

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Conference on Enforcement Policy

Docket No. AD07-13-000

COMMENTS

The American Gas Association, Edison Electric Institute, Electric Power Supply Association, Independent Petroleum Association of America, Interstate Natural Gas Association of America, and Natural Gas Supply Association (hereinafter “market participants”) answer additional questions submitted by Commissioner Philip D. Moeller¹ and Commissioner Marc Spitzer² in the above-referenced docket, respond to the request made by Chairman Joseph T. Kelliher at the Technical Conference on Enforcement Policy (“Enforcement Conference”) on November 16, 2007 for a list of ambiguities in FERC rules and policies,³ and provide additional perspectives on certain matters. In these Comments, market participants reference various portions of the Enforcement White Paper submitted in this proceeding on November 19, 2007.⁴

¹ Conference on Enforcement Policy, Additional Questions of Commissioner Philip D. Moeller, Docket No. AD07-13-000 (Nov. 20, 2007) [hereinafter “Moeller Questions”].

² Conference on Enforcement Policy, Additional Questions of Commissioner Marc Spitzer, Docket No. AD07-13-000 (Nov. 20, 2007) [hereinafter “Spitzer Questions”].

³ FERC, Enforcement Conference Webcast (Nov. 16, 2007), *available at* <http://ferc.gov/EventCalendar/EventDetails.aspx?ID=3469&CalType=%20&Date=11%2f16%2f2007&CalendarID=116> [hereinafter “Enforcement Conference Webcast”].

⁴ American Gas Association et al., Implementation of the Federal Energy Regulatory Commission’s Enforcement Authority (Nov. 14, 2007) [hereinafter “White Paper”].

A. Market Participants Agree That Vigorous and Fair Enforcement Is Critical to Ensuring that Energy Markets Operate in a Fair, Open, and Competitive Manner

Commissioner Spitzer asked whether there is any disagreement that vigorous enforcement is critical to ensuring that the markets operate in a fair, open, and competitive manner. As set forth below, there is no disagreement that enforcement by the Commission should be vigorous yet fair.

1. Vigorous, Firm, and Fair Enforcement Means Achieving the Proper Balance Between the Commission’s Enhanced Civil Penalty Authority and the Commission’s Efforts to Help Market Participants Comply

Market participants believe that the vitality of the markets regulated by FERC depends on the Commission’s vigorous, firm, and fair use of its enforcement authority. FERC’s enhanced civil penalty authority is an important weapon in what former Commissioner William L. Massey described as the Commission’s “Hard Power” arsenal,⁵ but the assessment and collection of civil penalties alone will not ensure that energy markets operate in a fair, open, and competitive manner for the benefit of consumers.⁶ The aim of enforcement should be to encourage and foster a culture of compliance. To achieve this goal, the Commission should bolster its “Soft Power” arsenal, which consists of providing a well-defined compliance road map, clarifying rules and policies, and educating market participants about FERC’s rules and policies. In the White Paper,

⁵ Conference on Enforcement Policy, Remarks of William L. Massey, Docket No. AD07-13-000 (Nov. 14, 2007) [hereinafter “Massey Remarks”].

⁶ Market participants understand that civil penalties help foster compliance when they are appropriately imposed. While flagrant violations of the Commission’s rules require particular scrutiny, there are other violations which also may require investigation and, under certain circumstances, possible civil penalty assessment. In the White Paper, however, market participants explained that there are situations where unclear rules and a lack of harm to consumers or the markets may make the imposition of large civil penalties inappropriate. White Paper, *supra* note 4, at 20.

market participants suggested a number of ways that the Commission could strengthen its “Soft Power” arsenal and achieve a better balance between “Hard Power” and “Soft Power.” This balance is called “Smart Power,” and it is the key to ensuring that energy markets operate in a fair, open and competitive manner for the benefit of consumers.

2. Articulating Core Regulatory Principles and Providing More Transparency in the Determination of Civil Penalty Levels Will Enhance the Effectiveness of the Commission’s Enforcement Program

As discussed at the Enforcement Conference, the Commission should define and articulate its “core regulatory principles.” There is confusion about what the Commission considers to be such principles. For example, at the Enforcement Conference, it became apparent that it has not always been clear to the industry that FERC’s shipper-must-have-title rule is a core regulatory principle.⁷ There was understandable surprise among market participants, therefore, when many of the settlement and consent agreements issued this year identified that rule as a core principle.⁸ FERC should provide market participants with a complete list of its core regulatory principles. Market participants appreciated the stated recognition by certain Commissioners of the need to articulate these principles, and look forward to more guidance from FERC.

