

## **FERC Releases Fiscal Year 2023 Annual Enforcement Report**

Article By:

Randall S. Rich

Jared S. des Rosiers

Nicholas H. Salalayko

---

The Federal Energy Regulatory Commission's (FERC) Office of Enforcement (OE) recently issued its **Fiscal Year 2023 Annual Report on Enforcement**. As in previous years, the Enforcement Report discusses the activities performed in the OE's Division of Investigations (DOI), Division of Audits and Accounting (DAA), and Division of Analytics and Surveillance (DAS).

During FY2023, OE opened 19 new investigations, closed nine pending investigations, negotiated 12 Commission-approved settlements totaling approximately \$53 million in civil penalties and disgorgements, completed nine audits of utilities, and reviewed several hundred thousand natural gas and electric surveillance screen trips.

### **FERC's Strategic Plan and OE's Priorities**

FERC's **Strategic Plan for Fiscal Years 2022-2026** (Strategic Plan) sets forth several primary missions, including:

- 
- Accounting for significant changes in the energy supply due to changes in the fuel mix of resources participating in the organized electric markets.
  - Addressing increasing threats to the nation's energy infrastructure.
  - Ensuring that consumers have access to economically efficient, safe, reliable, and secure energy at a reasonable cost.

To achieve its stated missions, the Strategic Plan indicated three goals:

1. Ensure just and reasonable rates, terms, and conditions.
2. Promote safe, reliable, and secure infrastructure consistent with the public interest.
3. Support the mission through organizational excellence.

In light of the goals identified in the Strategic Plan, and FERC's obligation to oversee regulated markets, the OE's enforcement priorities in FY2023 included the five following areas:

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.
5. Conduct that threatens transparency in regulated markets.

## **Enforcement Activities by the Numbers**

### *DOI Investigations, Settlements, and District Court Litigation*

DOI is primarily engaged in conducting investigations of potential violations of the statutes, regulations, rules, orders, tariffs, certificates, and licenses administered by FERC. If, after completing an investigation, the DOI

---

concludes that a violation has occurred, then DOI staff will seek to negotiate a resolution within the authority that FERC grants the division. According to the Report, FERC's Enforcement has negotiated settlements totaling approximately \$858 million in civil penalties and \$583 million in disgorgement since 2007.

In FY2023, FERC approved **12 settlement agreements** to resolve pending enforcement matters, eight of which were to conclude investigations for a total of approximately \$12 million in civil penalties and \$21.67 million in disgorgement. Additionally, one investigation was partially resolved by settlement with one individual, but remains open for the remaining investigative subjects. The other three FERC-approved settlements consist of one federal district court matter, one order to show cause proceeding, and one U.S. court of appeals matter.

Additionally, the OE's staff opened 19 new investigations in FY2023, as compared to 21 in FY2022 and 12 in FY2021. Of the 19 investigations, at least 11 involved market manipulation, six involved tariff violations, and three involved misrepresentations under FERC's Duty of Candor rule.

## **Litigation in District Court**

The DOI spent a substantial amount of time in FY2023 preparing for matters related to litigation in federal courts. There were two matters in district court that OE staff continued to litigate to enforce FERC's penalty assessments under the Federal Power Act.

- 1. FERC v. Powhatan Energy Fund, LLC, et al., No. 3:15-cv-00452 (E.D. Va.)** – In 2015, FERC issued an order assessing civil penalties against Powhatan Energy Fund, LLC (Powhatan), Houlian “Alan”

---

Chen, HEEP Fund, Inc., and CU Fund, Inc. (the Powhatan defendants) after determining the Powhatan defendants had violated the Commission's Anti-Manipulation Rule for certain trades made in PJM in 2010 and assessing civil penalties to those involved. On July 21, 2015, FERC staff filed a petition in district court to enforce the order against the Powhatan defendants. Over the next seven years, FERC settled with all the Powhatan defendants except Powhatan.

Powhatan later filed for Chapter 7 bankruptcy, and FERC moved for judgement against Powhatan's trustee in the bankruptcy proceeding. This resulted in the U.S. District Court for the Eastern District of Virginia staying the litigation pending the disposition of proceedings in the bankruptcy court. FERC eventually and successfully moved for an order lifting the stay, and on March 7, 2023, FERC filed a motion for default judgement against Powhatan after the trustee for Powhatan's bankruptcy estate determined it would no longer defend the district court litigation. On March 23, 2023, the district court granted FERC's motion and issued a final judgement against Powhatan. This marked the first time a federal district court had issued a final judgement against an entity FERC determined to have committed market manipulation.

