



Federal Energy Regulatory Commission
November 17, 2016
Open Commission Meeting
Staff Presentation
Item A-3

"Good morning Chairman Bay and Commissioners.

"Today, the Office of Enforcement is releasing its tenth annual Report on Enforcement. As in previous years, OE staff prepared this report to provide the public with information on the activities of all four OE Divisions: Analytics and Surveillance, Audits and Accounting, Energy Market Oversight, and Investigations. It describes both public and non-public Enforcement activities. The portions about public activities include summaries of audit reports, market reports, market surveillance and data analysis, litigation filings, and Commission-approved settlements. The portions about non-public activities include summaries of closed investigations and self-reports in which the identities of companies and individuals are masked to preserve confidentiality. We hope that the public will find the report to be a useful tool to better understand what the Office of Enforcement does, the priorities of our office, and the factors that have led our office to pursue—or to close—certain matters.

"This year, in addition to presenting highlights from the Annual Report itself, the report team is joined at the table by two of our enforcement colleagues, Jamie Marcos and Jeremy Medovoy to discuss two white papers that OE staff prepared regarding market manipulation and effective energy trading compliance practices.

"A major theme reflected in this year's Annual Report is the consistency in the Commission's enforcement program. OE's priorities have not changed over the past few years. We have focused, and will continue to focus, on four distinct areas: (1) fraud and market manipulation; (2) serious violations of the Reliability Standards; (3) anticompetitive conduct; and (4) conduct that threatens transparency in regulated markets.

"OE's general approach toward its work addressing those four priorities also has largely stayed the same. Among other things, DOI opened 17 new investigations in Fiscal Year 2016. Of those 17 new investigations, 12 involve potential market manipulation. It closed 11 investigations, with about half closed because staff concluded that the evidence was insufficient to support a finding of a violation and the other half closed through settlement. The settlements addressed market manipulation, violations of Commission-approved Reliability Standards, and tariff violations. Interestingly, shortly after the Commission approved one of the settlements—the settlement with Berkshire Power and Power Plant Management Services—the United States Attorney's Office completed its prosecution of those companies and one of them pleaded guilty to a criminal violation of the Federal Power Act. That guilty plea was the first time that a conviction had been obtained in the 81-year history of the FPA.

"The most significant shift in the nature of DOI's work this past fiscal year was the amount of time that it spent litigating in federal District Court. As you know, the Commission issued two penalty assessment orders under the FPA this past year, which the subjects elected not to pay. Consistent with statutory procedures, staff filed petitions in federal District Court to enforce those orders on behalf of the Commission and then litigated those filings. It also continued litigating four other petitions from previous years and continued its work at the Commission level regarding an earlier ALJ initial decision finding violations of the Natural Gas Act. In total, counting all pending federal court and the NGA matter, staff sought to recover in Fiscal Year 2016 over \$567 million in civil penalties and \$45 in disgorgement

through its litigation work.

“But not all of DOI’s litigation work is directly tied to penalties. It sometimes has to litigate ancillary matters supporting its investigations. This past year, DOI staff—working jointly with the Justice Department’s Civil Division—successfully defended in a federal District Court in Texas, among other things, the Commission’s jurisdiction to adjudicate violations under the NGA.

“OE’s other divisions also maintained their focus on the four priorities that I mentioned earlier. Among other accomplishments, the Division of Audits and Accounting completed 14 audits of oil pipeline, public utility, and natural gas companies in Fiscal Year 2016, including findings addressing market reporting deficiencies and transparency issues, among others. Those audits generated 214 recommendations for corrective action and directed refunds and recoveries totaling \$5.3 million.

“The Division of Market Oversight continued to monitor the jurisdictional markets to identify market anomalies and inadequate or flawed market rules. Among its highlights, Market Oversight issued an updated version of the Commission’s popular *Energy Primer* handbook—which, I will note, was cited by the United States Supreme Court in the *EPSA* case. It also presented the Commission’s annual State of the Markets Report and seasonal Market and Reliability Assessments, prepared briefings for policymakers outside the Commission, contributed to Commission docketed items and rulemakings, and reviewed compliance with the Commission’s filing requirements. Also, Market Oversight conducted *ex post* analyses of market data to determine whether any participants may be exercising market power without effective mitigation.

