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EDITOR'S NOTE: FERC

Victoria Prussen Spears

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Hidden Insights in the Federal Energy Regulatory Commission's 2023 Report on Enforcement

*By Norman C. Bay, Paul J. Pantano Jr. and Vivian W. Chum**

In this article, the authors highlight the most noteworthy insights from the enforcement report issued recently by the staff of the Federal Energy Regulatory Commission's Office of Enforcement.

On November 16, 2023, the staff of the Office of Enforcement (OE or Staff) of the Federal Energy Regulatory Commission (Commission) issued its 2023 Report on Enforcement (Report) for the fiscal year ending September 30, 2023.¹ The Commission requires OE to prepare the Report in order to inform the public of the activities of OE and its three Divisions: the Division of Investigations (DOI); the Division of Analytics and Surveillance (DAS); and the Division of Audits and Accounting (DAA).² OE's 2023 fiscal year priorities were:

- Fraud and market manipulation;
- Violations of the Reliability Standards;
- Anticompetitive conduct;
- Threats to the nation's energy infrastructure and associated impacts on the environment and surrounding communities; and
- Conduct that threatens transparency in regulated markets.

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¹ FERC, Presentation & Report | FY2023 Report on Enforcement, Docket No. AD07-13-017 (2023), available at <https://www.ferc.gov/news-events/news/ferc-releases-2023-enforcement-report>. All references to yearly totals in this document refer to FERC's fiscal year ending September 30, 2023. The Commission's fiscal year begins October 1 and ends September 30 of the following year.

² Enforcement of Statutes, Regulations and Orders, 123 FERC ¶ 61,156, at P 12 (2008).

This article highlights the most noteworthy insights gleaned from the Report.

OE'S PRIORITIES REMAIN THE SAME WITH SUBTLE SHIFTS AT THE EDGES

OE's priorities have remained unchanged since 2021, when the fourth priority ("threats to the nation's energy infrastructure and associated impacts on the environment and surrounding communities") was added to the list. The Report, however, hints at several subtle shifts in 2023. OE appears to be expanding more time and resources on enhanced surveillance of market responses to disruptive weather events. OE also appears to have increased its scrutiny of demand response providers.

SETTLEMENTS IN FISCAL YEAR 2023 INDICATE INCREASED SCRUTINY ON DEMAND RESPONSE PROGRAMS

In 2023, 12 settlement agreements resolved pending enforcement matters, including eight investigations, one federal district court matter, one Order to Show Cause proceeding, and one Fifth Circuit matter on remand to the Commission.³ The settlements addressed alleged violations of the Commission's Duty of Candor rule,⁴ the Commission's Anti-Manipulation Rule,⁵ the Federal Power Act (FPA), the Natural Gas Act, and various rules and tariffs.⁶

Three of the settled investigations involved demand response programs and highlight OE's increased scrutiny of demand response program participants and their sponsoring utilities.⁷ In fact, a single demand response investigation, *Big River Steel, LLC and Entergy Arkansas, LLC*,⁸ constituted the largest settlement of 2023. The subjects of the investigation paid approximately \$27 million, or a little over half of the total \$52.54 million from settlements this fiscal year.⁹

The Report offers several key insights into the Commission's approach to demand response investigations.

The Commission will hold utilities liable for the actions of their customers, as the settlement in *Big River Steel, LLC and Entergy Arkansas, LLC*,¹⁰

³ Report at 19.

⁴ 18 C.F.R. § 35.41(b).

⁵ 18 C.F.R. § 1c.1.

⁶ Report at 9-14, 19.

⁷ Id. at 19, 23-26.

⁸ *Big River Steel, LLC and Entergy Arkansas, LLC*, Docket No. IN23-11-000.

⁹ Report at 7, 25.

¹⁰ *Big River Steel, LLC and Entergy Arkansas, LLC*, Docket No. IN23-11-000.

demonstrates. The sponsoring utility, Entergy Arkansas, disgorged \$5 million based on its customer's collection of demand response payments from the Midcontinent Independent System Operator (MISO) between 2016 and 2022.¹¹ Entergy Arkansas' customer Big River Steel paid a civil penalty of \$6 million and disgorged approximately \$16 million to resolve the issue.¹² DOI apparently was not swayed by evidence that MISO had provided guidance that could have been interpreted as blessing the company's actions.¹³ The settlement serves as a reminder that informal guidance from an Regional Transmission Operator (RTO) or Independent System Operator (ISO) does not provide a safe harbor against enforcement actions.

