

INSIGHTS

Congress Proposes New Enforcement Authority for FERC

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The [**American Clean Energy And Security Act of 2009**](#) ("ACES"), or H.R. 2454, is a comprehensive energy bill that was introduced on May 15, 2009. ACES contains new enforcement provisions that would significantly increase the authority of the Federal Energy Regulatory Commission ("FERC" or "Commission") by empowering FERC to require jurisdictional entities to terminate behavior deemed inappropriate, even before all legal recourse is exhausted. ACES seeks to amend the Federal Power Act ("FPA") to give FERC authority to issue cease and desist orders to any entity that "may be violating, may have violated, or may be about to violate any provision of [the Federal Power Act], or any regulation promulgated by, or any restriction, condition, or order made or imposed by, the Commission under this part," if FERC finds that the violation or threatened violation is likely to result in significant harm to other entities or to the public interest. In a subsequent markup, the Committee voted to add the same cease and desist authority for perceived violations or threatened violations to the Natural Gas Act ("NGA") and the Natural Gas Policy Act. Thus, the bill is intended to extend FERC's cease and desist authority to all of its regulations rather than just its future regulations on carbon markets. The counterpart Senate Bill: [**The American Clean Energy Leadership Act of 2009**](#), which is currently being developed in the Energy and Natural Resource Committee, has recently added a similar provision that would amend the FPA and NGA to give FERC authority to issue cease and desist orders in instances where it suspects market manipulation is occurring or has occurred. The Senate Energy Bill provides FERC authority to step in where it believes that an entity "is manipulating or attempting to manipulate or has manipulated or attempted to manipulate any market for the sale of electric energy at wholesale in interstate commerce" in violation of the Federal Power Act or to stop an entity that it believes "is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market for the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission" in violation of the Natural Gas Act. In both scenarios, FERC would be able to enter temporary cease and desist orders to prevent a violation of a rule or regulation that "is likely to result in significant dissipation or conversion of assets, significant harm to electric consumers, or substantial harm to the public interest." Both the House and Senate Bills contemplate that FERC can enter a temporary order requiring an entity to cease and desist from the violation or threatened violation only after notice and opportunity for a hearing, ***unless FERC decides that notice and a hearing "would be impracticable or contrary to the public interest."*** Such temporary order becomes effective upon service to the entity, and remains in place until the proceedings are completed unless FERC or a court of competent jurisdiction sets it aside. If a temporary cease and desist order is entered without a hearing, the respondent may, within 10 days of the order being served, request a hearing at FERC. FERC must hold the hearing and render a decision "at the earliest practicable time." The respondent does not have to seek rehearing of FERC's decision before seeking judicial review, but may, within 10 days of the order being served if FERC has

conducted a prior hearing, or within 10 days of the date FERC renders a decision if the respondent has to request a hearing, seek review of the order from the U.S. Circuit Court in which the respondent resides or has its principal place of business, or the U.S. Circuit Court for the D.C. Circuit. The respondent cannot seek judicial review until FERC holds a hearing and makes its decision. Seeking judicial review of the order does not automatically stay FERC's cease and desist order. This new enforcement power for FERC is potentially significant because it gives FERC the ability to prohibit behavior, and threatened behavior, that it deems to create a significant harm to other entities or to the public interest before and during the time that the entity is seeking review of that decision. The consequences to those subject to a cease and desist order could be quite significant, and the process may erode the "innocent until proven guilty" and other due process presumptions that all generally expect.