

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Conference on Enforcement Policy

| Docket No. AD07-13-000

**POST-CONFERENCE COMMENTS OF THE  
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

The National Rural Electric Cooperative Association (“NRECA”) files these post-conference comments following its participation in the Commission’s November 16, 2007 Conference on Enforcement Policy. As noted at the conference, NRECA supported enactment of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), which gave the Commission enhanced civil penalty authority. NRECA’s support was premised on the need to shore up the Commission’s enforcement effort to more effectively police activities within its jurisdiction so that public utility rates are just and reasonable, not unduly preferential, and free from market manipulation. Such an enforcement effort is especially important to consumer-owned electric cooperatives that purchase power sold or transmitted by public utilities.

NRECA agrees with Chairman Kelliher’s emphasis on the Commission’s consumer protection role. His December 12, 2007 testimony before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, United States House of Representatives focuses on concern for consumers.<sup>1</sup> In his oft-cited *Energy Law Journal* article underscoring the pre-EPA 2005 need for enhanced Commission

---

<sup>1</sup> Joseph T. Kelliher, Chairman, FERC, Energy Speculation: Is Greater Regulation Necessary to Stop Price Manipulation? Testimony Before the H.R. Subcommittee on Oversight and Investigations (Dec. 12, 2007), available at <http://www.ferc.gov/EventCalendar/Files/20071212102420-kelliher-testimony-12-12-07.pdf>.

enforcement authority, then Commissioner Kelliher stated (quoting the United States Court of Appeals for the D.C. Circuit) that “the Commission’s primary task ... is to guard the consumer from exploitation... .”<sup>2</sup> NRECA agrees. Consistent with Chairman Kelliher’s observation, the Commission’s enforcement effort should focus on that primary task.

NRECA supports a robust enforcement program. While no NRECA member cooperative has been the subject of the twelve FERC civil penalty proceedings discussed at the enforcement conference, NRECA nevertheless desires an enforcement program that is both fair and perceived as fair. No doubt the Commission wants this too. A program that meets the minimum requirements of due process but is nevertheless subject to assertions of unfairness will be constantly distracted from its primary task of guarding consumers. On the other hand, an enforcement program that is firm and fair, in fact and in perception, will have the respect of the regulated community. More importantly, it should lead to robust compliance that will protect consumers.

NRECA believes that a key component of robust enforcement and compliance is education, both about how enforcement works and the standards that are being enforced. Below, NRECA reviews the history of the Commission’s enforcement program and where it stands today. NRECA urges further Commission efforts, such as the November 14, 2007 Staff White Paper,<sup>3</sup> to educate the regulated community and the public about how enforcement works so that all understand that it is firm and fair. NRECA also

---

<sup>2</sup> Joseph T. Kelliher, *Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission*, 26 Energy L.J. 1, 1 (2005) (quoting *NAACP v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975)).

<sup>3</sup> Report on Enforcement, Docket No. AD-03-000 (Nov. 14, 2007), *available at* eLibrary accession no. 20071114-3000.

discusses education about the standards that are enforced, which is essential for the regulated community to develop effective compliance programs and for the Commission's enforcement staff to perform its job effectively.

### Historical Perspective

The Commission (and FERC's predecessor agency, the FPC) did not have a formally organized investigation or enforcement function prior to 1978. During that period, investigations were conducted through show cause adjudications before administrative law judges. Numerous decisions indicated that such trial-type proceedings were inadequate for purposes of developing a satisfactory investigatory record.<sup>4</sup>

In 1978, a formal enforcement function was created at FERC under the leadership of the Commission's first Chairman, Charles Curtis. Chairman Curtis had first-hand experience with the successful work of the SEC's stand-alone enforcement division and determined to have an SEC-modeled enforcement function at FERC. His decision for a more evolved enforcement function was further encouraged by FERC taking on additional responsibilities under new legislation such as the Natural Gas Policy Act of 1978 which gave FERC its first authority to assess civil penalties. Thus a separate enforcement office reporting directly to the Chairman was created.

