

FERC Enforcement In 2021: A Year Of Change

By **Ruta Skučas, Kimberly Frank and Maeve Tibbetts** (January 3, 2022)

2021 was a pivotal year for the Federal Energy Regulatory Commission's Office of Enforcement. Under the direction of Chairman Richard Glick, the office gained a new director, Janel Burdick, added threats to infrastructure as a new priority, and increased its pace of opening and closing investigations and reaching settlements.

Most significantly, Glick asserted at the presentation of the 2021 enforcement report that "the cop is back on the street," and that he intends to ensure "vigorous oversight and enforcement" of jurisdictional markets.



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Increased Investigations Under Chairman Glick

During the commission's November 2020 open meeting, when the Office of Enforcement presented its 2020 annual report, then-Commissioner Glick criticized the commission's enforcement efforts, which he perceived as lacking. In 2020, the commission opened only six new investigations, and reached three settlements totaling \$553,376.



Kimberly Frank

Glick became chairman of the commission in January 2021, and announced shortly thereafter that vigorous enforcement would be one of his priorities. For 2021, the Office of Enforcement reported that it opened 12 new investigations and negotiated settlements in eight investigations totaling \$6.4 million, illustrating the implementation of Glick's priority.



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While 12 investigations is a relatively small number for a federal agency with substantial investigative authority, it was twice the rate of 2020, and showed an increased focus on market activity. Significantly, seven of the 12 new investigations opened arose from referrals by independent system operator, or ISO, and regional transmission organization, or RTO, market monitors.

This highlights the continued collaboration between the Office of Enforcement and market monitors, both internal and external, and emphasizes the importance of taking seriously queries from market monitors.

Further, five of the new investigations involved allegations of potential misrepresentations prohibited by the commission's duty of candor rule, which requires disclosure of all material facts and prohibits false statements. These allegations underscore the ease of gathering evidence necessary to demonstrate a misrepresentation claim, as compared to the more challenging and complex market manipulation allegation.

New Priority Added

Since the Office of Enforcement announced its priorities in its 2009 annual report, those priorities have remained consistent:

- Fraud and market manipulation;

- Serious violations of reliability standards;
- Anticompetitive conduct; and
- Conduct that threatens the transparency of regulated markets.

In 2021, however, the Office of Enforcement added a new priority related to matters involving threats to the nation's energy infrastructure and associated impacts on the environment and surrounding communities.

This priority was highlighted in a recent order to show cause, where the commission proposed to assess over \$20 million in civil penalties against a pipeline that allegedly purchased and then demolished a historic home, while making commitments to the commission and community that it would be preserved.

This new priority also harkens back to the protests occurring at the commission prior to the pandemic, showing the commission's willingness to engage with communities and environmental organizations to ensure adherence by certificate recipients to conditions and requirements.

2021 Trends: Self-Reporting, Renewables, Capacity Markets

Several trends can be seen from the 2021 enforcement report, as well as from the publicly issued settlements and orders to show cause.

These include the continued importance of self-reporting any violations that are discovered, the importance of compliance with tariff and regulatory obligations by renewable energy sellers and in capacity market participation, and the ongoing importance of compliance programs.

Self-Reporting Still Imperative

The commission noted that self-reporting remains the hallmark of an effective compliance program, as it shows the ability to detect, and the willingness to remediate, problematic issues and behaviors. Self-reporting also gives the company mitigating points pursuant to the penalty guidelines, reducing potential civil penalty exposure.

The 2021 enforcement report highlights 146 new self-reports that the Office of Enforcement received over the past year. The office reported that it closed the majority of self-reports with no action because the company promptly self-reported, corrected the mistake and, in some instances, provided refunds.

Examples of nonpublic self-reports in the report include:

- Electric Tariff/OATT violations. Several companies self-reported tariff violations where the utility inadvertently reported inaccurate generation data to an ISO/RTO or when it inadvertently scheduled generation quantity to an ISO/RTO that was in excess of the resource's transmission capacity.
- Regulatory filing violation. Several entities made errors in their regulatory filings, thereby violating commission regulations. For example, a natural gas company self-

reported that it failed to file an accurate FERC Form No. 552, and a power marketer self-reported errors in its electric quarterly reports. Another company self-reported that it failed to make timely category changes for its affiliates' market-based rates, and failed to make timely triennial filings.