Increased transparency regarding the Commission’s core regulatory principles will help market participants design robust compliance programs that reflect the Commission’s priorities.

⁷ Enforcement Conference Webcast, *supra* note 3.

⁸ For orders approving stipulation and consent agreements indicating that the shipper-must-have-title rule is “long-standing, well-known, and [a] critical element of the Commission’s capacity release program,” see *In re MGTC, Inc.*, Order Approving Stipulation and Consent Agreement, 121 FERC ¶ 61,087 at P 15 (Oct. 25, 2007); *In re Calpine Energy Services, L.P.*, Order Approving Stipulation and Consent Agreement, 119 FERC ¶ 61,125 at P 15 (May 9, 2007); *In re Bangor Gas Co.*, Order Approving Stipulation and Consent Agreement, 118 FERC ¶ 61,186 at P 12 (Mar. 7, 2007).

Market participants designing such programs must guard against violations of a large number of complex rules. At the Enforcement Conference, former Commissioner Clifford (Mike) M. Naeve discussed one way that market participants can organize their efforts when he outlined an approach that mapped the relationship between the consequences for violations of FERC rules, and the rules that an individual market participant is most likely to violate. If the Commission articulates core regulatory principles, market participants will better understand how to reflect in their compliance program designs the significance or consequence of violating a particular rule. This enhanced understanding will lead to the development of compliance programs that more effectively guard against violations of the rules that FERC considers most important.

Additionally, market participants would welcome greater transparency in the determination of civil penalty levels. Specifically, the Commission's policy for determining civil penalty levels should convey the relative importance the Commission places on certain of its rules and policies. This was the goal of the White Paper's suggestion that the Commission adopt a tiered civil penalty schedule, with the opportunity to consider mitigating factors, like that of the Nuclear Regulatory Commission.⁹ Another example of how the level of a penalty is linked to the significance of a rule can be found at the Environmental Protection Agency ("EPA"). In general, civil penalties assessed by EPA are comprised of two elements: the "economic benefit" component and the "gravity-based" component.¹⁰ The economic benefit component of a penalty reflects the economic gain attributable to a violation. The gravity component is the punitive

⁹ White Paper, *supra* note 4, at 22-24.

¹⁰ EPA, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations; Notice, 65 Fed. Reg. 19,618, 19,620 (Apr. 11, 2000) [hereinafter "EPA Audit Policy"]. Differences in the various statutes administered by EPA may result in deviations from the general penalty approach described in these Comments.

portion of the penalty.¹¹ To arrive at the gravity component, EPA ranks violations in accordance with the seriousness of the act.¹² This ranking is determined by evaluating the importance to the regulatory scheme, actual or possible harm, and the availability of data from other sources. After violations are ranked according to seriousness, appropriate dollar amounts or ranges of dollar amounts are assigned to derive the gravity component of the penalty. Before the EPA arrives at a final penalty assessment, it may also consider aggravating or mitigating factors and make appropriate adjustments.¹³

At a minimum, FERC should consider implementing an approach that reflects the importance of the regulatory requirement or core regulatory principle. This will allow FERC to exercise its enforcement authority in a manner that is firm but fair, and transparent, and provide a better compliance road map to market participants.¹⁴

B. The Commission Should Clarify its Rules and Policies and Continue to Increase Transparency to Encourage Self-Reporting

Both Commissioners Moeller and Spitzer asked questions about self-reporting.

Commissioner Moeller asked what types of self-reports may be discouraged by the lack of clarity

¹¹ *Id.*

¹² EPA, A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties, U.S. EPA General Enforcement Policy Compendium, *available at* <http://www.wildlaw.org/Eco-Laws/civ-pen.htm#on%20Civil%20Penalties>.

¹³ *Id.*

¹⁴ EPA's penalty policy has a companion audit policy that encourages self-reporting. EPA Audit Policy, *supra* note 10. The EPA audit policy mitigates penalties based on the presence of nine conditions. *Id.* at 19,625-26. Entities that meet all nine conditions are eligible for 100 percent mitigation of the gravity-based component of the penalty that would otherwise be assessed. *Id.* at 19,618. Regulated entities that do not meet the first condition, but meet the other eight conditions are eligible for a 75 percent mitigation of the gravity-based component of the penalty. *Id.*

in enforcement policy and what incentives generally impact an entity's decision to self-report.¹⁵ Commissioner Spitzer asked what the Commission can do to encourage self-reports.¹⁶

Self-reporting is heavily influenced by the ability to identify violations of clear FERC rules. As explained in the White Paper, it can be exceedingly difficult to decide whether to self-report in cases where the regulatory requirements are unclear.¹⁷ To encourage self-reporting, the Commission should clarify regulatory requirements so that market participants are able to clearly identify violations of FERC's rules and policies.