The Commission then adopted Rules Relating to Investigations.<sup>5</sup> The rules were based on the SEC's historically successful investigatory rules. The rules, modified years

---

<sup>4</sup> See Marilyn L. Doria & Gary Lloyd, *Enforcement at the Federal Energy Regulatory Commission: Considerations for the Practitioner*, 4 Energy L.J. 39, 41 n.21, 42-43 & n.34 (1983).

<sup>5</sup> Rules Relating to Investigations, 43 Fed. Reg. 27,174 (June 23, 1978).

later to include hotline procedures, were codified in 18 C.F.R. Part 1b, and remain the Commission's investigative rules to this day.

Shortly after the Commission adopted the new rules, the Commission strongly supported the new enforcement office's investigatory function through *Tenneco*, Opinion No. 41, 7 F.E.R.C. ¶ 61,258 (1979), which recognized the superior use of investigations rather than adjudications for effective fact-gathering. With the Commission's support, the enforcement office quickly garnered several victories, with multi-million dollar refund settlements to consumers and felony and misdemeanor convictions through coordination with the Department of Justice.

Although enforcement had the elevated authority of a separate office within the Commission, it was soon perceived as "too separate." Since its inception, it was located in a different location from the rest of the agency. While FERC regulatory policy was centered at 825 N. Capitol Street, the enforcement office was located in a separate building at 941 N. Capitol Street. The challenges of this physical separation were compounded when several senior enforcement officials left enforcement for positions elsewhere and new senior enforcement officials were hired directly from the SEC and DOJ. These new senior staffers had an appropriately strong law enforcement orientation but no FERC or other energy experience. During this period there was increasingly little daily or even weekly interaction between enforcement staff and other FERC staff. An apparent "culture gap" developed; there was a perceived disconnect between FERC's regulatory priorities and enforcement office activity.

As a result, the enforcement office was absorbed into the Commission's Office of the General Counsel ("OGC") in 1981.<sup>6</sup> The enforcement function then remained within OGC for the following two decades. During that period, enforcement staff garnered energy law expertise and investigative skills. Importantly, the culture gap between enforcement staff and other FERC staff substantially closed.

The Midwest price spikes in the late 1990s and later California meltdown then put FERC in an unprecedented public spotlight. Where FERC was previously mentioned in the Wall Street Journal or New York Times just a few times each year, it was now mentioned at least monthly and sometimes weekly. Aggressive congressional inquiries also increased. FERC responded by giving its enforcement function a higher profile, separating it from OGC and making it part of a newly-created Office of Market Oversight and Investigations ("OMOI").<sup>7</sup>

Congressional and public pressure did not abate. Indeed, FERC investigations and private litigation revealed that problems in California and elsewhere were more serious, and that available, effective remedies and penalties were more limited than previously understood. Chairman Kelliher (then Commissioner Kelliher) responded with an unambiguous call for Congress to enact legislation to "establish an express prohibition of market manipulation" and to "strengthen the Commission's penalty and enforcement authority" which the Commission would "judiciously use to discharge its legal duty to assure just and reasonable rates."<sup>8</sup>

---

<sup>6</sup> See *Butler Sees Stronger FERC Enforcement*, Inside FERC (Oct. 5, 1981).

<sup>7</sup> See *New Oversight Office Designed to Keep Gas, Electric Markets In Line*, Inside FERC (Jan. 21, 2002).

<sup>8</sup> Kelliher, *supra* note 2, at 31, 33.

With support from many stakeholders including NRECA, Congress responded through EPAct by giving FERC those tools. Under Chairman Kelliher, FERC in turn enhanced its enforcement mission by strengthening, expanding and reorganizing OMOI into the current Office of Enforcement.<sup>9</sup> Unlike FERC's initial enforcement office created in 1978, this new office had significant experience and did not suffer from a cultural separation from the rest of the agency. To the contrary, Chairman Kelliher put that issue to rest, repeatedly observing that FERC is now an enforcement agency.<sup>10</sup> To be sure, the current enforcement function at FERC is no stepchild.<sup>11</sup>

### The Present

To its credit, the Commission has undertaken the first-ever "self-evaluation" of its enforcement program. Just as the Commission initiated a ten-year re-examination of Order No. 888, the Commission is now appropriately looking back for insights into how best to move forward with its expanded enforcement effort. The Commission has now had more than two years of experience with its EPAct-enhanced enforcement authority. The numerous enforcement actions (including the larger number of instances in which there were affirmative determinations to forbear punitive actions) described in the

---

<sup>9</sup> See *Unveiling plan for new enforcement office, Court affirms commitment to oversight*, Inside FERC (Apr. 10, 2006).