## **2. FERC v. Vitol, Inc. and Federico Corteggiano, No.**

**2:20-CV-00040-KJM-AC (E.D. Cal.)** – On October 25, 2019, the Commission issued an Order Assessing Civil Penalties after determining that Vitol Inc. and its trader Federico Corteggiano (the Vitol defendants) violated FERC's Anti-Manipulation Rule and Section 222 of the Federal Power Act by selling power at a loss in 2013 in CAISO's day-ahead market for the purpose of eliminating congestion

---

costs expected to cause losses on Vitol's Congestion Revenue Rights positions. The Vitol defendants failed to pay the amounts.

On January 6, 2020, OE staff filed a complaint in district court to enforce the Commission's penalty assessment order against the Vitol defendants. They responded with a motion to dismiss the complaint, which, in relevant part, claimed that the statute of limitations barred FERC's claim. The district court rejected their claim. On appeal, the Ninth Circuit upheld the district court's ruling, stating that, "until there is a civil penalty, a cause of action for affirming the penalty cannot exist." The case is still pending in district court.

## **Self-Reports**

In FY2023, DOI staff received 148 self-reports from market participants and closed all but 23. The plurality of self-reports closed in FY2023, as in each of the four previous fiscal years, are for violations of tariff provisions. In the Enforcement Report, FERC staff continued to encourage the submission of self-reports and emphasized that such behavior can significantly mitigate penalties.

### *DAA Audits, Findings of Noncompliance, and Refunds*

The DAA administers the OE's audit, accounting, and forms administration and compliance programs. In FY2023, the DAA completed nine audits of public utility, natural gas, oil pipeline, and regional transmission organization companies. These audits resulted in 68 findings of noncompliance, 332 recommendations for corrective action, and directed approximately \$33 million in refunds and other recoveries. The Report noted that of the \$33 million, the DAA directed nearly \$20 million to be refunded to customers and prevented approximately \$13.6 million from being inappropriately

---

collected through customer rates.

The refunds and recoveries addressed DAA findings of improper application of merger-related costs; lobbying, charitable donation, membership dues, employment discrimination settlement costs; improper labor overhead capitalization rates; accounting for production-related or distribution-related expenses as general or transmission-related expenses; pending income tax refunds being treated as prepayments; and compliance with the FERC's allowance for funds used during construction (AFUDC)/construction work in progress (CWIP) regulations.

### *DAS Investigations, Transaction Analyses, and Data Management Initiatives*

DAS focuses on natural gas surveillance, electric surveillance, and analytics for reviewing market participant behavior. The analysts and economists in DAS identify market participants whose conduct may potentially call for investigation or further FERC action. With respect to surveillance, DAS seeks to detect anomalous behavior and identify potential investigative subjects. If DAS detects an anomaly through its surveillance screening, which DAS refers to as a "screen trip," DAS will conduct a series of analyses to evaluate whether to further investigate a situation.

Moreover, in FY2023, DAS staff took part in enhanced examination efforts related to Winter Storm Elliot and the Western Energy Price Spike to determine if any market participants engaged in market manipulation or other violations. Both efforts are still underway, but DOI has already received referrals for investigation.

During FY2023, natural gas surveillance screens produced approximately

---

24,000 screen trips. After review, DAS dismissed the vast majority, opening only 27 natural gas inquiries, two of which remain open. In the context of electricity, there were approximately 567,000 screen trips. DAS identified 43 instances that required further inquiry. Of the 43 instances, 25 were closed with no referral and 12 remain open with DAS staff continuing its analytic work. Six were referred to DOI for further investigation.

Along with surveillance activities, DAS worked on approximately 60 investigations and 15 other matters involving inquiries or litigation. The matters where DAS participated generally involved allegations of market manipulation and violations of tariff provisions.

The Enforcement Report noted that during FY2023, DAS conducted *ex post* analysis of over 2.6 million transactions filed through FERC's electric quarterly reports, analyzing the combined results of 30 statistical indicators to detect potential instances of market power.

Lastly, DAS continues to focus on two major data management initiatives:

1. The development of a data warehouse that will simplify data compiled under Order No 760 (an order seeking to enhance FERC's surveillance and analysis of the energy markets).
2. Migrating all FERC analytics into the cloud.

During FY2023, DAS helped the FERC Office of the Chief Information Officer to test and configure two enterprise-wide analytics products in the cloud, and completed an inventory of FERC's key data assets and its production screenings in preparation for the move.

The Enforcement Report illustrates the need for strict compliance with

FERC's rules, regulations, and policies. All parties active in the natural gas, electric, and oil pipeline markets should regularly conduct compliance training to maintain a culture of compliance and remind employees of the importance of operating within the law.

©2023 Pierce Atwood LLP. All rights reserved.

---

National Law Review, Volumess XIII, Number 325

Source URL: <https://www.natlawreview.com/article/ferc-releases-fiscal-year-2023-annual-enforcement-report>