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# ENERGY LAW REPORT



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# Federal Energy Regulatory Commission Imposes \$1.1 Billion Penalty for Alleged “Brazen” Capacity Market Fraud

*By Mark R. Haskell, Brett A. Snyder, Lamiya N. Rahman and  
Emily S. Childress\**

*In this article, the authors discuss a significant enforcement action that demonstrates the ongoing willingness of the Federal Energy Regulatory Commission (FERC) to pursue extensive penalties against those who, in FERC’s view, exploit regulatory frameworks.*

Nearly five years after opening its investigation, the Federal Energy Regulatory Commission (FERC or Commission) has unanimously issued an emphatic order<sup>1</sup> requiring six affiliated companies<sup>2</sup> that participated in what the Commission called “one of the largest and most brazen frauds” in its history to return nearly \$410 million in allegedly unjust profits, plus interest, and pay a civil penalty of \$722 million—totaling approximately \$1.1 billion.

FERC describes the alleged violations in stark terms: A “worthless paper-shuffling scheme.” “Trickery and nakedly abusive conduct.” A “flagrantly illegal” “money-for-nothing scheme.”

This significant enforcement action demonstrates FERC’s ongoing willingness to pursue extensive penalties against those who, in FERC’s view, exploit regulatory frameworks. This case involves six affiliated companies (collectively, American Efficient) that, beginning in 2014, participated in capacity markets administered by grid operators PJM Interconnection, L.L.C. (PJM), which operates the electric grid across 13 Mid-Atlantic and Midwestern states; the Midcontinent Independent System Operator (MISO), which manages the grid across 15 central U.S. states; and ISO New England, Inc. (ISO-NE), which operates the grid for the six New England states.

FERC concluded that American Efficient’s participation in two of these capacity markets violated the relevant tariffs and Commission rules. As explained in more detail below, these alleged violations were based on three independent legal bases:

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\* The authors, attorneys with Blank Rome LLP, may be contacted at mark.haskell@blankrome.com, brett.snyder@blankrome.com, lamiya.rahman@blankrome.com and emily.childress@blankrome.com, respectively.

<sup>1</sup> See American Efficient, LLC, 195 FERC ¶ 61,043 at PP 1, 574, 586 (2026).

<sup>2</sup> The six companies subject to the order are American Efficient, LLC; Modern Energy Group LLC; MIH LLC; Midcontinent Energy LLC; Wylan Energy, L.L.C.; and Affirmed Energy LLC.

1. American Efficient did not own or legally control the ability to reduce electricity demand from the energy efficiency projects that it bid into the capacity markets, in violation of PJM's and MISO's tariffs;
2. American Efficient's program was not designed to achieve energy reductions, in violation of PJM's and MISO's tariffs; and
3. American Efficient violated section 222 of the Federal Power Act (FPA) and the Commission's Anti-Manipulation Rule.

## **OVERVIEW OF RELEVANT CAPACITY MARKETS**

The capacity markets administered by PJM, MISO, and ISO-NE have allowed providers of energy efficiency (EE) resources to participate in markets. Under this market design, an EE resource provider could submit a sell offer into the capacity market, and if that offer was accepted, the seller would receive a capacity payment from the market administrator.

Capacity markets exist as a mechanism to compensate power suppliers for their commitment to ensure that reliable, sufficient power supply will be available to meet future electricity demand. Capacity markets help ensure that reliable electricity is continuously available for end users, and they influence how much those end users ultimately pay for that reliability. One way to ensure that sufficient capacity exists is by operating a power-generating source capable of providing future electric supply to meet end-users' demand for electricity. A second way is by reducing the overall demand for electricity, thereby reducing the amount of necessary capacity.

EE products are a tool for reducing demand. EE products can include things like light bulbs or refrigerators that actually require less energy to function compared to their non-EE counterparts, or things like caulk and insulation used to improve the efficiency of an HVAC system in a home, lowering the home's overall energy consumption.

The more EE products that are installed, the lower the total demand for energy across the electric system. Promoting the use of EE products can benefit grid operators like PJM, MISO, and ISO-NE, who work to ensure that enough capacity exists to meet the country's continuous demand for electricity. Because EE products reduce energy consumption, they also reduce the need for electric capacity. Capacity markets therefore exist as a way to incentivize and compensate EE resource providers for their commitment to reducing demand (and thus reducing the amount of capacity needed to meet that demand).

