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FERC Takes Additional Steps to Enhance Energy Market Oversight in the Wake of Recent Enforcement Actions

On April 19, 2012, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued a final rule (“Final Rule”) that further enhances ongoing Commission efforts to detect and penalize anti-competitive behavior or manipulation in the wholesale energy markets the Commission regulates. The Final Rule, Order No. 760, seeks to enhance the Commission’s surveillance and analysis of the energy markets by requiring regional transmission organizations (“RTOs”) and independent system operators (“ISOs”) to submit market data directly to the Commission on an ongoing basis. The Final Rule takes effect 60 days after publication in the Federal Register (the “Effective Date”).¹

Currently, the regional energy markets administered by RTOs and ISOs utilize independent market monitors (“MMUs”) for initial market data collection and analysis, though the Commission has ultimate regulatory oversight and enforcement authority in the energy markets. The Final Rule suggests the Commission is moving toward a more hands-on approach with respect to market monitoring and clarifies that the role of the MMUs is only to enhance the Commission’s authority to monitor market activities.

The Final Rule will require each RTO and ISO to deliver electronically to the Commission a significant amount of data related to regional energy market activity. All such data will be provided to the Commission on an ongoing, confidential basis. The data to be provided includes:

- Supply offers and demand bids for energy and ancillary services
- Virtual offers and bids (often referred to as incremental and decremental offers and bids)
- Awards of energy and ancillary services
- Capacity market offers, designations and prices
- Resource output (including RTO dispatch instructions)
- Marginal Cost estimates
- Day Ahead shift factors
- Financial Transmission Rights (FTRs) transactions
- Internal bilateral contracts
- Interchange transactions
- Uplift charges and credits

According to the Final Rule, this data “will provide the Commission with empirical information that will augment its ability to assess the effectiveness of Commission-approved market rules and provide better tools to monitor the efficiency of existing market designs in producing just and reasonable rates.”

¹ The Final Rule is expected to be issued in the Federal Register in early May 2012 and would therefore take effect in early July 2012.

Each RTO must submit a compliance filing within 45 days of the Effective Date (approximately mid-August 2012) amending its open access transmission tariff to reflect the obligations for electronic delivery of such data. Electronic delivery must be fully implemented within 210 days after the Effective Date (approximately January 2013). With respect to “ongoing” delivery obligations, the Final Rule requires data to be delivered within seven days after the RTO or ISO creates the applicable datasets.

The Final Rule comes at a time when the Commission’s Office of Enforcement (“Enforcement Staff”) has recently taken action in several matters relating to allegation of manipulative activities in these same markets. For example:

- On April 5, 2012 the Commission issued a notice of a formal, non-public enforcement proceeding initiated by the Commission’s Office of Enforcement (“Enforcement Staff”) against a major financial institution and four of its traders alleging market manipulation in the energy market. The notice alleged that the financial institution and the four traders each violated the Commission’s rules prohibiting market manipulation by engaging in a coordinated scheme of trading certain physically settled electricity products in an effort to benefit the financial institution’s financially-settled swap positions on the Intercontinental Exchange (“ICE”). The alleged market manipulation took place several years ago – in 2007 and 2008.
- In March 2012, the Commission announced a major settlement in a separate matter involving Constellation Energy Commodities Group Inc. (“Constellation”). Under the settlement, Constellation expressly did not concede to any claimed wrongdoing. However, Constellation agreed to pay a total of \$245 million to end FERC Enforcement Staff’s investigation of claims alleging that Constellation engaged in market manipulation in the day-ahead physical power markets in New York and neighboring regional energy markets. Pursuant to the terms of the settlement, Constellation agreed to pay \$135 million in civil penalties and to disgorge \$110 million in unjust profits, representing the largest enforcement penalty since the expansion of FERC’s enforcement authority in 2005.
- In December 2011, the Commission issued a Notice of Enforcement Staff’s preliminary findings that Deutsche Bank Energy Trading, LLC (“DBET”) allegedly violated the Commission’s market manipulation rules by scheduling and trading energy in the California market to benefit its Congestion Revenue Rights positions, which are financially settled rights associated with transmission congestion. Enforcement Staff also alleges that DBET violated the Commission’s rules by creating schedules in which no power flowed.

FERC Chairman Jon Wellinghoff referenced the Constellation settlement in advocating for internal compliance programs:

Compliance, not penalties, remains my primary goal. To that end, the [Settlement] is instructive regarding the characteristics of a robust compliance program. Now based on that agreement, Constellation will institute a policy and process to monitor profit and loss concentrations in virtual transactions and physical schedules of electric energy and to review and document the purpose of virtual transactions.

According to Chairman Wellinghoff, energy companies’ “senior management has an obligation to proactively monitor for market manipulation and to pursue concerns once brought to their attention.” Chairman Wellinghoff further noted that the Commission intends to “be vigorous in using its anti-manipulation authority to protect consumers.”

In light of the Final Rule signaling the Commission’s implementation of enhanced (and more direct) market monitoring, as well as the scope, breadth and number of recent Commission enforcement actions, energy market participants, including companies that trade electricity and/or natural gas, should take a hard look at their current internal compliance procedures to determine whether they have sufficient protections in place to monitor trading activity, to provide compliance training to key personnel, and to address potential allegations of market manipulation. This has become all the more important in light of the risk management verification procedures that are now required pursuant to the implementation of new FERC rules governing risk management and credit reforms in the wholesale energy markets. In addition, the fact that Enforcement Staff is announcing its investigation of events that arose in some cases over five years in the past suggests that compliance, training and monitoring programs are likely to provide important protections to companies for years to come.

This *GT Alert* was prepared by Ken Minesinger, Doreen Saia and Rob Lamkin. GT’s [Energy Practice Group](#) has significant experience in FERC Enforcement matters. Questions about this information can be directed to:

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