REPORT OF THE COMPLIANCE & ENFORCEMENT COMMITTEE

This report of the Compliance & Enforcement Committee summarizes key federal enforcement and compliance developments in 2016, including certain decisions, orders, actions, and rules of the Federal Energy Regulatory Commission (FERC or Commission), the United States Commodity Futures Trading Commission (CFTC), the Pipeline and Hazardous Materials Safety Administration, the U.S. Department of Energy (DOE), and the U.S. Department of Justice (DOJ).*

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I. THE FEDERAL ENERGY REGULATORY COMMISSION

A. Reports and Rules

1. Annual Enforcement Report

On November 17, 2016, the FERC Office of Enforcement (Enforcement) issued its Annual Report on Enforcement for fiscal year 2016 that identified priorities of "[1)] [f]raud and market manipulation; [2)] [s]erious violations of the Reliability Standards; [3)] [a]nticompetitive conduct; and [4)] [c]onduct that threaten[ed] the transparency of regulated markets."[1]

In pursuit of these priorities, Enforcement opened seventeen new investigations in fiscal year 2016, down from nineteen investigations in 2015, while bringing eleven pending investigations to closure.[2] Enforcement obtained almost $12.25 million in civil penalties and disgorgement of approximately $5.7 million in unjust profits.[3] Enforcement's penalty amount was lower than the $26.25 million it assessed in 2015.[4] The 2016 Report reaffirmed that Enforcement does not intend to change its priorities in the upcoming year.[5]

1. OFF. ENFORCEMENT, FED. ENERGY REG. COMM'N, Docket No. AD07-13-010, 2016 REPORT ON ENFORCEMENT 4 (2016) [hereinafter 2016 REPORT].

2. *Id.* at 5, 26; STAFF OF THE OFFICE OF ENFORCEMENT, FED. ENERGY REG. COMM'N, Docket No. AD07-13-009, 2015 REPORT ON ENFORCEMENT 2 (2015) [hereinafter 2015 REPORT].

3. 2016 REPORT, *supra* note 1, at 5.

4. 2015 REPORT, *supra* note 2, at 2-3.

5. 2016 REPORT, *supra* note 1, at 4.

2. Office of Enforcement White Papers

a. Staff White Paper of Effective Energy Trading Compliance Practices

Concurrent with the 2016 Report's release, the FERC Office of Enforcement Staff (Enforcement Staff) on November 17, 2016, issued its White Paper on Effective Energy Trading Compliance Practices, intended to provide guidance by giving examples of the type of compliance practices that may be effective or ineffective in deterring market manipulation.[6] The Compliance Practices White Paper stated that an organization must have a culture of compliance in order for any compliance program to be effective, and that a compliance program must make "appropriate decisions" relating to: 1) organizational structure and composition of the compliance function; 2) human resources; 3) training; and 4) technological resources dedicated to the compliance function.[7]

Enforcement Staff added that one of the areas organizations struggle with the most is monitoring traders' activities to detect potential misconduct.[8] Enforcement Staff stated that to address this issue, an organization should

> 1) establish appropriate rules and restrictions for its traders that will further reduce the risk of misconduct; 2) consistently monitor trading activities for violations of those rules and for any other suspicious activity; and 3) strictly enforce all compliance rules and follow up on all potential issues.[9]

Enforcement Staff indicated "the following practices may be ineffective: 1) over relying on standardized and lengthy annual training, 2) over relying on attorneys for training without including operational staff, 3) not providing sufficient funding for compliance efforts, and 4) relying on off-the-shelf compliance programs and tools."[10]

b. Staff White Paper on Anti-Manipulation Enforcement Efforts Ten Years After EPAct 2005

On November 17, 2016, concurrent with the 2016 Report's release, Enforcement Staff released its White Paper on Anti-Manipulation Enforcement Efforts Ten Years After EPAct 2005.[11] The report stated that in the ten years since FERC began implementing its increased penalty authority under the Energy Policy Act of 2005, the Enforcement has instituted more than 100 market manipulation-re-

6. OFF. ENFORCEMENT, FED. ENERGY REG. COMM'N, STAFF WHITE PAPER ON EFFECTIVE ENERGY TRADING COMPLIANCE PRACTICES 1, 4 (Nov. 2016), https://ferc.gov/legal/staff-reports/2016/tradecompliance-whitepaper.pdf [hereinafter COMPLIANCE PRACTICES WHITE PAPER].

7. *Id.* at 5-6.

8. *Id.* at 11-12.

9. *Id.* at 12.

10. *Id.* at 20-21.

11. OFF. ENFORCEMENT, FED. ENERGY REG. COMM'N, STAFF WHITE PAPER ON ANTI-MARKET MANIPULATION ENFORCEMENT EFFORTS TEN YEARS AFTER EPACT 2005 (Nov. 2016) [hereinafter ENFORCEMENT EFFORTS WHITE PAPER], https://www.ferc.gov/legal/staff-reports/2016/marketmanipulation-whitepaper.pdf.

lated investigations, settling twenty-four investigations, conducting two FERC administrative law hearings, and closing many others investigations without further action.[12] The Commission currently has six other investigations pending before the U.S. district courts for resolution of penalty issues.[13] Enforcement Staff indicated that the Enforcement Efforts White Paper is intended to "provide insight on the[] lesson learned" through its enforcement efforts, including information on: 1) the various factors that have been found to be indicative of fraudulent conduct; 2) some of the specific types of conduct and behaviors that have been found to constitute market manipulation; 3) mitigating and aggravating factors that have lessened or heightened an entity's culpability and sanctions; and 4) the types of cases that have been closed without action.[14]

Enforcement Staff stated that indicia of fraud can include engaging in uneconomic conduct or conduct that appears to have an illicit purpose, or engaging in behavior that is inconsistent with market fundamentals.[15] Enforcement Staff indicated that while it is not possible to provide an exhaustive or "static" list of manipulative actions, market manipulation can include cross-market manipulation schemes that involve making trades in one market in order to benefit positions in a related market, gaming market rules, and making misrepresentations or omissions of material facts.[16] It stated that the following factors can "play[] a significant role in shaping penalty determinations" as either mitigating or aggravating considerations—an organization's commitment to compliance, the extent of any self-reporting, and the degree of cooperation shown by the organization in an investigation.[17]

Finally, Enforcement Staff provided guidance on what sort of conduct should not merit penalties.[18] Examples provided included instances in which a trader or organization can provide "a credible, legitimate explanation" for its decisions to engage in particular behavior, or when economic fundamentals support the behavior.[19]

3. Notice of Proposed Rulemaking on Data Collection for Analytics and Surveillance and Market-Based Rate Purposes

On July 21, 2016, FERC issued a Notice of Proposed Rulemaking on Data Collection for Analytics and Surveillance and Market-Based Rate Purposes in Docket No. RM16-17-000 (Data Collection NOPR).[20] The NOPR proposed to amend FERC's regulations by requiring that market-based rate sellers (MBR Sellers) and entities that trade virtual products or hold financial transmission rights

12. *Id.* at 3-4.
13. *Id.*.
14. *Id.* at 4.
15. ENFORCEMENT EFFORTS WHITE PAPER, *supra* note 11, at 10-11, 13-14; *Id.* at 15-16.
16. *Id.* at 16; *Id.* at 17-18; *Id.* at 23*; Id.* at 28.
17. ENFORCEMENT EFFORTS WHITE PAPER, *supra* note 11, at 33-37.
18. *Id.* at 39.
19. *Id.*; *Id.* at 40.
20. *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 F.E.R.C. ¶ 61,045 (2016).

(FTR) in FERC-jurisdictional electric markets (Virtual/FTR Participants) provide certain information FERC would use for analytics and market surveillance purposes.[21]

> Under this proposed rule, MBR Sellers and Virtual/FTR Participants would be required to provide information on Connected Entities (affiliates that ultimately own an entity, participate in FERC-jurisdictional wholesale electric markets, or purchase or trade certain natural gas or electric financial products), as well as provide information on certain employees and contracts, along with other information.[22]

MBR Seller and the Virtual/FTR Participants would file the applicable information with FERC directly, with the information generally to be supplied in XML format thereby allowing it to be included in a searchable relational database.[23]

FERC stated that the purpose of the new data collection requirements is to assist it in "understanding the financial and legal connections among market participants and other entities and their activities in Commission-jurisdictional electric markets."[24] Comments on the Data Collection NOPR were due September 19, 2016.[25]

4. Interim Final Rule on Civil Monetary Penalty Inflation Adjustments

On June 29, 2016, FERC issued Order No. 826, its Interim Final Rule on Civil Monetary Penalty Inflation Adjustments.[26] FERC indicated that the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), requires each federal agency to issue an interim final rule by July 1, 2016 adjusting for inflation each civil monetary penalty within the agency's jurisdiction.[27] FERC stated that the 2015 Act requires it to make an initial inflation adjustment to its civil monetary penalties, and then to adjust each such penalty on an annual basis every January 15 thereafter.[28] FERC indicated that Order No. 826 was intended to implement the initial adjustment.[29]

FERC currently has authority under the Federal Power Act (FPA), the Natural Gas Act (NGA), and the Natural Gas Policy Act (NGPA), to assess civil monetary penalties in amounts up to $1,000,000.[30] FERC stated that applying the requisite inflation adjustments resulted in a maximum civil penalty of $1,193,970.[31] FERC also adjusted other civil monetary penalties it is authorized to assess under

21. *Id.* at P 31.
22. *Id.* at P 52 & proposed 18 C.F.R. § 35.49(d).
23. *Id.* at P 14 & Att. A.
24. *Id.* at P 2.
25. *Id.* at iii.
26. Order No. 826, *Civil Monetary Penalty Inflation Adjustments*, 155 F.E.R.C. ¶ 61,320 (2016).
27. *Id.* at P 2.
28. *Id.* at PP 2, 4.
29. *Id.* at P 4.
30. *Id.* at PP 8, 11, 12, and 17 (citing FPA section 316A(b), 16 U.S.C. § 825o-l(b)).
31. 155 F.E.R.C. ¶ 61,320, at PP 8, 11-12.

these and other statutes.[32] Order No. 826 became effective July 6, 2016, the date it was published in the Federal Register.[33]

B. Notices of Alleged Violations

1. GDF SUEZ Energy Marketing NA, Inc.

On December 2, 2016, Enforcement Staff issued a notice of violation alleging that GDF SUEZ Energy Marketing NA, Inc. (GSEMNA) had violated FERC's Anti-Manipulation Rule, 18 C.F.R. § 1c.2.[34] Specifically, Enforcement Staff alleged that GSEMNA violated 18 C.F.R. § 1c.2 "by engaging in a strategy to target and inflate its receipt of lost opportunity cost credits (LOCs) in the PJM Interconnection, L.L.C. (PJM) markets during the period May 2011 to September 2013."[35] Enforcement Staff alleged the GSEMNA implemented this strategy by offering its combustion turbine units,

> in the day-ahead market with below-cost offers when it anticipated that the units would not be dispatched in the real-time market, and when the discounted units likely would run at a loss if dispatched, in order to receive LOCs paid to combustion turbine units that clear the day-ahead market but are not dispatched in the real-time market.[36]

2. National Energy & Trade, L.P.

On August 3, 2016, Enforcement Staff issued a notice alleging that National Energy & Trade, L.P. (National Energy) violated FERC's Anti-Manipulation Rule, 18 C.F.R. § 1c.1.[37] Specifically, Enforcement Staff alleged that National Energy violated 18 C.F.R. § 1c.1 by: 1) fraudulently selling physical basis at Texas Eastern M3 (Tetco M3) during the January 2012 bidweek at arbitrarily low prices early in the morning to "benefit a large short financial basis position acquired before bidweek;" and 2) by fraudulently trading physical basis at Henry Hub during the April 2014 bidweek to increase the value of its financial exposure, "solely to benefit National Energy's exposure to the Henry Hub Inside FERC index."[38] National Energy subsequently entered into a settlement with Enforcement Staff to resolve the allegations raised in this notice.[39]

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32. *Id.* at P 17 (table listing existing and revised civil monetary penalty amounts).

