ENERGY MARKET OVERSIGHT
AND ENFORCEMENT:
ACCOMPLISHMENTS AND PROPOSAL FOR ENHANCED PENALTY AUTHORITY

Prepared by the Staff of the
Federal Energy Regulatory Commission

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Energy Market Oversight and Enforcement: Accomplishments and Proposal for Enhanced Penalty Authority

I. Executive Summary

In this report, the Federal Energy Regulatory Commission (the Commission or FERC) staff sets forth a proposal for amendments to the Federal Power Act (FPA), the Natural Gas Act (NGA), and the Natural Gas Policy Act of 1978 (NGPA) that will give the Commission enhanced civil and criminal penalty authority for violations of these laws and the Commission's rules and regulations based on them. This enhanced penalty authority would allow the Commission to better address market manipulation and other misconduct that is damaging to competitive markets. Moreover, it would lead to greater certainty for market participants, thereby encouraging increased participation and liquidity in those markets. Notwithstanding the limited remedies currently available to the Commission, the Commission has accomplished much of what it sought to achieve with the establishment of its Office of Market Oversight and Investigations (OMOI), the Commission's "cop on the beat." The enforcement and audit capacity of the Commission has expanded significantly. That expansion has resulted in roughly three times as many completed investigations and audits as prior to OMOI's formation and numerous multi-million dollar settlements. However, due to the Commission's narrow penalty authority, the Commission's enforcement and audit efforts often lack the most effective means of addressing serious misconduct such as market manipulation or the provision of undue preferences to affiliates.

Currently, the Commission has few remedies to address misconduct by market participants. The Commission may require that a company issue a refund or disgorge any profits earned as a result of the wrongful conduct. However, application of these remedies is restricted to situations in which an actual profit is earned as a result of the wrongful activity. Where a market participant engages in misconduct but no profit can be proven to have resulted from that misconduct, the violative conduct may go unpunished. In addition, refunds and the disgorgement of unjust profits serve only to return the company that committed the violation to the status quo before the misconduct occurred; the remedy cannot be said to be a true penalty since it merely requires the return of any ill-gotten gains. While those remedies are important because they return monies to persons adversely affected by misconduct, they are not a highly effective means of deterring misconduct.

As an alternative to ordering refunds or disgorgement of profits, the Commission may revoke a company's authorization to charge market-based rates. Unlike the former remedies, revocation of a company's market-based rate authority can have a dramatic impact on both markets and companies participating in those markets. By revoking a company's authorization to sell at market-based rates, the Commission may effectively eliminate that company's ability to act as a seller in the competitive energy market. Because such an action may have far-reaching effects, not only for the company at issue, but also for the market in which the company operates, the Commission must take into account myriad potential ramifications to the market in deciding whether to revoke a company's market-based rate authority. In many situations, a more targeted approach in the form of civil penalties would better accomplish the twin objectives of deterring misconduct while ensuring the continued vitality of the energy markets. For example, a modest civil penalty may be more appropriate than suspending market-based rates for relatively minor violations of the rules.

In other regulated environments, such as the securities and commodities futures trading industries, Congress has long recognized that civil penalty authority is the most effective means of deterring conduct that may harm markets. Civil penalties are also necessary in the markets regulated by the Commission. Appropriate civil penalties would enhance the Commission's ability to enforce the statutes, rules, and regulations governing jurisdictional energy markets by allowing the Commission to appropriately tailor the penalty to reflect the gravity of the act or omission at issue. To that end, Commission staff recommends that the Commission seek the following statutory changes:

- An amendment of the FPA to expand civil penalty authority to cover violations of any provision (and Commission regulations and orders under any provision) in Parts II and III of the FPA and to increase the maximum civil penalty for any such violation from not more than $11,000 per day for each violation[1] to not more than $1,000,000 per day per violation;

- An amendment of the NGA to create civil penalty authority to cover violations of any provision (and Commission regulations and orders under any provision) of the NGA up to a maximum civil penalty of not more than $1,000,000 per day per violation;

- An amendment to the NGPA to increase available civil penalty amounts up to a maximum civil penalty of not more than $1,000,000 per day per violation;

- Amendments to the FPA, the NGA and the NGPA increasing criminal penalties from a fine of up to $5,000 per day for each violation and two years imprisonment to a fine of up to $1,000,000 per day per violation and up to five years imprisonment under both statutes, and

- Amendments to the FPA, the NGA and the NGPA adding a separate civil penalty for intentional, material false statements made in any matter or filing before the

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[1] FPA section 316A provides for penalty authority up to $10,000 per day per violation. However, this amount is subject to inflation adjustment and is now $11,000 per day per violation. 18 C.F.R. § 385.1602(d) (2004).

Commission, including false statements made to Commission staff during the course of an investigation or audit.

Specific language for this proposed legislation is set out in Appendix B to this report.

II. Background and Overview

The Commission's Chairman established OMOI in August 2002. OMOI's mission is to guide the evolution and operation of energy markets to ensure effective regulation and to protect customers through understanding markets and their regulation, timely identification and remediation of market problems, and assured compliance with Commission rules and regulations. To those ends, OMOI seeks to provide vigilant oversight and vigorous enforcement of proper market rules to ensure dependable, affordable, competitive energy markets to benefit end use customers and other participants. OMOI's investigatory team of more than 70 attorneys, auditors, analysts, and engineers monitors the energy marketplace for potential problems and works to achieve corporate compliance. OMOI's analytic team of another 50 staff probes market developments to detect anomalous or suspicious activity, such as attempts at market manipulation or inappropriate communications or improper cooperation between market participants.

A. The Commission's Accomplishments

Since the inception of OMOI, the Commission has made significant progress in improving the Commission's enforcement and market monitoring capabilities. The Commission's enforcement efforts in 2004, led by OMOI**,** facilitated settlements in the California refund proceedings that will lead to a return of more than $1 billion to consumers. In addition, the Commission completed more than 90 separate investigations, and completed 27 financial audits that (1) uncovered over $10 million of pipeline assessment and testing costs that were improperly capitalized, (2) affirmed FERC formula rate refund calculations totaling approximately $2.2 million, and (3) will generate about $7.3 million in refunds by seven public utilities that improperly billed costs through FERC formula rates.

The Commission has recovered through OMOI some of the largest dollar settlements in its history and has instituted stringent compliance plans in cases where companies have committed violations. In January 2005, for example, OMOI obtained agreement from a company to pay $21 million in civil penalties – the largest civil penalty ever obtained by the Commission. The Commission also has greatly increased the numbers and market relevance of investigations and audits completed. The Commission currently has underway more than three times the number of investigations that were open at FERC prior to OMOI's inception. The overall speed of these investigations, in terms of opening and closing them, has also increased.

