



FERC Proposes Landmark Penalty for Alleged Energy Efficiency Resource Capacity Market Manipulation

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On December 16, 2024, the Federal Energy Regulatory Commission (FERC or the Commission) issued an Order to Show Cause and Notice of Proposed Penalty proposing to assess staggering civil penalties against American Efficient, LLC and its affiliates (collectively, American Efficient) in connection with an alleged scheme to manipulate the capacity markets operated by PJM Interconnection, L.L.C. (PJM) and the Midcontinent Independent System Operator, Inc. (MISO).¹ The Order directs American Efficient to show cause as to why it should not be required to pay a civil penalty of \$722 million and disgorge \$253 million.²

The Order arises from an investigation that was commenced in 2021 to evaluate the participation of American Efficient in the MISO and PJM markets as “Energy Efficiency Resources” (EER). Until recently, both MISO and PJM permitted entities to participate in their capacity markets as EERs and receive capacity payments for committing to reducing demand.³ Under the MISO and PJM tariffs, EERs were required to (i) reduce electricity use, (ii) maintain a nexus to end-use customer projects and (iii) either own or hold contractual rights to such projects in order to qualify for capacity payments.⁴

The Order alleges that American Efficient violated these tariff requirements by bidding EERs into the capacity market reflecting its estimate of the demand reduction associated with the sale and installation of certain energy efficient products. According to the FERC Enforcement Staff Report (the Report) attached to the Order, American Efficient entered into program

agreements with manufacturers, distributors and retailers of energy efficient products under which American Efficient agreed to pay its partners for data on the sales of energy efficient products to consumers. These agreements also purported to transfer title to the products' environmental attributes from the program partner to American Efficient. According to the Report, American Efficient would then use the sales data to estimate the number of megawatts (MWs) of peak energy consumption that would be saved if end-use customers used the products as assumed in a future delivery year and then allocated those MWs to capacity zones within the market based on a retailer's zip code. The Report claims, however, that American Efficient did not have any contractual relationships with the customers purchasing the products, did not provide product rebates or discounts to end-use customers and had no way of ensuring that its program caused changes in consumer behavior.⁵ The Report states that, because the program did not actually reduce electricity use and American Efficient did not own or hold contractual rights to the use of the products producing the projected energy savings, American Efficient was ineligible to participate in the PJM and MISO capacity markets as an EER.⁶ Enforcement staff further alleges that American Efficient "knowingly or recklessly misled" MISO and PJM by presenting what was effectively a "market research scheme" as a capacity resource and unjustly profited from the scheme to the tune of more than half a billion dollars.⁷

The Order gave American Efficient 30 days (since extended to 90 days, until March 17, 2025) to respond to the Commission's allegations and show cause as to why it should not be found to have violated the Federal Power Act (FPA), FERC regulations and the MISO and PJM tariffs, and why the alleged violations should not result in the proposed disgorgement and civil penalty.⁸ It also requires American Efficient to choose between an immediate penalty assessment with the right to a jury trial in federal court and an administrative hearing before an administrative law judge prior to the assessment of the penalty, with any further right to a jury trial waived.⁹

The Order is notable in several respects. First, the magnitude of the proposed penalties dwarfs the penalties that FERC has proposed or assessed in enforcement actions in recent years. In fact, the civil penalties that FERC proposes to assess to American Efficiency represent approximately 80% of the total civil penalties that FERC has assessed in other enforcement actions between 2007 and 2024.¹⁰ American Efficient believes it is "the largest proposed penalty and disgorgement figure in the Commission's history."¹¹ In recommending a

civil penalty of \$722 million, FERC Enforcement staff cited American Efficient’s decision to expand its market participation in PJM after having been disqualified from participating in the MISO and ISO New England Inc. capacity markets. This, according to FERC Enforcement staff, demonstrates that “American Efficient knowingly or recklessly misled the ISO/RTOs to gain entry and retain access to those markets.”¹² FERC Enforcement staff also noted the significance of the violations, the involvement of high-level personnel in the allegedly manipulative scheme, the lack of any meaningful compliance program, and the failure of American Efficient to cooperate with FERC Enforcement staff’s investigation.

Second, the Order highlights FERC’s continued focus on pursuing enforcement actions against entities that commit to provide a product—such as capacity—when they do not have the capability to do so or that fail to meet their commitments.¹³ Although this has long been a focus of FERC’s enforcement efforts, these types of actions have become increasingly common in recent years as tightening supply conditions across FERC-jurisdictional markets have increased the potential economic and reliability consequences of non-performance.