33. *Civil Monetary Penalty Inflation Adjustments*, Order No. 826, 81 Fed. Reg. 43,937 (2016).

34. Notice from Kimberly D. Bose, Sec'y, Fed. Energy Reg. Comm'n, Staff Notice of Alleged Violation (Dec. 2, 2016), https://www.ferc.gov/enforcement/alleged-violation/notices/2016/20161202-Issued-GSEMNA-NAV.pdf. FERC's Anti-Manipulation Rule codified at 18 C.F.R. § 1c.1 prohibits manipulation in natural gas markets subject to FERC's jurisdiction. FERC's Anti-Manipulation Rule codified at 18 C.F.R. § 1c.2 prohibits manipulation in electric energy gas markets subject to FERC's jurisdiction.

35. *Id*.

36. *Id*.

37. Notice from Kimberly D. Bose, Sec'y, Fed. Energy Reg. Comm'n , Staff Notice of Alleged Violations (Aug. 3, 2016), https://www.ferc.gov/enforcement/alleged-violation/notices/2016/Second-Revised-NET-NAV.pdf.

38. *Id*.

39. *See generally Nat'l Energy & Trade, L.P.*, 156 F.E.R.C. ¶ 61,154 (2016), discussed *infra*.

3. David Silva

On August 3, 2016, Enforcement Staff issued a notice alleging that David Silva violated FERC's Anti-Manipulation Rule, 18 C.F.R. § 1c.1.[40] Specifically, Enforcement Staff alleged that Silva violated 18 C.F.R. § 1c.1 by fraudulently trading physical basis at Tetco M3 during the January 2012 bidweek "at arbitrarily low prices early in the morning to benefit a large short financial basis position acquired before bidweek."[41] Silva subsequently entered into a settlement with Enforcement Staff to resolve the allegations raised in this notice.[42]

4. Saracen Energy Midwest, LP

On May 6, 2016, Enforcement Staff issued a notice alleging that Saracen Energy Midwest, LP (Saracen) violated Southwest Power Pool, Inc.'s (SPP) Open Access Transmission Tariff (SPP Tariff) "by submitting bids for Transmission Congestion Rights (TCR) at Electronically Equivalent Settlement Locations (EESL) between August 2014 and March 2015."[43] Saracen subsequently entered into a settlement with Enforcement Staff to resolve the allegations raised in this notice.[44]

C. Show Cause Proceedings

1. Total Gas & Power North America, Inc., Total, S.A., Total Gas & Power, Ltd., Aaron Hall, and Therese Tran f/k/a Nguyen

On April 28, 2016, FERC issued an order to show cause and notice of proposed penalty to Total Gas & Power North America, Inc. (TGPNA), Aaron Hall, and Therese Tran f/k/a Nguyen (collectively, with TGPNA, the TGPNA Respondents).[45] Enforcement Staff accused the TGPNA Respondents of violating NGA section 4A and FERC's Anti-Manipulation Rule, 18 C.F.R. § 1c.1, "through a scheme to manipulate the price of natural gas between June 2009 and June 2012" at four heavily-traded locations in the southwestern United States.[46] FERC directed "TGPNA to show cause why it should not be required to disgorge unjust profits of $9.18 million, plus interest," and directed the TGPNA Respondents to show cause why they should not be assessed civil penalties in the following amounts: TGPNA: $213,600,000; Hall: $1,000,000 (jointly and severally with TGPNA); and Tran, $2,000,000 (jointly and severally with TGPNA).[47] FERC also

40. Notice from Kimberly D. Bose, Sec'y, Fed. Energy Reg. Comm'n , Staff Notice of Alleged Violations (Aug. 3, 2016), https://www.ferc.gov/enforcement/alleged-violation/notices/2016/David-Silva-NAV-NET.pdf.

41. *Id*.

42. Order Approving Stipulation and Settlement Agreement, *In re David Silva*, 156 F.E.R.C. ¶ 61,155 (2016), discussed *infra*.

43. Notice from Kimberly D. Bose, Sec'y, Fed. Energy Reg. Comm'n, Staff Notice of Alleged Violations (May 6, 2016), https://www.ferc.gov/enforcement/alleged-violation/notices/2016/Saracen-NAV-20160506.pdf.

44. *Saracen Energy Midwest, LP*, 156 F.E.R.C. ¶ 61,122 (2016), discussed *infra*.

45. Order to Show Cause and Notice of Proposed Penalty, *Total Gas & Power N. Am., Inc.*, 155 F.E.R.C. ¶ 61,105 (2016). Enforcement Staff's report and recommendation was included as Appendix A to this show cause order.

46. 15 U.S.C. § 717c-1 (2005); 155 F.E.R.C. ¶ 61,105, at P 1, App. A at 1.

47. 155 F.E.R.C. ¶ 61,105, at P 1.

directed TGPNA's ultimate parent company, Total, S.A. (Total), and TGPNA's affiliate, Total Gas & Power, Ltd. (TGPL), to show cause why they should not be held liable for the TGPNA Respondents' actions, in order to prevent Total and TGPL from permitting the undercapitalized TGPNA to manipulate U.S. natural gas markets and then avoid the consequences due to insufficient funds.[48]

Enforcement Staff alleged that Hall and Tran were trading managers at the TGPNA's "West Desk," and directed and engaged in a cross-market manipulation scheme involving physical trading in one market in order to benefit related positions in another market.[49] Enforcement Staff indicated that the scheme operated in two stages. First, before and during bidweek, the West Desk would accumulate large positions of physical and financial natural gas products exposed to monthly index prices, giving the West Desk both the motivation and ability to manipulate prices.[50] Second, the West Desk would trade a dominant market share of monthly physical fixed price natural gas during bidweek to inflate or suppress the volume-weighted average price, and then report these trades for inclusion in the calculation of the published monthly index prices to which it was exposed.[51] Enforcement Staff claimed that this scheme allowed the TGPNA Respondents to reap millions of dollars in profits from their related derivative positions.[52] Enforcement Staff also stated that this conduct harmed other market participants who purchased or sold natural gas at manipulated prices, and undermined the credibility of the southwestern U.S. gas prices indices.[53]

2. Coaltrain Energy, L.P., Peter Jones, Shawn Sheehan, Robert Jones, Jeff Miller, Jack Wells, and Adam Hughes

On January 6, 2016, FERC issued an order to show cause and notice of proposed penalty to Coaltrain Energy, L.P. (Coaltrain), Coaltrain's co-owners Peter Jones and Shawn Sheehan, and traders/analysts Robert Jones, Jeff Miller, Jack Wells, and Adam Hughes (collectively, with Coaltrain, the Coaltrain Respondents).[54] Enforcement Staff accused the Coaltrain Respondents of violating FERC's Anti-Manipulation Rule, 18 C.F.R. § 1c.2 and FPA section 222, by engaging in fraudulent Up To Congestion (UTC) transactions in PJM energy markets.[55] Enforcement Staff further alleged that Coaltrain violated 18 C.F.R. § 35.41(b) by providing false and misleading statements and making material omissions in response to data requests and in other instances during Enforcement Staff's investigation.[56] FERC ordered Coaltrain, Peter Jones, and Shawn Sheehan

48. *Id.* at P 2 and App. A at 5.

49. *Id.*, App. A at 1.

50. *Id.*

51. *Id.*, App. A at 2.

52. 155 F.E.R.C. ¶ 61,105, App. A at 2.

53. *Id.*

54. Order to Show Cause and Notice of Proposed Penalty, *Coaltrain Energy, L.P.,*, 154 F.E.R.C. ¶ 61,002 (2016). Enforcement Staff's report and recommendation was included as Appendix A to this show cause order. FERC later issued an order assessing penalties, Order Assessing Civil Penalties, *Coaltrain Energy, L.P.*, 155 F.E.R.C. ¶ 61,204 (2016), discussed *infra.*

55. 16 U.S.C. § 824v(a); 154 F.E.R.C. ¶ 61,002, at P 1, Appendix A at 1.

56. 154 F.E.R.C. ¶ 61,002 at PP 1, 4.

to show cause why they should not be jointly and severally required to disgorge unjust profits of $4,121,894, and proposed to assess the following civil penalties: Coaltrain: $26,000,000; Peter Jones: $5,000,000; Sheehan: $5,000,000; Robert Jones: $1,000,000; Miller: $500,000; Wells: $500,000; and Hughes: $250,000.[57]

Enforcement Staff alleged that during the summer of 2010, the Coaltrain Respondents devised and executed a trading scheme to make sham UTC trades, intended not to profit from price differentials between the day-ahead and real-time markets, but from PJM's Marginal Loss Surplus Allocation (MLSA) payments.[58] UTCs were developed as a means to hedge congestion price risk associated with physical transactions, and later became a way for market participants to profit by arbitraging the price differences between two nodes in the day-ahead and real-time markets.[59]

During the relevant period, UTC transactions associated with transmission service in PJM were eligible to receive a portion of MLSA payments, which are the PJM-developed and FERC-accepted distribution to market participants of the surplus revenues that PJM collects for transmission line losses.[60] Enforcement Staff stated that while UTCs are intended to arbitrage price differences between two nodes, the Coaltrain Respondents executed trades on paths with zero or near-zero price spreads, and unnecessarily purchased transmission services on such paths, in order to obtain MLSA payments.[61] Enforcement Staff stated that while the Coaltrain Respondents lost more than $96,000 on the UTC price spreads and incurred another $3.83 million in transaction costs, they collected $8.05 million in MLSA payments from these trades and "unjust profits" of $4.12 million.[62] Enforcement Staff claimed that Coaltrain's conduct was similar to conduct that had been found to be manipulative in two other cases.[63] Enforcement Staff also alleged that the Coaltrain Respondents omitted or concealed important and responsive evidence from its documents production to Enforcement Staff, and falsely or misleadingly attested to Enforcement Staff that the productions were complete.[64]

D. Enforcement Litigation and Adjudication

1. *FERC v. City Power Marketing, LLC and K. Stephen Tsingas*

On August 10, 2016, the U.S. District Court of the District of Columbia issued a memorandum and opinion finding that the Federal Rules of Civil Procedures (FRCP) apply in a penalty enforcement proceeding, but rejecting the motion

57. *Id.* at 1.