The following are summaries of just a few of the noteworthy accomplishments in the past two years:

- In 2001, the Commission found that sales through the California centralized markets were unjust and unreasonable from October 2, 2000 to June 21, 2001.[2] In an effort to facilitate distribution of funds and to resolve remaining issues without protracted litigation, OMOI has assisted in resolving the matter with several large sellers and the California Parties.[3] Under these settlements, approved by the

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[2] *See San Diego Gas & Electric Co*. 95 FERC ¶ 61,115 (2001); *San Diego Gas & Electric Co*. 95 FERC ¶ 61,418 (2001) (Refund Proceedings).

[3] The California Parties include the California Attorney General, the California Electricity Oversight Board, the California Department of Water Resources, Southern California Edison, Pacific Gas and Electric, San Diego Gas and Electric, and the California Public Utilities Commission.

Commission, over $1 billion began flowing back to California.[4] To date, the following settlements have been achieved:

-- Williams Power Co. – Settlement for $140 million was approved on July 2, 2004. 108 FERC ¶ 61,002 (2004).

-- Dynegy, Inc. – Settlement for $281 million was approved on October 25, 2004. 109 FERC ¶ 61,071 (2004).

-- Duke Energy Corporation – Settlement for $207 million was approved December 7, 2004. 109 FERC ¶ 61,257 (2004).

-- Mirant Corporation – Settlement for approximately $458 million pending approval by the Commission.

- *Reliant Energy Services*, 105 FERC ¶ 61,008 (2003). OMOI discovered that Reliant had violated its California Independent System Operator (Cal ISO) and California Power Exchange (Cal PX) tariffs as a result of submission of certain bids above $250 per megawatt hour (MWh) in the California markets between May 1, 2000 and October 2, 2000. Such conduct qualified as "economic withholding."[5] As a result, OMOI obtained in a settlement, approved by the Commission, a total of $50 million in disgorgement of profits including: $25 million in cash and $25 million from an auction of capacity from certain of the entity's gas-fired electric generation units. All the monies recovered are to be

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[4] However, the California Independent System Operator has not yet determined the amounts of refunds owed by the sellers using a Commission-specified methodology and is not expected to have those final sums available until at least mid-2005. Further, multiple appeals have been taken by numerous parties from several Commission orders in the Refund Proceeding that are currently pending in the Ninth Circuit.

[5] "Economic withholding" is defined as "bidding available supply at a sufficiently high price in excess of the supplier's marginal costs so that it is not called on to run and where, as a result, the market clearing price is raised." *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorization*, 107 FERC ¶ 61,175 at p. 61,705 n.22 (2004).

paid into an account established by the U.S. Treasury for distribution for the benefit of California and Western electricity customers. The Commission also instituted a compliance plan to prevent future problems. The settlement further required that Reliant submit to increased oversight by OMOI for one year, including random reviews by OMOI of emails and taped telephone conversations.

- *American Electric Power Co., et al.* (2005). OMOI's investigation uncovered that AEP's Jefferson Island Storage & Hub improperly entered into a non-public agreement putting AEP Energy Services in control of natural gas injections and withdrawals. This allowed AEP Energy Services to improperly receive confidential information about non-affiliated customers. OMOI also learned that AEP's Louisiana Intrastate Gas provided undue preferences in transportation services to AEP Energy Services. Neither pipeline company is currently owned by AEP. The settlement calls for AEP to pay a $21 million civil penalty under the NGPA, the largest civil penalty ever assessed by the Commission. In addition, the agreement requires AEP, AEP Energy Services, American Electric Power Service Corp. and any AEP intrastate pipeline company, to follow a four-year compliance plan providing for continued monitoring by Commission staff for compliance with Standards of Conduct and Market Behavior rules. OMOI also shared information from its investigation of AEP with the Commodity Futures Trading Commission (CFTC) and the Department of Justice, leading to their obtaining an additional $61 million in civil and criminal penalties for AEP's illegal activities.

- *Transco, et al.*, 102 FERC ¶ 61,302 (2003). OMOI found violations of the NGA, the NGPA and the Standards of Conduct by Transco. Those violations included giving undue preference to affiliates, allowing an affiliate access to computer databases in order to optimize its transportation nomination on Transco's pipelines, and disclosing to its marketing affiliate information about a non-affiliated shipper. Transco agreed to civil penalties of $20 million under section 311 of the NGPA. In addition, Transco was required to implement a four-year compliance plan designed to ensure marketing affiliates are not given preferential access and to ensure compliance with other Commission regulations. Limitations were also imposed on transportation that could be obtained by affiliates from Transco.

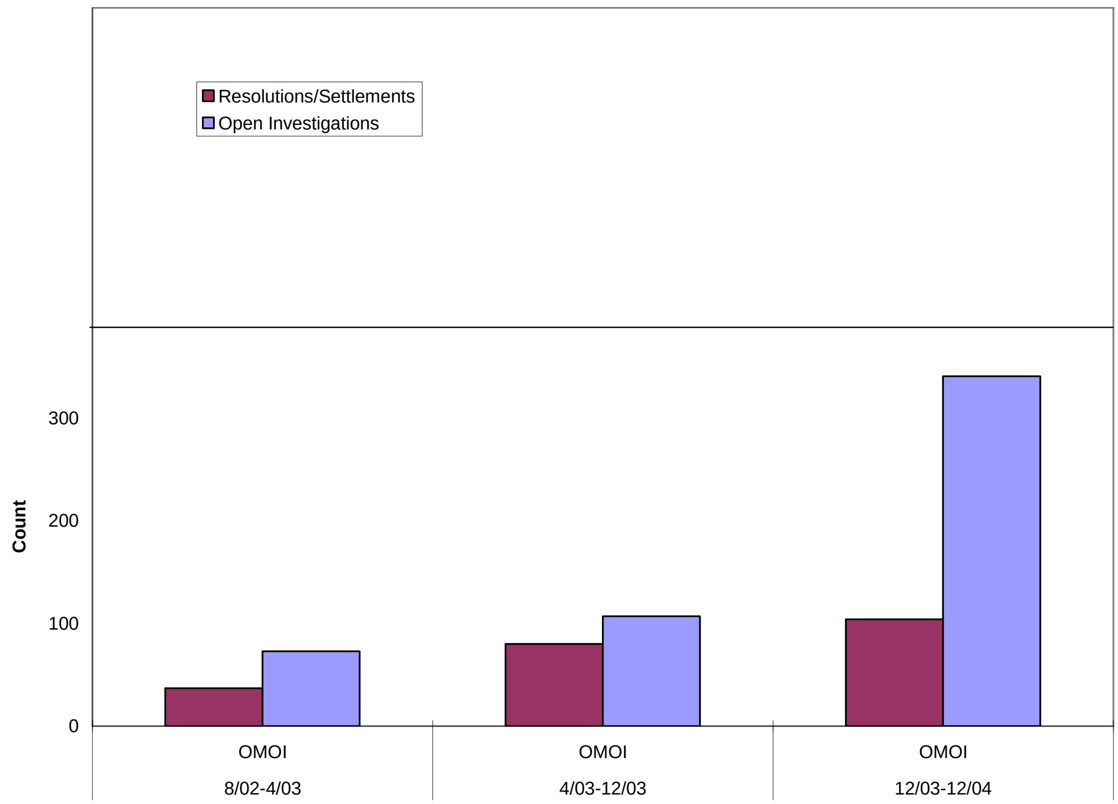
- *Dominion, Northern Illinois Gas Co., Columbia Gas Transmission,* 108 FERC ¶ 61,110 (2004). OMOI discovered that these companies had violated the Commission's Standards of Conduct and other regulations by providing non-public gas storage information that was not provided to the public at large to affiliates, as well as to select entities and individuals. The Commission obtained total refunds of $4.5 million and total fines of $3.6 million under section 311 of the NGPA, which were paid by the companies. The Dominion entities and Northern Illinois Gas Company were also required to implement extensive employee training to deter similar violations in the future. Columbia Gas Transmission was required to record and maintain for a period of one year conversations between its customer service representatives and its customers.