Self-reporting is also influenced by a market participant's level of understanding of the Commission's use of its prosecutorial discretion and of the risk of civil penalty assessment. As explained in the White Paper, self-reporting can be undermined when market participants are uncertain about how self-reporting will be credited in enforcement actions and do not understand when a self-report may lead to an investigation.¹⁸ Market participants welcome the additional transparency provided by Chairman Kelliher's statements at the Enforcement Conference and by the Report on Enforcement issued on November 14, 2007, and look forward to learning more about the Commission's treatment of self-reports.¹⁹ Specifically, the Commission can bolster its "Soft Power" arsenal by providing as much specificity as possible, on a periodic basis, about its treatment of self-reports. Market participants understand that confidentiality plays an important

¹⁵ Moeller Questions, *supra* note 1.

¹⁶ Spitzer Questions, *supra* note 2.

¹⁷ White Paper, *supra* note 4, at 18-20.

¹⁸ *Id.*

¹⁹ *See e.g.*, Chairman Joseph T. Kelliher, Statement on Enforcement at 3 (Nov. 14, 2007); FERC, Conference on Enforcement Policy, Report on Enforcement at 14-19, Docket No. AD07-13-000 (Nov. 14, 2007) [hereinafter "Report on Enforcement"].

role in the Commission's investigation process, but believe that transparency can be improved without compromising confidentiality.

For instance, the Report on Enforcement indicated that one set of the self-reported violations that was closed with no action was the “[f]ailure to make certain filings required by the regulations.”²⁰ Market participants would like to know what types of filings were not made in such cases. Disclosing such information is unlikely to compromise confidentiality, and it is likely to further self-reporting and compliance. Additionally, the Report on Enforcement stated that “37 of the 74 self-reports of violations received since October 2005 have been closed without conducting an investigation or imposing a sanction.”²¹ Although the Report on Enforcement listed factors FERC generally takes into account when deciding whether to initiate an investigation,²² it did not fully explain why FERC chose not to open investigations or pursue maximum penalties for self-reported violations.²³ Market participants would like to know whether a lack of clarity in regulations, a misinterpretation of regulations by the market participants, a lack of harm, or the nature of the regulation at issue influenced the decision not to open an investigation. They would welcome this information because it will help them better understand self-reporting and in turn promote compliance.

²⁰ *Id.* at 16.

²¹ *Id.* at 15.

²² *Id.* at 14.

²³ The Report on Enforcement did state that Staff determines that a violation is minor and does not warrant an investigation in some instances when a company brings itself into compliance or voluntarily increases its internal procedures to prevent the reoccurrence of the violation. *Id.* at 15. It also stated that an investigation may be opened in these circumstances if Staff cannot determine whether the company fully intends to bring its conduct into compliance. *Id.* at 16. Market participants would like to know what factors are considered when determining whether a violation is minor and how Staff determines whether a market participant has demonstrated an intent to bring itself into compliance.

C. The Commission Should Consider a Limited Period of Forbearance For Certain Types of Violations

Both Commissioners Moeller and Spitzer asked questions about forbearance.

Commissioner Moeller asked for “specific details of any program involving forbearance, especially in relation to how such a program would lead to greater compliance in the future.”²⁴

He also asked whether similar programs have resulted in greater compliance at other regulatory agencies. Commissioner Spitzer asked for comment on how a forbearance period could be implemented, including whether there should be temporal limits or restrictions on the types of violations eligible for the program.²⁵

The Commission previously has used various forms of forbearance to strike the proper balance between firm and fair enforcement. For example, upon discovering that market participants were failing to file jurisdictional rates in accordance with section 205(d) of the FPA and that there was a lack of clarity regarding the application of FERC’s filing policies in a changing market environment, the Commission implemented a series of limited amnesty or forbearance programs to allow market participants to bring themselves into compliance.²⁶ Similarly, when clarifying the importance of its filing rules for individuals seeking to hold

²⁴ Moeller Questions, *supra* note 1.

²⁵ Spitzer Questions, *supra* note 2.