58. *Id.*, Appendix A at 1. Enforcement Staff stated that Coaltrain came up with the scheme in early June 2010, and put it into action from June 15, 2010 to September 2, 2010. *Id*.

59. *Id.*, Appendix A at 8.

60. 154 F.E.R.C. ¶ 61,002, Appendix A at 10.

61. *Id.*, Appendix A at 3.

62. *Id.*, Appendix A at 3-4.

63. *Id.*, Appendix A at 2 (citing *City Power Marketing, LLC*, 152 F.E.R.C. ¶ 61,012 (2015) and *Oceanside Power, LLC*, 142 F.E.R.C. ¶ 61,088 (2013)).

64. *Id.* at P 4 and Appendix A at 63.

to dismiss filed by City Power Marketing, LLC (City Power) and K. Stephen Tsingas to dismiss the proceeding against them.[65]

This proceeding involves a petition filed by FERC to enforce its order assessing civil penalties against City Power and Tsingas. FERC previously issued a show cause order and assessed civil penalties, finding that City Power had violated the Anti-Manipulation Rule by fraudulently engaging in UTC transactions in order to collect MLSA payments.[66] City Power and Tsingas declined to pay the penalties, and on September 1, 2015, FERC filed a petition before the district court for enforcement of the penalties.[67] On November 2, 2015, City Power filed a motion to dismiss FERC's petition, and FERC filed a response on December 22, 2015.[68]

The court first addressed the "threshold question" of whether, as claimed by City Power, the proceeding before the court was a standard civil action subject to the FRCP, including the right to undertake discovery.[69] The court noted there are two "pathways" involving a penalty assessed under the FPA.[70] Under option 1, the party subject to the penalty can choose to have a full hearing before FERC, with the ability to appeal FERC's findings to the U.S. Courts of Appeals.[71] Under option 2, the party can elect to have FERC assess the penalty without undergoing a FERC hearing.[72] In such instance, if the penalty is not paid within sixty days, FERC can institute an action in U.S. district court to enforce its order, with the court having the "authority to review de novo the law and the facts involved."[73] City Power and Tsingas had elected option 2 in this instance.[74]

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65. *FERC v. City Power LLC*, No. 1:15-01428-JDB 2016 U.S. Dist. LEXIS 105421 (D.D.C. Aug. 10, 2016) [hereinafter August 10 Opinion].

66. *Id.*, at *22-24; *see also* Order Assessing Civil Penalties, *City Power Mktg., LLC*, 152 F.E.R.C. ¶ 61,012 (2015); Order to Show Cause and Notice of Proposed Penalty *City Power Marketing, LLC*, 150 F.E.R.C. ¶ 61,176 (2015). FERC assessed civil penalties of $14 million against City Power and $1 million against Tsingas, and required City Power and Tsingas to disgorge $1,278,358 in unjust profits. 152 F.E.R.C. ¶ 61,012 at P1.

67. *Petition for an Order Affirming the Federal Energy Regulatory Commission's July 2, 2015 Order Assessing Civil Penalties Against City Power Marketing, LLC and K. Stephen Tsingas*, No. 1:15-cv-01428-JDB (D.D.C. Sept. 1, 2015). *See* August 10 Opinion, *supra* note 65, at *24.

68. Notice of Motion and Motion to Dismiss, *FERC v. City Power Marketing, LLC*, No. 1:15-01428-JDB (D.D.C. Nov. 2, 2015). City Power's motion also sought a ruling that if its motion to dismiss were denied, that the proceeding be treated as a normal civil action subject to the FRCP, not a summary review of agency action. *See* August 10 Opinion, *supra* note 65, at *24; Memorandum in Opposition to Respondents' Motion to Dismiss, *FERC v. City Power Marketing*, LLC, No. 1:15-cv-01428-JDB (D.D.C. Dec. 22, 2015). *See* August 10 Opinion, *supra* note 65, at *24.

69. August 10 Opinion, *supra* note 65, slip op. at 16. The court noted that similar issued had recently been addressed in *FERC v. Maxim Power Corp.*, Civ. No. 15-30113-MGM (D. Mass. July 21, 2016), and stated that it agreed with much of the court's reasoning in that case. August 10 Order, *supra* note 65, at *25. The *Maxim* decision is discussed *infra.*

70. August 10 Opinion, *supra* note 65, at *25-26.

71. *Id.* (citing FPA section 31(d), 16 U.S.C. § 823b(d)(2)).

72. *Id.* at *26-27, (citing FPA section 31(d)(3), 16 U.S.C. § 823b(d)(3)).

73. *Id.* at *27 (citing FPA section 31(d)(3), 16 U.S.C. § 823b(d)(3)).

74. *Id*.

That court stated that the FRCP govern all civil actions in U.S. district courts unless exempted by the rules, or when there is a "clear expression" of Congressional intent to exempt a particular type of action.[75] In this instance, nothing in the FRCP exempted the enforcement action brought by FERC from the FRCP, and there was no indication of Congressional intent to exempt such actions.[76] The court rejected FERC's arguments that the word "review" in FPA section 31(d)(3) is intended to preclude plenary review, stating the use of the phrase "to review de novo the law and the facts involved" indicates that the court should undertake an independent determination of the issues.[77] The court also stated when a party selects option 2, it foregoes the opportunity for discovery and the development of a full record through the agency procedures, and should have the opportunity for discovery before the district court.[78]

Having addressed this issue, the court turned to, and denied, the motion to dismiss.[79] The court stated that in reviewing a motion to dismiss, it assumes the truth of the complaint's factual allegations, and determines whether the facts alleged are sufficient to state a plausible claim.[80] The court found that the petition met this standard, and that FERC had plausibly alleged that the UTC trading was undertaken for fraudulent purposes.[81] The court stated that while the alleged activities must involve an intent to deceive to be fraudulent, FERC had plausibly alleged that such conduct occurred.[82]

The court also rejected City Power's assertion FERC lacked jurisdiction over the trading activity because it involved virtual, rather than physical, trades.[83] The court stated that FPA section 222 gave FERC jurisdiction over any fraudulent scheme in connection with the sale or purchase of electricity or transmission services subject to FERC jurisdiction.[84] In this instance, the fact City Power purchased jurisdictional transmission service was sufficient to provide FERC with jurisdiction.[85]

Finally, Tsingas claimed that he should not be subject to any penalties in his individual capacity because FPA section 222 prohibits deceptive actions by "any entity."[86] The court rejected this argument, finding FERC's determination that the term "entity" applies to individuals, is entitled to *Chevron* deference.[87]

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75. August 10 Opinion, *supra* note 65, at *27-28, (citing Fed. R. Civ. P. 1 and *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979)).

76. *Id.* at *28.

77. *Id.* at *28-29.

78. *Id.* at *29-30.

79. *Id.* at *1.

80. August 10 Opinion, *supra* note 65, at *33-34.

81. *Id.* at *34.

82. *Id.* at *36-38, 40-42.

83. *Id.* at *49-50.

84. *Id*.

85. August 10 Opinion, *supra* note 65, at *50-51.

86. *Id.* at *51-53*; see also* FPA section 222(a), 16 U.S.C. § 824v(a).

87. August 10 Opinion, *supra* note 65, at *53 (citing *Maxim Power*, 2016 WL 4126378)

2. *FERC v. Maxim Power Corp., et al*.

On July 21, 2016, the U.S. District Court for the District of Massachusetts issued an opinion and order finding that the "*de novo*" review provisions under FPA section 31(d)(3) mean that a district court proceeding to enforce penalties is to be treated as an ordinary civil proceeding with appropriate limitations in order to promote efficient discovery.[88] The court also rejected Maxim Power Corporation's (Maxim) motion to dismiss.[89]

This proceeding involves a petition filed by FERC to enforce its order assessing civil penalties against Maxim.[90] FERC previously issued a show cause order and assessed civil penalties, finding that Maxim, its affiliates, and Kyle Mitton, a Maxim employee, violated FPA section 222 and FERC's Anti-Manipulation Rule by submitting false or misleading information to ISO-New England, Inc. (ISO-NE).[91] Maxim and Mitton declined to pay the penalties, and on July 1, 2015, FERC filed a petition before the district court for enforcement of the penalties.[92] On September 4, 2015, Maxim filed a motion to dismiss FERC's petition, and FERC filed a response on September 25, 2015.[93]

The court addressed the question of what procedures applied first, determining that Maxim was entitled to a full *de novo* review.[94] The court noted that under FPA section 31(d), a party being assessed a civil penalty can seek a full hearing before FERC, with the right to file a petition for review with the U.S. Courts of Appeals (option 1), or can elect to have FERC assess the penalty, and if the penalty is not paid within sixty calendar days, FERC can institute an action in U.S. district court to enforce its order, with court having the "authority to review de novo the law and the facts involved" (option 2).[95] The court stated option 2 gives district courts the authority to engage in a *de novo* review, which means a "'fresh independent determination' that gives 'no deference' to FERC's decision."[96] The court added that option 2 "would not be fair" if parties facing a penalty did not have due process rights before FERC because they did not select option 1, and then did not

88. Memorandum and Order Regarding Procedures Applicable to FERC's Petition and Respondents' Motion To Dismiss, *FERC v. Maxim Power Corp.*, No. 315-30113-MGM 2016 U.S. Dist. LEXIS 107770 (D. Mass., July 21, 2016) [hereinafter July 21 Order].

89. *Id.* at *52.

90. *Id*.

91. *Id.* at *5-8; *see Maxim Power Corp.,* 150 F.E.R.C. ¶ 61,068 (2015); *Maxim Power Corp.*, 151 F.E.R.C. ¶ 61,094 (2015). FERC assessed civil penalties of $5 million against Maxim, and $50,000 against Mitton. 151 F.E.R.C. ¶ 61,094 at P1.

92. Petition for an Order Affirming the Federal Energy Regulatory Commission's May 1, 2015 Order Assessing Civil Penalties Against Maxim Power Corp., No. 3:15-cv-30113-MGM (D. Mass. July 1, 2015). *See* July 21 Order, *supra* note 88, at *1-2.

93. Defendants' Motion to Dismiss the Federal Energy Regulatory Commission's "Petition," *FERC v. Maxim Power Corp.*, 15-30113-MGM (D. Mass. Sept. 4, 2015). Maxim's motion also argued if its motion to dismiss were denied, that the proceeding be treated as a normal civil action subject to the FRCP, not a summary review of agency action. *See* July 21 Order, *supra* note 88, at *13-14; Memorandum in Opposition to Respondents' Motion to Dismiss, *FERC v. Maxim Power Corp.* 15-30113-MGM (D. Mass. Sept. 25, 2015).

94. July 21 Order, *supra* note 88, at *14, *18.

95. *Id.* at *14-16 (quoting FPA § 31(d)(3), 16 U.S. § 823b(d)(3)).

