvious and important — point that is on the minds of subjects, potential

subjects and all those who wish to avoid becoming subjects of investigations (i.e., everyone). FERC issued a useful white paper on market manipulation last November — the first, but one hopes not the last, of its kind.[17]

Fundamentally, though, at least in the authors' views, the only guidance that will truly matter is guidance in the form of merits decisions from federal courts. This is true for every area of enforcement law — whether in actions brought by the SEC, CFTC, FTC, DOJ, FERC or any other agency.

Remarkably, although there are now several rulings on motions to dismiss,[18] there is still not yet a single federal court decision on the merits of a FERC market manipulation case. Several cases are now proceeding toward merits decisions in federal court over the next few years, and they will be very important in terms of providing guidance to the market.

But most enforcement cases settle — usually while still at the agency, though sometimes after cases have been filed in federal court but before judgment. If all or most of the current cases settle, the market could find itself with few or no vehicles for obtaining federal court guidance over the next several years.

If that happens, it will only heighten the importance of FERC providing market participants with more detailed and meaningful guidance on how it will apply the Anti-Manipulation Rule — focusing on the practical realities of how energy traders, sellers in RTO markets, and other market participants actually do business.

Reconsidering key enforcement policies — including the size of civil penalties

FERC should consider revisiting certain key enforcement policies (and policy documents) over the coming years, many of which are now five to ten years old. One such policy is FERC's Penalty Guidelines (PGs) — or at least the agency's current application of the guidelines.

FERC's PGs take a mechanical, formulaic approach to determining civil penalty ranges for penalties against companies.[19] While there is value in the transparency the PGs were intended to provide, the PGs have been controversial due to, among other things, the size of the civil penalty ranges in market manipulation and other cases.

In market manipulation cases, the PGs have generated large penalty amounts due to the framework of the PGs and their focus on market "harm" — which is often impossible to calculate with precision — rather than the gain to the violator. And since FERC issued the PGs, FERC's civil penalties have been substantially larger than penalties assessed by other regulators in similar cases, including the CFTC.

As FERC considers its continued use and application of the PGs, we think it should ask the following questions: Do the PGs result in higher penalties than necessary to achieve compliance? Has the agency lacked sufficient flexibility in departing downward (and not just in cases where the subject is near bankrupt)? Does the agency fail to give sufficient financial credit to companies that follow good compliance practices but one or more of whose employees either made a mistake or "went rogue"? Should the agency consider scrapping the PGs altogether and following a more predictable approach in terms of set amounts for tariff or regulatory violations and potentially a "treble damages" cap on penalties? These are topics for another article, but there are good reasons to answer "yes" to these questions.

Another enforcement policy FERC should reconsider is the Notice of Alleged Violations Policy, which provides for accelerated public disclosure of investigation subjects. We think this policy has not lived up to its intended benefits and therefore appears to do more harm than good.[20]

Greater willingness to ease the burden of investigation-related costs

Many of FERC's investigations are complex, require a lot of data, and take staff a considerable amount of time to analyze the facts and underlying market policies in order to reach conclusions about the conduct in question. This is especially true for market manipulation cases and electric reliability inquiries, but can also be true of more complex tariff or regulatory investigations.

Nobody would want Enforcement staff to conduct cursory investigations in cases where it intends to recommend to the Commission that the agency seek a settlement or proceed with an enforcement action. And FERC should not proceed to federal court unless it has thoroughly analyzed the relevant conduct, as the government should be committed to getting the facts and the law right before going public with an enforcement action.

But there are many cases where, early on, the agency can reach a sensible conclusion — even if an imperfect one — that it need not proceed to settlement but can instead close out the investigation without further action, especially where the subject has already committed to improving its compliance program relating to the conduct in question.

Simply put, there are more investigations within Enforcement that can be analyzed with less data and over a shorter period of time, and then closed without further action before the subject has incurred significant expense or disruption to its business.

This is a problem affecting nearly every government agency; FERC is not alone here. But, like other agencies, FERC can improve its performance. And the agency should therefore consider taking steps to analyze its performance in this regard over the next few years to see what changes in Enforcement's investigative policies might accomplish that goal.