On other fronts, during 2004, 12 operational audits resulted in over 100 recommendations to remedy deficiencies found that were adopted and implemented by the audit targets. The Commission implemented Order 2004 relating to the new Standards of Conduct for Transmission Providers,[6] including reviews of compliance for

[6] *See Standards of Conduct for Transmission Providers,* Order No. 2004, FERC Stats. & Regs., Regulations Preambles ¶ 31,155 (2003), *order on reh'g,* Order No. 2004-A, III FERC Stats. & Regs. ¶ 31,161 (2004), 107 FERC ¶ 61,032 (2004), *order on reh'g,* Order No. 2004-B, III FERC Stats. & Regs. ¶ 31,166 (2004), 108 FERC ¶ 61,118 (2004), *order on reh'g,* Order No. 2004-C, 109 FERC ¶ 61,325 (2004).

over 200 companies. The Commission terminated market-based rate authority of 90 companies that are no longer active in power marketing and to provide guidance on electric and natural gas price reporting to publications for purposes of indexing.[7] Finally, the Commission handled over 286 Hotline calls.[8]

The chart below summarizes the Commission's accomplishments since the establishment of OMOI in 2002.[9]



[7] *See also* Foster's *Natural Gas Report*, December 16, 2004.

[8] The Enforcement Hotline is an informal means available to market participants to resolve disputes and to ask questions of Commission staff.

[9] Attached, as Appendix A to this report, is a more detailed chart summarizing OMOI's accomplishments.

In addition to its enforcement and investigative activities, the Commission, through OMOI, has worked to enhance market integrity in other ways. First, OMOI provides regular reports to the Commission to ensure that the Commission has a comprehensive understanding of the current state of the energy markets. Last year, OMOI provided 15 market surveillance reports to the Commission and published assessments identifying areas of concern for each upcoming season. OMOI also frequently interacts with industry and the public to explain market monitoring at FERC, including making over 150 presentations last year.

OMOI provides to the Commission special purpose reports in response to events such as the January 14-16, 2004, New England cold snap that resulted in record spot market gas prices and strained electric generation resources and power and gas delivery systems. In that instance, OMOI conducted an investigation to determine whether markets reacted rationally to the weather event or whether any price manipulation occurred, including whether any electric generators improperly sold natural gas supplies rather than generating electricity. OMOI's investigation determined that the energy markets functioned appropriately to avoid curtailments of natural gas deliveries while still avoiding power blackouts. OMOI's findings were reported to the New England Council of Public Utility Commissioners and released publicly.

The Commission, through OMOI, has also focused on building the capability to respond quickly to potentially troublesome market events and to safeguard the energy markets. For example, OMOI was able to expeditiously investigate and report on the unexpected high level of storage withdrawals reported by the Energy Information Administration (EIA) on November 24, 2004, which prompted a sharp run-up in NYMEX prices upon the EIA's release of the information. Within a week of the precipitating event's occurrence, OMOI determined that misreporting by Dominion Transmission, Inc. (Dominion) to EIA caused by a Dominion contract employee's clerical error, resulted in the company's provision of incorrect data indicating a substantially larger natural gas storage withdrawal for the week ending November 19, 2004 than had in fact occurred. The Commission apprised the market of OMOI's findings and EIA is currently soliciting comments on proposed changes in the way it reports errors.

B. Civil Penalty Authority

As the foregoing illustrations demonstrate, the Commission has accomplished much of what the Commission sought to achieve when OMOI was established. These achievements notwithstanding, the Commission, with its limited civil penalty authority, lacks a critical tool.

At present, in most circumstances the Commission can only order a company that breaks the rules either to disgorge any profits that resulted from that violation or to return monies paid as the result of the imposition of an unjust and unreasonable rate. Such remedies are important because they return money to people and entities adversely affected by the conduct. However, these remedies serve only to return the company that perpetrated the wrongdoing to the status quo that existed before the wrongdoing occurred, and as such are not the most effective means of deterring misconduct.

Congress has long recognized civil penalty authority for federal regulatory agencies as the most effective means of deterring conduct detrimental to free and open markets. The Commission's enforcement efforts would be further enhanced if its statutory authority allowed it to impose appropriate civil penalties for violations of the FPA and the NGA. For most violations of these statutes, the Commission currently does not have sufficient - - or in many instances, any - - civil penalty authority that would assist it in regulating its jurisdictional markets and entities. Remedies currently available to the Commission in the form of refunds and disgorgement of profits do not deter anticompetitive or manipulative market behavior to the same degree as civil penalties.

As stated in a report to the Administrative Conference of the United States:

> [T]he civil fine has assumed a place of paramount importance in the compliance arsenal of most federal regulatory agencies. It is today almost inconceivable that Congress would authorize a major administrative regulatory program without empowering the enforcing agency to impose civil monetary penalties as a sanction. It has become commonplace for observers of the administrative process, disillusioned with traditional criminal, injunctive and license-removal sanctions, to urge greater reliance on civil fines as an enforcement device.[10]

Appropriate civil penalties would allow the Commission to be even more effective in enforcing the statutes, rules and regulations governing its jurisdictional markets. The discrepancy in the settlements obtained by the Commission as compared to the CFTC in connection with the investigation of market manipulation during the California energy crisis of 2000–2001 demonstrates the need for the Commission to have effective civil penalty authority.[11] The Commission and CFTC each based their settlements on conduct that was brought to light in the Western Markets Report, which was prepared by Commission staff. In other words, both agencies' settlements were based on actions engaged in to attempt to manipulate the energy markets. Although the Commission was able to obtain the full amount of revenues associated with the alleged misconduct from the majority of the twenty-four wrongdoers, estimated at just over $28 million, the