96. *Id.* at *18, (quoting *FERC v. MacDonald*, 862 F. Supp, 667 (D.N.H. 1994)).

have due process rights at the subsequent district court review.[97] The court therefore concluded that option 2 calls for a "trial *de novo*" subject to the FRCP applicable in an ordinary civil action.[98] The court also held due process concerns entitled Maxim to the opportunity to be heard in a meaningful time and manner.[99]

The court, however, denied Maxim's motion to dismiss the petition, stating that to survive a motion to dismiss, FERC's petition must allege facts that "raise a right to relief above the speculative level."[100] The court found that FERC had provided sufficient factual allegations that identified the alleged misconduct, and that FERC had adequately pled fraudulent intent.[101]

Finally, the court indicated that while the case would proceed as an ordinary civil action, discovery must be tailored to account for the procedures that had already taken place and "promote [the] efficient resolution of the dispute."[102] Stating that the parties were the best situated to develop a reasonable discovery framework, the court set forth certain guidelines the parties should propose in formulating a discovery plan.[103] These included balancing Maxim's and the court's need for information about FERC investigation while avoiding duplication of efforts that had taken place.[104]

3. BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company

On July 11, 2016, FERC issued Opinion No. 549, which affirmed an August 13, 2015 Initial Decision, and found that BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company (collectively, BP), violated 18 C.F.R. § 1c.1, and NGA section 4A, by devising and executing a scheme to manipulate the price of natural gas in the Houston region and unjustly profit from the market conditions in the aftermath of Hurricane Ike.[105]

Specifically, FERC affirmed the Administrative Law Judge's determination that BP's Southeast Gulf Texas trading desk (Texas Team),

> engaged in uneconomic trading of next-day, fixed-price natural gas at Houston Ship Channel and related transport of natural gas from Katy, Texas to Houston Ship Channel with the requisite intent of depressing the Platts *Gas Daily* index prices at Houston Ship Channel to benefit larger financial spread positions held by BP that settled off

97. July 21 Order, *supra* note 88, at *19-20.

98. *Id.* at *20.

99. *Id.* at *31.

100. *Id.* at *39-40 (quoting *Bell. Atl. Corp. v. Twombly*, 540 U.S. 544 (2007)).

101. *Id.* at *40-45.

102. July 21 Order, *supra* note 88, at *50-51.

103. *Id.* at *51-52.

104. *Id.* On September 26, 2016, Maxim entered into a settlement with Enforcement to resolve the issues in the underlying FERC proceeding. Order Approving Stipulation and Consent Agreement, *Maxim Power Corp.*, 156 F.E.R.C. ¶ 61,223 (2016), discussed *infra*.

105. Opinion No. 549, Order on Initial Decision and Rehearing, *BP Am. Inc.*, 156 F.E.R.C. ¶ 61,031 (2016); Initial Decision, *BP Am. Inc.*, 152 F.E.R.C. ¶ 63,016 (2015) [hereinafter Initial Decision]; 156 F.E.R.C. ¶ 61,031, at PP 2-3. FERC also denied rehearing of its May 15, 2014 order that set the issues related to BP's conduct for hearing. *Id.* at PP 28-29, 38. *See* Order Establishing Hearing, *BP Am. Inc.*, 147 F.E.R.C. ¶ 61,130 (2014).

the index prices during the period from September 18, 2008 through November 30, 2008.[106]

FERC found that BP had not rebutted Enforcement Staff's showings that BP changed its pattern of trading behavior in order to artificially suppress prices listed on the Houston Ship Channel *Gas Daily* index.[107] FERC found that BP and its Texas Team had the requisite intent to manipulate the affected markets, and that scienter and intent can be shown "based on legitimate inferences from circumstantial evidence."[108] In response to BP's claims that its trading activities only took place in non-jurisdictional markets, FERC held that BP's actions sufficiently affected FERC-jurisdictional markets to be subject to FERC's penalty authority.[109] In this regard, FERC specifically held that "far from being limited to reaching only jurisdictional transactions, the Commission's anti-manipulation authority protects jurisdictional markets from manipulation, and this protective duty reaches manipulative transactions that directly affect jurisdictional markets—even if the manipulative instruments happen to involve non-jurisdictional natural gas."[110]

With respect to the appropriate sanctions, FERC agreed with the Initial Decision that Enforcement Staff need only provide a reasonable estimate of unjust profits, and that "disgorgement need only be a reasonable approximation of profits causally connected to the violation."[111] FERC added that once Enforcement Staff met its burden of providing reasonable estimates, the burden was on BP to show these estimates were not reasonable.[112] Examining Enforcement Staff's evidence of gross and net gains, FERC determined that BP should disgorge $207,169 in improper profits.[113] Finally, finding that the subject violations were very serious, FERC also directed BP to pay civil penalties in the amount of $20.16 million.[114]

BP filed a request for hearing of Opinion No. 549 on August 10, 2016, which is still pending before FERC.[115] On September 7, 2016, BP filed a motion seeking for modification of the requirement to provide the disgorgement amount to LIHEAP, stating that LIHEAP as a state agency was not authorized to accept contributions as directed by FERC.[116] FERC stayed the disgorgement directive by order issued September 12, 2016.[117]

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106. 156 F.E.R.C. ¶ 61,031, at P 2.

107. *Id.* at PP 71, 189.

108. *Id.* at P 191 (citing 152 F.E.R.C. ¶ 63,016, at P 95 n.58 (citing Order Assessing Civil Penalties, *Barclays Bank PLC*, 144 F.E.R.C. ¶ 61,041 at P 75 (2013))).

109. *Id.* PP 313-14.

110. *Id.* P 313.

111. 156 F.E.R.C. ¶ 61,031, at P 366 (quoting 144 F.E.R.C. ¶ 61,041, at P 148).

112. *Id.* at P 366.

113. *Id.* at P 368. FERC directed that BP disgorge this amount to the Texas Low Income Home Energy Assistance Program (LIHEAP). *Id.* ordering para. (C).

114. *Id.* at PP 407-10.

115. Request for Rehearing of Opinion No. 549, "Order on Initial Decision and Rehearing" of BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company, Docket Nos. IN13-15-000 and IN13-15-001 (Fed. Energy Reg. Comm'n Aug. 10, 2016).

116. Motion For Modification of Payment Directive at 2, Docket Nos. IN13-15-000 and IN13-15-001, (Sept. 7, 2016).

117. Order Staying the Payment Directives of the Order Assigning Penalties, *BP Am. Inc.*, 156 F.E.R.C. ¶ 61,174 at P 5 (2016).

4. ETRACOM LLC and Michael Rosenberg

On June 17, 2016, FERC issued an order assessing civil penalties to ETRACOM LLC (ETRACOM) and Michael Rosenberg (Rosenberg).[118] The order found that ETRACOM and Rosenberg violated 18 C.F.R. § 1c.2 and FPA section 222 by submitting virtual supply transactions at the New Melones intertie (New Melones) at the border of the California Independent System Operator (CAISO) wholesale electric market in order to affect power prices and economically benefit ETRACOM's Congestion Revenue Rights (CRR) sourced at that location.[119] FERC stated that virtual transactions in CAISO's market serve as a mechanism for market participants to make financial sales or purchases of energy in the day-ahead market with the explicit requirement to buy or sell it back in the real-time market.[120] FERC asserted that in May 2011, ETRACOM and Rosenberg engaged in a cross-commodity scheme in which they submitted virtual supply offers at the New Melones intertie that were not intended to be profitable.[121] Instead, these transactions entered into with the intent of lowering power prices artificially at New Melones in order to increase the value of ETRACOM's CRR positions that settled based upon power prices at that location.[122] FERC noted that ETRACOM's virtual trading at New Melones during May 2011 differed from its trading at all twenty-one other locations where it was also trading virtuals.[123] FERC indicated that ETRACOM's virtual supply offers resulted in a $42,481 loss, while it earned $315,072 in unjust profits related to its CRR positions.[124]

In light of the seriousness of the violations, FERC assessed the following civil penalties: $2,400,000 against ETRACOM and $100,000 against Rosenberg.[125] FERC also directed ETRACOM to disgorge unjust profits, plus applicable interest, of $315,072.[126]

As neither ETRACOM nor Rosenberg paid these amounts, FERC on August 17, 2016, filed a petition in the U.S. District Court for the Eastern District of California seeking enforcement of this order.[127] On October 17, 2016, ETRACOM and Rosenberg filed an answer to FERC's petition.[128] While the court has not

118. Order Assessing Civil Penalties, *ETRACOM LLC*, 155 F.E.R.C. ¶ 61,284 (2016).

119. *Id.* at P 1.

120. *Id.* at P 8.

121. *Id.* at P 15.

122. *Id.* at PP 15, 52-54.

123. 155 F.E.R.C. ¶ 61,284, at P 54.

124. *Id.* at PP 50, 197.

125. *Id.* at PP 179, 193.

126. *Id.* at P 199.

127. Petition for an Order Assessing Civil Penalty *FERC v. ETRACOM* , No. 2:16-cv-01945-SAB (E.D. Cal.. Aug. 17, 2016).

128. ETRACOM LLC and Michael Rosenberg's Answer to Petition for an Order Affirming the Federal Energy Regulatory Commission's June 17, 2016 Order Assessing Civil Penalties, Docket No. 2:16-cv-01945-SAB (E.D. Cal. Oct. 17, 2016).

acted on the petition or other pleadings filed in this proceeding, it ordered the parties to file initial briefs addressing the scope of review issues by January 23, 2017, with responsive briefs due February 3, 2017.[129]

5. Coaltrain Energy, L.P., Peter Jones, Shawn Sheehan, Robert Jones, Jeff Miller, Jack Wells, and Adam Hughes

On May 27, 2016, FERC issued an order assessing civil penalties to Coaltrain, Coaltrain's co-owners Peter Jones and Shawn Sheehan, and traders/analysts Robert Jones, Jeff Miller, and Jack Wells (collectively, Coaltrain Respondents).[130] FERC in the order found that the Coaltrain Respondents had violated 18 C.F.R. § 1c.2 and FPA section 222 by engaging in fraudulent UTC transactions in PJM energy markets.[131] The order further found that Coaltrain violated 18 C.F.R. § 35.41(b) through false and misleading statements and material omissions relating to the existence of documents responsive to data requests. [132]

Specifically, FERC found that Coaltrain, during the summer of 2010, devised and executed a trading scheme to make sham UTC trades, not to profit from price differentials between the day-ahead and real-time markets, but rather to avoid or nullify such price spreads in order to profit from MLSA payments.[133] While UTCs were intended to be used to hedge congestion price risk associated with physical transactions, Coaltrain had executed trades on paths with zero or near-zero price spreads, and unnecessarily purchased transmission services on such paths, in order to obtain MLSA payments.[134] FERC found that while the Coaltrain Respondents lost more than $96,000 on the UTC price spreads and incurred another $3.83 million in transaction costs, they collected $8.05 million in MLSA payments from these trades and "unjust profits" of $4.12 million.[135] FERC also determined that the Coaltrain Respondents had omitted or concealed important and responsive evidence from its document production to Enforcement Staff, and falsely or misleadingly attested to Enforcement Staff that the productions were complete.[136]

Based on the seriousness of the transaction, FERC ordered the Coaltrain Respondents to pay the following sanctions and penalties: Coaltrain, $26,000,000 (jointly and severally with Peter Jones and Sheehan); Peter Jones, $5,000,000; Sheehan, $5,000,000; Robert Jones, $1,000,000; Miller, $500,000; and Wells, $500,000.[137] FERC also directed Coaltrain and these individuals to disgorge unjust profits, plus applicable interest, of $4,121,894.[138] FERC ordered the parties

129. Order Setting Briefing Schedule and Staying Petitioner's Motion to Affirm, Docket No. 2:16-cv-01945-SAB (E.D. Cal. Dec. 7, 2016).