Finally, the Order is notable in that FERC provides American Efficient with the option of electing to have a proceeding before an administrative law judge (ALJ) despite the Supreme Court’s decision in *Jarkesy v. SEC*,¹⁴ which held that the Securities and Exchange Commission’s (SEC) assessment of civil penalties through an adjudication before an ALJ violated the right to a jury trial guaranteed by the 7th Amendment. FERC previously terminated proceedings before an ALJ in a longstanding FERC enforcement action following the issuance of the Court’s decision in *Jarkesy* and indicated that it would be issuing a further order clarifying FERC’s view on the implications of the Court’s holding.¹⁵ Because *Jarkesy* concerned whether the 7th Amendment “permits the SEC to compel respondents to defend themselves before the agency,”¹⁶ it may be that FERC views the voluntary election of a proceeding before an ALJ as not implicating the issues raised in *Jarkesy*. However, the Order directs American Efficient to choose from these procedural paths without offering further comment on the court’s ruling.

¹ *American Efficient, LLC*, 189 FERC ¶ 61,196 (2024) (Order), available at:

<https://elibrary.ferc.gov/eLibrary/filedownload?fileid=5DC48F13-EB3B-CC57-94DC-93D040E00000>.

² *Id.* at P 2.

³ On November 5, 2024, FERC approved PJM's proposal to remove EERs from its capacity market following the 2025/2026 Delivery Year. *PJM Interconnection, L.L.C.*, 189 FERC ¶ 61,095 (2024). EERs can still participate in the MISO capacity market.

⁴ See, e.g., Order at P 3.

⁵ See Report at 2.

⁶ See *id.*

⁷ *Id.* at 2, 41, and 146.

⁸ *Id.*, Ordering Paras. (A)-(D); *Am. Efficient, LLC*, Notice of Extension of Time, Docket No. IN24-2-000 (Dec. 26, 2024).

⁹ Order at P 4 and Ordering Para. (F).

¹⁰ See FERC, All Civil Penalty Actions – 2025 (stating that FERC has assessed a total of approximately \$885 million in civil penalties since 2007), available at: <https://www.ferc.gov/civil-penalties/all-civil-penalty-actions-2025>.

¹¹ *Am. Efficient, LLC, et al.*, Unopposed Motion of Respondents to Extend Answer Deadline at 2, Docket No. IN24-2-000 (filed Dec. 26, 2024).

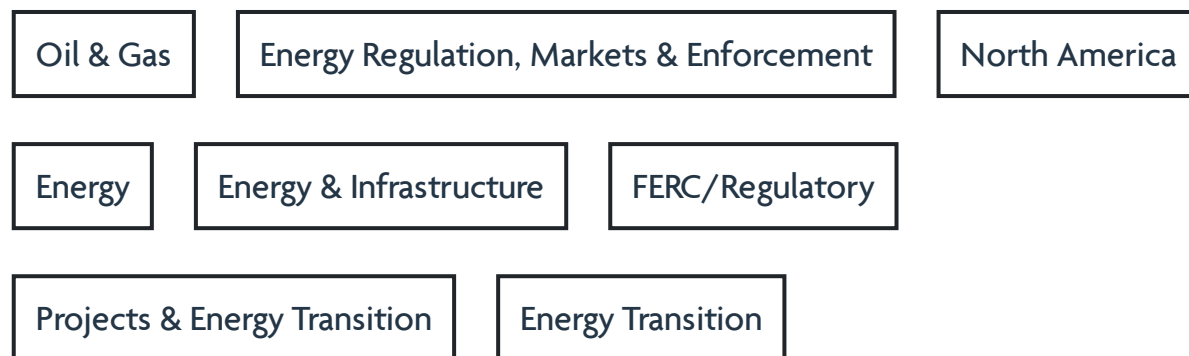
¹² Report at 146.

¹³ See, e.g., *Big Rivers Elec. Corp.*, Docket No. IN24-9-000; *Vista Energy Storage, LLC*, Docket No. IN24-11-0000; *Ketchup Caddy, LLC and Philip Mango*, Docket No. IN23-14-000; *Todd Meinershagen*, Docket No. IN23-4-000; *FERC v. Silkman, et al.*, No. 1:16cv00205 (D. Maine).

¹⁴ *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024).

¹⁵ *Total Gas & Power North Am., Inc., et al.*, 188 FERC ¶ 61,197 (2024).

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