²⁶ *In re Central Maine Power Co.*, Order Conditionally Accepting Rates as Modified and Notices of Termination, Ordering Refunds and Payment of Additional Filing Fees and Announcing Policy Concerning the Timing of Electric Rate Filings, 56 FERC ¶ 61,200 (Aug. 2, 1991), *reh’g denied* 57 FERC ¶ 61,083 (Oct. 22, 1991); Prior Notice and Filing Requirements Under Part II of the Federal Power Act, Final Order, 58 Fed. Reg. 41,745-46 (Aug. 5, 1993). For instance, the Commission implemented one amnesty period after recognizing that there was confusion regarding the applicability of the Commission’s filing rules to umbrella tariffs. *Id.* Similarly, another amnesty period was implemented after the Commission recognized that the application of the filing requirements to contributions-in-aid-of-construction agreements was not clear. *Id.*

interlocking directorate positions, FERC implemented a limited period of forbearance.²⁷

Additionally, as discussed in the White Paper, FERC established a safe harbor policy for data providers in connection with guidelines for reporting and developing price indices for natural gas and electric transmission transactions.²⁸

In the White Paper, market participants suggested that the Commission provide amnesty under appropriate circumstances.²⁹ As former Commissioner Naeve discussed at the Enforcement Conference, inevitable human error may prevent complete compliance with FERC rules. Nevertheless, as FERC recognized when it previously used various forms of forbearance, fair enforcement may require forbearance when FERC first establishes, re-interprets, or re-emphasizes a rule or policy, or when a rule or policy is unclear. Under these circumstances, it may not be appropriate to impose penalties for the first violation by a market participant.

Partial forbearance at EPA has facilitated compliance. Under one amnesty program offering reduced penalties, manufacturers provided EPA with 11,000 never-published scientific studies on chemicals on the market that could pose a substantial risk of injury.³⁰ In another amnesty-style program at EPA, known as the Inventory Update Rule Record Search, penalties were capped for natural gas processors who provided EPA with updated figures on the volume

²⁷ Order No. 664, Commission Authorization to Hold Interlocking Positions, Final Rule, 112 FERC ¶ 61,298 at P 30 (Sept. 16, 2005) (codified at 18 C.F.R. 45).

²⁸ Price Discovery in Natural Gas and Electric Markets, Order Further Clarifying Policy Statement on Natural Gas and Electric Price Indices, 112 FERC ¶ 61,040 at PP 10-11 (July 6, 2005); Price Discovery in Natural Gas and Electric Markets, Policy Statement on Natural Gas and Electric Price Indices, 104 FERC ¶ 61,121 at PP 37-38 (July 23, 2003). *See also* White Paper, *supra* note 4, at 21.

²⁹ White Paper, *supra* note 4, at 20-21.

³⁰ Marianne Lavelle, *Be Careful What You Ask For - EPA's Amnesty Has Become a Mixed Blessing*, 19 NAT'L L. J. at A1 (Feb. 24, 1997).

and production location of all toxic chemicals they processed.³¹ EPA stated that these programs made it possible to use fewer resources to bring more companies into compliance than did traditional litigation.³²

Market participants believe a limited forbearance program is appropriate now because, like FERC, market participants need time to adapt to the Commission's new role as an enforcement agency, and many of the Commission's rules lack clarity. Compliance programs must be reviewed and, in some instances, modified to prevent violations of rules that market participants have not always understood to be core regulatory principles. Modifying robust compliance programs to reflect more accurately the Commission's priorities will take time. The suggestion of a forbearance program is limited in scope and should be considered only as compliance programs are put in place in response to the Commission's evolving focus and in situations where regulations or policies lack clarity. As emphasized by former Commissioner Massey, market participants believe that any "forbearance period" should be temporary.³³ To strike the balance between "Hard Power" and "Soft Power," however, the Commission's forbearance policy should be explicit and transparent.

D. The Commission Should Ensure That There Is a Wide Range of Information Available About Internal Compliance Programs

Commissioner Spitzer asked what a meaningful and robust compliance program should require of a regulated entity and what steps the Commission should take to assist entities in designing compliance programs.

³¹ *Id.*

³² *Id.* ("The EPA says it can bring more companies into compliance with the law, using fewer resources, than it ever could through traditional litigation.").

³³ Massey Remarks, *supra* note 5, at 6.