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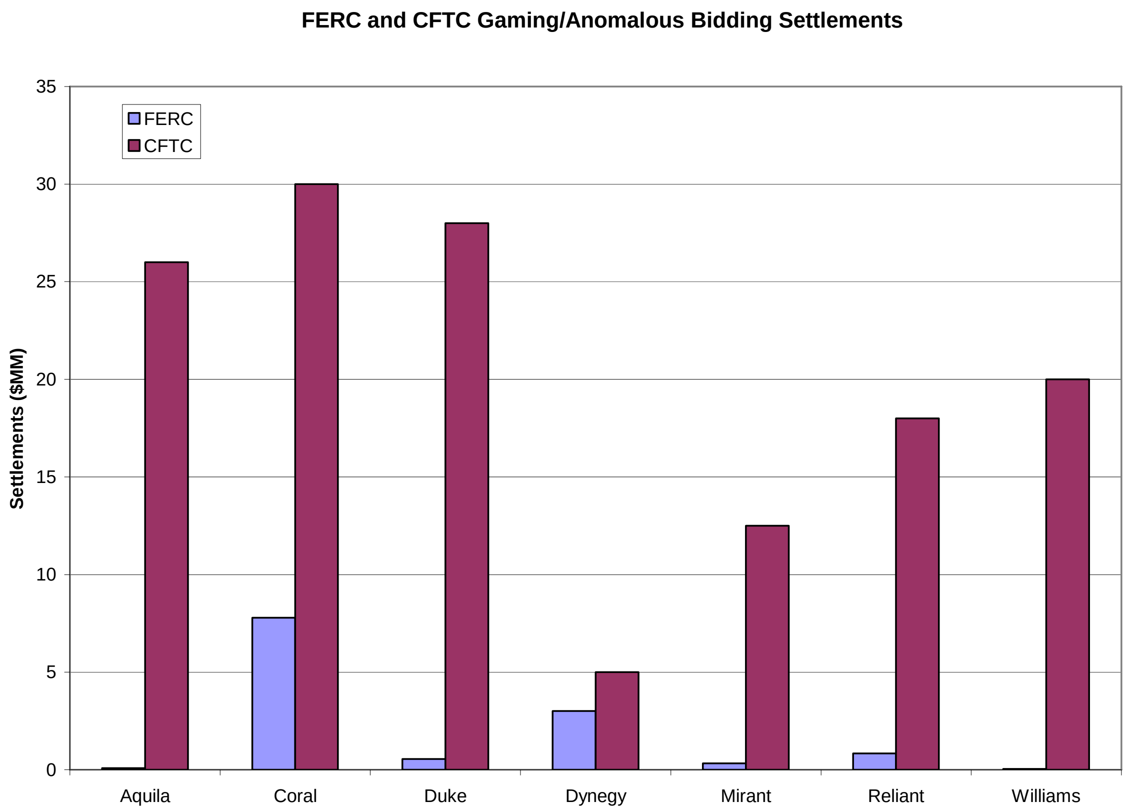
[10] Colin S. Diver, Report to the Administrative Conference of the United States Concerning the Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies 1 (May 1979) (as cited in H. Rpt. 101-616 (July 1990)).

[11] In its June 25, 2003 *Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior*, 013 FERC ¶ 61,346, the Commission declared various types of gaming activities that had been conducted by Enron and others to be violations of applicable tariffs, entitling the Commission to obtain all unjust profits received as the result of those gaming activities.

Commission lacked the authority to obtain civil penalties. In contrast, the CFTC was able to obtain approximately $268 million in civil penalties from 23 parties.[12] In short, because it had civil penalty authority, the CFTC was able to obtain settlement amounts that were approximately ten times greater than those obtained by the Commission. The chart below further illustrates the wide gap between the Commission's and the CFTC's available remedies.



The Commission's limited civil penalty authority under the FPA regarding electric markets was conferred in the Energy Policy Act of 1992, but it does not address the needs of the greatly changed electric energy markets since that time. Expansion of civil penalty authority would modernize the Commission's powers and allow it to address problems in

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[12] From the seven parties that were investigated by and settled with both the Commission and CFTC, the Commission was able to obtain $12.6 million while the CFTC was able to obtain $139.5 million.

today's energy markets. In addition, Congress should increase the Commission's criminal penalty authority to levels that will serve as effective deterrence and punishment in today's economy. It is worth noting that at least some of the Commission's success to date is attributable to the fact that the Enron debacle and the California energy crisis, which were the impetus for the formation of OMOI by Chairman Wood, are still prominent in the minds of investors and the public. Thus, the possibility of negative publicity and reputation risk for companies found to have engaged in misconduct has undoubtedly helped motivate companies to negotiate settlements with Commission staff, even given the limitations on the Commission's ability to penalize certain conduct. During the last several years, a public pronouncement that a company may have engaged in market manipulation and, thus, may lose its ability to charge market-based rates, has posed a serious threat to both the company's reputation and its stock price. Nonetheless, the most effective long-term deterrent to abusive misconduct by companies is expanded civil penalty authority.

Specifically, Commission Staff recommends that the Commission seek the following statutory changes to enhance its civil and criminal penalty authority:

- An amendment of the FPA to expand civil penalty authority to cover violations of any provision (and Commission regulations and orders under any provision) in Parts II and III of the FPA and to increase the maximum civil penalty for any such violation from not more than $11,000 per day for each violation[13] to not more than $1,000,000 per day per violation;

- An amendment of the NGA to create civil penalty authority to cover violations of

[13] FPA section 316A provides for penalty authority up to $10,000 per day per violation. However, this amount is subject to inflation adjustment and is now $11,000 per day per violation. 18 C.F.R. § 385.1602(d) (2004).

any provision (and Commission regulations and orders under any provision) of the NGA up to a maximum civil penalty of not more than $1,000,000 per day per violation;

- An amendment to the NGPA to increase available civil penalty amounts up to a maximum civil penalty of not more than $1,000,000 per day per violation;

- Amendments to the FPA, the NGA and the NGPA increasing criminal penalties from a fine of up to $5,000 per day for each violation and two years imprisonment to a fine of up to $1,000,000 per day per violation and up to five years imprisonment under both statutes, and

- Amendments to the FPA, the NGA and the NGPA adding a separate civil penalty for intentional, material false statements made in any matter or filing before the Commission, including false statements made to Commission staff during the course of an investigation or audit.

Specific language for this proposed legislation is set out in Appendix B to this report.

III. Remedies Currently Available to the Commission

A. Electric Power

Electric energy markets in the United States have changed dramatically since 1935, the year in which Part II of the FPA was enacted into law. Before then, the "regulatory compact" between the government and utilities, which were viewed as natural monopolies, was the basis for all regulation. Under that system, almost all sales of electricity were made by traditional utilities to their retail customers at rates set by state regulatory commissions. The rates charged were based upon cost of service and relatively few sales of electricity were made in interstate commerce.

Part II of the FPA is the Commission's principal grant of authority for regulating the transmission and sale of wholesale electric power in interstate commerce. However, under the FPA, civil penalty authority is available only for violations of sections 211 through 214 of Part II.[14] The limited sections of the FPA to which civil penalties apply are generally insufficient for enforcement in a market environment. The Commission is rarely able to invoke the civil penalties for sections 211 through 214 of Part II and most violations of Part II involve violations of other provisions.[15] Moreover, even in these limited circumstances where civil penalties are available, the amounts of civil penalties assessable pursuant to the FPA are inadequate because they are limited to not more than $11,000 per day per violation, a nominal amount when compared to the size of most energy companies.

