



Following *Jarkesy*, FERC Signals Sea Change in Enforcement

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In the greatest enforcement sea change since the Energy Policy Act of 2005 gave the Federal Energy Regulatory Commission (the Commission or FERC) civil penalty authority, the Commission terminated the administrative hearing procedures in the long-running market manipulation case against [Total Gas & Power North America, Inc. and two of its traders \(Docket No. IN12-17-000\)](#).¹ The termination is in response to the Supreme Court's decision in *Jarkesy v. SEC*, which held that SEC administrative proceedings seeking civil penalties for fraud violate the Seventh Amendment right to a jury trial.²

This is FERC's first major administrative action taken in response to *Jarkesy*. FERC will no longer prosecute market manipulation cases administratively using its own Administrative Law Judges. In the Order, the Commission clearly signaled its enforcement mandate will continue, stating that further guidance on enforcement cases is forthcoming. What seems clear is that FERC will likely pursue enforcement cases in federal courts going forward. This development should not impact the key role that Administrative Law Judges play in factual disputes involved in rate cases and in a number of different types of complaints brought to FERC under the Natural Gas Act or Federal Power Act.

Key take-aways from FERC's decision are:

1. FERC will not impose penalties against Total based on an administrative enforcement proceeding before a FERC Administrative Law Judge (ALJ).
2. No trial-type evidentiary hearing will be conducted by a FERC ALJ, nor will any initial decision, findings, or determinations be made by an ALJ in this proceeding.
3. FERC is examining *Jarkesy's* impact on its enforcement procedures and expects to further address its approach to enforcement cases.
4. The docket remains open, but any further administrative proceedings will not involve a trial-type hearing before an ALJ.
5. The order will take effect once the U.S. District Court for the Southern District of Texas clarifies or lifts its stay of the FERC proceeding.
6. After the stay is lifted, the proceeding will be held in abeyance until FERC issues a further order on how it will proceed.

This development significantly alters the course of this high-profile enforcement action, which began in 2016 with allegations that Total manipulated natural gas prices in the Southwest U.S. between 2009-2012. It also signals potential broader changes to FERC's enforcement processes in light of the *Jarkesy* decision. The FERC Order states that that the Commission "expects to further address its approach to enforcement cases in light of *Jarkesy*." Given the likelihood that FERC enforcement actions will proceed in federal courts instead of administrative proceedings,

¹ *Total Gas & Power North America, Inc., Total, S.A., Total Gas & Power, Ltd., Aaron Hall, and Therese Tran f/k/a Nguyen*, 188 FERC P 61,197 (2024).

² *Jarkesy v. SEC*, 144 S.Ct. 2117 (2024).

an important open question is the extent to which there will be new processes and procedures providing for coordination with the U.S. Department of Justice.

Companies facing FERC enforcement actions should closely monitor further developments as the Commission reconsiders its approach to administrative proceedings seeking civil penalties.

VNF's top-notch FERC enforcement team is standing by to help FERC-regulated entities sort out the potential effects on enforcement risks and where things may go from here. For additional information, please contact [Mike Farber](#), [Mosby Perrow](#), or [Mike Pincus](#), or any member of the firm's Enforcement team in Washington, D.C. at (202) 298-1800.

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