<sup>10</sup> See Kelliher Testimony, *supra* note 1, at 6.

<sup>11</sup> Although the organization of the enforcement function at FERC has significantly changed during its twenty-nine year lifespan, the Commission's Rules Relating to Investigations in 18 C.F.R. Part 1b effectively remained unchanged. During this period, there were neither successful challenges to the Commission's investigative rules nor of enforcement staff's application of them. It would not be correct to assert that challenges were not made because strong enforcement actions before EPAct were not taken. Enforcement staff can readily provide details of numerous instances of substantial refunds and other significant enforcement activity before EPAct.

Commission's November 14, 2007 Report on Enforcement in Docket No. AD07-13-000 provide a good basis for that review.

Since EPC Act was enacted the Commission has taken several steps to increase the procedural and substantive transparency of its enforcement program. It has:

- Initiated a No-Action Letter program.<sup>12</sup>
- Issued a Policy Statement on Enforcement.<sup>13</sup>
- Issued its Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties setting forth the different procedures it uses to assess civil penalties for the different statutes it administers.<sup>14</sup>
- Issued a Report on Enforcement on November 14, 2007.
- Held a Conference on Enforcement Policy on November 16, 2007.
- Invited post-November 16 Conference comments.

Simply put, since the inception of FERC's formal enforcement program in 1978, the Commission has never sought to provide greater transparency into its enforcement effort than it has already done during the last two years.

### The Future

NRECA does not believe that major changes in the Commission's enforcement program are necessary. Indeed, care should be taken not to undermine enforcement staff's efforts through implementation of new procedures that would hinder their critical mission.<sup>15</sup> On the other hand, more education about the enforcement program and the

---

<sup>12</sup> *Interpretive Order Regarding No-Action Letter Process*, 113 F.E.R.C. ¶ 61,174 (2005), *modified*, 117 F.E.R.C. ¶ 61,069 (2006).

<sup>13</sup> *Enforcement of Statutes, Orders, Rule, and Regulations*, 113 F.E.R.C. ¶ 61,068 (2005).

<sup>14</sup> *Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, 117 F.E.R.C. ¶ 61,317 (2006).

<sup>15</sup> For example, the Commission's enforcement task could be made more difficult if enforcement staff were

standards enforced would build confidence in the program and improve compliance, which should benefit both the regulated community and the consumers protected.

By necessity, enforcement investigations are generally non-public. As a result, even many experienced FERC practitioners are unfamiliar with the Commission's enforcement procedures and practices. It is understandable that a perception of secret and unfair procedures and practices can take hold, especially when the stakes are high. A transparent enforcement program can diminish the possibility of such a perception. NRECA suggests some measures for the Commission's consideration to both increase transparency and to help the regulated community achieve compliance:

- **Enforcement rules, practices and legal precedents.** The Commission can issue a report or conduct a public seminar on its Rules Relating to Investigations in 18 C.F.R. Part 1b. Most FERC practitioners are unfamiliar with those rules until they are in the middle of an enforcement investigation. A public discussion of the rules and how they work would go a long way in taking the mystery out of how investigations are conducted. Such a report or seminar could also update or restate the article by Doria and Lloyd.<sup>16</sup> That twenty-four year-old article remains the primary substantial public discussion of the practices and legal precedents applicable to FERC enforcement investigations. For practitioners, the article presents a window into non-public investigations conducted by the Commission. It would be particularly helpful if the Commission could provide guidance as to which discussions and conclusions in that