To assist entities in designing compliance programs, the Commission should ensure that there is a wide range of information available. In various stipulation and consent agreements, the Commission has referenced different elements of effective compliance programs. While certain general principles apply to establishing corporate compliance programs, there is no “one-size-fits-all” approach. Because an individual market participant best understands the unique compliance challenges its organization faces, it is the most appropriate architect of its own compliance program. The Commission would provide valuable assistance to market participants designing their programs, however, if it were to specify the necessary elements of any good compliance program, make available a wide range of information about compliance programs, and conduct workshops on good compliance programs. The Commission should also recognize, as Mark Hanafin, CEO of Shell Energy North America, explained at the Enforcement Conference, that even when a company has a robust compliance program in place and a rule appears to be simple and clear, the complexities of real-world transactions and organizations can make it difficult to assure 100 percent compliance.

E. The Commission Should Adopt Practices Used by Other Agencies to Educate Market Participants About its Rules and Policies

Both Commissioners Moeller and Spitzer asked questions about practices the Commission should adopt to educate market participants. Commissioner Moeller asked whether and to what benefit practices used by other agencies should be considered by the Commission for adoption.³⁴ Commissioner Spitzer asked what steps the Commission should take to educate market participants.³⁵

³⁴ Moeller Questions, *supra* note 1.

³⁵ Spitzer Questions, *supra* note 2.

In outlining a number of steps FERC can take to educate and promote compliance by market participants, the White Paper primarily drew from the enforcement programs of other agencies such as the CFTC, FCC, SEC, EPA, FTC and NRC. In addition to the recommendations made elsewhere in these Comments, market participants recommend the Commission take the following steps, most of which were described throughout the White Paper, to achieve a “Smart Power” balance:

- clarify, simplify, and codify (where appropriate) certain Commission policies and rules, thereby reducing regulatory uncertainty
- provide more clarity about the levels of civil penalties the Commission will assess
- increase efforts to educate market participants about Commission policies and rules and to provide guidance they can rely on by
 - broadening the scope of the no-action letter process and providing for anonymous requests
 - establishing a Help Desk to supplement the no-action letter process or placing compliance divisions in program offices to assist market participants in their efforts to comply
 - holding public workshops to provide guidance on what steps market participants can take to achieve compliance
 - publishing answers to commonly asked questions that market participants can rely on
 - providing reference guides for market participants that describe rules and prior FERC actions, clarify or expand on the rules in one source, and clarify any remaining ambiguities
- ensure that processes used to implement enforcement policy reinforce long-term policy goals and promote due process by
 - developing a more transparent compliance and audit process (along with publication of a guidebook with audit protocols and standard audit questions) as discussed below, and promptly issuing closing letters at the conclusion of audits
 - incorporating letters of warning or reprimand into FERC’s enforcement process
 - expanding the use of mediation

- inviting an expert panel to review regularly FERC’s enforcement policies and actions
- developing measurements of success that tie enforcement actions to long-term policy goals and that measure industry compliance

The specific programs of other agencies that include many of these actions are cited primarily at pages 12 through 28 of the White Paper. In addition to such programs, the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”) enforcement program provides many examples of actions taken to educate market participants about gas pipeline safety compliance. For instance, PHMSA asked industry to review questions and answers to Frequently Asked Questions (“FAQs”) to determine if the answers to these questions were clear to market participants and PHMSA. These questions are posted and updated on PHMSA’s website.³⁶ In addition, PHMSA posts its inspection protocols on its website.³⁷ This allows audited companies to know what inspectors expect and facilitates the audit process.

F. The Commission Should Review and Modify, as Appropriate, its Enforcement Procedures

Commissioner Spitzer asked what the Commission can do and what procedures it can put in place to dispel concerns that it is acting as both “judge and jury” with regard to enforcement matters.³⁸ He also asked what provisions of the Commission’s Separation of Functions Policy Statement, or other Commission procedures, should be revised to address this concern.³⁹

³⁶ PHMSA, Frequently Asked Questions, <http://primis.phmsa.dot.gov/gasimp/faqlist.gim>.

³⁷ PHMSA, Inspection Protocols, <http://primis.phmsa.dot.gov/gasimp/prolist.gim>.

³⁸ Spitzer Questions, *supra* note 2.