The Commission's May 2003 Order approving a settlement agreement involving Idaho Power Co., IDACORP Energy, L.P., and IDACORP, Inc., provides a useful illustration of the limitations on the Commission's civil penalty authority. The Commission's investigation revealed evidence that Idaho Power violated the Commission's Standards of Conduct and a code of conduct, including giving preferential access to non-public transmission information to its own wholesale marketing employees.[16] The company also violated sections 203[17] and 205[18] of the FPA by failing

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[14] Those sections apply only in very limited circumstances involving either the transmission or "wheeling" of power through utilities' transmission systems or inappropriate preferences granted by public utilities to a certain type of generation plant as defined under the Public Utility Holding Company Act of 1935 (PUHCA).

[15] However, the Commission has been able to use section 214 in one case. *See CLECO*, 104 FERC ¶61,125 (2003), as set forth in attached Appendix A.

[16]*See* 18 C.F.R. § 37.4 (2002) (setting forth standards of conduct for public utilities). A power marketer (such as IDACORP Energy) that is affiliated with a public utility (such as Idaho Power) must provide a code of conduct for the Commission's approval in order

to file a large number of contracts to provide jurisdictional transmission service. The evidence against Idaho Power was strong, and the company admitted to many violations and subsequently refunded $6.1 million to customers, but because the Commission cannot impose civil penalties for that conduct, violations which the Commission views as serious and to which the violating entity had admitted, were left essentially unpunished.[19]

As a result of these limitations on civil penalties under the FPA, the principal remedy available to FERC under the FPA is the ordering of a refund for unjust or unreasonable rates or disgorgement of profits. The Commission may also order penalties identified in Commission-approved tariffs (*e.g.*, imbalance penalties). However, these remedies are limited. Section 206 of the FPA provides for refunds where a rate charged is deemed to be unjust and unreasonable, but the refund effective date may be no earlier than 60 days following the filing of a complaint or the initiation of a proceeding by the Commission. In addition, although the Commission may order disgorgement of profits when a Commission-approved tariff is violated (in addition to any specific penalties identified within the tariff), this remedy may also have limitations. Some courts have held that in applying the disgorgement of profits remedy, the Commission must calculate

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to obtain market-based rate authority from the Commission. The code of conduct is meant to deter affiliate abuse by, among other things, addressing the concern that profits earned from intra-affiliate transactions not accrue at the expense of the captive customers of investor-owned utilities.

[17] Section 203 of the FPA requires that public utilities obtain authorization from the Commission before disposing of facilities, including agreements, with a value of greater than $50,000. 16 U.S.C. § 824b (1994).

[18] Section 205 of the FPA provides in pertinent part: "every public utility shall file with the Commission, within such time and in such form as the Commission may designate . . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission . . . ." 16 U.S.C. § 824d(c) (1994).

[19] *See Idaho Power, et al.* 103 FERC ¶ 61,182 (2003).

profits exclusive of the entity's costs for the violative conduct.[20]

In November 2003, to prevent manipulation of the electricity markets in the future, the Commission enacted the Market Behavior Rules. The Market Behavior Rules are six specific behavioral rules designed to prohibit forms of market manipulation and other market misconduct. Among them, for example, is Market Behavior Rule 2 which prohibits "[a]ctions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products."[21] The Market Behavior Rules Order amended all then-existing market-based rate tariffs, and applied to all new market-based rate tariffs. In the Market Behavior Rules Order, the Commission provided that in connection with any such violation, the seller would be subject to disgorgement of unjust profits associated with the tariff violation, and the Commission held that the seller may also be subject to the suspension or revocation of its authority to sell at its market-based rates or to other appropriate non-monetary remedies.

The Market Behavior Rules monetary remedy of disgorgement of profits is limited by the fact that if no actual profits are realized from the market manipulation, the company is required to pay nothing, even though its market manipulative behavior has undermined the operation of the markets. For example, a manipulative scheme may fail to affect price. The Commission may still want to sanction the behavior because even unsuccessful attempts to manipulate markets undermine the integrity and/or operation of

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[20] *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249 (5th Cir. 1986).

[21] *See* Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003). There are similar Market Behavior Rules prohibiting market manipulation in the natural gas markets. *See* Amendments to Blanket Sales Certificates, 105 FERC ¶ 61,217 (2003).

markets.[22] Similarly, when a company engages in misconduct in order to "cut its losses," no actual profit is nominally earned. In such situations, where the gain to the company is in the form of a mitigated loss, rather than a realized monetary profit, there is no profit to disgorge.[23] In sum, providing the Commission with the ability to impose civil penalties in a broader array of situations would serve as a better deterrent to market abuse and give the Commission the ability to appropriately sanction egregious behavior.

B. Gas

The NGA is the Commission's principal grant of authority for regulating the transportation and resale of natural gas in interstate commerce. The NGA regulates the interstate transportation of gas, imposing various rules, including requirements for entry into and exit from natural gas transportation. However, the Commission lacks statutory authority under the NGA to impose civil penalties of any kind. The NGA contains minimal criminal penalty authority: up to $5,000 per day per violation and two years imprisonment.

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[22] However, as previously stated, the Commission also has the option of suspending or revoking a company's authority to make sales at market-based rates, although that remedy may not be appropriate in certain situations.

[23] In *American Electric Power Co., et al.*, 103 FERC ¶ 61,345 (2003) (the "Gaming Order"), the Commission described the practice of underscheduling load as conduct violating the California Power Exchange's ("Cal PX") and the California Independent System Operator's ("Cal ISO"). By engaging in underscheduling load, the utilities may have submitted inaccurate information and taken advantage of tariff rules in violation of the Commission-approved Cal PX and Cal ISO tariffs and caused a demonstrable detriment to the efficiency of California's power markets. Although the Commission noted its disapproval of the practice in the Gaming Order, 103 FERC at 62,338, because underscheduling load was a price-reducing purchasing strategy for which there were no profits, the Commission could not order disgorgement of unjust profits.

Although the Commission has no civil penalty authority under the NGA, the Commission may impose civil penalties for conduct that violates section 311 of the NGPA. The NGPA covers transportation of gas on behalf of local distribution gas companies or gas pipelines and relieves intrastate pipeline companies that provide this transportation from the regulatory requirements of the NGA.[24] As noted above (at pages 3-6 and in the attached Appendix A), although the Commission has been successful to date in obtaining section 311 penalties, its continuing ability to do so is diminishing because section 311 transportation contracts with interstate pipelines have become relatively uncommon. Since the early 1990s, blanket transportation certificates have allowed interstate pipelines to provide transportation under the NGA with features similar to section 311 transportation. Thus, civil penalties are available in increasingly fewer instances as section 311 transactions become a smaller part of the interstate natural gas market.