Need to study the effect of enforcement actions on market behavior

Numerous market participants, energy industry analysts and commentators have questioned whether market manipulation actions may have chilled some useful market activity and participation. There is a concern that some companies are exiting — or declining to enter — energy trading markets at least in part due to a concern about the risk of enforcement investigations and actions. And for companies that are active in energy markets, there is a concern that enforcement actions may have had a chilling effect on some useful market activity.

In particular, this includes: (1) traders who refrain from transacting in the financial or physical markets for fear that they could be investigated for a “related position” trading scheme even though all their trading was legitimate; and (2) generators who may limit their bidding into RTO markets out of concern that if their strategy is not clearly supported by existing tariffs they may be investigated for “gaming.”

These are serious concerns, as robust market participation — by both physical asset owners and financial participants — is essential to effective and efficient markets. FERC could study these and other critiques through various means, including surveys of market participants, technical conferences, hiring an outside consultant to analyze the issue, or other means.

FERC's enforcement mission is to achieve compliance by deterring harmful conduct that violates FERC-jurisdictional laws and regulations — but not in a way that causes market participants to refrain from productive and efficient market transactions. Studying whether the latter is occurring is possible, would be useful and could be done over the next year or two, culminating in a public report on the agency's findings.

Following the Western energy crisis and Congress' response to it through EAct 2005, FERC quickly transformed itself into a robust enforcement agency. There is little to no reason to think FERC will backtrack from its enforcement mission going forward. FERC has an opportunity to take action over the next several years to make sure that its efforts to deter conduct in violation of federal law do not overregulate or unnecessarily increase market participants' costs, and we are confident it will do so.

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[1] This is not to say FERC had no enforcement-related authorities at the time. For example, FERC could assess penalties of up to \$11,000 per day under Part I and Sections 210-214 of Part II of the Federal Power Act (FPA) and up to \$5,550 per day under the Natural Gas Policy Act of 1978 (NGPA). 16 U.S.C. §§ 823b(c), 825o-1 (2000); 15 U.S.C. § 3414(b)(6) (2000); 18 C.F.R. § 385.1602 (2017). Additionally, the FPA, NGPA and the Natural Gas Act (NGA) all had sections governing the finding of violations, injunctive authority and the right to inspect books and records. 16 U.S.C. §§ 825f, 825m; 15 U.S.C. §§ 3414(b)(6)(e), 3414(b); 15 U.S.C. §§ 717m(a), (c), (d). But FERC did not have the resources and legal authority it has today. And, more fundamentally, FERC did not really conceive of itself as an enforcement agency, and therefore wasn't truly designed to take advantage of whatever tools it did have or might have had to respond effectively to market manipulation schemes.

[2] See Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003); Amendments to Blanket Sales Certificate, 105 FERC ¶ 61,217 (2003); see also generally FERC Staff, Final Report on Price Manipulation in Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices (2003).

[3] Pub. L. No. 109-58, 119 Stat. 594 (2005); 16 U.S.C. § 824v(a) ("Prohibition of Energy Market Manipulation" under the FPA); id. § 825o-1 (penalty authority of up to \$1,000,000 per violation per day under the FPA); 15 U.S.C. § 717c-1 ("Prohibition on Market Manipulation" under the NGA); id. § 717t-1 (penalty authority of \$1,000,000 per day per violation under the NGA). In addition, FERC recently issued a final rule adjusting these penalty amounts for inflation. See Civil Monetary Penalty Inflation Adjustments, 82 Fed. Reg. 8,137, 8,138 (Jan. 24, 2017).

[4] Prohibition of Energy Market Manipulation, Order No. 670, FERC Stats. & Regs. ¶ 31,202, reh'g

denied, 114 FERC ¶ 61,300 (2006); see also 18 C.F.R. Part 1c.

[5] FERC also recently issued a white paper providing an overview and guidance on how it has interpreted the Anti-Manipulation Rule. See FERC Staff, *White Paper on Anti-Market Manipulation Enforcement Efforts Ten Years After Epect 2005* (2016), <https://www.ferc.gov/legal/staff-reports/2016/marketmanipulationwhitepaper.pdf> (“Anti-Market Manipulation White Paper”).

