

# Critic assails DOE inspector general finding that FERC investigations followed procedures

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The U.S. Department of Energy's Office of Inspector General has given a big thumbs-up to the way FERC's Office of Enforcement is conducting its investigations.

"Based on our review, nothing came to our attention to indicate that [Office of Enforcement] had not performed enforcement activities in accordance with relevant policies and procedures," the inspector general said in a special report.

However, one of FERC's biggest critics in that regard assailed the inspector general for focusing on whether FERC complies with its own policies without discussing whether those policies are flawed or violate due process in the first place.

"That takes damning with faint praise to new heights," William Scherman, a former FERC general counsel and partner with the firm Gibson Dunn, said in an interview. The lawyer also said the inspector general appears to be inviting Congress to address the problem, "and hopefully they will" in the energy bills moving thru the Legislature.

The inspector general, Gregory Friedman, launched the investigation partly in response to requests that it do so made by several U.S. senators who have questioned the way FERC has been investigating alleged energy market manipulation.

Those questions were sparked in part by an *Energy Law Journal* article co-authored by Scherman asserting that the commission's enforcement process has become "lop-sided and unfair," as well as similar accusations by certain targets of the agency's investigations.

In particular, the lawmakers asked the inspector general to look at whether FERC's practices are transparent and fair, the agency is providing proper notice of the types of conduct it considers to be market manipulation, and the targets of FERC investigations are being afforded the due process required by the agency's own regulations and precedents and comparable to that provided by other federal enforcement agencies.

The lawmakers also urged the inspector general to look at the connection between the announcement of a FERC enforcement settlement with Constellation Energy and its approval of Constellation's merger with Exelon Corp. on the same day of that announcement.

After agreeing to launch an inquiry, the inspector general looked at FERC's enforcement activities between fiscal years 2010 and 2014 as well as the agency's procedures, and interviewed FERC's enforcement staff and commissioners.

## Inspector general's report

Stressing that FERC's enforcement policies and procedures have evolved in the 10 years following the enactment of the Energy Policy Act of 2005, which greatly enhanced the agency's enforcement powers, the inspector general found nothing wrong with the way the agency is conducting its investigations.

For instance, after considering allegations that FERC's staff was being allowed to act in an overly aggressive manner because of a lack of adequate oversight, the inspector general found that the commission has policies and procedures requiring agency officials to oversee staff's investigations and provide key approvals at different stages of those investigations.

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Another complaint by FERC's critics is that staff does not allow adequate access to depositions. The inspector general did not directly respond to the question, but instead cited the existence of regulatory provisions and specific policies and procedures requiring that copies of deposition be given to witnesses, provided appropriate safeguards are in place. However, those procedures also allow staff to refuse to provide a copy of a deposition transcript until after a nonpublic investigation has been completed if it has good cause to do so.

FERC's practices complied with those requirements, the inspector general found. It recalled observing during the course of its review one instance in which a deposition transcript was made available to the subject of an investigation. In a different case, the full commission issued a nonpublic order denying a request that it provide transcripts to a subject until the investigative team had completed all of the depositions in the investigation, reasoning that doing so would reduce the possibility that witnesses would tailor their testimony to previous testimony, the report noted.

The commission's critics have also claimed that staff does not offer access to exculpatory material, which is evidence favorable to the subject of an investigation. The inspector general found that the agency does require staff to provide such material, and discovered a case in which it did so. However, the inspector general also found instances "where there was a misunderstanding on the part of the subject of investigation as to what was considered exculpatory material."

The inspector general also found an instance in which FERC provided requested information to the subject of the investigation as a courtesy even though material was not determined to be exculpatory. In another situation, a subject's request for information was denied because the investigation was not yet as the stage of making preliminary findings.

Responding to yet another allegation, the inspector general found that FERC generally has complied with requirements addressing the confidentiality of nonpublic information. The one exception was when former FERC Chairman Jon Wellinghoff improperly disclosed nonpublic information after he left the agency, as discussed in a separate inspector general review. In response to that review, the inspector general noted in the current report, FERC has agreed to take corrective actions addressing certain inconsistencies and weaknesses in the guidance it gives departing employees regarding the handling of nonpublic information.

The inspector general also investigated assertions that Constellation agreed to settle an enforcement action in exchange for FERC's approval of its merger with Exelon, ultimately concluding that it could not establish that such a quid pro quo took place.

The report said that the merger and the enforcement proceedings were handled by two different FERC offices. However, the inspector general discovered that Exelon had asked that the settlement agreement link the effective date of the settlement to the effective date of the merger. Since FERC also approved the merger and the settlement of the enforcement action on the same day, the inspector general's report said "it is understandable that those not directly involved in the process may have arrived at the conclusion that there was a direct connection between what we found to be separate, mostly independent processes/events."

Digging into the matter a little further, the inspector general discovered that the settlement was only reached after Exelon took the lead on Constellation's behalf — a move that a FERC commissioner that the report left unnamed said may have been made because Exelon wanted to know in advance the amount of the liability if it merged with Constellation. FERC officials also told the inspector general that Exelon wanted to be mentioned in the settlement agreement because Exelon would be responsible for ensuring payment terms and compliance requirements were met if the merger were approved.

"We found no indication that [Office of Enforcement] had considered the merger during its investigation," the report added. "In fact, we found that OE attorneys involved with this investigation were given specific instructions not to take into account the pending merger during settlement negotiations."

Moreover, the inspector general found no evidence "[suggesting] that the then-pending Constellation enforcement action played any type of role in the determination that the merger between Constellation and Exelon was consistent with [the] public interest."

The inspector general did discover that certain FERC officials, including Wellinghoff's staff, considered whether a pending investigation of one of the entities involved in a proposed merger could be a factor in merger approval decisions. The idea was later dropped after FERC's legal staff concluded that doing so would require a rulemaking, and

the investigation and merger approval process continued separately, according to the inspector general's report.

Finally, the inspector general found no evidence suggesting that FERC was conducting its investigations in an inconsistent manner, and determined that commission staff has given adequate notice to the subjects of investigations.

"Reasonable people can disagree" as to how FERC's now extensive authority is to be exercised, the report concluded. "However, based on the totality of our reviews, nothing came to our attention to indicate that FERC's enforcement practices were inconsistent with its own operating policies and procedures."

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