

## FERC Enforcement Actions After Chairman's Abrupt Exit and Lack of Quorum

**Q** Federal Energy Regulatory Commission (FERC) Chairman Norman Bay resigned on February 3, leaving just two FERC commissioners. What will be the impact of having only two members on FERC enforcement proceedings?

**Matthew Connolly:** With two commissioners, FERC lacks a quorum to issue major orders and take certain actions, including in enforcement matters. The commission must have a quorum to issue orders to show cause, assess penalties, and commence federal court litigation. On Bay's last day, the commission issued an order delegating certain authority to staff until the commission returns to a quorum. The order permits staff to accept uncontested settlements, which may apply to certain enforcement cases, but it doesn't apply to other enforcement matters needing commission approval.

A lack of quorum would only worsen an already lengthy investigation process. Of the six enforcement actions currently in federal court, the shortest investigation lasted four years and nine months from the start of the investigation to the date of FERC's order assessing penalties. The statute of limitations on manipulation cases is five years. Any ongoing investigations nearing the limitations period may be imperiled by a protracted confirmation process to appoint a third commissioner.



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Matthew Connolly of Nutter represents energy companies and traders in FERC matters. Matt has extensive experience representing energy companies and traders in enforcement and compliance matters. He currently represents an entrepreneurial energy trading firm and an individual trader in federal court regarding market manipulation charges in the California wholesale electricity market.

**Q** Will the appointment of Commissioner Cheryl LaFleur as Acting FERC Chairman change what FERC investigates or the conduct of its investigations?

**MC:** Probably not. As Acting Chairman, it is unlikely that LaFleur will develop any significant enforcement changes, especially as only one of two commissioners.

Even if she were permanently elevated to Chairman (which is unlikely since she is a Democrat), we may not see the major changes that some hope. Many market participants and lawyers of the defense bar have criticized Bay for the conduct of FERC investigations. For example, many have raised due process concerns during the investigation process and believe that FERC goes too far and is too vague in defining market manipulation as anything "impairing, obstructing, or defeating a well-functioning market." These issues are unlikely to change unless a federal court weighs in. Notably, LaFleur voted to authorize all six enforcement cases currently in federal court, as well as approve all of FERC's enforcement settlements (concurring in some).

One area where LaFleur has publicly differed with Bay concerns FERC's Penalty Guidelines used to assess civil penalties. LaFleur has said that the Guidelines double count the duration of the alleged fraud, because they increase the penalty both (i) according to the number of days the manipulation persisted, and (ii) based on monetary loss, which is directly attributable to the duration of the alleged scheme. If confirmed as permanent Chairman, LaFleur may seek to avoid this double counting in the Guidelines formula.

**Q** How else has Bay's departure affected recent enforcement activities?

**MC:** Two days before Bay's departure, FERC approved the first two enforcement settlements of 2017: with GDF Suez Energy Marketing and with Covanta Haverhill Associates. The former, where GDF Suez agreed to pay a combined \$82 million in civil penalties and disgorgement, is FERC's largest settlement since 2013. The latter, where Covanta agreed to pay a \$36,000 civil penalty, is one of the smallest. FERC likely was motivated to complete these settlements before Bay's departure.

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