130. 155 F.E.R.C. ¶ 61,204. While Adam Hughes had been a subject of the earlier show cause order, FERC found that his behavior did not merit sanctions. *Id.* at P 1 n.3.

131. *Id*. at PP 1, 6-7

132. *Id.* at PP 1, 8, 274

133. 155 F.E.R.C. ¶ 61,204, at P 4. As described by FERC, an MLSA payment is a "transmission credit that had nothing to do with the underlying product." *Id.* P2.

134. *Id.* at PP 2, 4-5.

135. *Id.* at P 47.

136. *Id.* at PP 8, 274.

137. 155 F.E.R.C. ¶ 61,204, at PP 331, 345-49.

138. *Id.* at P 359-60.

to pay the civil penalties within sixty days, and stated that if the amounts were not paid, it would commence an action in a U.S. district court for an order affirming the penalties.[139]

As none of the Coaltrain Respondents paid these amounts, FERC on July 27, 2016, filed a petition in the U.S. District Court for the Southern District of Ohio to enforce its order.[140] On September 26, 2016, the Coaltrain Respondents filed motions to dismiss FERC's petition, which FERC answered on October 20, 2016.[141] The court has not acted on these pleadings as of the date of this writing.

6. *FERC v. Richard Silkman and Competitive Energy Services LLC* and *FERC v. Lincoln Paper and Tissue, LLC*

On April 11, 2016, the U.S. District Court for the District of Massachusetts issued a Memorandum and Order addressing motions to dismiss filed in two related proceedings.[142] The proceedings involves petitions submitted by FERC seeking to enforce civil penalties assessed by FERC against Richard Silkman and Competitive Energy Services, LLC (CES), and against Lincoln Paper and Tissue, LLC (Lincoln) (collectively, with Silkman and CES, Respondents), alleging that they acted to create an inflated baseline level of electrical consumption in order to achieve excessive Day-Ahead Load Response Program (DALRP) payments.[143] Silkman and CES had filed a motion to dismiss, as had Lincoln, and FERC had filed responses to these motions.[144] FERC had alleged that the Respondents curtailed the generation output at the subject generation facilities and purchased replacement energy to establish an artificially inflated baseline.[145] The baseline

139. *Id.* at P 332.

140. Petition for an Order Affirming the Federal Energy Regulatory Commission's May 27, 2016 Order Assessing Civil Penalties Against Coaltrain Energy, L.P., Peter Jones, Shawn Sheehan, Robert Jones, Jeff Miller, and Jack Wells, *FERC v. Coaltrain Energy, L.P.*, Docket No. 2:16-cv-00732 (S.D. Ohio July 27, 2016).

141. Defendants Peter Jones, Robert Jones, and Jack Wells Motion to Dismiss, Memorandum In Support, and Memorandum In Support Of Coaltrain Energy, L.P.'s Motion to Dismiss Plaintiff's Complaint, *FERC v. Coaltrain Energy, L.P.,* Docket No. 2:16-cv-00732 (S.D. Ohio Sept. 26, 2016); Motion to Dismiss of Shawn Sheehan and Jeffrey Miller, *FERC v. Coaltrain Energy, L.P.*, Docket No. 2:16-cv-00732 (S.D. Ohio Sept. 26, 2016); Defendant Coaltrain Energy, L.P.'s Motion to Dismiss Plaintiff's Complaint and Memorandum In Support, *FERC v. Coaltrain Energy, L.P.*, Docket No. 2:16-cv-00732 (S.D. Ohio Sept. 26, 2016); Petitioner Federal Energy Regulatory Commission's Opposition to Respondents' Motions to Dismiss, *FERC v. Coaltrain Energy, L.P.*, Docket No. 2:16-cv-00732 (S.D. Ohio Oct. 20, 2016).

142. Memorandum and Order Regarding Motions to Dismiss, *FERC v. Silkman*, 177 F. Supp. 3d 683 (D. Mass. Apr. 11, 2016) [hereinafter April 11 Order].

143. *Id.* at 693-94; *see also Lincoln Paper & Tissue, LLC*, 140 F.E.R.C. ¶ 61,031 (2012); *Lincoln Paper & Tissue, LLC*, 144 F.E.R.C. ¶ 61,162 (2013).

144. Respondents' Motion to Dismiss and Incorporated Memorandum, *FERC v. Silkman*, Docket No. 1:13-cv-13054-DPW (D. Mass. Dec. 19, 2013); Lincoln Paper and Tissue, LLC's Motion to Dismiss Complain, *FERC v. Lincoln Paper & Tissue, LLC*, Docket No. 1:13-cv-13056-DPW (D. Mass,. Feb. 14, 2014); Federal Energy Regulatory Commission's Opposition to Respondents' Motion to Dismiss and Incorporated Memorandum, *FERC v. Silkman*, Docket No. 1:13-cv-13054-DPW (D. Mass. Jan. 9, 2014); Federal Energy Regulatory Commission's Opposition to Respondent's Motion to Dismiss and Incorporated Memorandum, Docket No. 1:13-cv-13056-DPW (D. Mass. Mar. 14, 2014).

145. 144 F.E.R.C ¶ 61,162, at P 3.

would then allow them to claim load reductions (the difference between its baseline load and normal operations) without reducing their load, and fraudulently obtain DALRP compensation.[146]

The court rejected the motions to dismiss.[147] One of the initial issues addressed was whether, as claimed by FERC, the Respondents waived their statute of limitation and jurisdictional defenses by failing to raise them in FERC proceeding.[148] The court found that Respondents had not waived their statute of limitations claim, stating that FERC's interpretation would have required the Respondents to raise such claims before they were ripe.[149] The court also held that parties retained the right to raise a judicial challenge to an agency's assertion of jurisdiction even if such claims were not raised before the agency itself.[150]

Despite finding for the Respondents on these procedural issues, the court determined that the petitions were filed within the applicable five-year statute of limitations because they were filed within five years of the time the Respondents failed to pay the assessed penalties.[151] Citing to the Supreme Court's recent decision in *Electric Power Supply Association v. FERC*, the court also held that FERC had jurisdiction over the alleged violations, as DALRP was a demand response program in a FERC-jurisdictional market.[152] In response to arguments raised by Lincoln, the court found that FERC's Anti-Manipulation Rule was sufficient to provide Lincoln with notice that its conduct was not lawful, and that FERC pled its claim with sufficient particularity to survive a motion to dismiss.[153]

Finally, Silkman and CES had argued that they were not liable under FERC's Anti-Manipulation Rule because they only aided and abetted the actions of the plant that provided the inflated baseline information.[154] The court held that while a party that only aids and abets the manipulations of another is not subject to liability, there was sufficient showing that Silkman and CES were primary violators to survive a motion to dismiss.[155] In response to arguments raised by Silkman, the court also found that while FPA section 222 states it applies to "entities," the term "entities" as used in this context included natural persons.[156]

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146. April 11 Order, *supra* note 142, at 690-92.

147. *Id.* at 711.

148. *Id.* at 695-96. The Respondents had asserted FERC's petitions were filed beyond applicable statute of limitations, and that FERC lacked jurisdiction to oversee the DALRP. *Id.* at 697.

149. *Id*. at 697.

150. April 11 Order, *supra* note 142, at 697-98.

151. *Id*. at 698. The court stated that in addition to this statute of limitations, FERC was also subject to a separate statute of limitations, which required it to initiate the enforcement proceeding within five years of the alleged conduct.

152. *Id.* at 702.; *Elec. Power Supply Ass'n v. FERC*, 136 S. Ct. 760 (2016) [*EPSA*]. In *EPSA*, the Court upheld FERC's jurisdiction over demand response program. *Id.* at 767; *see also* April 11 Order, *supra* note 142, at 701-02 (citing *EPSA*).

153. April 11 Order, *supra* note 142, at 705-07.

154. *Id.* at 707.

155. *Id.* at 707, 709.

156. *Id.* at 709-11. Lincoln subsequently entered into a settlement with Enforcement to resolve the issues in underlying FERC proceeding. *See* Order Approving Stipulation and Consent Agreement, *Lincoln Paper & Tissue, LLC*, 155 F.E.R.C. ¶ 61,228 (2016), discussed *infra.*

7. *Total Gas & Power North America, Inc., Aaron Trent Hall, and Therese Nguyen Tran v. FERC*, Civil Action No. 4:16-cv-01250 (S.D. Tex.)

On January 27, 2016, Total Gas & Power North America, Inc., Aaron Trent Hall, and Therese Tran Nguyen (collectively, TGPNA) filed a Complaint for Declaratory Relief in U.S. district court, seeking a determination that enforcement actions being brought against them by FERC were contrary to the NGA, the Administrative Procedure Act, and TGPNA's constitutional protections.[157] The Complaint alleged NGA section 24, 15 U.S.C. § 717u, provides the exclusive jurisdiction over violations of the NGA resides in the federal district courts.[158] The Constitutional claims included assertions that FERC proceedings deprived TGPNA of its right to a jury trial in federal court.[159] On May 2, 2016, FERC filed a motion to dismiss the Complaint, challenging it on jurisdictional and other grounds, and TGPNA filed a motion for summary judgment on May 6, 2016.[160]

On July 15, 2015, the court issued a Memorandum and Order granting FERC's motion to dismiss the Complaint.[161] The court stated that when a request for a declaratory judgment is challenged on jurisdictional grounds, the burden is on the party asserting jurisdiction to show that it exists.[162] The court also stated in deciding whether to handle on a declaratory judgment action, the court must determine whether the declaratory action is justiciable; whether the court has jurisdiction over the case; and whether to exercise its discretion to entertain the action.[163] The court held that a declaratory judgment action is justiciable when "'the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment,'" and that the declaratory relief should "'completely resolve' the controversy."[164] The court further stated that even if a declaratory judgment dispute is justiciable, the court has discretion to decide whether to exercise jurisdiction.[165]

The court found that the matters raised in the complaint were not justiciable or subject to complete resolution because they would not resolve the merits of

157. Complaint for Declaratory Relief, *Total Gas & Power N. Am. Inc. v. FERC*, Docket No. 4;16-cv-01250 at ¶ 13 (S.D. Tex. Jan. 27, 2016) [hereinafter TGPNA Complaint]. The enforcement actions included allegations that TGPNA violated the NGA and various FERC regulations. *Id.* at ¶ 1.

158. *Id.* at ¶¶ 30, 82.

159. *Id.* at ¶ 91.

160. Defendants' Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction and Venue, *Total Gas & Power N. Am., Inc. v. FERC*, Docket No. 4:16-cv-1250, (S.D. Tex. May 2, 2016); Plaintiffs' Motion for Summary Judgment, *Total Gas & Power N. Am., Inc. v. FERC*, Civil Action No. 4:16-cv-01250, (S.D. Tex. May 16, 2016).