---

precluded from subsequently litigating a matter they previously investigated. While some may now question whether the current lawful practice is "fair" because enforcement staff may develop insight into the Commissioners' concerns during the investigation stage, this is conceptually no different from regulated companies having "pre-filing meetings" with Commissioners or advisory staff prior to filing merger or other applications that foreseeably will be protested when filed. Indeed, companies have such meetings precisely to prepare applications reflecting concerns inferred from those meetings, and the Commission has declined to preclude them. *See Regulations Governing Off-The-Record Communications*, Order No. 607, 64 Fed. Reg. 51,222, 51,230-31 (Sept. 22, 1999), [1996-2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 61,079, at 30,891, *on reh'g*, Order No. 607-A, 65 Fed. Reg. 71,247 (Nov. 30, 2000) [1996-2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,112. ("The Commission views pre-filing communications as harmonious with the APA and ... consistent with our past practice..."). In any event, it is important to note that the Commission has already explicitly determined that an enforcement "investigator may speak to decision makers and their advisors throughout her investigation (up to the point where she may be assigned to be a litigator), providing them with details of the investigation, seeking their input on how to proceed, and discussing settlement with them." *See Statement of Administrative Policy on Separation of Functions*, 101 F.E.R.C. ¶ 61,340, P 26 (2002).

<sup>16</sup> Doria & Lloyd, *supra* note 4.

article remain applicable, which are now incorrect or no longer relevant, and important newer practices and precedents that have been developed.

- **Communications with the Commission during investigations.** At the Conference on Enforcement Policy it became apparent that there has been a misunderstanding about the propriety of communications with the Commission during ongoing investigations. Commissioners and senior FERC staff there appeared to indicate (but there was no official transcript) that such communications are not improper. In addition, subsequent discussions among practitioners suggest that relevant misconceptions persist. The Commission should therefore confirm (1) that an “investigation” under 18 C.F.R. Part 1b is not a “proceeding” to which the rules prohibiting *ex parte* communications are applicable;<sup>17</sup> (2) that 18 C.F.R. § 1b(19) does not limit a person from communicating with the Commission to the sole circumstance when that person is invited to do so by an enforcement official; (3) that the Commission emphasizes such communications are not inappropriate in the course of an investigation when a person believes that he or she is being treated unfairly or has a question that he or she believes only the Commission can address.
- **Future reports.** The Commission’s November 14 Report was both valuable and unprecedented. It included important context and background information that was not otherwise readily apparent from the Commission’s orders. It helped diffuse many concerns. The Commission should consider issuing similar reports in the future. The resulting increased transparency will make it easier for practitioners to more effectively advise their clients and will result in increased confidence in the Commission’s enforcement program.
- **Meaningful notice of prohibited conduct.** This may be the most challenging issue to address. To its credit the Commission has successfully met significant logistical challenges by issuing many new regulations required by EPA’s stringent schedule. Under those circumstances, no one should be surprised if the Commission later discovers that one or even several of its newest regulations give less than meaningful notice of prohibited conduct (*i.e.* notice sufficient to support a fair assessment of civil penalties), at least until those regulations are applied and interpreted by the Commission in individual cases. To increase meaningful notice, several potential steps should be considered:
  - The Commission should consider expanding application of no action letters to all areas within its jurisdiction.
  - The Commission should consider expanding application of no action letters for hypothetical fact situations.

---

<sup>17</sup> See, e.g., *RNR Enterprises, Inc. v. S.E.C.*, 122 F.3d 93, 98 (2nd Cir. 1997).

- The Commission should encourage the regulated community to obtain clarifications of Commission regulations as a means of promoting compliance. The Commission could do this, for example, by revising its Policy Statement on Enforcement to clarify that the Commission will credit efforts by regulated entities to obtain clarifications of Commission rules and regulations when the Commission considers remedies for violations of such rules and regulations.
- Conversely, if entities are informed as a result of such efforts that certain acts or omissions would likely be considered violations, this would be a penalty enhancing factor.<sup>18</sup>

### CONCLUSION

NRECA appreciates the Commission's efforts to develop a robust, firm and fair enforcement program that protects consumers and promotes compliance. It supports those goals and looks forward to working with the Commission to build cultures of compliance and ensuring consumer protection.

Respectfully submitted,

*/s/ Wallace F. Tillman*

---

Wallace F. Tillman, General Counsel  
Richard Meyer, Senior Regulatory Counsel  
National Rural Electric Cooperative  
Association  
4301 Wilson Boulevard  
Arlington, VA 22203-1860

December 17, 2007

---

<sup>18</sup> To that end, if a regulated entity disagrees with a negative opinion, a variation on the procedures for appeals from staff action could be promulgated to apply in such circumstances.