Due to the lack of civil penalty authority in the NGA, some of the Commission's investigations have been curtailed because, even if wrongdoing were uncovered, it could not be punished because no section 311 transaction was involved. In other cases, companies that are the subjects of the investigations receive disparate treatment, based upon whether or not they perform services under section 311 of the NGPA. The Commission's settlement of *Enogex, et al.*, 105 FERC ¶ 61,308 (Enogex), exemplifies such differing treatment for the same conduct. Enogex and Ozark failed to comply with regulations requiring them to obtain advance approval for certain pipeline construction projects. Because Enogex operated an intrastate natural gas pipeline pursuant to section 311 of the NGPA, the Commission was able to obtain a civil penalty against Enogex. However, because Ozark operated under a blanket construction certificate pursuant

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[24] Section 311 was enacted in 1978 as part of an effort to increase the sales of natural gas in the interstate market by reducing the amount of red tape needed for pipelines to transport natural gas on behalf of others. Commission regulations allow local distribution companies to provide this type of transportation as well.

section 7 of the NGA, the Commission could not assess a civil penalty against Ozark for the same misconduct. The two companies committed the same violations on different parts of the same pipeline, but because Enogex was operating intrastate under NGPA section 311 and Ozark was operating under the NGA, they were not subject to the same penalty. *See* Appendix A.

IV. Amending Civil and Criminal Penalty Authority under the Federal Power Act

The Commission's narrow civil penalty authority under the FPA leaves it with an insufficient foundation for strong enforcement of the electric power market regulations. As discussed above, and as illustrated in the chart comparing FERC and CFTC settlements for similar conduct (see page 11, above), the Commission's limited remedial authority in the electric power markets is readily apparent. To remedy this situation, the Commission proposes expanding its civil penalty authority to: (1) include all of Parts II and III of the FPA, and (2) increase the maximum civil penalties applicable to each violation of the FPA from no more than $11,000 per day for each violation, to no more than $1,000,000 per day for each violation. Part II contains the statutory provisions that are the most relevant to the Commission's regulation of its jurisdictional electric markets. For example, section 205 provides, in part, that rates and charges "shall be just and reasonable" and prohibits "any undue preference or advantage to any person"; and section 206 gives the Commission authority to "determine a just and reasonable rate, charge, classification, rule, regulation, practice, or contract," if it determines, after a hearing, that any of the foregoing were unjust and unreasonable. Because Part II is also the basis for the Market Behavior Rules, the proposed amendment would mean that civil penalties in addition to disgorgement of profits would be available for market manipulation.

Part III of the FPA covers numerous administrative and substantive requirements, including provisions mandating compliance with the Commission's operational and financial audit functions[25] and prohibiting certain interlocking directorates without Commission approval.[26] Provisions included in Part III give the Commission the authority to request that entities provide information, documents and other materials during investigations and audits.[27] Under the existing statutory scheme, without applicable civil penalties, entities that are undergoing an audit face no direct penalties for failure to comply with requests by the Commission's auditors for information, documents and other materials.

Similarly, although the FPA clearly prohibits serving in interlocking directorates without seeking prior authorization, the Commission can impose no civil penalties on anyone who violates this prohibition. In the situation of interlocking directorates, which occurs when a person simultaneously serves as a director or officer of more than one public utility, or serves as an officer of a public utility and a securities underwriter or an equipment supplier for a public utility, the Commission's inability to impose civil penalties for violations of FPA section 305 can have troubling implications. The legislative history of this provision indicates that "Congress exhibited a relentless interest in . . . the evils of concentration of economic power in the hands of a few individuals" and it "recognized that the conflicts of interest stemming from the presence of the same few persons on boards of companies with intersecting interests generated subtle and

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[25] FPA section 301, 16 U.S.C. §§ 825(a) and (b).

[26] FPA section 305, 16 U.S.C. § 825d.

[27] Section 307 provides that the Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of the FPA or any rule, regulation or order thereunder, or to aid in the enforcement of the provisions of the FPA or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which the FPA relates. 16 U.S.C. 825f(a). The comparable provision in the NGA is section 14. 15 U.S.C. 717m.

difficult-to-prove failures in the arm's length bargaining process."[28] However, the Commission is without authority to punish or deter violations of the prohibition on interlocking directorates through civil penalties.

To address the effects of the lack of civil penalty authority in Parts II and III of the FPA, we propose that section 316A be amended to include civil penalties for violations of these provisions within the Act. Specific language for the proposed amendment is set forth in Appendix B.

The Commission also proposes an increase in criminal penalties that would be available under any referral for criminal prosecution by the Commission to the Department of Justice under section 316 of the FPA for violation of the Act from a fine of up to $5,000 for each violation to a fine of up to $1,000,000 for each violation and a term of imprisonment of up to five years, increased from the current term of two years imprisonment. An increase in the current $5,000 maximum fine per violation to a $1,000,000 per violation fine was proposed in H.R. 6 during the 108th Congress.

Finally, in addition to the expansion of the Commission's civil penalty authority for violations of the FPA, the Commission also proposes including a separate penalty for making intentional, material false statements in any matter or filing before the Commission pursuant to the FPA, including false statements made to Commission staff during the course of an investigation or audit. In contrast with other regulatory schemes, the statutes under which the Commission acts do not provide it with the ability to impose civil penalties for making false statements or otherwise providing false information in filings with, or other matters before, the Commission, such as ongoing investigations,

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[28] *See Hatch v. FERC*, 654 F.2d 825, 831 (D.C. Cir. 1981), *citing, e.g.*, 79 Cong. Rec. 10379 (1935) (remarks of Representative Lea), 79 Cong. Rec. 8524 (1935) (remarks of Sen. Norris), and *15 U.S.C. § 79a(b)(2)* (2000); *see also Paul H. Henson*, 51 FERC ¶ 61,104 at 61,230 n.5 (1990).

inquiries, or audits.

The provision proposed is comparable to the authority of other regulatory agencies including the Atomic Energy Act of 1954 § 234(a). See 42 U.S.C. § 2282(a) (2000) (authorizing civil penalties for any violation for which a license issued under that Act may be revoked, including material false statements). Currently, the Commission generally can address this type of conduct only with the revocation or suspension of market-based rate authorizations or blanket certificates. In cases where such revocations or suspension may be an overly severe remedy, the Commission's only clear options are to let the false statement go unpunished, or to refer the matter to the Department of Justice for a possible criminal prosecution for the obstruction of justice under 18 U.S.C. § 1001. Specific language for the proposed false statements provision is set forth in Appendix B.

V. Creation of Civil Penalty Authority and Expansion of Criminal Penalty Authority under the Natural Gas Act

Because the Commission's role in regulating gas transportation and markets has transformed from traditional cost-based rate regulation to oversight of market-based rates, the Commission's civil penalty authority should be updated to reflect the present reality. Moreover, Congress should grant civil penalty authority under the NGA to enhance the Commission's ability to regulate the companies under its jurisdiction. Accordingly, the Commission proposes amendments adding civil penalty authority to the NGA.[29] Specific language for this proposed amendment is set forth in Appendix B.