161. Memorandum and Order, *Total Gas & Power N. Am., Inc. v. FERC*, Memorandum and Order, Docket No. 4:16-cv-01250 2016 U.S. Dist. LEXIS 92036 (S.D. Tex. July 15, 2016) [hereinafter TGPNA Order], *reconsideration denied*, Memorandum and Order, *Total Gas and Power N. Am., Inc. v. FERC*, Docket No. 4:16-cv-01250 2016 U.S. Dist. LEXIS 124640 (S.D. Tex. Sept. 14, 2016) [hereinafter TGPNA Reconsideration Order].

162. TGPNA Order., *supra* note 161, at *2.

163. *Id.* at *2.

164. *Id.* at *2 (quoting *MedImmune Inc. v. Genetech, Inc.*, 549 U.S. 118, 127 (2007)); *Id.* at *2 (quoting *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998)).

165. *Id.* at *3.

FERC's allegations against TGPNA, and the fundamental issue of whether TGPNA should be assessed civil penalties was not before the court.[166] The matters were also not ripe, because FERC had not issued any final findings.[167]

The court also rejected TGPNA's arguments that NGA section 24 provides the district courts with exclusive jurisdiction over NGA violations, stating that the revisions to NGA under the EPAct 2005, which provided FERC with enhanced penalty authority, combined with FERC's other authority under the NGA, and FERC's expertise in NGA matters, showed that Congress intended the determination of such violations to be subject to FERC jurisdiction, subject to review in the U.S. Courts of Appeals.[168] Finally, the court held that even if the court did have jurisdiction, it would decline to exercise that jurisdiction.[169]

On September 26, 2016, TGPNA filed a notice of appeal of the TGPNA Order and the TGPNA Reconsideration Order in the U.S. Court of Appeals for the Fifth Circuit.[170] TGPNA filed its initial brief on October 25, 2016, and FERC filed its brief on November 28, 2016.[171] TGPNA filed a reply brief on December 12, 2016.[172]

E. Settlements

1. Maxim Power Corp., Maxim Power (USA), Inc., Maxim Power (USA) Holding Company Inc., Pawtucket Power Holding Company, LLC, and Pittsfield Generating Company, LP

On September 26, 2016, FERC approved a stipulation and consent agreement between Enforcement and Maxim Power Corp. (Maxim), Maxim Power (USA), Inc., Maxim Power (USA) Holding Company Inc., Pawtucket Power Holding Company, LLC, Pittsfield Generating Company, LP, (collectively, Maxim Respondents), resolving the investigation into whether the Maxim Respondents violated FPA section 222 and FERC's Anti-Manipulation Rule, 18 C.F.R. § 1c, and its rule concerning communications by entities with market-based rate authority.[173]

Maxim owned a 181 MW plant based in Pittsfield, Massachusetts (Pittsfield plant), which can burn either fuel oil or natural gas, and which participates the ISO-NE energy markets.[174] ISO-NE frequently needed the Pittsfield plant to run

166. TGPNA Order., *supra* note 161, at *8-9.

167. *Id.* at *9.

168. *Id.* at *12-13.

169. *Id.* at *22. The court based this finding on the fact there were ongoing proceedings before FERC that could resolve the issues, the fact that the TGPNA Complaint was an anticipatory lawsuit and appeared to be forum shopping, and that judicial economy weighed against entertaining this case. *Id.* at *23.

170. The appeal was assigned Case No. 16-20642. *Total Gas & Power N. Am. Inc., v. FERC*, No. 16-20642 (5th Cir. May 5, 2016).

171. Brief for Appellants, *Total Gas & Power N. Am. Inc. v. FERC*, No. 16-20642 (5th Cir. Oct. 25, 2016); Brief for Appellees, *Total Gas & Power N. Am., Inc. v. FERC*, No. 16-20642 (5th Cir. No. 28, 2016).

172. Reply Brief for Appellants, *Total Gas & Power N. Am. Inc. v. FERC*, No. 16-20642 (5th Cir. Dec. 12, 2016).

173. 156 F.E.R.C. ¶ 61,223, at P 1.

174. *Id.* at P 3.

even when its offer price is above the applicable locational marginal price (LMP) in order to provide support.[175] The ISO-NE in such instances provided Maxim with a make-whole payment that was equal to the difference between its offer price and the LMP.[176] Enforcement alleged that, on a number of days in July and August 2010, Maxim submitted offers for the Pittsfield plant based on fuel oil prices when it burned less expensive natural gas.[177]

In addition, under the then-applicable provisions of the ISO-NE tariff, a generator could submit different component prices in its offers that included a one-time-per-dispatch "Startup" price and a separate recurring price for energy. Enforcement had found that during the period July 2012 to August 2013, Maxim shifted dollars from the Startup price to the recurring Energy charge using a four-minimum run time, such that one quarter of its Startup price would be recovered in each hour of that four-hour period.[178] Under this strategy, if the ISO-NE were to dispatch the Pittsfield plant beyond its four-hour minimum run time, Maxim would be compensated "equivalent to Maxim receiving an additional Startup payment every four hours, even though the plant had actually started up only once."[179]

Maxim stipulated to the facts as set forth in the agreement but neither admitted nor denied the alleged violations.[180] Maxim agreed to make a disgorgement payment of $4 million to the ISO-NE, and pay a civil penalty of $4 million.[181]

2. David Silva

On September 1, 2016, FERC approved a stipulation and consent agreement between Enforcement and David Silva, resolving the investigation into whether Silva violated FERC's Anti-Manipulation Rule, 18 C.F.R. § 1c.1, by manipulating physical natural gas prices in January 2012 in order to benefit his related financial position.[182] Silva is a former trader with National Energy and other related companies, which were also subject to enforcement investigations and entered into a settlement with Enforcement.[183] Enforcement had found that Silva is an experienced trader who fraudulently traded physical basis at Texas Tetco M3 during the January 2012 bidweek to increase the value of his financial basis position.[184]

Silva stipulated to the facts as set forth in the agreement, but neither admitted nor denied the alleged violations.[185] Silva agreed to a one-year ban from participation in any FERC-jurisdictional natural gas markets, and to pay a civil penalty of $40,000.[186]

175. *Id.* at P 4.
176. *Id.*
177. *Id.* at P 6.
178. 156 F.E.R.C. ¶ 61,223, at PP 10-11.
179. *Id.* at P 11.
180. *Id.* at P 16.
181. *Id.* at P 17.
182. 156 F.E.R.C. ¶ 61,155, at P 1.
183. *Id.* at P 2; *see also* 156 F.E.R.C. ¶ 61,154.
184. 156 F.E.R.C. ¶ 61,155, at PP 4, 9-10.
185. *Id.* at 15.
186. *Id*.

3. National Energy & Trade, L.P.

FERC approved a stipulation and consent agreement between Enforcement and National Energy to resolve an investigation into whether National Energy violated FERC's Anti-Manipulation Rule, 18 C.F.R. § 1c.1, by manipulating physical natural gas prices at the Houston Ship Channel, Tetco M3, Transco Zone 6, and Henry Hub between January 1, 2011 and September 30, 2015 in order to benefit its related financial positions.[187] Enforcement alleged found that National Energy's bidding practices had the effect of moving down prices at Tetco M3 in manner that benefitted its financial position.[188] Enforcement had also claimed that found National Energy's trading practices had the effect of moving prices at Henry Hub in a direction that benefitted its related financial position.[189]

National Energy stipulated to the facts as set forth in the agreement, but neither admitted nor denied the alleged violations.[190] National Energy agreed to disgorge $305,780.50 ($212,780.50 for the Tetco M3 allegations and $93,000 for the Henry Hub allegations), as well as pay a $1,155,225.91 civil penalty.[191]

4. Saracen Energy Midwest, LP

On August 22, 2016, FERC approved a stipulation and consent agreement between Enforcement Staff and Saracen, resolving an investigation violated the SPP Tariff by submitting bids for TCRs at EESLs.[192] The investigation was initiated in response to a referral from SPP's Market Monitor.[193] Under the SPP Tariff, TCRs provide market participants with a mechanism to hedge price risk, or to speculatively profit from price differences, associated with congestion between two locations; and, EESLs are two points that SPP determines are electrically equivalent, so that are expected to have a zero price divergence.[194] While the SPP Tariff prohibits market participants from placing TCR bids at EESLs, Enforcement alleged that in four separate auction rounds from August 2014 to March 2015, Saracen submitted TCR bids at EESLs, and that after each auction, SPP notified Saracen that the bids were improper.[195] Enforcement stated while Saracen took remedial action after each such notification, it was not until the fourth notification that it implemented the necessary controls and procedures sufficient to prevent such bids.[196]

187. 156 F.E.R.C. ¶ 61,154, at P 1.
188. *Id.* at P 10.
189. *Id.* at P 19.
190. *Id.* at P 24.
191. *Id*. The disgorgement amount is to be paid to the LIHEAP.
192. 156 F.E.R.C. ¶ 61,122, at P 1.
193. *Id.* at P 3.
194. *Id.* at PP 5-6.
195. *Id.* at PP 7-9.
196. *Id.* at P 10.

Saracen stipulated to the facts as set forth in the agreement, but neither admitted nor denied the alleged violations.[197] Saracen agreed to pay a civil penalty of $25,000, and submit to one year of compliance monitoring.[198]

5. Lincoln Paper and Tissue, LLC

On June 1, 2016, FERC approved a stipulation and consent agreement between Enforcement and Lincoln, resolving an investigation into whether Lincoln engaged in fraudulent conduct in its participation the ISO-NE's DALRP in violation of FERC's Anti-Manipulation Rule, 18 C.F.R. § 1c.2, and FPA section 222.[199] Specifically, FERC alleged that Lincoln curtailed its generation output and purchased replacement energy to establish an artificially inflated baseline.[200] The baseline would then allow Lincoln to claim load reductions (the difference between its baseline load and normal operations) without reducing its load, allowing Lincoln to fraudulently obtain DALRP compensation.[201]

Lincoln stipulated as to the facts in the agreement, but did not admit or deny any violations.[202] Lincoln agreed to disgorge $379,016.03 to ISO-NE, and pay a $5 million civil penalty.[203]

6. Berkshire Power Company LLC and Power Plant Management Services LLC

On March 30, 2016, FERC approved a stipulation and consent agreement between Enforcement, Berkshire Power Company LLC (Berkshire), and Power Plant Management Services LLC (PPMS), resolving an investigation into whether Berkshire and PPMS violated FPA section 222 and 18 C.F.R. section 1c.1, and well as ISO-NE and certain FERC-approved reliability standards, by concealing plant maintenance and associated outages from ISO-NE during the January 1, 2008 to March 30, 2011 (the Relevant Period).[204] Berkshire owns a 245 MW natural gas-fired generating facility in Agawam, Massachusetts (the Plant), and PPMS is a general administrative services management firm that provided project management and administrative services at the Plant.[205] Berkshire and PPMS hired a third party company to provide operations and maintenance services at the Plant.[206]

Following a referral from the U.S. Attorney's Office of the District of Massachusetts, Enforcement Staff undertook an investigation that determined that at

197. 156 F.E.R.C. ¶ 61,122, at P 12.

198. *Id.* at P 13.

199. 155 F.E.R.C. ¶ 61,228, at P 1.

200. *Id.* at PP 15-16.

201. *Id.* at PP 16-18, 22.