## **AMERICAN EFFICIENT'S ALLEGED SCHEME**

American Efficient's business model was straightforward: purchase sales data from retailers who sold EE products, use that data to submit sell offers into

capacity markets based on the potential energy savings, and collect capacity payments. American Efficient entered into contracts with various retailers, including The Home Depot, Lowe's, Walmart, and Costco, to purchase EE product sales data and to obtain "Environmental Attributes" (i.e., the purported rights to claim capacity payments related to the EE products).

Each month, the retailers would provide American Efficient with data on EE product sales. In exchange, American Efficient paid "micropayments" to the retailers—an average of just ten cents per EE product (according to the Commission's calculation). American Efficient used this sales data and statistical modeling to estimate energy reductions from the EE products, although it allegedly did nothing to verify whether the products were actually installed. American Efficient then relied on its rights to the "Environmental Attributes" to submit offers into capacity markets.

In addition to gathering ongoing sales data, American Efficient also allegedly collected historical data from its retail partners on sales of EE products that pre-dated the contractual relationships. FERC claims that American Efficient used this historical data to offer additional capacity into the capacity markets. FERC claims that an analysis of the 2020-2021 MISO capacity market indicated that as much as one-third of the capacity that American Efficient offered into MISO originated from historical sale data.

FERC asserts that American Efficient pressed on with this business model for years, despite what FERC says were clear signs that problems awaited on the horizon. American Efficient was partially disqualified from further participation in ISO-NE's capacity market in August 2019 and completely disqualified from MISO's capacity market in March 2021. FERC's Office of Enforcement began investigating American Efficient in May 2021 after receiving referrals from the independent market monitors for both PJM and MISO.

FERC asserts that over 11 years, American Efficient offered and cleared more than 20 gigawatts of capacity in PJM's and MISO's capacity markets. In other words, American Efficient claimed that the EE products to which it had rights could reduce electricity demand on the system by 20 gigawatts—nearly twice the peak summer demand of New York City. American Efficient received approximately \$473 million in capacity awards from PJM and \$15.5 million from MISO, achieving an 84 percent profit margin on its micropayments. At its peak, American Efficient represented over 70 percent of the EE market in PJM, according to FERC.

### **FERC'S LIABILITY THEORY: THREE INDEPENDENT VIOLATIONS**

FERC's lengthy investigation claims to have uncovered violations using three legal theories, each of which independently justified significant penalties, according to FERC.

## **1. Tariff Violation: No Ownership or Control of Load Reduction Capabilities**

First, the Commission concluded that American Efficient was ineligible to participate in PJM's and MISO's capacity markets because it "lacked the requisite ownership of or equivalent contractual rights to control the load reduction capability" (i.e., the ability to reduce electricity demand) of the EE resources it purported to sell.

American Efficient argued that through its contracts with retailers, it obtained the rights to "Environmental Attributes" associated with the EE products. Under American Efficient's theory (as interpreted by FERC), EE products have inherent Environmental Attributes from the moment of manufacture, which could be sold into capacity markets. When a retailer sold an EE product to a customer, the customer obtained the physical product while the retailer supposedly retained the Environmental Attributes, and then transferred those rights to American Efficient. In essence, American Efficient claimed it could acquire rights to the energy-saving potential of a product even before anyone installed it.

FERC concluded that under PJM's tariff, the right to sell capacity linked to an EE product comes into existence only once the product is actually installed by an end user. American Efficient could not contract for "Environmental Attributes" of products sitting on retail shelves because uninstalled EE products have no ability to reduce electricity demand; that capability arises only from installation, according to FERC.

For a seller to bid an EE resource into a capacity market, the seller must have some contractual relationship with the end user of the EE product. American Efficient had no such relationship; it only contracted with retailers. FERC asserts that at no time did the end users of the EE products transfer the associated energy-saving potential rights to either American Efficient or the retailers.

Both the PJM and MISO tariffs require sellers bidding EE resources into the capacity market to have contractual rights to installed EE products. These rights belong to the end user unless transferred to another entity. FERC alleged that because no contractual chain linked American Efficient to end users, the company could not claim ownership or control of the load reduction capabilities of the EE products, and therefore was ineligible to participate in the PJM or MISO capacity markets.

## **2. Tariff Violation: Program Design Not Tailored to Achieve Energy Reductions**

Second, the Commission concluded that American Efficient was ineligible to participate in PJM's and MISO's capacity markets because its program was not

“designed to achieve energy reductions that would not otherwise have occurred.” The tariffs require that valid EE resource programs be intentionally structured to cause energy reductions by end users that would not otherwise happen if the program did not exist. This concept is known as “additionality”—the idea that the program must cause energy savings that would not have happened without it.

