

## INSIGHTS

## FERC Demands Due Diligence and Continues Focus on ISO Communications

January 24, 2013

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Last month, the Federal Energy Regulatory Commission (FERC) issued an Order Approving Stipulation and Consent Agreement [1] (EnerNOC, Inc., 141 FERC ¶ 61,211 (2012)) to resolve an investigation by the Office of Enforcement (Enforcement) into whether EnerNOC, Inc. (EnerNOC) submitted inaccurate metering data to ISO New England (ISO-NE) without exercising due diligence and to address multiple late filings by EnerNOC's wholly-owned subsidiary, Celerity Energy Partners San Diego LLC (Celerity). EnerNOC is a demand response provider and Celerity is an operator/lessor of Network Distribution Resource Facilities with a maximum aggregated generation capacity of 25 MW. Celerity has a market-based rate schedule on file with FERC. The settlement requires EnerNOC and Celerity to pay a civil penalty of \$820,000, disgorge \$656,806 (plus interest), develop a compliance program, and make semi-annual reports to Enforcement. The last section of this post identifies some "takeaways" specific to this order.

**Accuracy & Due Diligence** Enforcement found that EnerNOC, in its role as a demand response aggregator in ISO-NE's demand response markets, submitted inaccurate load data for five of its approximately 1,800 demand response sites in New England. In the first instance, a math error caused a utility to give EnerNOC an inaccurate "pulse multiplier," which resulted in an inaccurate acceptance test in December 2008. At the time, EnerNOC had eleven months of the utility's bills reflecting maximum peak power consumption of 4-5 MW, but the acceptance test showed 7 MW. In June 2010, an EnerNOC employee recognized that the load data might be incorrect and initiated an inquiry, but Enforcement concluded EnerNOC did not expedite the inquiry and EnerNOC received excess payments for Summer 2010. The EnerNOC employee responsible for the asset "concluded that EnerNOC did not have to notify ISO-NE of either the error or the overpayments because he believed that there was no means to correct the overpayments because ISO-NE's resettlement period had closed." EnerNOC failed to correct the inaccurate data for September through early November and received \$793,331 in excess payments. In two other cases, EnerNOC "failed to promptly and accurately" update the pulse multipliers for new meters at two locations. At one location, the EnerNOC project manager overlooked an email from the utility that provided the new pulse multiplier. When EnerNOC discovered the problem, it did not submit corrected data to ISO-NE. The ISO discovered the inaccurate data itself and prevented EnerNOC from receiving unjust profits and the ISO-NE Internal Market Monitor made two referrals to the FERC Office of Enforcement. At the other location, the utility changed the pulse multiplier without informing EnerNOC, and EnerNOC

requested an updated multiplier. However, the utility did not provide complete information, and EnerNOC did not seek clarification, causing it to submit inaccurate data for 4 months. Ultimately, EnerNOC began submitting corrected data, but it again failed to notify ISO-NE of the prior inaccurate submissions. In the final two instances, EnerNOC was aware of faulty equipment at two locations "but took insufficient steps to timely fix the error and ensure that ISO-NE received accurate data." At one location, EnerNOC replaced a faulty Modbus converter but failed to resubmit two months of data. Enforcement concluded that "EnerNOC failed to exercise due diligence " when it did not promptly address the problems responsible for the inaccurate data and when it did not notify ISO-NE that inaccurate data was being used for settlement." At another location, EnerNOC discovered errors that resulted from both equipment problems and EnerNOC's use of incorrect transformer ratios. Enforcement again concluded EnerNOC failed to exercise due diligence and failed to promptly discover and resolve the causes of the inaccurate load, resulting in \$100,766 of unjust profits. **Late Filings** Celerity, a subsidiary of EnerNOC, is authorized by the Commission to make wholesale sales at market-based rates. In 2008, Celerity made two late filings related to an upstream change in ownership that occurred in 2006 when EnerNOC acquired all of the membership interests in Celerity. The Commission's orders included "late-filer" warning language reminding Celerity that it must submit required filings on a timely basis of face possible sanctions. In 2010, Celerity again failed to comply with two different filing obligations. First, under Order No. 714, Celerity was required to make an electronic baseline filing of its tariff by October 1, 2010. Celerity failed to file its baseline tariff until September 30, 2011, and only after being named in a delegated letter order instructing Celerity and 254 other companies to file their baseline tariffs. Second, under Order No. 697, Celerity was required to file its updated market power analysis or a Category 1 Seller classification request by June 2010. Celerity made its filing requesting Category 1 Seller classification on October 7, 2011, more than 15 months late. Celerity did not have any of its own employees and relied on EnerNOC's compliance program for FERC compliance. Enforcement "concluded that a lack of a compliance program specific to Celerity was responsible for Celerity's failure to comply with the Commission filing requirements enumerated in Order Nos. 714 and 697." Moreover, other than for EQR submissions, EnerNOC did not have a written FERC compliance policy or procedures for Celerity until July 2012. Instead, EnerNOC relied on outside counsel for reminders about Celerity's FERC filings and did not have outside FERC counsel for Celerity between March 2010 and July 2011. Enforcement concluded that, since the violations, EnerNOC had strengthened its compliance and data quality procedures and undertaken significant efforts to develop and implement a compliance program to ensure that its subsidiaries comply with their FERC filing requirements. Moreover, the violations were not willful, did not harm market transparency or system reliability, and EnerNOC and Celerity cooperated fully with Enforcement. **Take Aways** As explained above, the Commission concluded that the erroneous reporting was not willful, and that it has routinely accepted late filings where companies have submitted them after discovering an administrative oversight. So what caused these errors and oversights to rise to a level that caused the Commission to take enforcement action resulting in a significant financial settlement? The answer likely is at least two-fold. First, in this case, EnerNOC profited from the errors and failed to report the errors upon discovery. Second, Celerity's failure to make timely filings was not

isolated, and Celerity failed to institute measures to ensure compliance even after warnings from the Commission. Also, the FERC order in this case references FERC "protocol" for reviewing late-filed documents with the protocol involving an inter-office team including the Office of Energy Market Regulation, the Office of General Counsel, and the Office of Enforcement. Although not mandatory, companies may benefit from establishing policies and procedures to ensure any errors in reporting will be promptly investigated and redressed, including reporting any errors to the relevant ISO and considering whether to report the errors to FERC. Companies also should maintain systems to remind employees of periodic regulatory filings and have appropriate resources to identify new filing requirements as they arise. Among other things, FERC found relying on reminders from outside counsel to be an imperfect approach to FERC compliance. It also is noteworthy that this is the second recent public enforcement matter related to the accuracy of demand response data.\* [2] This also is the second recent enforcement matter in which an individual, or individuals, has received emails of significance from an ISO but have failed to act in accordance with the emails. [3] (See J.P. Morgan Ventures Energy Corp., 141 FERC ¶ 61,131 (2012)) Therefore, this settlement should remind market participants to be diligent in all communications with or related to the Commission, ISOs, RTOs, and other regulatory bodies. *\*Note: Commission staff has issued four notices of alleged violations against two paper companies, a consulting company, and an individual consultant for an alleged scheme to establish inflated baseline load to over-recover under a demand response program. See January 25, 2011 Staff Notices of Alleged Violations involving Rumford Paper Company, Lincoln Paper & Tissue, LLC, Competitive Energy Services, LLC, and Richard H. Silkman, Ph.D.*