The Commission also supports an increase in the amount of criminal penalties available under the NGA. Proposed amendments to the NGA that were before the 108th

[29] The House Conference Report on the energy bill that had been pending before the 108th Congress, H.R. 6, H. Rept. No. 108-375, did not include an amendment adding civil penalties to the NGA.

Congress would have expanded the Commission's criminal penalty authority. H.R. 6 included a proposal to amend section 21 of the NGA to increase the amount of criminal penalties available for violations of the NGA from not more than $5,000 to not more than $1,000,000; the term of imprisonment would have been increased from two years to five years. H.R. 6 also proposed an increase in the penalty for any willful and knowing violation of "any rule, regulation, restriction, condition, or order made or imposed by the Commission under this act" from not more than $500 to not more than $50,000 for each day of the offense. The Commission believes that, if enacted, these amendments would put the Commission's criminal penalties in balance with the severity of willful and knowing violations of the NGA and promote prosecution of appropriate cases by the Justice Department.

In addition, although the NGPA provides for civil penalties as discussed herein, increasing the dollar amount of civil penalties available under the NGPA to comport with the civil penalties proposed for the NGA would further the goal of eliminating disparate treatment of conduct governed by those acts. Specific language for the proposed amendment is set forth in Appendix B.

VI. Conclusion

Today, OMOI serves as the Commission's "cop on the beat" for energy markets that encompass numerous power sellers, interstate transmission lines, Regional Transmission Organizations, interstate gas pipelines, gas storage facilities and highly-sophisticated financial institutions. In its first two years of existence, OMOI has proven successful in increasing the number of investigations the Commission has conducted and in resolving those investigations to the maximum extent of its ability under the Commission's existing statutory authority. However, the Commission is missing a key tool - - effective civil penalty authority under the FPA, the NGA and the NGPA. Such authority would allow the Commission to more effectively deter market misconduct.

The Commission has taken great strides to put in place appropriate rules, and an office dedicated to enforcing those rules, so that the energy markets can function competitively and effectively. However, it must also have the necessary authority to punish those who fail to follow the rules and to deter any participant that may contemplate deviating from the rules. For energy markets to function properly, the Commission needs sufficient tools to penalize participants who violate the market rules.

Appendix A
Settlement Table

SETTLEMENT (BY NAME OF LEAD ENTITY OR PATTERN OF BEHAVIOR)	BASIS FOR INVESTIGATION AND FOR SETTLEMENT	COMPLIANCE TERMS OR OTHER CONDITIONS IMPOSED	SETTLEMENT AMOUNT OBTAINED THROUGH DISGORGEMENT OF PROFITS, REFUNDS OR PAYMENT OF COSTS	CIVIL PENALTIES UNDER THE NGPA OR FPA §§ 211, 212, 213 OR 214
RELIANT ENERGY SERVICES 105 FERC ¶ 61,008 (2003)	Violations of the entity's California Independent System Operator (Cal ISO) and California Power Exchange (Cal PX) tariffs as a result of submission of bids above $250 per megawatt hour (MWh) in the California markets between May 1, 2000 and October 2, 2000. Conduct qualified as "economic withholding" defined as "bidding available supply at a sufficiently high price in excess of the supplier's marginal costs so that it is not called on to run and where, as a result, the market clearing price is raised"	Oversight by OMOI for one year, including random reviews of emails and taped telephone conversations.	Total of $50 million in disgorgement of profits including: $25 million in cash and $25 million from an auction of capacity from certain of entity's gas-fired electric generation units, all to be paid into an account established by the U.S. Treasury for distribution for the benefit of California and Western electricity customers	No civil penalties available
AMERICAN ELECTRIC POWER CORPORATION, ET AL. (2005)	AEP's intrastate pipeline, Jefferson Island Storage & Hub, failed to disclose that it entered into a non-public agreement putting an affiliated marketer, AEP Energy Services, in control of injections and withdrawals. This allowed the marketer unduly preferential use of the pipeline's NGPA section 311 storage service and continuous access to confidential storage information about other pipeline customers. Another AEP pipeline, Louisiana Intrastate Gas, also provided undue preferences in section 311 transportation services to the affiliated marketer.	AEP, Energy Services, American Electric Power Service Corp. and Houston Pipe Line Co., AEP's remaining intrastate pipeline company, are required to follow a four-year compliance plan to prevent future violations, including enhanced employee training and continued monitoring by Commission staff for compliance with Standards of Conduct and Market Behavior rules. (Neither Jefferson Island nor Louisiana Intrastate Gas are currently owned by AEP.)	None	$21 million civil penalty under the NGPA, the largest civil penalty ever assessed by the Commission
DOMINION, ET AL. 108 FERC ¶ 61,110 (2004)	Alleged violation of the Commission's Standards of Conduct by providing non-public gas storage information to affiliates, select entities and individuals that was not provided to the public at large	Extensive employee training to deter future similar violations for employees of two involved entities; recording and maintaining the recordings of conversations between customer service representatives and customers of another entity for one year	Total refunds of $4.5 million paid by Dominion and its affiliates	Total of $3.6 million under §311 of the NGPA paid by Dominion and its affiliates and by 2 non-affiliated entities

SETTLEMENT (BY NAME OF LEAD ENTITY OR PATTERN OF BEHAVIOR)	BASIS FOR INVESTIGATION AND FOR SETTLEMENT	COMPLIANCE TERMS OR OTHER CONDITIONS IMPOSED	SETTLEMENT AMOUNT OBTAINED THROUGH DISGORGEMENT OF PROFITS; REFUNDS OR PAYMENT OF COSTS	SETTLEMENT AMOUNTS BASED ON CIVIL PENALTIES UNDER THE NGPA OR FPA §§ 211, 212, 213 OR 214
IDAHO POWER, ET AL. 103 FERC ¶ 61,693 (2003)	Alleged violations of Standards of Conduct and Code of Conduct including: giving preferential access to non-public transmission information to its own wholesale marketing employees; violations of Sections 203 and 205 of the FPA by failing to file 12 agreements for sale of power and failing to timely file 1,182 contracts for off-system sale of power for resale in interstate commerce	Parent entity agreed to adhere to a compliance plan until the Commission modified or terminated the plan for good cause shown; agreed also to retain an independent auditor to ensure compliance with entity's standards of conduct; Commission refrained from suspending marketing affiliate's market based rate sales authority because affiliate was terminating operations.	Total refunds of $6.1 million	No civil penalties available
CENTERPOINT 106 FERC ¶61,214 (2004)	Alleged violations of the NGA and the Commission's regulations by failing to report and post all of the non-conforming terms and conditions in 70 negotiated rate contracts	Three year compliance plan; agreement to certain new tariff provisions, including one requiring Centerpoint to file each negotiated rate contract executed by the earlier of 2 days prior to execution or by the date gas is expected to flow under the contract; and posting of previously unreported non-conforming terms and conditions of negotiated rate contracts with detailed explanatory narrative	$75,000 paid to the U.S. Treasury as reimbursement of staff's cost of investigation.	No civil penalties available
TRANSCO, ET AL. 102 FERC ¶ 61,302 (2003)	Alleged violations of the NGA, NGPA and the Standards of Conduct including: giving undue preference to affiliates; allowing an affiliate access to computer databases in order to optimize its transportation nomination on Transco's pipelines; and disclosing to its marking affiliate information about a non-affiliated shipper	Four year compliance plan designed to ensure marketing affiliates are not given preferential access and to ensure compliance with other Commission regulations. Limitations imposed on transportation that could be obtained by affiliates from Transco	None	Total civil penalties of $20 million under § 311 of the NGPA