American Efficient argued that its micropayments incentivized retailers to increase sales, ultimately resulting in more installations of EE products. The Commission rejected this argument, citing numerous prior statements by American Efficient that “unequivocally show that [American Efficient] knew that its program was designed to capture and monetize energy reductions that were happening anyway, not to achieve additional reductions.” For years, FERC asserts that American Efficient made documented statements that its program did not need to prove additionality, was not designed to encourage sales, and was not causing energy efficiency to occur.

Beyond these statements, FERC analyzed the mechanics of American Efficient’s program and asserted that it was not designed to intentionally achieve energy reductions. American Efficient did not require its retail partners to use the micropayments to promote EE product sales, nor did it gather any data to determine whether its program actually resulted in increased sales. FERC alleges that the company’s use of historical sales data—information on sales made before American Efficient partnered with a retailer—further demonstrated that its micropayments were not intended to incentivize sales.

### **3. Statutory and Rule Violation: Fraudulent Schemes & Market Manipulation**

Third, the Commission concluded that American Efficient violated section 222(a) of the FPA, which prohibits manipulative or deceptive tactics in connection with the purchase or sale of electric energy.

The Commission asserts six violations of its Anti-Manipulation Rule. FERC claims that American Efficient intentionally, knowingly, and/or recklessly:

1. Fraudulently presented itself as a legitimate EE resource provider;
2. Fraudulently collected capacity payments based on historical sales data;
3. Made false and misleading statements to PJM and MISO that its program lowered prices of EE products for consumers;
4. Failed to disclose information to PJM and MISO about the small size of its micropayments to retailers;
5. Failed to disclose to PJM that MISO and ISO-NE had disqualified

American Efficient from their capacity markets, and materially misrepresented its participation status in MISO; and

6. Made false affirmations about the rights American Efficient held to EE resources in reports submitted to PJM and MISO.

## **ENFORCEMENT AND POTENTIAL CRIMINAL REFERRAL**

In a separate concurrence, Commissioner LaCerte urged the Commission to refer the matter to the U.S. Attorney General for criminal prosecution, asserting that the extraordinary harm caused by the companies warrants both civil and criminal accountability “to deter such future schemes and deliver justice to the wrongdoers in this case.”

Under section 309 of the FPA, the Commission has broad power to assert remedies for violations of the FPA. FERC has historically relied upon this authority to order disgorgement (the return of illegally obtained profits) when addressing unlawful conduct. The FPA also expressly provides for the assessment of civil penalties. (Adjusted for inflation, the current statutory maximum for civil penalties is \$1,584,648 per violation per day.)

American Efficient contends that under 28 U.S.C. § 2462, a five-year statute of limitations period applies to limit the Commission’s assessment of penalties. The Commission found that the company had waived the statute of limitations argument by failing to properly develop it. Nonetheless, the Commission explained that the argument would fail for two substantive reasons.

First, according to FERC, American Efficient’s participation in capacity markets “constitute[s] a single, overarching effort to obtain payments to which it was not entitled,” and that because American Efficient “engaged in a continuing violation,” its conduct going back to 2014 is actionable.

Second, FERC asserts that disgorgement is an equitable remedy—and not a fine, penalty, or forfeiture covered by the five-year statute of limitations—because it returns the allegedly unlawful profits to victims (PJM and MISO market participants) and the total amount is limited to American Efficient’s gains (the capacity awards minus micropayments made to retailers).

American Efficient, LLC and its affiliates are jointly and severally liable for the \$1.1 billion in penalties imposed by the Commission. The companies may submit a payment plan to the Commission for approval by May 15, 2026. Otherwise, they have 60 days to pay the \$722 million civil penalty to the U.S. Treasury. Failure to pay on time will result in interest accruing on the final penalty amount from the date a federal district court enters a final judgment. Also within 60 days, the companies must disgorge \$407,732,930, plus interest, in unjust profits to PJM and \$2,084,828, plus interest, to MISO. PJM and

MISO will submit proposals on how to allocate these returned funds to the market participants allegedly harmed by the companies' conduct.

FERC's decision is not self-implementing. The companies elected a procedure under the FPA that does not permit rehearing, so the Commission's order is final. If they fail to pay the penalty as directed, FERC will file an action in federal district court to enforce it. The federal district court will review both the law and the facts *de novo* and may affirm or set aside the civil penalty wholly or in part. The final judgment of the federal district court itself will be subject to potential appellate review.

American Efficient has challenged both the legal and factual basis of FERC's penalty assessment.