202. *Id.* at P 25.

203. The order also noted that Lincoln had filed for bankruptcy under chapter 11 of title 11 of the United States Code, and that the amount that Lincolns actually disgorges to the ISO-New England will be decided by the bankruptcy court. *Id.* at PP 12, 45, 47-48.

204. Order Approving Stipulation and Consent Agreement, *Berkshire Power Co. LLC.*, 154 F.E.R.C. ¶ 61,259 at P 1 (2016).

205. *Id.* at P 2.

206. *Id.* at P 3.

the direction of a project general manager hired by PPMS, "Berkshire Power engaged in a fraudulent scheme to perform unreported maintenance work and to conceal that work and associated maintenance outages from ISO-NE."[207] The Stipulation and Consent Agreement states that individuals at the Plant scheduled maintenance work for times when the plant was unlikely to be dispatched, but failed to notify ISO-NE about the work or the associated Plant unavailability.[208] The scheme ended in 2010 when the project general manager was suspended due to other reasons.[209]

Under the agreement, Berkshire and PPMS admitted to the alleged violations, and agreed to agree to pay a civil penalty of $2,000,000, with Berkshire agreeing to pay to ISO-NE disgorgement of $1,012,563, plus interest.[210] Berkshire also agreed to pay a penalty of $30,000 related to its Reliability Standards violations.[211] In assessing the penalties, FERC noted that both Berkshire and PPMS cooperated during the investigation and accepted responsibility for the violations.[212] FERC also stated that while the individuals at the Plant were not directly employed by Berkshire, Berkshire is responsible for the actions of agents and their employee.[213]

II. THE COMMODITY FUTURES TRADING COMMISSION

A. Energy-Related Enforcement Cases

1. *In re JPMorgan Ventures Energy Corp. and JPMorgan Chase Bank N.A.*, CFTC Docket No. 16-11 (March 23, 2016).

On March 23, 2016, the Commodity Futures Trading Commission (CFTC) issued an order filing and settling charges against JPMorgan Ventures Energy Corp. and JPMorgan Chase Bank, N.A. (together, the JPMorgan Entities) for failing to submit accurate large trader reports (LTRs) for physical commodity swap positions, in violation of section 4s(f) of the Commodity Exchange Act (CEA) and CFTC Regulations 20.4 and 20.7. The order alleges that from at least March 1, 2013 through April 30, 2014 the JPMorgan Entities failed to submit LTRs on two days, and routinely submitted LTRs that contained errors, such as "1) reporting the underlying commodity, futures equivalent months, and currency value strike price in the wrong data fields; 2) reporting futures contract equivalents, commodity units, and notional values that were incorrect or missing; and 3) providing identifying information for principals that attributed positions to the wrong entities; and 4) incorrectly reporting counterparty names."[214]

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207. *Id.* at PP 8, 14,t at P 19.

208. 154 F.E.R.C. ¶ 61,259, at P 14; Stipulation and Consent Agreement at P 20.

209. 154 F.E.R.C. ¶ 61,259; Stipulation and Consent Agreement at P 26.

210. 154 F.E.R.C. ¶ 61,259, at P 19; Stipulation and Consent Agreement at P 2.

211. 154 F.E.R.C. ¶ 61,259, at P 20; Stipulation and Consent Agreement at P 3.

212. 154 F.E.R.C. ¶ 61,259, at P 21.

213. 154 F.E.R.C. ¶ 61,259, at P 22.

214. In re JPMorgan Ventures Energy Corp., Docket No. 16-11, 2016 WL 1239109, at *2 (Commodity Futures Trading Comm'n March 23, 2016).

According to the order, the JPMorgan Entities' data processing and reporting systems used to generate the LTRs did not detect the errors before the JPMorgan Entities submitted the LTRs to the Commission's Division of Market Oversight (DMO).[215] As a result, the JPMorgan Entities' LTRs did not comply with the requirements governing Part 20 Reports which went into force on March 1, 2013.[216] Prior to that time, the DMO had issued a series of no-action letters, providing temporary relief from the reporting requirements and certain safe-harbor provisions, between September 20, 2011, when the Part 20 rules became effective, until March 1, 2013.[217]

The JPMorgan Entities provisionally registered as swap dealers on December 31, 2012 and were required to submit LTRs during the Relevant Period, pursuant to section 4s(f)(l)(A) of the CEA: "Each registered swap dealer and major swap participant . . . shall make such reports as are required by the Commission by rule or regulation regarding the transactions and positions and financial condition of the registered swap dealer or major swap participant." Regulation 20.4(c) lays out certain data elements that must be included in a swap dealer's data report.[218] These data elements include: the commodity underlying the reportable positions, the commodity reference price, futures equivalent month, long paired swap positions and short paired swap positions, swaption strike price, name of the counterparty, and an identifier indicating that a principal or counterparty position is being reported.[219] Regulation 20.7 provides for the manner in which such reports must be submitted to the CFTC.[220]

In anticipation of the institution of an administrative enforcement proceeding, the JPMorgan Entities submitted an offer of settlement, which the Commission accepted.[221] Without admitting or denying any of the findings or conclusions of the order, the JPMorgan Entities were required to pay, jointly and severally, a $225,000 civil monetary penalty and to cease and desist from committing further violations of the CEA and CFTC Regulations.[222] The Commission recognized the JPMorgan Entities' cooperation in the matter, noting that upon the DMO bringing apparent instances of non-compliance to the JPMorgan Entities' attention, "Respondents analyzed their past reports and made modification to their data processing and reporting systems as necessary to comply with their LTR reporting requirements," and "also corrected errors as they were identified and submitted corrected historical LTRs."[223]

215. *Id*.
216. *Id*.
217. *Id.* at n.2.
218. 17 C.F.R. § 20.4(c) (2015).
219. *Id*.
220. 17 C.F.R. § 20.7 (2015).
221. *In re JPMorgan,* 2016 WL 1239109, at *1.
222. *Id.* at *4.
223. *Id.* at *2.

2. *In re Angus Partners, LLC, d/b/a Angus Energy*, CFTC Docket No. 16-36 (September 29, 2016).

On September 29, 2016, the CFTC issued an order filing and settling charges against Angus Partners LLC d/b/a Angus Energy (Angus) and requiring Angus to pay a civil money penalty for acting as an unregistered Commodity Trading Advisor (CTA), and for violations of certain disclosure rules that apply to CTAs.[224] The order alleges that since at least October 2012, Angus acted as an unregistered CTA by "advising clients as to the value of or advisability of trading in commodity option and swap contracts and held itself out to the public as a CTA."[225] During this time, Angus also "failed to make required disclosures, including certain conflicts of interest and fees."[226]

According to the order, Angus "advised clients on the development and implementation of fuel hedging programs to mitigate the clients' exposure to price movements in the fuel oil markets."[227] More than fifteen clients received advice from Angus as to the value or the advisability of trading in over-the-counter (OTC) commodity options and swaps.[228] Angus allegedly represented itself as an "expert in helping its clients devise optimal hedging strategies, uniquely tailored to each clients' business" and its marketing materials and website offered the impression that Angus would act in its clients' best interest.[229] Angus also allegedly entered into consulting agreements with clients, in which it undertook to "act as a general advisor and consultant in matters related to the development and implementation of hedging strategies, among other things."[230] The CFTC alleged that Angus' actions were in violation of section 4m(l) of the CEA, which,

> requires a person who is acting as a CTA and makes use of the mails or any means or instrumentality of interstate commerce in connection with the person's business as such CTA to register with the Commission unless the person provides such commodity trading advice to fewer than fifteen persons in the preceding twelve months and does not hold itself out generally to the public as a CTA.[231]

According to the order, Angus was also the counterparty to its clients' commodity option and swap transaction.[232] "When a client expressed interest in purchasing a particular option or swap," Angus would go to a third-party dealer and procure a quote for an offsetting option or swap and then quote its clients a price that was higher "than the price at which the [t]hird-[p]arty [d]ealer was willing to sell the contract to Angus."[233] Angus failed to disclose the conflict between ad-

224. In re Angus Partners, LLC, Docket No. 16-36, 2016 WL 5682202, at *1 (Commodity Futures Trading Comm'n Sep. 20, 2016).

225. *Id*.

226. *Id*.

227. *Id*.

228. *Id.* at *3.

229. *In re Angus Partners, LLC*, 2016 WL 5682202, at *2.

230. *Id*.

231. *Id.* at *3.

232. *Id.* at *2.

233. *Id*.

vising clients on the merits of entering into commodity option and swap transactions and Angus's financial interest in those same transactions.[234] Angus also allegedly did not disclose to its clients that it was profiting from the difference between the price it was charged by the third-party dealer and the price it charged its clients, which the CFTC likened to a "transaction fee."[235]

The CFTC contends that Angus did not provide clients with a Disclosure Document, as required pursuant to Regulation 4.31, which is required to contain "a complete description of each fee which the commodity trading advisor will charge the client. Wherever possible, the trading advisor must specify the dollar amount of each such fee" or explain how the fee will be calculated.[236] The Disclosure Document must also contain a full description of any actual or potential conflicts of interest.[237] According to the order, the documentation that Angus provided did not alert clients that Angus had an undisclosed financial interest in the commodity option and swap transactions it was advising its clients on the merits of engaging in, or that Angus was profiting from difference between the price it was charged by the third-party dealer and the price it charged its clients for those commodity option and swap transactions, and thus was in violation of Regulations 4.31 and 4.34.[238]

In anticipation of the institution of an administrative enforcement proceeding, Angus submitted an offer of settlement, which the Commission determined to accept.[239] Without admitting or denying any of the findings or conclusions of the order, Angus was required to pay a $250,000 civil monetary penalty and to cease and desist from further violations of the CTA registration provision of the CEA and disclosure regulations.[240]

B. The Dodd-Frank Wall Street Reform and Consumer Protection Act

1. Certain Natural Gas and Electric Power Contracts, 81 Fed. Reg. 20,583 (Apr. 8, 2016)

On April 8, 2016 the CFTC and Securities and Exchange Commission (SEC) issued proposed guidance (Proposed Guidance) relating to the appropriate treatment of certain electric power and natural gas contracts.[241] The CFTC proposed guidance that certain capacity contracts in electric power markets and certain natural gas contracts, known as "peaking supply contracts," should not be considered "swaps" under the CEA because they are examples of "customary commercial arrangements" as described in the final rule defining the term "swap."[242]

234. *In re Angus Partners, LLC*, 2016 WL 5682202, at *3.

235. *Id.* at *2.

236. 17 C.F.R. § 4.34(i).

237. 17 C.F.R. § 4.34(j).

238. *In re Angus Partners, LLC*, 2016 WL 5682202, at *3.

239. *Id.* at *1.

240. *Id.* at *1, 4-5.

241. Notice of Proposed Rulemaking, *Certain Natural Gas and Electric Power Contracts*, 81 Fed. Reg. 20,583 (2016).

242. *Id.* at 20,583-84.