SETTLEMENT (BY NAME OF LEAD ENTITY OR PATTERN OF BEHAVIOR)	BASIS FOR INVESTIGATION AND FOR SETTLEMENT	COMPLIANCE TERMS OR OTHER CONDITIONS IMPOSED	SETTLEMENT AMOUNT OBTAINED THROUGH DISGORGEMENT OF PROFITS; REFUNDS OR PAYMENT OF COSTS	SETTLEMENT AMOUNTS BASED ON CIVIL PENALTIES UNDER THE NGPA OR FPA §§ 211, 212, 213 OR 214
CLECO, ET AL. 104 FERC ¶ 61,125 (2003)	Alleged violations of Section 214 of the FPA, the entities' own Codes of Conduct and Commission regulations. Stipulation to having participated in unauthorized power sales, transmission transactions, and operational arrangements among affiliates	Three year compliance plan; revocation of market based rate authority for one entity subject to ability to re-apply for such authority after 12 months; imposition of stringent Codes of Conduct; and limitation and conditions on power sales, transmissions and operational arrangements between lead entity and affiliates	Disgorgement of approximately $2 million profits	Civil penalties of $750,000 as a result of FPA § 214 violation
ENOGEX, OZARK 105 FERC ¶ 61,308 (2003)	Alleged violations of regulations requiring advance approval of pipeline construction for compliance with statutes and regulations that protect the environment and cultural resources. Enogex operated pipeline under section 311 of the NGPA; Ozark operated pipeline under NGA section 7 blanket construction certificate.	$15,000 of $95,000 civil penalty under NGPA would be suspended if lead entity completed an outreach program to inform other intrastate and interstate natural gas pipelines about proper, timely procedures for obtaining prior approval clearances	Ozark operating under NGA section 7 blanket certification paid $20,000 toward costs of the investigation	Enogex assessed civil penalties of $95,000 under § 311 of the NGPA
NATIONAL FUEL 103 FERC ¶61,192 (2003)	Alleged violations of NGA and relevant regulations including: the prohibition on giving an undue preference or advantage to any person regarding the provision of gas transportation information; failure to satisfy reporting requirements	Three year compliance plan to ensure entity's compliance with the Commission's standards of conduct and regulations	$300,000 to cover the costs of the audit and investigation	No civil penalties available
TEXAS EASTERN TRANSMISSION, LP, ET AL. 110 FERC ¶61,188 (2005)	Alleged violations of NGA, and the Commission's Standards of Conduct, reporting and posting requirements including: the prohibition on providing an undue preference to any person regarding the provision of gas transportation information; failure to satisfy reporting requirements	Three year compliance plan to ensure entity's compliance in all areas in which violations were found	$500,000 voluntary payment to the U.S. Treasury	No civil penalties available

CORAL ENERGY RESOURCES IN05-5	Coral inaccurately submitted information to the Commission indicating that Coral's traders had not engaged in reporting inaccurate information to energy price-reporting publications.	Establishment of a task force to develop and implement a "best in class" model for regulatory compliance within the company and strengthening of Corals existing compliance program	Payment of $3.5 million to an organization providing energy assistance to low income customers. Allocation of approximately $500,000 for Coral task force to complete its work.	No civil penalties available.

Appendix B

Proposed Statutory Language

I. Increase in the criminal penalty authority under the FPA:

The Federal Power Act is amended as follows:

Section 316:

Subsection 316(a)

By striking "$5000" and inserting "$1,000,000"; and

by striking "two years" and inserting "five years"

Subsection 316(b)

By striking "$500" and inserting "$25,000"

By striking Subsection 316(c)

II. Addition of Civil Penalty Authority for the Federal Power Act (FPA):

The Federal Power Act is amended as follows:

Section 316A:

Subsection 316A (a)

By striking "section 211, 212, 213, or 214" and inserting "Part II or Part III of this Act"

Subsection 316A (b)

By striking "section 211, 212, 213, or 214" and inserting "Part II or of Part III of this Act"; and

by striking "$10,000" and inserting "$1,000,000"

III. Increase in criminal penalties under the NGA and the NGPA

Section 21 of the Natural Gas Act is amended as follows:

Subsection 21(a):

by striking "$5,000" and by inserting "$1,000,000"; and

by striking "two years" and by inserting "five years"

Subsection 21(b):

by striking "$500" and by inserting "$50,000"

Section 504 of the NGPA is amended as follows:

Subsection 504(c)(1)(A):

by striking "$5,000" and inserting "$1,000,000"

Subsection 504(c)(1)(B):

by striking "two years" and inserting "five years"

Subsection 504(c) (2):

by striking "$500 for each violation" and inserting "$50,000 for each and every day during which such offense occurs"

IV. Creation of civil penalty authority under the NGA:

The Natural Gas Act is amended as follows:

Inserting a new Section 21A to immediately follow Section 21

Section 21A to read as follows:

Any person who violates this Act or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this Act, shall be subject to a civil penalty of not more than $1,000,000 per day per violation for as long as such violation continues. Such penalty shall be assessed by the Commission after notice and opportunity for public hearing. In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation.

V. Increase in the amount of civil penalties available under the NGPA:

Section 504 of the Natural Gas Policy Act is amended as follows:

Subsection 504(b) (6) (i):
By striking "$5,000" and inserting "$1,000,000"

Subsection 504(b) (6) (ii)
By striking "$25,000" and inserting "$1,000,000"

VI. Addition of a false statements penalty for the FPA, Natural Gas Act (NGA) and the Natural Gas Policy Act (NGPA):

The Federal Act is amended to add a new Section 316B
The Natural Gas Act is amended to add a new Section 21B
The Natural Gas Policy Act is amended to add a new Section 504(b)(7)

To read as follows:

If any person or regulated entity has in any matter or filing within the Commission's jurisdiction under this Act, or under any rule, regulation, order, or license issued under this Act, made a false statement regarding a material fact, the Commission may, after giving notice and an opportunity for a response, impose a civil penalty of not more than the higher of $1,000,000 for each false statement or triple the monetary gain to such person or entity for each such violation;

(a) A matter as described in this section shall include any proceeding, hearing, investigation, audit or inquiry conducted by the Commission and/or its staff;

(b) A false statement shall include any deliberate, reckless or grossly negligent omission of a material fact;

(c) An inadvertent omission or error in factual information shall not constitute a false statement, except to the extent that it is determined to have been part of a pattern of negligent behavior.