In *Todd Meinershagen*,¹⁴ DOI settled early with Todd Meinershagen, one subject of the ongoing investigation and co-owner of a demand response aggregator company in MISO. Meinershagen stipulated to facts, admitted to the violations by the unnamed company, and agreed to disgorge about \$525,450 to MISO. The Report does not name the aggregator company or the other co-owner.¹⁵ According to the stipulated facts, the unnamed co-owner misled Meinershagen about a demand response scheme carried out between June 2019 and October 2021.¹⁶ As a result of the scheme, MISO awarded the company approximately \$1 million in demand response payments.¹⁷ The settlement with Meinershagen, who agreed to cooperate with any ongoing investigation into potential fraud through demand response programs in MISO (including by providing documents and testimony as requested by OE),¹⁸ could potentially strengthen DOI's litigation position in the ongoing investigation of any remaining subjects.

Considerable attention appears to be focused on potential violations in MISO's demand response programs. Notably, the 2021 MISO State of the Market report issued by MISO's market monitoring unit attributed \$60 million of the \$65.3 million, or 92% of total payments in a MISO demand response program, to "payments for energy that the participant never intended to

¹¹ Report at 25.

¹² *Id.*

¹³ Big River Steel, LLC and Entergy Arkansas, LLC, 184 FERC ¶ 61,111, at P 13 (2023).

¹⁴ Todd Meinershagen, Docket No. IN23-4-000.

¹⁵ Report at 7 n.5, 23.

¹⁶ Todd Meinershagen, 181 FERC ¶ 61,251, at Attach. Stipulation and Consent Agreement, PP 9-12 (2022).

¹⁷ *Id.*

¹⁸ Meinershagen, 181 FERC ¶ 61,251 at P 24.

consume” and “payments for curtailments based off an inflated baseline value.”¹⁹

More demand response investigations are likely to be on the horizon. Demand response program participants and sponsoring utilities would do well to ensure that their compliance measures are in place and up to date.

FOCUS ON MARKET DISRUPTIONS, PRICE SPIKES, AND RELIABILITY

FERC Chairman Willie L. Phillips recently highlighted the significant role of enhanced surveillance in protecting consumers from energy price spikes and market disruptions.²⁰ In fiscal year 2023, OE continued to dedicate significant time and resources to examining these issues, which are often connected to extreme weather events.

DAS made three referrals to DOI for investigation of activities in connection with its enhanced surveillance of Winter Storm Elliott in December 2022 and the Winter 2022/2023 Western Energy Price Spike.²¹ DAS's review of market activity during both events is ongoing.

- DAS's enhanced surveillance of markets during Winter Storm Elliott resulted in two referrals for investigation to DOI thus far. DAS conducted enhanced surveillance to determine if market participants may have engaged in market violations, including market manipulation, during Winter Storm Elliott. It analyzed 57 screen trips and scrutinized planned or maintenance outages of 37 units that avoided nonperformance penalties because of those outages. DAS opened six inquiries related to market activity during Winter Storm Elliott and referred two of these inquiries to DOI for investigation by the end of the 2023 fiscal year.²²
- Enhanced surveillance of markets during the Winter 2022/2023 Western Energy Price Spike resulted in one referral for investigation to DOI in fiscal year 2023. DAS examined western wholesale natural gas and electricity market activity to determine whether participants engaged in market manipulation during a period of high price volatility

¹⁹ Potomac Economics, 2021 State of the Market Report for the MISO Electricity Market, Analytic Appendix at 155-56 (June 2022), available at https://www.potomaceconomics.com/wp-content/uploads/2022/06/2021-MISO-SOM_Analytic-Appendix_Final.pdf.

²⁰ FERC, November 16, 2023 Open Meeting, available at <https://www.ferc.gov/news-events/events/november-16-2023-open-meeting-11162023>.

²¹ Report at 80, 79.

²² Id. at 79.

in Winter 2022/2023. In total, DAS analyzed 93 natural gas market surveillance alerts and 10 inquiries into the behavior of natural gas market participants. In addition, DAS made two power market inquiries.²³

The Commission, the North American Electric Reliability Corporation (NERC) and six regional reliability entities issued a joint report on Winter Storm Elliott in fiscal year 2023. The joint report detailed the causes of widespread power disruptions across the Eastern Interconnection during Winter Storm Elliott and provided recommendations to prevent similar events in the future. The joint report found that 96% of all outages, derates, and failures to start could be attributed to three causes:

- (1) Freezing issues;
- (2) Fuel issues; and
- (3) Mechanical electrical issues.

