



BALCH & BINGHAM LLP

## FERC Compliance / Enforcement Update

FROM: Balch FERC Compliance/Enforcement Team  
DATE: May 20, 2008  
RE: FERC Updates Enforcement and Compliance Package

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On May 15, 2008, the Federal Energy Regulatory Commission (“FERC”) issued four inter-related documents pertaining to its compliance and enforcement programs:

1. A Revised Policy Statement on Enforcement;<sup>1</sup>
2. A Final Rule addressing internal procedure for staff pursuit of orders to show cause;<sup>2</sup>
3. An Interpretive Order slightly modifying the current no-action letter process and addressing other means by which regulatory guidance is available from the Commission or its staff;<sup>3</sup> and
4. A Notice of Proposed Rulemaking concerning *ex parte* contacts and internal staff separation of functions.<sup>4</sup>

### **Revised Enforcement Policy Statement (Docket No. PL08-3)**

The Revised Enforcement Policy Statement supersedes FERC’s 2005 Enforcement Policy Statement. Although largely affirming prior guidance, the Revised Enforcement Policy offers a view into FERC’s enforcement process by setting out the factors Enforcement Staff will consider when deciding to: (a) initiate an investigation; (b) recommend sanctions; (c) assess a penalty; and (d) increase or decrease the amount of any penalty assessed.

The Revised Enforcement Policy discusses the various objectives and motivating factors at work in audits and investigations, as well as differences in process. The Revised Enforcement Policy also discusses FERC's approach to settlements, show cause orders and the types (and suitability) of remedies available to FERC. Lastly, the Revised Enforcement Policy sets forth one change from prior interpretations of the *ex parte* rule. This change provides that utilities

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<sup>1</sup> *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,157 (2008) [“Revised Enforcement Policy”].

<sup>2</sup> Order No. 711, *Submissions to the Commission upon Staff Intention to Seek an Order to Show Cause*, 123 FERC ¶ 61,159 (2008).

<sup>3</sup> *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 6,157 (2008).

<sup>4</sup> *Ex Parte Contacts and Separation of Functions*, Notice of Proposed Rulemaking, 123 FERC ¶ 61,158 (2008).

may only communicate with Commissioners or their staffs in writing (*i.e.*, not face-to-face or by phone), even during non-public investigations. By leaving a majority of FERC's existing enforcement policy intact, the Revised Enforcement Policy appears intended to:

- (a) remind the regulated community that many non-public investigations have been launched, resulting in no or mitigated penalties (lest we believe that the publicized investigations resulting in severe sanctions have been the only investigations);
- (b) bring emphasis to the level of cooperation and self-reporting expected from the regulated community; and
- (c) bring emphasis to the importance of rigorous compliance programs, including effective "self monitoring" and quality control processes, such as use of independent outside firms to evaluate and test compliance (and whether training is effective and taking hold).

#### **Show Cause Final Order ("Order No. 711")**

This Final Rule requires FERC Staff to inform a utility under non-public investigation (pursuant to Section 1b of FERC's Rules) that Staff intends to recommend that FERC: (a) initiate a proceeding against the utility under FERC's rules (*e.g.*, issue an order to show cause); or (b) make the utility a defendant in a civil action brought by FERC. Further, the Final Rule provides that the utility shall have the right to have the opportunity to provide FERC a written response to the recommendation within 30 days of receiving Staff's notice. These rights are available to all subjects of non-public investigations except in extraordinary circumstances (*e.g.*, when there is imminent danger of irreparable harm).

#### **No-Action Letter Interpretive Order**

This interpretive order expands the scope of issues for which FERC will permit requests for no-action letters to include everything within the area of energy markets jurisdiction except licensing of hydroelectric projects, transmission siting and reliability standards. However, FERC will no longer permit the withdrawal of a submitted no-action letter request except when FERC Staff determines that no-action letter submitted on a non-public basis do not deserve confidential treatment. FERC will also establish a compliance "help desk" on FERC's website as another way to obtain staff guidance and will require FERC Staff to hold periodic workshops to discuss general compliance issues with the industry. In addition, the Interpretive Order discusses various means by which the industry can obtain FERC guidance, as well as the relative reliance that the industry could place on such types of guidance (since none of it is binding on FERC).

**NOPR on Ex Parte Contacts and Separation of Functions (Docket No. RM08-8-000)**

This NOPR would require separation of functions (and would prevent *ex parte* communications) between the FERC Staff who worked on a non-public investigation (and other non-decisional FERC employees, such as litigation staff, settlement judges and neutrals) and FERC's decisional employees (*i.e.*, Commissioners and their staffs, ALJs, and other FERC employees/contractors reasonably expected to be involved in the decisional process of the proceeding) regarding any proceeding arising from the non-public investigation. Further, the NOPR would prevent a party to such a proceeding from conducting *ex parte* communications during the proceedings, as well. However, these *ex parte* partitions are only raised after a proceeding is commenced as a result of the investigation, and not before (*i.e.*, not at the time Staff submits its investigation report, which is when the wall previously went up). Lastly, the NOPR proposes to prohibit interventions as a matter of right in proceedings that arise from non-public investigations. FERC is seeking industry input concerning these proposals.

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