



Overseer's Undercurrent

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FERC's New Cop on the Energy Market Beat

In the mind of the mainstream media and the general public, the jury-trial convictions of Enron executives Ken Lay and Jeff Skilling - and Lay's death this week - will seem to mark the end of a modern era of corporate malfeasance and government prosecution of energy market scoundrels. Recent settlements in the Western market refunds proceeding provide an additional sense of closure, despite the amount of money that may actually change hands as a result.

In reality, the enforcement effort is just beginning.

As a result of the Energy Policy Act of 2005, the Federal Energy Regulatory Commission finds itself with new duties and greatly expanded market enforcement powers. Mere market monitoring has given way to a regime that promises detailed audits, strict enforcement, and the potential for prosecution on both civil and criminal grounds.

These are no longer minor issues of skirting market rules. We're talking fraud, reckless behavior, deceptive practices, making false statements, and willful withholding of relevant information.

In the past, energy regulators lamented the perceived limits on their market oversight and refund authority. Now, they have the power to impose fines of up to \$1 million per day, to send violators to jail for five years, and to seek court orders that could permanently bar individuals from serving as corporate officers, directors, or energy traders.

And don't think the agency won't do it.

While in Washington, D.C., last week, I got a chance to meet Susan Court, the recently appointed director of FERC's new Office of Enforcement. Our conversation was recorded for E&ETV's "OnPoint" program June 28 (you can watch it on your computer at www.eande.tv/main/).

The office is composed of four divisions, covering investigations, audits, financial regulation, and market oversight. While that sounds a little like police/prosecutor/judge/jury, it is certainly worlds away from the old FERC way of doing business.

Beyond the basic information about FERC's new enforcement structure, what I heard from Court is that her office will be thorough and relentless once it gets involved in a case. I learned that these new powers extend to just about anyone involved in electricity and natural gas markets, and that there is no safe harbor from enforcement. I also discovered that we might never even know when a case is being launched, because the law provides for complete confidentiality of investigations.

Among the strongest criticisms aimed by Congress at FERC's actions/inactions during the Western energy mess was that it didn't do anything to protect consumers from market manipulation. Consumer protection was never spelled out in FERC's mission statement, the Federal Power Act.

There, "just and reasonable rates" were the highlights of federal regulators' bailiwick. What exactly does "just and reasonable" mean, anyway? Even in its rate cases and complaint proceedings, the agency acted more like an arbiter among jurisdictional entities than a consumer protection agency.

Court assured me that despite FERC's field of jurisdiction being limited to wholesale markets, consumer protection is now very much a part of her job. The intent of legislation and new enforcement policies will be to bring FERC's powers into alignment with those of other market overseers - the Securities and Exchange Commission, the Commodity Futures Trading Commission, and even the Department of Justice.

Unlike in the past, Court's office isn't going to wait around until somebody files a complaint or some Congress member makes a speech. She outlined half a dozen different triggers for the agency to launch an investigation - from hotline tips and compliance audits to referrals from market overseers both in D.C. and in residence at regional transmission organizations around the country. Because of time limits, we never got to the part of the interview that I believe would be most valuable for energy professionals to hear: How do you steer clear of the Office of Enforcement?

My other guest, Michael Sweeney, an attorney with Hunton & Williams, offered such relevant advice. It boils down to greater corporate accountability, internal controls, self-reporting of questionable activities, and complete cooperation with the agency if it does decide to investigate. Call it Sarbanes-Oxley for energy companies.

As we saw during the Enron trials, denial of illegality and unaware management are no longer going to be allowed or accepted as excuses. The rules are tougher, the stakes are higher, and you really don't want to get Susan Court very interested in you.

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