February 3, 2009 **Acting Chairman Jon Wellinghoff**

Statement of Acting Chairman Jon Wellinghoff at Skadden 4th Annual Enforcement And Compliance Seminar

Thank you for inviting me to speak today about the Commission's enforcement program.

Before going into greater detail, I would like to note my belief that the central objective of the Commission's enforcement program is compliance. That goal was central to the Commission's enforcement program before Congress enacted the Energy Policy Act of 2005, and it remains the central objective today, three-and-a-half years after that law became effective.

Background

As you know, EPAct 2005 greatly expanded the enforcement authority of the Commission. EPAct 2005 gave the Commission express jurisdiction to prohibit energy market manipulation and to enforce reliability standards for the bulk power transmission system. It also included provisions to increase transparency in energy markets, and it increased the Commission's civil penalty authority to $1 million per day per violation.

Taken together, these changes placed increased emphasis on Commission monitoring of natural gas and electricity markets to assure fair dealing. Moreover, by granting the Commission the ability to assess substantial civil penalties for virtually all violations of the Federal Power Act, the Natural Gas Act, and the Natural Gas Policy Act, Congress gave the Commission an important additional tool to enforce all of the statutes, orders, rules, and regulations it administers.

Because of its interest in compliance and in light of the Commission's increased civil penalty authority, many in the industry asked the Commission to provide more information and guidance about how we are administering our enforcement program. The Commission first responded to such requests by issuing a Policy Statement on Enforcement in 2005. Drawing on our initial experience under our expanded EPAct 2005 authority, the Commission provided further guidance in May 2008, issuing a package of orders that included a Revised Policy Statement on Enforcement, an Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance, and an order clarifying the separation of functions. Building on that action, Commission staff held a very well attended Compliance Workshop in July. Most recently, in October, the Commission issued its Compliance Policy Statement.

Compliance Policy Statement

I would first like to focus my comments on the Compliance Policy Statement. Our earlier 2005 Policy Statement on Enforcement stated that credit would be provided in determining penalties if a company had an effective compliance program. Drawing upon the Commission's experience in utilizing its enhanced civil penalty authority and upon the dialogue at our staff's July workshop on compliance, the Compliance Policy Statement lists several actions that are indicative of a strong compliance culture. Four factors that characterize vigorous and effective compliance programs are:

- active engagement and leadership by senior management;
- preventive measures appropriate to the circumstances of the company that are effective in practice;
- prompt detection of problems, cessation of misconduct, and reporting of a violation; and
- remediation of the misconduct.

Where a company's conduct shows that it has embraced these key elements of effective compliance and acted accordingly when a violation nonetheless occurs, the Commission will in most cases provide significant credit by reducing or even eliminating the civil penalty that otherwise would be imposed for the violation. The Commission is most likely to award such credit where violations are not serious, that is, they do not involve significant harm, risk of significant harm, or damage to the integrity of the Commission's regulatory program.

There is no standard formula for an effective compliance program. The Compliance Policy Statement makes clear that each entity must determine the best approach to compliance given all the relevant factors, such as the size of the company and the nature and extent of its operations that are subject to Commission requirements. Regardless of how companies approach their compliance activities, the Commission will consider the end result—whether the compliance program worked as it should.

Civil Penalties

The Commission also understands that the industry is keenly interested in how the Commission will apply our civil penalty authority. To shed light on that important issue, our 2005 Enforcement Policy Statement and our May 2008 Revised Policy Statement on Enforcement discuss the balancing that the Commission conducts in determining whether civil penalties are warranted and, if so, the severity of penalties to be imposed. The 2005 Enforcement Policy Statement lists a number of factors that will guide the Commission in selecting sanctions:

- What was the harm;
- whether the violation involved manipulation, fraud, deceit or artifice;
- whether the action was willful;
- whether it was a repeat offense or pattern of offenses;
- whether it was done by or with approval of senior management;
- how did the wrong-doing come to light; and
- what effect would potential penalties have on the financial viability of the company.

The Revised Policy Statement on Enforcement indicates that the Commission will also consider:

- What, if any, harm was there to the efficient and transparent functioning of the market;
- What are the earnings, revenues, and market share of the part of the company that is under investigation; and
- What penalty amount best discourages improper conduct, while not excessively discouraging beneficial market participation.

Exemplary cooperation is another important factor that the Commission considers. Exemplary cooperation is evidenced by:

- whether the company provided internal reports;
- whether senior management actively encouraged employees to cooperate;
- whether the company facilitated Commission access to key employees;

- whether culpable employees were identified by the company;
- whether the company assisted in research of its records; and
- whether the company fairly determined the effect of its misconduct.

2008 Enforcement Report

To further increase transparency in our enforcement program, the Revised Policy Statement on Enforcement directs our enforcement staff to issue annual reports that provide statistics and other information about enforcement activities during the previous fiscal year.

The 2008 Enforcement Report provides some enlightening data about how the Commission is administering our enforcement program.

a. Settlements

For example, in fiscal year 2008, the Commission approved seven settlement agreements for a total of $19.95 million in civil penalties. In two of the seven settlements, we required that the companies establish stronger, more effective compliance programs.

b. Self-Reporting

Self-reports of compliance violations by regulated entities doubled from 31 in 2007 to 68 in 2008. There appear to be two potential explanations for that increase. First – companies are improving their compliance and auditing procedures, so they are better able to detect violations and report them to staff. Second, the Commission has repeatedly stated that it will reduce or even eliminate a company's potential penalty for a violation if it is self-reported.

The data support these explanations.

For example, the 2008 Enforcement Report provides 10 illustrations of real world self-reports that were closed with no action, along with the reasons why staff chose not to pursue an enforcement action.

c. Investigations

22 investigations were closed in 2008: 8 eight of which had findings of violations; seven of which had no violation findings; and seven other investigations were concluded through settlement. As with the self-reporting cases, the 2008 Enforcement Report provides guidance to the industry on investigations, with 7 short, unnamed narratives about investigations that were closed with no action, and why.

d. Audits

Audits are another key element of the Commission's Enforcement program. In fiscal year 2008, 60 audits of public utilities and natural gas pipeline and storage companies were completed, 39 of which were classified as financial audits and 21 that, among other things, addressed open access transmission tariffs, interconnection rules, gas tariffs, website postings, standards of conduct and Commission regulations. These audits resulted in 156 recommendations for corrective action, and included $1 million in recoveries from accounting and billing adjustments and $8.7 million in reductions to utility plant. Implementation of compliance plans to ensure regulated entities adhere to Commission policies and procedures were also required.

Conclusion

My message to you is that compliance is the central objective of our enforcement program. The vast majority of our reviews and investigations do not result in civil penalties. We are also committed to providing information and guidance to assist the industry about how to comply with the Commission's rules and regulations. We are receptive to suggestions to improve the transparency about how we administer our enforcement program. Finally, if we do find a violation and assess a civil penalty, the statistics reaffirm that we have been firm and fair. Thank you.