

# FERC Imposes Civil Penalties of \$22.5 Million in First Exercise of New Authority

January 23, 2007

On January 18<sup>th</sup>, the Federal Energy Regulatory Commission (FERC) approved settlements with four traditional electric utilities and one independent generator in which FERC imposed civil penalties totaling \$22.5 million and additional monetary remedies totaling \$2.8 million. These settlements represent the first use of the enhanced civil penalty authority that the Energy Policy Act of 2005 (EPA 2005) granted to FERC under the Federal Power Act, the Natural Gas Act, and the Natural Gas Policy Act of 1978. It is also an important application of the October 20<sup>th</sup>, 2005 Policy Statement on Enforcement, where FERC identified the factors to be taken into account in determining remedies, including civil penalties, for violations of those statutes. (See VNF issue alert on [Policy Statement on Enforcement](#).) FERC stated that it relied on the factors set forth in the Policy Statement on Enforcement in assessing the penalties in each of the settlements approved on January 18<sup>th</sup>.

## January 18<sup>th</sup> Settlements

**Entergy:** The Entergy Services, Inc. (Entergy) settlement involved three matters: (1) Entergy's loss of all Available Flowgate Capability (AFC) hourly data for the period April 2004-January 2005, allegedly in violation of applicable record retention requirements; (2) Entergy's AFC system's erroneous responses to certain requests for transmission service, allegedly in violation of Entergy's OATT; and (3) alleged violations of several OASIS posting requirements. Because the loss of AFC data occurred prior to the enactment of EPA 2005, the Commission's penalties were based only on the latter two alleged violations. Entergy self-reported the potential violations and agreed in the settlement to pay a \$2 million civil penalty, to make an additional \$1 million charitable contribution, and to submit compliance filings for one year.

**NorthWestern:** NorthWestern Corporation d/b/a NorthWestern Energy (NorthWestern) allegedly violated FERC orders and its OATT by failing to act within 30 days on 83 requests for firm monthly or firm yearly transmission service. FERC initiated the investigation as a result of a complaint to the Enforcement Hotline. In settling the investigation, NorthWestern agreed to pay a \$1 million civil penalty and to implement a two-year compliance plan. FERC considered only the 39 alleged violations that occurred after the enactment of EPA 2005 in assessing the civil penalty.

**NRG:** NRG Energy, Inc. (NRG) self-reported an incident in which NRG personnel allegedly violated ISO-NE's tariff and FERC's Market Behavior Rules by failing to declare a maintenance outage for a generating unit prior to taking it out of service and intentionally misrepresenting that the unit was available when, in fact, it was unavailable. NRG agreed to pay a \$500,000 civil penalty to settle this investigation, and also agreed to submit semi-annual compliance filings for one year.

**PacifiCorp:** PacifiCorp self-reported numerous potential Open Access Transmission Tariff (OATT) and Standards of Conduct violations, resulting in FERC alleging over 2,000 violations since 1999, of which over 300 took place after the enactment of EPA 2005. The alleged violations included: (1) using network transmission service to return power to Bonneville Power Authority under a grandfathered pre-Order No. 888 exchange agreement in violation of the OATT requirements that network transmission service be used only to serve native or network loads; (2) using network transmission service instead of point-to-point service to import power to facilitate off-system sales; (3) using network transmission service to bring power onto its system from resources that were not designated as network resources; (4) allowing its merchant function exclusive access to certain points of receipt and delivery; (5) allowing merchant function employees access to non-public transmission information and allowing merchant and transmission employees to communicate by telephone and e-mail rather than over the OASIS; (6) failing to properly administer network resource designations;

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and (7) using budget estimates rather than actual metered usage to bill the merchant function for ancillary services and long-term firm point-to-point service. The settlement requires PacifiCorp to pay a civil penalty of \$10 million, to hire an independent third party to monitor its OATT and Standards of Conduct compliance for one year, and to submit quarterly compliance reports to FERC for one year.

**SCANA:** SCANA Corporation and its subsidiary, South Carolina Electric & Gas Company (SCEG), self-reported potentially non-compliant power marketing business practices and OATT compliance issues. In the settlement, Staff alleged that SCANA's power marketing function violated the OATT by using network transmission service to import power not only to serve native and network loads, but also to facilitate off-system sales. Staff was troubled by the fact that questions regarding this practice had been raised internally, but the practice continued for over a year after these questions were raised. Staff also alleged that SCEG violated its OATT by using an improper curtailment priority for imports from non-designated network resources, by improperly designating network resources, and by failing to properly calculate ATC. As a part of the settlement, SCANA agreed to disgorge \$1.4 million to SCEG's retail native load ratepayers and non-affiliated firm transmission customers, pay \$400,000 to SCEG's transmission department, pay a \$9 million civil penalty, and make quarterly compliance filings for one year.

### Lessons Learned

As the first application of FERC's new civil penalty authority, these settlements are an important precedent for energy companies subject to FERC regulation, including electric utilities and independent generators, power and gas marketers, and natural gas pipelines. In commenting on these settlements, Chairman Kelliher stated that FERC will exercise its civil penalty authority even in cases where violations are not intentional, the company in violation did not benefit from the violations, and the violations resulted in little or no harm to customers or markets, if FERC determines that the company had a weak compliance culture at the time of the violations. FERC also noted that, consistent with the Policy Statement on Enforcement, the civil penalties assessed in these investigations would have been substantially higher had the companies not engaged in the kinds of actions for which companies may receive "credit" when FERC assesses civil penalties (*i.e.*, self-reporting, taking corrective actions, cooperating with Staff, etc.). Finally, it is clear that FERC continues to focus on OATT compliance issues related to a transmission owner's use of its own system to serve retail customers, including issues related to the use of network service that FERC previously discussed in *Idaho Power Company* (103 FERC ¶ 61,182 (2003)) and *MidAmerican Energy Company* (112 FERC ¶ 61,346 (2005)).

### For Additional Information

Van Ness Feldman provides compliance counseling, training, and internal assessments with respect to all aspects of Federal Power Act and Natural Gas Act regulation. The firm has significant experience working with energy companies to develop, implement, and oversee compliance programs to ensure full compliance with applicable FERC requirements. Van Ness Feldman also regularly advises and represents energy companies in FERC investigations and compliance audits. For assistance in evaluating the implications of these settlements and additional information on FERC's enforcement policy, please contact Doug Smith or Curt Moffatt in Washington, D.C. at (202) 298-1800, Pam Anderson in Seattle at (206) 623-9372, or any member of the Electricity or Natural Gas practices.

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