“Finally, in fiscal year 2016, DAS analyzed market and other data in more than 40 investigations, and it continued to exercise and enhance its market surveillance capabilities. In particular, using Large Trader Report data from the CFTC, data provided by RTOs and ISOs, e-Tag data, and other sources, staff performed daily, weekly, and monthly screening of the wholesale natural gas and electricity markets to identify trading anomalies. It then analyzed those anomalies using other tools and information and referred potential market misconduct to DOI. In addition to this analytic and surveillance work, DAS, along with other Commission offices, also developed a Notice of Proposed Rulemaking regarding collection of data from market-based rate sellers and others to replace the Connected-Entity NOPR and a market-based rate NOPR that the Commission withdrew. If adopted as a final rule, this updated data collection NOPR will eliminate duplication and streamline MBR reporting requirements, provide additional information for surveillance, and modernize staff’s data collections, all while making the information that the Commission collects more usable and accessible.

“Copies of the Annual Report and the white papers are now available on the Commission’s website. This concludes my portion of the presentation, and I will turn it over to Jamie and Jeremy.

“Good morning Mr. Chairman and Commissioners. I am presenting the staff White Paper on Anti-Market Manipulation Enforcement Efforts Ten Years After EAct 2005, which was prepared by several members of the Office of Enforcement.

“In the more than 10 years since the Commission has implemented EAct 2005 with the enactment of its Anti-Manipulation Rule, Enforcement staff has investigated more than 100 market manipulation-related investigations, settling 24, trying two before administrative law

judges , and closing many others without further action. In addition, Enforcement staff has recommended and pursued 15 manipulation matters in adjudicatory proceedings following the issuance of Orders to Show Cause, and has represented the Commission in federal court seeking to enforce its penalty assessments in 8 manipulation actions. The Commission, itself, has issued many orders approving market manipulation-related settlements, orders to show cause to subjects to respond to allegations of market manipulation by Enforcement staff, and orders assessing penalties for manipulation.

"These efforts have created a body of law on energy market manipulation, which, while continuing to evolve, provides valuable guidance to industry and the public on the types of conduct that can constitute market manipulation. This White Paper summarizes that guidance and lessons learned.

"Specifically, staff offers lessons learned in four main areas. First, the White Paper describes factors the Commission and courts have found to be indicative of fraudulent conduct under the Anti-Manipulation Rule. Second, the White Paper describes specific types of conduct that the Commission has found to constitute market manipulation under the Anti-Manipulation Rule, including cross-market manipulation schemes, gaming, and misrepresentations.

"Third, the White Paper describes mitigating and aggravating factors the Commission has considered in assessing an entity's culpability and sanctions for manipulative conduct. Finally, the White Paper discusses examples of market manipulation investigations that staff closed without action and the factors that led to such decisions.

"In discussing these lessons learned, we hope that the White Paper provides useful guidance to the industry and public on the developing body of law on energy market manipulation.

"Good morning Mr. Chairman and Commissioners. I am presenting the staff White Paper on Effective Energy Trading Compliance Practices (Compliance White Paper), which was prepared by several members of the Office of Enforcement.

"The primary goal of the Commission's enforcement program is compliance. Over the years, the Commission has provided guidance on developing and maintaining strong compliance programs and has consistently emphasized that there is no one-size-fits-all approach to compliance. Even so, market participants continue to seek more detailed guidance, especially with respect to creating effective compliance programs geared towards preventing and detecting market manipulation.

"The purpose of the Compliance White Paper is to respond to those requests for additional guidance by presenting specific examples of compliance practices that, in staff's view, can be effective in detecting and preventing market manipulation. Staff used its experience in conducting surveillance and investigations and the input it received through outreach to a variety of industry representatives to develop this list of effective trading compliance practices.

"The effective compliance practices described in the Compliance White Paper are divided into three categories: (1) designing an effective trading compliance program; (2) establishing, implementing, and enforcing effective practices to deter and detect market manipulation and other misconduct; and (3) assessing the performance of the compliance program on a regular basis. The Compliance White Paper also includes a discussion of many ineffective trading compliance practices that staff has observed as part of its

investigative and surveillance efforts.

“Staff recognizes that not all of the effective practices discussed in the Compliance White Paper will be appropriate for every organization and that there are likely other compliance practices that are also effective or that may be more appropriate or effective for a particular organization. In addition, organizations are not required to utilize any specific practices to receive compliance credit under the Penalty Guidelines if a violation occurs. However, if an organization utilizes the practices discussed in the Compliance White Paper but nonetheless commits a violation, the use of those practices may factor positively into the Commission’s consideration of whether the organization’s compliance program is effective.

“While it is for individual organizations to choose which, if any, of the effective compliance practices are appropriate for their situation, we believe that the Compliance White Paper will provide useful guidance. Our intent is to assist organizations engaged in trading Commission-jurisdictional natural gas and electric products in designing and implementing robust and effective compliance programs that succeed in detecting and preventing market manipulation.

“That concludes our presentation. We would be pleased to respond to questions.”