³⁹ *Id.*

FERC should take appropriate steps, including changing or clarifying certain of its rules and policies, to prevent even the appearance of prejudgment. The Commission's enforcement policies and actions should ensure due process and the perception of fairness and impartiality. In the White Paper, market participants recommended that the Commission determine whether it is appropriate for FERC, when adjudicating civil penalty liability in a case brought under the NGA, to be both prosecutor and judge by first guiding the investigation of a matter, then sitting as a decision maker in a Commission proceeding to determine liability.⁴⁰ This remains a concern. In addition, the Commission's choice of words in a show cause order can create the appearance of prejudgment of alleged violations. To address this concern, the Commission should draft show cause orders to avoid such appearances and, where appropriate, consider appending staff reports with significant detail so that it is clear that the views expressed therein are those of Enforcement Staff, not the Commission.

Under current Commission policies and rules, FERC Enforcement Staff members who perform an investigation where the Commission may assess civil penalties are not precluded from later serving as Trial Staff in any proceeding the Commission may establish before an administrative law judge ("ALJ"). An Enforcement Staff member is permitted to discuss an investigation with the Commission up until the time that the Enforcement Staff member is assigned to be a litigator on the case.⁴¹ As a result, such a litigator will know the privately expressed views of the Chairman and Commissioners and will be able to craft arguments and pleadings to shape the outcome of the litigation so that the findings and conclusions of the ALJ

⁴⁰ White Paper, *supra* note 4, at 28-29.

⁴¹ Separation of Functions, Statement on Administrative Policy on Separation of Functions, 101 FERC ¶ 61,340 at PP 26-27 (2002).

resonate with the privately expressed views of the Commission as a whole. Reviewing and modifying, as appropriate, these provisions of the Commission's Separation of Function Policy will help the Commission achieve the necessary procedural fairness.

The Commission should also review and clarify or modify, as appropriate, the procedures regarding written submissions from, and oral communications with, market participants under investigation. Section 1b.19 of the Commission's Rules Relating to Investigations allows a market participant, when the Investigating Officer determines it is appropriate, to dispute in writing Enforcement Staff's recommendation to bring a civil action against the market participant.⁴² The market participant may submit a statement of fact, argument, and/or memorandum of law, with supporting documentation, showing why it should not be a defendant in a civil action.⁴³ The Commission should consider amending this provision so that a market participant has a unilateral right to make such a submission at any time during an investigation. Moreover, there is concern that this rule does not provide a mechanism for a market participant to obtain non-public guidance from the Commission regarding a §1b.19 submission. This guidance is very important during investigations into potential violations of rules that may lack clarity, despite the Commission's best efforts to eliminate ambiguities through other mechanisms, such as the no-action letter program, Help Desk, or FAQs. To enhance procedural fairness, FERC should clarify or amend §1b.19 to provide substantive, non-public guidance to market participants during investigations in situations where Commission rules or policies are new, ambiguous, or lack clarity and the absence of such Commission guidance could compromise the fairness of an investigation or later proceeding. It should consider establishing

⁴² 18 C.F.R. 1b.19.

⁴³ *Id.*

an interlocutory, non-public process during the course of an investigation whereby market participants can seek a determination from the Commission on what the Commission's rules and policies require.

Finally, FERC should address concerns that have arisen because of uncertainty surrounding the application of its *ex parte* rules. The Commission's *ex parte* rules do not bar communication between the Commission and market participants under investigation.⁴⁴ A well-respected commentator on energy law and administrative law and procedure recently agreed with this interpretation.⁴⁵ Nevertheless, there is concern that a market participant's position in settlement discussions with Enforcement Staff could be adversely effected if a market participant communicates directly with the Commission. Market participants need to be assured that direct communication with the Commission is not improper or unethical. Given that Enforcement Staff communicates with the Commission during an investigation, the Commission should clarify and re-affirm that its *ex parte* rules do not bar market participants under investigation from communicating with the Commission.

G. Guidance Provided in No-Action Letters, Handbooks, and by a Help Desk Should Be, At a Minimum, a Mitigating Factor in Enforcement Proceedings

Commissioner Spitzer asked for comments on the value that market participants would receive if the Commission expanded the no-action letter program, issued handbooks, and created

⁴⁴ 18 C.F.R. § 385.2201.

⁴⁵ Richard J. Pierce, Jr., Federal Energy Regulatory Commission Ex Parte Regulations and Practices at 1, 7, *available at* <http://www.ferc.gov/news/headlines/2006/2006-4/11-27-06.pdf> ("I conclude that FERC's practices respecting ex parte communications are fully consistent with the law. I also conclude that FERC's ex parte rules are more stringent than those required by the APA.")

a Help Desk, in light of the fact that guidance issued under such mechanisms has not been binding on the Commission.⁴⁶

In the White Paper, market participants urged the Commission to use the mechanisms identified by Commissioner Spitzer as sources for reliable guidance to the industry.⁴⁷ If the Commission is unwilling to use such mechanisms to provide binding advice, reliance on the guidance received should be an explicit mitigating factor in enforcement proceedings. Reliance on guidance received through other mechanisms such as FAQs, reference guides, and public workshops should also be an explicit mitigating factor. This would help to create a compliance road map, strike a better enforcement balance, and give market participants greater confidence in the guidance they receive.