Natural gas fuel issues alone constituted 20% of all causes. Accordingly, a number of the recommendations made in the joint report addressed natural gas coordination and reliability rules for natural gas infrastructure.²⁴

The Report shows that Staff will consider evidence of investments in reliability enhancing measures and cooperation with regional reliability entities, as well as demonstrations that the conduct under investigation did not raise reliability concerns.²⁵ Even where Staff finds violations of Reliability Standards, this type of evidence can mean the difference between a case closing with no action or remaining open with a continuing investigation.²⁶

DAS developed new tools in fiscal year 2023 that improved its ability to analyze interactions between physical and financial power indices and physical Locational Marginal Prices, as well as physical power and natural gas spot and future pricing.²⁷ Such tools may augment DAS's ability to spot indicators of potential cross-market manipulation.

In addition, the OE Reliability Coordinator, who serves in a leadership role in inquiries and investigations of reliability-related matters, was elevated

²³ Id. at 80.

²⁴ Id. at 18.

²⁵ Id. at 26, 41, 45.

²⁶ Id. at 41.

²⁷ Id. at 80.

recently from DOI staff member to reporting directly to the Director of Enforcement.²⁸

TWO ADMINISTRATIVE PROCEEDINGS REMAIN STAYED PENDING RESOLUTION OF U.S. SUPREME COURT CASE EXAMINING CONSTITUTIONALITY OF ADMINISTRATIVE LAW JUDGES AND RIGHT TO A JURY TRIAL

Total Gas & Power North America, Inc., et al.,²⁹ and *Rover Pipeline, LLC and Energy Transfer Partners, LP*,³⁰ are two administrative proceedings that remain stayed pending resolution of *SEC v. Jarkesy* in the U.S. Supreme Court.³¹ The Court heard oral arguments in *Jarkesy* on November 29, 2023.³² *Jarkesy* challenges the constitutionality of administrative law judges, the reliance on administrative proceedings to impose civil penalties rather than jury trials, and the ability of the Securities Exchange Commission to determine whether to proceed in district court or an administrative proceeding.³³

PROTRACTED LITIGATION OF ENFORCEMENT MATTERS IN FEDERAL COURTS

OE has not shied away from protracted litigation against non-settling parties, even after the subject of an investigation declares bankruptcy. *FERC v. Powhatan Energy Fund, LLC, et al.*,³⁴ arose from an investigation into Up-To Congestion trades that were made 13 years ago in 2010.³⁵ The Commission issued the underlying Order Assessing Civil Penalties in 2015.³⁶ Powhatan filed for Chapter 7 bankruptcy in 2022, and the case before the United States District Court for the Eastern District of Virginia was stayed. Last year, the U.S. District Court of the Eastern District of Virginia granted a Motion for Default Judgment to the Commission. While, as the Report notes, this marks the first time a federal district court has ever issued a final judgment against an entity that the Commission found to have committed market manipulation, it is worth also noting that Powhatan agreed that it would not oppose lifting the stay

²⁸ Id. at 47, 86.

²⁹ Total Gas & Power North America, Inc., et al., Docket No. IN12-17-000.

³⁰ Rover Pipeline, LLC and Energy Transfer Partners, LP, Docket No. IN19-4-000.

³¹ Report at 14-17.

³² Oral Argument, *SEC v. Jarkesy*, No. 22-859 (U.S. Nov. 29, 2023).

³³ *SEC v. Jarkesy*, cert. granted, No. 22-859 (U.S. June 30, 2023).

³⁴ *FERC v. Powhatan Energy Fund, LLC, et al.*, No. 3:15-cv-00452 (E.D. Va.).

³⁵ Report at 11-14.

³⁶ Houlian Chen, *Powhatan Energy Fund, LLC, HEEP Fund, LLC CU Fund, Inc.*, 151 FERC ¶ 61,179 (2015).

or challenging the final judgment in exchange for the Commission's agreement not to pursue judgment outside bankruptcy court.³⁷ Staff, in conjunction with the U.S. Department of Justice, are pursuing remedies in bankruptcy court.³⁸

FERC v. Vitol, Inc. and Federico Corteggiano,³⁹ arose from physical power sales made more than 10 years ago, in 2013. Discovery in the United States District Court for the Eastern District of California began in 2022 and remains ongoing. Following a challenge by Vitol and Corteggiano, the Ninth Circuit joined the Fourth Circuit in holding that the five-year statute of limitations on the Commission's right to bring an action in federal district court does not begin to run until an Order Assessing Civil Penalties is issued by the Commission.⁴⁰

Because the Commission issues Orders Assessing Civil Penalties after an oftentimes lengthy investigation, an Order to Show Cause, and a briefing period, investigations that do not close or resolve in settlement can lead to years of legal battles.

