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Three-Plus-Year Investigation Results in Blockbuster Show Cause Order from FERC

DECEMBER 18, 2024

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Following an investigation that began in May 2021, the Federal Energy Regulatory Commission (FERC) recently issued an Order to Show Cause and Notice of Proposed Penalty against American Efficient, LLC, its subsidiaries, and corporate parents for market manipulation and tariff violations for which FERC seeks $722 million in civil penalties and disgorgement of over $253 million in unjust profits to PJM and MISO. The case revolves around definitions of eligible energy efficiency projects that may be entitled to capacity payments.

The order, issued on December 16, 2024, alleges that the company violated Section 222 of the Federal Power Act (FPA) and FERC regulations through a manipulative scheme in PJM and MISO capacity markets. The alleged violations involve extracting millions of dollars in capacity payments for a purported energy efficiency “projects” that, according to the Commission, did not actually reduce energy use and failed to meet tariff requirements regarding measurements and validation for participation as an Energy Efficiency Resource (EER).

American Efficient allegedly monetized, through the capacity markets, numerous independent customer decisions to purchase energy efficient products at retail by buying the sales data and, purportedly, “environmental attributes” from various retailers, manufacturers, and distributers such as Walmart, GE-Current, and Stop and Shop, and then seeking capacity payments from PJM and MISO capacity markets for the energy reductions associated with the customers’ anticipated use of those products.

FERC’s Investigation

FERC Enforcement Staff employed various investigative techniques, including reviewing American Efficient's submissions to the ISOs/RTOs, analyzing capacity auction results, and examining the company's measurement and verification (M&V) plans and post-installation M&V reports. Staff also scrutinized American Efficient's relationships with finance partners, including an investment bank, its affiliate, and an investment company. FERC Enforcement Staff reviewed American Efficient's decade-long history of EER participation in PJM and MISO related to Energy Efficiency Resources (EERs) as well as attempts to expand its program to ISO-NE and the subsequent rejection by that RTO. The investigation covered financial transactions, market participation data, and communications between American Efficient and the relevant ISOs/RTOs.

FERC Enforcement Staff noted that American Efficient refused to cooperate with its investigation, declining to make witnesses available for interviews and/or sworn testimony. After converting the preliminary investigation into a formal investigation, Staff took testimony from two company employees and two former company executives. Staff also alleged that American Efficient provided misleading information to FERC.

What Happens Next

The Show Cause Order requires the respondents to, within 30 days, respond to the allegations and show cause as to why they should not be found in violation of the FPA and FERC regulations. The order also requires the Respondents to choose between an immediate penalty assessment with a right to a *de novo* trial in court and an administrative hearing before a FERC Administrative Law Judge (ALJ). It remains unclear whether the Supreme Court's decision in *SEC v. Jarkesy* will affect these proceedings. Under the FPA, respondents will have the option to contest any penalty assessment in a *de novo* trial in federal district court. The *Jarkesy* decision suggests that a proceeding before an ALJ would violate the Seventh Amendment if respondents were required to go before an ALJ. But under the FPA, respondents are not "required" but have the option to pursue an administrative hearing before an ALJ. It is uncertain how a federal court, post-*Jarkesy*, would conduct a Seventh Amendment analysis of any ALJ rulings that the defendant opted to pursue.

It is important to note that in September 2024, FERC terminated administrative hearing proceedings in a long-running market manipulation case against Total Gas & Power North America and two of its traders. (See Following Jarkesy , FERC Signals Sea Change in Enforcement | Van Ness Feldman LLP). The dismissal order stated that the Commission "expects to further address its approach to enforcement cases in light of *Jarkesy*." It is curious that, after the Total Gas and Power voluntary dismissal and the issuance of this statement, that the American Efficient Show Cause Order provides respondents with the ALJ administrative hearing option without directly addressing its views on *Jarkesy* as it suggested it would.

The American Efficient enforcement action aligns with FERC's increased focus on market manipulation and serious violations of reliability standards in 2024. The proposed penalty of $722 million is significantly larger than the total civil penalties of $16.68 million reported in FERC's Fiscal Year 2024 Enforcement Report (see FERC's Annual Enforcement Report – Understanding Trends and Preparing for an Uncertain Future | Van Ness Feldman LLP), indicating either FERC's views on the severity of the alleged violations or on the behavior of the company during the investigation.

We expect the respondents will continue to aggressively defend itself, most likely in a *de novo* trial given the dollars at stake. It will be to closely follow this proceeding as it plays out further to understand how FERC's enforcement process will proceed in large cases amidst broad and continuing changes in Administrative Law.

For More Information

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