H. Mediation Is Appropriate at Any Stage of an Investigation

Commissioner Spitzer asked what steps in an audit or investigation lend themselves to mediation and how a mediation mechanism should be implemented in FERC enforcement proceedings.⁴⁸

As a general matter, Alternative Dispute Resolution (“ADR”) programs can be implemented at the earliest stage that a conflict or dispute arises and is recognized. ADR can also be implemented after discovery has been completed and before an adjudication regarding an alleged violation. An effective mediation program should be flexible at any stage, depending on the facts and the will of all parties.

⁴⁶ Spitzer Questions, *supra* note 2.

⁴⁷ White Paper, *supra* note 4, at 9, 18.

⁴⁸ Spitzer Questions, *supra* note 2.

If there are no issues of material fact and the parties have engaged in unsuccessful bilateral negotiations in an investigation without the assistance of a mediator, then a mediation intervention would still be worthwhile prior to the Commission's making a determination whether to assess civil penalties or other remedies and proceed to adjudication.

In circumstances where there are material issues of fact and extensive discovery might be helpful in clarifying the issues unfolding in the investigation, a mediation intervention can assist the parties in focusing discovery and designing a mediation process that would produce the best chances for a negotiated resolution (either a settlement or a determination by Enforcement Staff that no violation occurred). Even if the parties are able to have a mutual, productive exchange of information during discovery without the assistance of a mediator, a mediation intervention can be productive at the end of the discovery period.

I. To Bring More Transparency to the Audit and Investigation Process, the Commission Should Provide Generic Information About Audit Findings, Information About Matters Auditors Evaluate, and Timely Closing Letters When No Violation Is Found

Commissioner Spitzer asked what steps the Commission should take to bring more transparency to the audit and investigation process.⁴⁹

Market participants appreciated the additional context provided in the Report on Enforcement about the Commission's audit and investigation process.⁵⁰ They recommend that the Commission modify audit reports to better explain findings and actions taken to come into compliance so that the reports can be used as a better compliance road map for others. In the

⁴⁹ *Id.*

⁵⁰ Report on Enforcement, *supra* note 19, at 11-31.

White Paper, market participants suggested many additional steps FERC could take to increase the transparency of compliance audits and investigations.⁵¹ These included:

- publishing updates on generic audit findings to alert market participants to problem areas of compliance, like the SEC's "*Compliance Alert*" letters
- providing information about the matters auditors will be evaluating, as is done in handbooks published by other agencies
- instituting the practice of providing timely closing letters in connection with audits and investigations where no violations are found.

J. The Commission Should Provide, and Educate Market Participants About, Formal and Informal Avenues to Resolve Legitimate Discovery Disputes and Procedural Issues that May Arise

Commissioner Spitzer asked if there is a concern that a market participant cannot adequately raise a legitimate dispute in enforcement proceedings for fear that such action may be perceived by the Commission as "uncooperative" or less than exemplary when the Commission considers penalties.⁵² If such concern exists, he asked how the Commission should resolve legitimate discovery and procedural issues that may arise.

Market participants have such concerns. Legitimate discovery disputes that do not demonstrate lack of cooperation can arise in the course of any investigation. At the Enforcement Conference, Barbara K. Heffernan raised concerns that objections to requests from Enforcement Staff could be viewed negatively by the Commission. As discussed above, these types of disputes could be effectively addressed in mediation. In addition, the Commission should consider designating an ALJ who is knowledgeable about FERC's enforcement program to assist informally in resolving discovery disputes that arise in the context of an investigation.

⁵¹ White Paper, *supra* note 4, at 15-16.

⁵² Spitzer Questions, *supra* note 2.

K. There Are Ambiguities in Certain FERC Rules and Policies and the Commission Should Continue to Work with Market Participants to Resolve These Ambiguities

At the Enforcement Conference, Chairman Kelliher asked market participants to identify ambiguities in FERC's rules and policies. In the White Paper, market participants generally identified ambiguities that exist in the rules pertaining to asset management transactions, standards of conduct and market manipulation.⁵³ Ambiguities identified by former Commissioner Naeve at the Enforcement Conference included certain areas in section 203 of the FPA, qualifying facility rules, code of conduct rules, and certain tariff interpretations.