- Gas-related violations. Several examples related to Natural Gas Act violations, including mistakenly entering into prohibited buy/sell transactions between affiliates, and violations of certificate of public necessity and convenience conditions.

Scrutiny of Capacity Market Participants

Capacity markets have been a significant commission focus for the past several years. Several self-reports and settlements highlight the Office of Enforcement's close attention to sellers' compliance with capacity supply obligations and market offers, emphasizing that entities obtaining those obligations must comply with requirements.

Enforcement staff reached two capacity market-related settlements. The first was with a company that allegedly violated its must-offer requirements in the ISO-NE forward capacity market, by not offering fully into the forward reserve market.

The second was with a company that allegedly submitted inaccurate cost-based/static de-list bids to ISO-NE's forward capacity market. One company also self-reported its failure to comply with day-ahead energy market offer obligations.

Renewable Resource Owners' Regulatory Obligations

Renewable resources were also not exempted from scrutiny, with several proceedings and self-reports highlighted. These matters highlight the importance of careful compliance with all regulatory obligations, including qualifying facility, or QF, status, market-based rate authority and close monitoring of any tariff-based exemptions.

The commission approved a settlement with Terra-Gen LLC after the Office of Enforcement investigated whether Terra-Gen submitted false or misleading information to the California Independent System Operator, or CAISO, about the capabilities of its wind-powered electric generation facility, and whether Terra-Gen violated the CAISO tariff by deviating its wind farms' output from CAISO's dispatch instructions.

The CAISO tariff permits variable energy resources to receive protective measure treatment of real-time energy imbalance settlements, given their inability to curtail output, but prohibits these resources from submitting economic bids. Terra-Gen obtained participating intermittent resource program protective measure treatment, representing that it could not ramp down in response to economic signals, but on 86 days, it shut down its production when prices were negative.

The CAISO market monitor referred the conduct to the commission as a violation of CAISO's tariff and the submission of false or misleading information. This settlement demonstrates the commission's and market monitors' careful monitoring of representations made to gain tariff exemptions.

The commission also highlighted a self-report by the owner of several wind projects that noted its failure to self-certify a project as a QF before making wholesale power sales.

The owner submitted a FERC Form No. 556, certifying the project as a QF, and paid refunds on revenues collected on the wholesale power sales made during the period when the project was not certified as a QF. Staff closed the self-report without further action because the violation was unintentional, and the owner paid refunds.

Effective Compliance Programs Still Critical

In 2010, the commission issued revised penalty guidelines allowing an organization to reduce its culpability score through favorable factors, including a compliance program. Out of the eight approved settlements in 2021, six included compliance monitoring requirements, underscoring the importance of a comprehensive compliance program.

In 2016, the Office of Enforcement issued a white paper providing guidance on the components of an effective energy trading compliance program. In the recently issued 2021 enforcement report, the Office of Enforcement provided some guidance on the elements of an effective compliance program. These elements, which largely mirror the guidance provided in 2016, include:

- Equipping staff and management with sufficient training, education, tools and other resources to detect issues promptly to correct or prevent noncompliance;

- Maintaining effective lines of communication and notifying staff of standards through well-publicized policies and procedures;

- Staying abreast of compliance trends by reviewing commission orders and audit reports and incorporating these trends and other developments in the industry;

- Having a designated compliance officer and compliance committee charged with development and oversight of compliance activities and metrics that assess program effectiveness;

- Actively involving senior management and providing for the allocation of funds necessary for compliance programs;

- Actively involving internal audit and monitoring functions to routinely assess compliance with tariff provisions and commission rules, orders and regulations, to foster a strong and sustainable culture of commitment to compliance on an enterprise-wide basis; and

- Seeking guidance from the commission as necessary to ensure compliance, including an effective process to self-report noncompliance identified through internal oversight activities.

In 2022, we expect to see an active year for the Office of Enforcement. Given that investigations can take several years to become public, this year will likely be dynamic and insightful.

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