

FERC Asks a Federal Court to Enforce Civil Penalties against a Marketer and Trader

by Steven A. Weiler

Last fall, FERC assessed civil penalties against an electric marketer and trader for alleged market manipulation, and when the bill went unpaid asked a Federal court in California to enforce the penalties. At issue is (1) whether an electric marketer engaged in market manipulation by losing money in a physical market, in order to make money a financial market and (2) the extent to which a trader should be penalized.

The Federal Power Act (“FPA”) vests FERC with authority to levy civil penalties of up to \$1,269,500 per violation per day. To remedy market manipulation FERC can and does assess penalties against both a public utility (e.g., electric marketer) and any trader involved with the alleged violations. Before FERC assesses civil penalties, those being investigated can make a forum choice. The first option involves delaying a penalty determination until after litigation before a FERC administrative law judge, while the second option involves a prompt penalty assessment, which if not paid within 60 days, allows FERC to seek review of the assessment by a federal court. The court can affirm, modify, set aside, or remand the proceeding for further action. The marketer and trader chose the second option.

In essence, FERC claims that Vitol, Inc. sold physical power at a loss in a California wholesale electric market to eliminate congestion expected to cause losses on Vitol’s congestion revenue rights (CRRs). [CRRs are financial instruments that manage transmission congestion costs based on varying locational marginal prices in the day-ahead market.] At first blush, this appears to be a routine FERC enforcement order involving a violation of FERC’s prohibition against losing money in one market, in order to make money in another. But there is a twist that makes this case unique.

Last summer, FERC’s enforcement staff issued a report alleging that Vitol avoided a loss of \$1,227,143 on its CRRs through its manipulative trading and recommending that Vitol be required to disgorge that amount plus interest. Staff also recommended that Vitol and the trader pay civil penalties based on their actions, which caused \$2,515,738 in market harm (mainly in reduced CRR funding). In an October 25, 2019 order assessing civil

Related People

- Steven A. Weiler

Related Capabilities

- Energy & Natural Resources
- Electric Power
- Environmental

penalties, FERC noted that application of its “penalty guidelines” would normally require Vitol to pay civil penalties totaling more than \$2.5 million. However, FERC found that would “be unfair and unreasonable . . . because it would not adequately account for conduct that was conceived of and primarily carried out by an individual trader.”

Specifically, FERC found the trader (1) withheld information from Vitol’s lawyers and compliance officer, (2) devised the scheme, proposed it to others, worked to facilitate its approval, and benefitted from CRR position booked to his account, and (3) had engaged in similar behavior previously investigated by Enforcement staff involving a different electric marketer. Accordingly, FERC fined the trader \$1 million and reduced Vitol’s penalty by \$1 million to \$1,515,738. Vitol was also required to disgorge \$1,227,143 in unjust profits.

Vitol and the trader did not pay the penalties, which prompted FERC, on January 6, 2020, to file with the Eastern District of California a complaint seeking enforcement of FERC’s penalties. Normally, FERC enforcement orders are upheld by the courts or, alternatively, the underlying issues informally resolved. However, this case has been anything but normal. It will be interesting to see how it unfolds.