INVESTIGATIONS CLOSED WITH NO ACTION, INCLUDING WHERE STAFF CONCLUDED VIOLATIONS DID NOT MERIT SANCTIONS

During the 2023 fiscal year, DOI closed nine investigations without recommending charges.⁴¹ Five of the nine investigations were described in the Report.⁴²

While Staff has typically closed investigations with no action only after a finding of no violations or insufficient evidence to conclude a violation occurred, the Report highlights two investigations closed with no further action where the violations were deemed immaterial or to have otherwise been adequately addressed. In one matter, which arose from a referral by NERC based on an entity's failure to notify its balancing authority of generator outages, Staff closed the investigation without further action after concluding that the agreement between the market participant and the regional reliability entity had adequately addressed the conduct at issue and that the entity had

³⁷ *FERC v. Powhatan Energy Fund, LLC, et al.*, No. 3:15-cv-00452 (E.D. Va. Mar. 22, 2023).

³⁸ Report at 12-13.

³⁹ *FERC v. Vitol, Inc. and Federico Corteggiano*, No. 2:20-CV-00040-KJM-AC (E.D. Cal.).

⁴⁰ *FERC v. Vitol, Inc.*, 79 F.4th 1059, 1063 (9th Cir. 2023).

⁴¹ Report at 35.

⁴² *Id.* at 41-42.

implemented improvements to address compliance weaknesses and prevent reoccurrence of similar behaviors. In another matter, Staff closed an investigation into potential misrepresentation of available capacity of its resources and/or failure to comply with must-offer obligations after concluding that any failure to meet the must-offer obligations was immaterial or otherwise did not merit further enforcement action.⁴³

The Report also describes three investigations, which were closed with no action because the facts corroborated the investigated entities' non-manipulative reasons for the market behavior (e.g., software error, market signals, and information available at the time).⁴⁴

SELF-REPORTS CLOSED WITH NO FURTHER ACTION

The Report includes a selection of self-reports that were closed with no further action.⁴⁵ The examples illustrate how penalties and protracted litigation may potentially be avoided through self-reporting, particularly when the violations caused no economic harm and were promptly addressed upon being discovered, and steps to prevent reoccurrence of the violations were promptly taken.

Self-reports that were closed with no further action included reports of failure to make certain filing requirements required as a condition of market-based rate authority. For example:

- Affiliates of a renewable energy power producer with market-based rate authorization self-reported that they did not file required updates related to uncommitted "remote capacity" in the California Independent System Operator market. Within 10 days of discovering the mistake, the affiliates filed notices of non-material change in status and changed their internal compliance measures to ensure accurate reporting of market-based rate changes in the future. Because the self-reported violation was quickly addressed and caused no economic harm, OE closed the self-report without further action.⁴⁶
- The owner of five small solar generation entities self-reported failing to make filings relating to the entities' market-based rate authority, QF status (Form 556), and section 203 of the FPA. The violations were discovered during an acquisition. The entities agreed to make corrective filings, including appropriate time value refunds. Staff closed the

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id. at 27-32.

⁴⁶ Id. at 31.

self-report without further action because the errors were inadvertent, quickly resolved, and mitigated.⁴⁷

Some self-reports closed without further action involved transmission interconnection issues:

- An electric utility self-reported that it failed to timely process generation interconnection applications per tariff requirements. The utility missed tariff-mandated deadlines nine times. Staff closed the self-report because the utility self-reported the issue, the error was inadvertent, and the utility took steps to improve its internal processes.⁴⁸
- A generation facility self-reported failure to comply with its interconnection agreement with its transmission provider when it failed to timely install certain equipment required by the interconnection agreement. The transmission provider was aware of the violation, agreed that it was minor and technical in nature, and provided a way for the violation to be quickly cured. The self-report was closed with no action because the duration of the violation was minimal, there was no identifiable harm caused by the violation, and the violation was quickly cured.⁴⁹

The Report includes a description of a natural gas company's self-report of a potential buy/sell violation:

- A natural gas company discovered a potential buy/sell violation less than three weeks after sales began and promptly rescheduled delivery of gas from another source to cure the violation. The company also improved buy/sell compliance training for staff. Staff closed the self-report without further action because of the minimal potential harm resulting from the potential violation and the company's swift corrective action.⁵⁰

OE BY THE NUMBERS

Division of Investigations

In the 2023 fiscal year, DOI opened 19 new investigations, which is comparable to the 21 opened in fiscal year 2022.⁵¹ Staff received 23 new referrals from RTO/ISO market monitors, which resulted in 11 opened

⁴⁷ Id. at 32.