[6] *Regulating Financial Holding Companies and Physical Commodities: Hearing before the S. Subcomm. on Financial Institutions and Consumer Protection, 113th Cong. (2014)* (opening remarks of Norman Bay, then Director, FERC Office of Enforcement).

[7] See *supra* note 3.

[8] *Enforcement of Statutes, Orders, Rules, and Regulations, 113 FERC ¶ 61,068 (2005)* (“2005 Policy Statement on Enforcement”).

[9] *Enforcement of Statutes, Orders, Rules, and Regulations, 132 FERC ¶ 61,216 (2010)* (“Revised Policy Statement on Penalty Guidelines”).

[10] See, e.g., *id.*; *Enforcement of Statutes, Regulations, and Orders, 123 FERC ¶ 61,156 (2008)* (“Revised Policy Statement on Enforcement”); *Compliance with Statutes, Regulations, and Orders, 125 FERC ¶ 61,058 (2008)* (“2008 Policy Statement on Compliance”); *2005 Policy Statement on Enforcement*; FERC Staff, *White Paper on Effective Energy Trading Compliance Practices* (2016); *Anti-Market Manipulation White Paper*, *supra* note 5.

[11] FERC’s Office of Enforcement released the first “Enforcement Report” in 2007, while the most recent report was issued in November 2016. FERC Staff, *Report on Enforcement* (2016), <https://www.ferc.gov/legal/staff-reports/2016/11-17-16-enforcement.pdf> (“2016 Enforcement Report”); FERC Staff, *Report on Enforcement* (2007), <https://www.ferc.gov/EventCalendar/Files/20071114084824-Staff-report-11-14-07%20.pdf>.

[12] See, e.g., *Hunter v. FERC*, 711 F.3d 155, 158-59 (D.C. Cir. 2013) (decision limiting FERC’s enforcement authority over conduct occurring in the futures markets, as advocated by the CFTC).

[13] See, e.g., *Berkshire Power Co. LLC*, 154 FERC ¶ 61,259, at P 13 (2016).

[14] See U.S.-Canada Power System Outage Task Force, *Final Report on the Aug. 14, 2003 Blackout in the United States and Canada: Causes and Recommendations* (2004), <https://www.ferc.gov/industries/electric/indus-act/reliability/blackout/ch1-3.pdf>.

[15] FERC recently issued a helpful primer on this subject, perhaps motivated by the positive reception among many (including congressional staff and federal courts) to the previously-issued Energy Markets Primer. See FERC Staff, *Reliability Primer* (2016), <https://www.ferc.gov/legal/staff-reports/2016/reliability-primer.pdf>; FERC Staff, *Energy Markets Primer* (2015), <https://www.ferc.gov/market-oversight/guide/energy-primer.pdf>.

[16] See *2016 Enforcement Report*, *supra* note 11, at 4; see also FERC Staff, *Report on Enforcement* 17 (2008), <https://www.ferc.gov/legal/staff-reports/2008-enforc.pdf>.

[17] See Anti-Market Manipulation White Paper, *supra* note 5.

[18] See Mem. Op., *FERC v. City Power Mktg. LLC*, No. 15-1428 (JDB) (D.D.C. Aug. 10, 2016); Mem. and Order Regarding Procedures Applicable to FERC's Pet. and Res. Motion to Dismiss, *FERC v. Maxim Power Corp.*, No. 15-30113-MGM (D. Mass. July 21, 2016); Mem. and Order Regarding Motions to Dismiss, *FERC v. Silkman et al.*, Nos. 13-13054-DPW, et al. (D. Mass. Apr. 11, 2016); Order on Motion to Dismiss, *FERC v. Barclays Bank PLC*, No. 2:13-cv-2093-TLN-DAD (E.D. Cal. May 20, 2015).

[19] FERC does not use the PGs when determining penalties for individuals. See *Enforcement of Statutes, Orders, Rules, and Regulations*, 130 FERC ¶ 61,220, revised, 132 FERC ¶ 61,216 (2010).

[20] David A. Applebaum, Todd L. Brecher & Jeffery S. Dennis, *FERC Should Rescind Its Notice of Alleged Violations Policy*, 8 *Geo. Wash. J. Energy & Envtl. L.* 87 (2016), https://gwujeel.files.wordpress.com/2017/04/applebaum_final.pdf.