

# There's a New Sheriff in Town: FERC Imposes Civil Penalties for the First Time Under its EAct Enforcement Authority

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## The Change

The Energy Policy Act of 2005 (EAct) significantly expanded the Federal Energy Regulatory Commission's (FERC) power to enforce the Federal Power Act (FPA), the Natural Gas Act (NGA), the Natural Gas Policy Act (NGPA), and the rules, regulations and orders promulgated thereunder. Specifically, EAct gave FERC the "teeth" it needs to enforce the statutes it administers by increasing the civil penalties that it may impose on a regulated company from a maximum of \$10,000 per day to a maximum of \$1,000,000 per day. *See* 16 USCA § 825o-1; 15 USCA § 717t-1; and 15 USCA § 3414.

## Why Pay Attention

On January 18, 2007, FERC asserted its new civil penalty authority for the first time by approving five separate settlement agreements under which PacifiCorp, SCANA Corporation, Entergy Services, Inc., Northwestern Corporation, and NRG Energy, Inc. will pay a total of \$22.5 million in civil penalties for statutory and tariff violations and violations of FERC's rules and regulations. Among other things, the FERC-approved settlement agreements require:

- PacifiCorp to pay a \$10 million civil penalty for violations of its Open Access Transmission Tariff (OATT) and FERC's standards of conduct for transmission providers.
- SCANA to pay a \$9 million civil penalty for violations of its OATT, and to disgorge \$1.4 million in profits gained as a result of the violations.

- Entergy to pay \$3 million (consisting of a \$2 million civil penalty and a \$1 million payment to support the rebuilding of New Orleans schools damaged by Hurricane Katrina) for violations of the OATT and FPA.
- NorthWestern to pay a \$1 million civil penalty for violations of FERC's Business Practice Standards.
- NRG to pay a \$500,000 civil penalty for violations of the ISO-NE tariff and FERC's Market Behavior Rules.

These settlements provide important guidance to regulated companies as to how FERC will assert its EAct enforcement authority in the future.

## Some Important Observations

As an initial matter, it is important to note that while each settlement imposes some level of civil penalty, no settlement imposes the maximum penalty allowed by law. In his January 18, 2007 statement regarding the settlements ("Settlement Statement" available at <http://www.ferc.gov/press-room/statements-speeches/kelliher/2007/01-18-07-kelliher-M-3.asp>), FERC Chairman Joseph Kelliher explained that maximum penalties will be reserved for those circumstances where the seriousness of a company's offense is egregious or where the harm is significant. However, he and the other commissioners concluded that the companies' violations at

issue in the January 18 settlements did not rise to that level. In fact, four of the five settlements involved companies (PacifiCorp, SCANA, Entergy and NRG) that self-reported their violations, and as a result, those companies received credit for their compliance in the form of substantially reduced penalties. FERC's practice of giving credit for self-reporting in these cases is consistent with its October 20, 2005 Policy Statement on Enforcement, which emphasizes "firm but fair enforcement" and encourages the creation of a "culture of compliance" by providing regulated companies an incentive to maintain internal compliance, self-report violations and cooperate with FERC's enforcement efforts. *See Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶61,068 (2005) ("Policy Statement on Enforcement"). Regulated companies should be aware however, that unless they are committed to the development of a strong compliance culture, any credit given for self-reporting violations will likely diminish and civil penalties will increase.

Likewise, when a company maintains a weak compliance culture, FERC may see fit to impose civil penalties even if the violations are unintentional and cause minimal or even no harm. For example, in the order approving the Entergy settlement, FERC found that the violations at issue "were generally the result of low-level employees' inadvertent actions, done without the knowledge or acquiescence of senior management. The matters did not reflect undue preference or undue discrimination and resulted in little or no quantifiable harm." *In Re Entergy Services, Inc.*, 118 FERC ¶61,027, Par. 16 (2007). Despite these findings, however, and despite the fact that Entergy self-reported its violations, FERC required Entergy to make a \$3 million payment and to take steps to improve its compliance. Chairman Kelliher explained in his Settlement Statement that a company can expect its civil penalties to increase if it continues to maintain a weak compliance culture. While there is no set formula for determining a "strong" compliance culture, FERC may consider a number of factors, including: whether a compliance program is well-documented and disseminated throughout the company; whether a compliance program is supervised and supported by the company's senior management; a company's procedure for auditing compliance; and

a company's procedure for providing regulatory compliance training to its employees. *See* Policy Statement on Enforcement, ¶22.

Finally, the settlements demonstrate FERC's intent to aggressively enforce OATT through its EAct civil penalty authority. Indeed, the PacifiCorp, SCANA and Entergy settlements – which collectively impose \$21 million in civil penalties – all involve violations of OATT. Further, Chairman Kelliher's Settlement Statement clarifies that FERC will use its EAct enforcement authority to "assur[e] compliance" with OATT, unequivocally ending any perception on the part of regulated companies that FERC will passively assume compliance.

## What It Means To You

The civil penalties imposed by the settlements are clear evidence of FERC's intent to aggressively utilize its penalty authority under EAct and to become "a preeminent enforcement agency." *See* Kelliher Settlement Statement. These settlements come on the heels of pre-EAct settlements in which FERC overcame limitations on its penalty and refund authority by asserting the right to require the disgorgement of revenues collected as a result of tariff violations. Accordingly, regulated companies should take the steps necessary to maintain a strong compliance culture with respect to the statutes FERC administers. And in the event violations occur, companies should take care to self-report the violations, take immediate corrective action, and cooperate with FERC's enforcement efforts in order to mitigate potential civil penalties. In this regard, the commissioners noted, in their open meeting, the larger number of cases which had been resolved cooperatively without the assessment of any penalties or other enforcement action.

Compliance is, therefore, one of the critical issues for participants in the energy sector. The complexity of FERC's regulations can be particularly difficult for the many new actors in the industry. All energy sector participants should be taking steps to implement strong internal training and monitoring programs and to meet the standards set forth in the Policy Statement on Enforcement.

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*If you have any questions regarding these issues, we would be pleased to discuss them with you. For more information, please contact either of the attorneys listed below.*

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