



FY2023 FERC Actions Signal Potential Uptick in Enforcement Actions

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In January 2024, the Federal Energy Regulatory Commission (“FERC” or the “Commission”) approved two consent agreements – [Linde, Inc. and Northern Indiana Public Service Company](#), and [Vitol Inc. and Federico Corteggiano](#) - which resolved enforcement actions resulting in substantial civil penalties and disgorgements for violations of market rules and market manipulation. This early-year activity comes on the heels of FERC’s continued trend in 2023 of aggressive enforcement initiatives focused primarily on policing jurisdictional energy markets. As stated in FERC’s [Fiscal Year 2023 Report on Enforcement](#), the Commission continues to prioritize enforcement of requirements addressing fraud and market manipulation, serious violations of the mandatory reliability standards, and conduct that threatens the transparency of regulated markets.

This Alert summarizes the two recent consent agreements, highlights likely FERC enforcement trends, and provides recommendations on evaluating and mitigating enforcement risks through enhanced compliance efforts.

Linde, Inc., and Northern Indiana Public Service Company

In [Linde, Inc. and Northern Indiana Public Service Company](#), FERC’s Office of Enforcement (“Enforcement”) entered into the [Consent Agreement](#) to settle charges that Linde, Inc. (“Linde”) violated the Midcontinent Independent System Operator’s (“MISO”) tariff through its participation in the MISO demand response program, in which Northern Indiana Public Service Company (“NIPSCO”) was the market participant. Under the Consent Agreement, Linde will disgorge \$48,500,000 it received through the demand response program and pay a civil penalty of \$10,500,000, and NIPSCO will disgorge \$7,700,000 it received in connection with Linde’s participation in the demand response program.

NIPSCO was the Market Participant for Linde, selling energy in the form of reduced energy usage, in MISO’s Day Ahead market between August 2017 to July 2022. During this period Linde did not reduce energy usage when MISO accepted its demand response offers. Enforcement concluded that such conduct violated section 38.3.5(d)(ii)(e) of the MISO Tariff because Linde did not “respond to [MISO] directives to . . . change output levels” by decreasing its load. Because NIPSCO was the Market Participant for Linde’s participation as a Demand Response Resource-Type 1, Enforcement found NIPSCO responsible for Linde’s MISO Tariff violation.

Vitol Inc. and Federico Corteggiano

Under the [Consent Agreement](#) approved by the Commission January 4, 2024, to resolve an ongoing market manipulation dispute, energy and commodities company, Vitol Inc., will pay a civil penalty of \$2,225,000, and one of the company’s power traders, Federico Corteggiano, will pay a civil penalty of \$75,000 (collectively the “Defendants”).

In 2014, Enforcement commenced an investigation of the Defendants’ trading activity in the CAISO electric power market, resulting in the Commission issuing a July 2019 [Order to Show Cause](#). August 2019 Defendants provided notice of their election for prompt assessment and requested a federal district court de novo review pursuant to section 31(d)(3) of the Federal Power Act (“FPA”). In the October 2019 [Assessment Order](#), the Commission determined that the Defendants’ conduct violated the Commission’s Anti-Manipulation Rule section 1c.2 and FPA section 222 by selling physical power at a loss in October and November 2013 in the CAISO Day Ahead market for the purpose of eliminating congestion costs that expected to cause losses on Vitol’s Congestion Revenue Rights positions. Concluding the Defendants colluded to defraud the CAISO market and market participants, the Commission imposed civil penalties

and disgorgement. Thereafter, FERC filed a complaint in U.S. District Court in January 2020 to request a court order affirming the Assessment Order and seeking recovery of the assessed fines.

Before the District Court, the Defendants argued the time for FERC to seek penalties had passed since the statute of limitations began to accrue from the date of the alleged wrongdoing; conversely FERC argued it is instead from the date when FERC assesses the penalty not when it commences the investigation.

The District Court found in favor of FERC, agreeing that FERC must first assess a penalty before the clock can begin to run. Following the District Court litigation, the Defendants' petitioned the U.S. Court of Appeals in March 2022 to partially dismiss FERC's complaint on the grounds that it had surpassed the five-year statute of limitations period for which FERC had to bring a federal action to enforce its civil penalties.

Following briefs and oral argument in August 2023, the [Ninth Circuit issued an opinion](#) affirming the District Court in FERC's favor. Quoting the court in [Powhatan](#), the Ninth Circuit held "it is unsurprising that Congress designed the statute to give the agency the necessary time to 'investigate and to uncover' violations of the Federal Power Act."

FERC's Enforcement Agenda Likely to Remain Robust

In fiscal year 2023, Enforcement prioritized five areas to prevent and remedy misconduct in wholesale natural gas and electric markets: (1) Fraud and market manipulation; (2) Serious violations of the Reliability Standards; (3) Anticompetitive conduct; (4) Threats to the nation's energy infrastructure and associated impacts on the environment and surrounding communities; and (5) Conduct that threatens the transparency of regulated markets.

In 2023, Enforcement completed nine audits, resulting in 68 findings of noncompliance and 332 recommendations for corrective action, directing \$33 million in refunds and recoveries. During 2023, FERC Enforcement opened 19 new investigations, of which at least 11 involved market manipulation, six involved tariff violations, and three involved misrepresentations under the Commission's existing [Duty of Candor rule](#).

We expect FERC to continue or expand this level of enforcement activity in 2024. Another potential near-term FERC enforcement development is the proposed Duty of Candor rulemaking, which would specifically require anyone communicating with FERC or other specified entities, to submit accurate information, not to submit false or misleading information, and not to omit the submission of material information. If this rule is finalized, it will provide another tool to FERC enforcement staff and may further increase FERC investigative and enforcement activity.

Compliance Activities to Evaluate and Potentially Mitigate Your Enforcement Risks

Given the likelihood of robust enforcement activity at FERC during 2024, entities subject to FERC's jurisdiction should consider taking specific steps to evaluate and mitigate potential compliance risks.

Such steps could include:

- Evaluating your organization's existing compliance functions;
- Reviewing your organization's FERC compliance training materials and refreshing, as needed;
- Conducting FERC enforcement training sessions;
- Targeted internal review/ "audit" of specific areas of potential compliance risk;
- Ensuring whistleblower reporting channels are established;
- Reviewing your organization's policies on the use of portable devices to conduct business (see [Mitigating the Rising Risk from Corporate Use of Third-Party Apps](#)); and

- Establishing “top-down” messaging on the importance of compliance.

For More Information

Van Ness Feldman counsels, trains, and represents clients regarding a wide range of FERC matters including enforcement, compliance, and litigation and investigations. If you would like more information regarding FERC enforcement and compliance activities, please contact [Mike Farber](#), [Mosby Perrow](#), [Michael Diamond](#), [Nakia Arrington](#) or any member of the firm’s [Litigation & Investigations](#), [Electric](#), or [Pipeline & LNG Practice Groups](#) at (202) 298-1800.

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