Market participants provide a list of ambiguities in Appendix A. The list is illustrative, not exhaustive.⁵⁴ Ambiguities often arise when the Commission identifies new enforcement priorities or provides an interpretation of a rule that market participants did not consider to be ambiguous. Therefore, it is important for the Commission to minimize ambiguity and provide clarity when implementing new rules and policies and providing clarifications of existing rules and polices. Moreover, it is important for market participants to have the opportunity to update

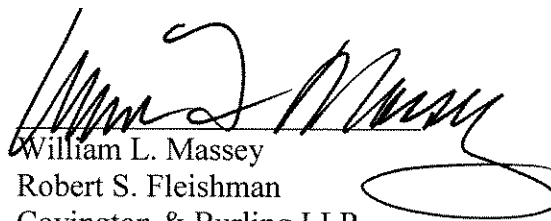
⁵³ White Paper, *supra* note 4, at 5-9, 17 n.44. Market participants appreciate the clarity the Commission recently provided regarding asset management transactions with the issuance of the Notice of Proposed Rulemaking (NOPR) for the Promotion of a More Efficient Capacity Release Market. Promotion of a More Efficient Capacity Release Market, 121 FERC ¶ 61,170 (proposed Nov. 15, 2007) (to be codified at 18 C.F.R. Part 284). However, there are still open questions, and until a final rule is in place, there is a continued concern that asset management transactions may continue to be chilled. In a similar vein, market participants hope that the final rule on Standards of Conduct NOPR resolves ambiguities and lack of clarity regarding those rules. Standards of Conduct for Transmission Providers, 118 FERC ¶ 61,031, 72 Fed. Reg. 3,958 (proposed Jan. 29, 2007) (to be codified at 18 C.F.R. Part 258).

⁵⁴ Given the diversity of the organizations represented in these Comments, market participants do not suggest how these ambiguities should be resolved. Market participants look forward to discussing these ambiguities with the Commission. Moreover, not all of the ambiguities identified need to be resolved through rulemaking proceedings. Many could be resolved through the mechanisms suggested in these Comments and in the White Paper to educate market participants.

this list of ambiguous rules and policies on a regular basis so that new ambiguities that arise in evolving energy markets can be addressed by the Commission in a timely fashion.

CONCLUSION

Market participants thank the Commission for its willingness to hear and consider their views on enforcement matters. In the White Paper and in these Comments, market participants offer a constructive analysis to support the Commission's use of its enforcement authority to foster a culture of compliance. Market participants want to aid the Commission in striking the proper "Smart Power" balance between "Hard Power" and "Soft Power" so that the energy markets they operate in will remain open, fair and competitive for the benefit of consumers. Market participants urge the Commission to be both firm and fair in the exercise of its enforcement authority by explicitly articulating a relationship between core regulatory principles and levels of civil penalties and adopting a limited forbearance program. The Commission can foster a culture of compliance and provide a better compliance road map by clarifying ambiguous rules; reaching out to market participants to educate them about FERC's rules and policies; encouraging self-reporting; ensuring that its investigation, audit, and decision-making processes are transparent, fair, and comport with due process; and looking for ways to work cooperatively with market participants.



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APPENDIX A

Examples of Ambiguous Rules and Policies

- A. Buy-sell prohibitions - treatment of transactions that are non-jurisdictional in part; treatment of corporate affiliates
- B. Posting and bidding procedures for natural gas capacity
- C. Permissible trading strategies under the market manipulation rules
- D. Order No. 890 and various uncertainties that have been raised on rehearing
- E. Order No. 652 and the contractual characteristics that constitute control with respect to filing changes in status
- F. Order No. 697 and various uncertainties that have been raised on rehearing
- G. Reliability - definitions; NERC functional model; applicability of standards to unregistered entities; roles of FERC, NERC and regional entity staffs; and due process standards
- H. Generator interconnection - jurisdiction at distribution level (“first in line” rule); “at or beyond” rule
- I. PUHCA 2005 - distinction between centralized and specialized service companies
- J Standards of Conduct
- K. Asset management transactions and various uncertainties to be raised in comments in the Capacity Release NOPR
- I. Permissible transactions in view of the interplay between the shipper-must-have-title rule, tying prohibition, and buy-sell prohibition