⁴⁸ Id. at 34.

⁴⁹ Id.

⁵⁰ Id. at 31.

⁵¹ Id. at 35.

investigations.⁵² Referrals for investigation also came from other sources, including DAS and DAA.⁵³ The number of investigations opened in 2022 was notably higher than the 2019-2021 period, and similar to the 2013–2018 period, as reflected in Table 1.

DOI negotiated 12 settlement agreements approved by the Commission, nine of which resolved eight investigations for a total of \$33.39 million in settled penalties and disgorgement.⁵⁴ Commission-approved settlements also resolved a district court litigation matter for \$4 million in disgorgement, an order to show cause proceeding for \$4.4 million in civil penalties, and one U.S. Court of Appeals case on remand to the Commission for a \$10.75 million civil penalty.⁵⁵ By comparison, in fiscal year 2022, DOI staff settled 11 investigations, eight of which were settled for \$55.54 million in total penalties and three of which were settled in district court for a total of \$1,975,000 in penalties.⁵⁶ For the third year in a row, the number of settlements has trended upwards, as reflected in Table 1.

Table 1

Fiscal Year	Number of New Investigations	Number of Settlements
2013	24	11+ ⁵⁷
2014	17	8
2015	19	9
2016	17	6
2017	27	5
2018	24	6
2019	12	2
2020	6	3
2021	12	9
2022	21	11
2023	19	12

⁵² Id. at 44.

⁵³ Id. at 35.

⁵⁴ Id. at 19-20.

⁵⁵ Id. at 7.

⁵⁶ See OFF OF ENF'T, FED. ENERGY REGUL. COMM'N, 2022 REPORT ON ENFORCEMENT at 6-7 (2022), available at <https://www.ferc.gov/media/fy2022-oe-annual-report> (2022 Report).

⁵⁷ The 2013 Report on Enforcement did not specify the number of settlements, but listed 11 example matters that settled in 2013.

DOI received 148 new self-reports in fiscal year 2023. Most of the self-reports were made by ISOs and RTOs and involved “minor” tariff violations. Staff closed 172 reports, 50 of which were carried over from previous fiscal years. Only 23 self-reports received in fiscal year 2023 remain pending. Staff stressed the importance of self-reports and its view that self-reporting “show[s] a company’s commitment to compliance.”⁵⁸

Division of Analytics and Surveillance

DAS’s surveillance of the electricity sector triggered 566,933 screen trips, which resulted in 43 electric surveillance inquiries into market behavior. Six of those inquiries were referred to DOI for investigation, 25 were closed with no referral, and 12 inquiries remain open.⁵⁹

DAS’s surveillance of the natural gas sector triggered 23,769 screen trips. DAS documented 1,584 surveillance alerts ranging from low to high concern, of which 27 led to new natural gas surveillance inquiries, of which 19 were closed and five remain open. Three matters were referred to DOI for investigation.⁶⁰

Division of Audits and Accounting

During the 2023 fiscal year, DAA completed nine audits of public utility, natural gas, and oil companies. Staff found 68 instances of noncompliance and made 332 recommendations for corrective action, ultimately directing \$33 million in refunds and recoveries.⁶¹

DAA administered 380 proceedings covering various accounting matters with cost-of-service rate implications.⁶² Of these proceedings, DAA participated in or reviewed 62 rate proceedings, 42 natural gas pipeline applications, 114 merger and divestiture transactions, asset acquisition, and sales transactions, and 191 accounting inquiries from jurisdictional entities, industry trade associations, legal and consulting firms, other regulators, academia, other Commission program offices, and other stakeholders.⁶³

⁵⁸ Report at 27.

⁵⁹ Id. at 7.

⁶⁰ Id. at 81.

⁶¹ Id. at 7.

⁶² Id. at 71.

⁶³ Id. at 74.