

New England demand response enforcement deal raises FERC enforcement critic's ire

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Market Intelligence

FERC has approved a \$5.38 million deal resolving allegations that Lincoln Paper and Tissue, LLC manipulated an ISO New England Inc. demand response program.

The company initially refused to pay the \$5.38 million civil penalty, which led FERC to ask a federal district court to affirm its ruling. But with the court case pending, Lincoln was forced to declare bankruptcy, leaving it with no money to continue fighting the charges.

The result left Bill Scherman, a partner with Gibson, Dunn & Crutcher LLP who provided legal counsel to Lincoln, fuming. A vocal critic of FERC's enforcement policies and a former FERC general counsel, Scherman in an interview decried that yet another enforcement case was settled before a court could review the agency's enforcement practices.

"The public should really wonder why FERC's Office of Enforcement, if it truly believes it can prove the allegations it brings, continues to erect every conceivable roadblock it can to avoid any real trial on the merits of its allegations," said Scherman, who stressed that he was speaking entirely on his own behalf and not on that of Lincoln or any remaining employee. "This pattern of conduct is as repugnant to the Constitution as it is harmful to the markets FERC oversees."

Lincoln is a privately held company that owned and operated a paper mill in Lincoln, Maine.

FERC accused Lincoln of manipulating an ISO-NE demand response program by turning off on-site generation that normally would be in operation during a period when the mill's baseline usage was being calculated for the purpose of measuring demand response under that program.

In a separate proceeding, the commission accused consultant Richard Silkman of manipulating that same program when he advised another paper mill, the Rumford Paper Co., to take similar actions when its facility's baseline power usage was being determined.

Rumford agreed to pay \$10 million and disgorge more than \$2.8 million in unjust profits to settle its case, but Silkman and his consulting company refused to deal and FERC ordered them together to pay nearly \$9 million for manipulating the ISO-NE's rules. Lincoln also refused to settle, and in August 2013 the commission ordered that company to pay a \$5 million fine and disgorge \$379,016 in illegally obtained revenue.

When the targeted entities refused to pay, FERC asked the court to hear the cases and affirm its findings.

Then, in September 2015, Lincoln declared Chapter 11 bankruptcy. After FERC filed a proof of claim in that proceeding to recover its penalties, Lincoln and commission enforcement staff resumed settlement discussions and reached a deal requiring Lincoln to pay the \$5.38 million penalty.

In approving the settlement June 1, FERC acknowledge that because Lincoln is bankrupt it probably cannot pay the entire penalty. The total therefore was broken into two parts: an unsecured claim of \$379,016 and a subordinated claim of \$5 million.

Since the bankruptcy court must sign off on the deal, Lincoln agreed to take all steps necessary to obtain permission to make the payment, such as filing a motion seeking approval of the settlement.

Under the agreement, if Lincoln pays \$379,016 or less, all payments will be made to the ISO-NE for allocation to network load during the applicable period. Any funds exceeding \$379,016 will go to the United States Treasury.

The agency noted that like the one at issue here, many demand response programs use a baseline for measuring demand response performance. And while it has required organized markets to adopt demand response measurement and verification programs, FERC noted that even the most rigorous of those programs may not stop deceptive conduct and consumers end up paying for demand response that does not really occur.

FERC therefore found the agreement to be fair and in the public interest, "as it reflects the nature and seriousness of Lincoln's conduct."

Scherman criticized FERC staff for "continually ignoring Lincoln's financial distress and the role this case played in contributing to this tragic outcome, without any apparent regard for the hard working men and woman who have lost their jobs."

Equally regrettable, according to Scherman, is that Lincoln's bankruptcy prevented the company from having its day in court.

"Once again, FERC's Office of Enforcement has continued its strategy of using any procedural trick it can find to avoid having the merits of its allegations tried in a federal court where the due process rights of both individuals and companies are respected," Scherman said.

FERC's case against Silkman remains before the court. (IN12-10)

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