In 2012, the CFTC and SEC adopted a final rule defining "swap," "security-based swap" and other terms (Swap Definition Rule).[243] The Swap Definition Rule also articulates "the facts and circumstances in which certain agreements, contracts, or transactions entered into by commercial and non-profit entities should be considered not to be swaps because they are customary commercial arrangements."[244] The Swap Definition Rule provided a list of contracts that constitute customary commercial arrangement and a list of the characteristics and factors common to such agreements.[245] As a result of public comments the CFTC received describing "certain types of contracts that are closely tied to regulatory obligation in the markets for electric power and natural gas," the CFTC issued the Proposed Guidance "regarding particular facts and specific circumstances in which these contracts should be considered not to be 'swaps'" for the purpose of the CEA.[246]

The Proposed Guidance describes the two types of contracts that the CFTC states it preliminarily believes are similar to the purchase and service contracts described in the swap definition and would be excluded from the swap definition:

- Certain Capacity Contracts in Electric Power: A contract that is used in situations where regulatory requirements from a state public utility commission obligate load serving entities and load serving electric utilities in that state to purchase "capacity" from suppliers to secure grid management and on-demand deliverability of power to consumers;[247] and
- Certain Natural Gas "Peaking Supply Contracts": A contract that enables an electric utility to purchase natural gas from another natural gas provides on those days where its local natural gas distribution companies curtails its natural gas transportation service due to regulatory restrictions, such as commitments to prioritize residential gas demand.[248] These contracts have no ability to be financially settled, the price paid for the gas is based on market cost of fuel at specified delivery points, and the gas purchased cannot be resold by the utility.[249]

The comment period for the Proposed Guidance ended on May 9, 2016.[250] If the Proposed Guidance is adopted the Certain Capacity Contracts in Electric Power and Certain Natural Gas "Peaking Supply Contracts" described in the Proposed Guidance, would not be regulated as swaps.

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243. Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,207, 48246 (Aug. 13, 2012) [hereinafter *Swap Definition Rule*].

244. Certain Natural Gas and Electric Power Contracts, 81 Fed. Reg. 20,583, at *3, n.1 (citing to *Swap Definition Rule*, *supra* note 243, at 48,246).

245. *Id.* at *9-11 (citing to *Swap Definition Rule*, *supra* note 243, at 48,246-50).

246. *Id*.

247. *Id.* at *4.

248. *Id.* at *6-8.

249. 81 Fed. Reg. 20,583, at *8.

250. *Id.* at *1.

2. Whistleblower Awards Process, Notice of Proposed Rulemaking, 81 Fed. Reg. 59,551 (Aug. 30, 2016)

On August 30, the CFTC requested public comment on proposed amendments to the Whistleblower Rules located at 17 CFR Part 165.[251] The CFTC is proposing to amend its regulations related to the requirements for qualifying for a whistleblower, to enhance the process for reviewing whistleblower claims, and to make changes to clarify authority to administer the whistleblower program.[252] The CFTC also proposed reinterpreting its anti-retaliation authority.[253] One proposed amendment would make clear that a claimant may be eligible for an award by providing the CFTC with original information without being the source of the original information.[254] The CFTC also proposed extending the timeframe that a whistleblower has to file a Form TCR (Tip, Complaint or Referral) from 120 to 180 days, pursuant to Rule 165.3, as required after previously providing the same information to Congress, any other federal or state authority, a registered entity, a registered futures association, a self-regulatory organization, or to any of the persons described in Rule 165.2(g)(4) and (5).[255]

The CFTC also proposed modifying Rule 165.7 to: 1) replace the Whistleblower Awards Determination Panel with a Claims Review Staff designated by the Direction of the Division of Enforcement, in consultation with the Executive Director; 2) assign "facially ineligible claims" to the Whistleblower Office for review; 3) allow the Whistleblower Office to request "additional information, explanation, or assistance" from the claimant; 4) empower the Claims Review Staff to issue Preliminary Determinations, which would be sent to the claimant, who could review and contest the Preliminary Determination; and 5) lay out a process for challenging a Preliminary Determination by the claimant regarding the denial or an award or its amount.[256]

The CFTC proposed amending Rule 165.11 to "permit claimants who are eligible to receive an award in a covered judicial or administrative action also to receive an award based on the monetary sanctions that are collected from a final judgment in a related action."[257] However, claimants would not be allowed to "double dip" and receive an award in a related action if that claimant had already received an award for the same action under a whistleblower program.[258] Similarly, if the claimant has previously been denied an award in a related action, the claimant will be precluded from relitigating any issues before the CFTC that were resolved against the claimant as part of the award denial in the related action.[259]

The CFTC noted that the Whistleblower Office has been located in the Division of Enforcement since 2013, and proposed assigning overall responsibility for

251. Whistleblower Awards Process, 81 Fed. Reg. 59,551 (Aug. 30, 2016).
252. *Id*.
253. *Id*.
254. *Id.* at 59,552.
255. *Id*.
256. 81 Fed. Reg. 59,551, at 59,553-54.
257. *Id.* at 59,554.
258. *Id*.
259. *Id*.

administering the whistleblower program to the Director of the Division of Enforcement.[260] The CFTC also proposed "authoriz[ing] the Director of the Division of Enforcement to act on its behalf to disclose whistleblower identifying information as permitted by CEA section 23(h)(2)(C) and § 165.4(a)(2) and (3)" "when deemed necessary or appropriate to accomplish, the customer protection and law enforcement goals of the whistleblower program."[261]

The CFTC also proposed setting aside its prior interpretation that it lacked the authority to take enforcement action against employers that retaliate against whistleblower in violation of the CEA, noting that the earlier interpretation "cannot be squared with CEA section 23(h)(1)(A), which establishes that retaliation is in fact a separate violation of the CEA, nor with the Commission's broad rulemaking authority under CEA section 23(i)" and that nothing in CEA section 23(h)(1)(A) limits the CFTC's "general enforcement authority or suggests that such private action is exclusive."[262]

The comment period for the proposed amendments to the Whistleblower Awards Process ended on September 29, 2016.[263]

3. Final Order Regarding Southwest Power Pool, Inc. Application to Exempt Specified Transactions; Amendment to the Final Order Exempting Specified Transactions of Certain Independent System Operators and Regional Transmission Organizations, 81 Fed. Reg. 730602 (Oct. 24, 2016)

On October 17, 2016, in a reversal of its previously-stated intent, the CFTC approved a final order clarifying that certain transactions in Regional Transmission Organization (RTO) and Independent System Operation (ISO) markets are exempt from the CEA provisions governing private rights of action.[264] In the October 17, 2016 order, the CFTC amended the "RTO-ISO Order"[265] to provide that the exemption contained in that order also will expressly exempt the transactions covered under that order from private actions under CEA section 22.[266] The CFTC also granted a request by Southwest Power Pool, Inc. (SPP) that certain transac-

260. *Id*.

261. 81 Fed. Reg. 59,551, at 59,554-55.

262. *Id.* at 59,555.

263. *Id.* at 59,551.

264. *Final Order in Response to an Application From Southwest Power Pool, Inc. to Exempt Specified Transactions Authorized by a Tariff Approved by the Federal Energy Regulatory Commission From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in section 4(c)(6) of the Act; Amendment to the Final Order Exempting Specified Transactions of Certain Independent System Operators and Regional Transmission Organizations Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas from Certain Provisions of the Commodity Exchange Act.*, 81 Fed. Reg. 73,062 (Oct. 24, 2016).

265. *Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act*, 78 Fed. Reg. 19,880 (Apr. 2, 2013), [hereinafter *RTO-ISO Order*].

266. 81 Fed. Reg. 73,062, 73,063.

tions in its markets be exempt from CEA and CFTC regulations, with the exception of those relating to the CFTC's "general anti-fraud and anti-manipulation authority, and scienter-based prohibitions."[267]

On March 28, 2013 the CFTC issued the RTO-ISO Order, which exempted certain specified transactions of six Covered Entities from certain provisions of the CEA and CFTC regulations.[268] "The RTO-ISO Order exempted contracts, agreements, and transactions for the purchase or sale of" certain products from provisions of the CEA and CFTC regulations, with the exception of some enumerated "Exempted Provisions."[269] The RTO-ISO Order was silent regarding the applicability of the private right of action available pursuant to section 22 of the CEA, which provides for private rights of action for damages against persons who violate the CEA, or persons who willfully aid, abet, counsel, induce, or procure the commission of a violation of the Act.[270]

On October 17, 2013, SPP filed an Exemption Application with the CFTC requesting that certain categories of transactions be exempted from certain provisions of the CEA.[271] The Exemption Application requested relief largely mimicking the relief granted by the RTO-ISO Order.[272] In response, on May 21, 2015, the CFTC proposed an order (SPP Proposed Order) that was substantially similar to the RTO-ISO Order, except that it explicitly stated that it would not exempt SPP from the private right of action under section 22 of the CEA.[273] The CFTC explained that Congress' rationale for enacting section 22 was to provide a private right of action as a means for addressing violations of the CEA as an alternative or supplement to CFTC enforcement actions.[274] The CFTC stated that in drafting the RTO-ISO Order it did not intend to create the impression that it was reserving for itself the power to pursue claims for fraud and manipulation and thereby denying the victims of losses or violations the right to themselves pursue disgorgement or damages.[275] In the SPP Proposed Order, the CFTC stated that the RTO-ISO

267. *Id*.

268. These specified transactions are known as the "RTO-ISO Covered Transactions" and include transactions that fall within the definitions of "Financial Transmission Rights"; "Energy Transactions," "Forward Capacity Transactions," or "Reserve or Regulation Transactions." *Id.* at 73,080. The RTO-ISO Order applies to "any person or class of persons offering, entering into, rendering advice, or rendering other services with respect" to any of the Covered Transactions. *Id*. These persons, including the six RTOs and ISOs that had jointly filed a petition requesting an exemption are referred to as the "Covered Entities." *Notice of Proposed Amendment*, 81 Fed. Reg. 30,245, 30,246, n.21 (May 16, 2016).

269. The "Exempted Provisions" include the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the Act, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180." 81 Fed. Reg. 30,245, at 30,245.

270. *Id.* at 30,247.

271. Notice of Proposed Order and Request for Comment on an Application for an Exemptive Order From Southwest Power Pool, Inc. From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in section 4(c)(6) of the Act, 80 Fed. Reg. 29,490, 29,491 (May 21, 2015).

272. *Id*.

273. *Id.* at 29,493.

274. *Id*.

275. *Id*.

Order did not prevent private claims for fraud and manipulation from being brought under the CEA.[276]

In February 2016, the U.S. Court of Appeals for the Fifth Circuit affirmed a February 2015 ruling by the U.S. District Court for the Southern District of Texas that dismissed a private lawsuit on the grounds that a CEA section 22 private right of action was not available to the plaintiff under the RTO-ISO Order.[277] In *Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, No. H-14-1111, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015) it was alleged that certain generators in ERCOT manipulated the price of electricity by intentionally withholding electricity generation when supply was low, among other activities, and that, as a result, those generators were manipulating contract prices in the derivatives commodity market in violation of the CEA.[278] The district court dismissed the claim, and held that under the RTO-ISO Order, the private right of action in CEA section 22 was not available to the plaintiff.[279]

On May 9, 2016 the CFTC issued a proposed amendment to the 2013 RTO-ISO Order clarifying that in issuing the RTO-ISO Order, the Commission did not intend to bar private rights of action.[280] In light of the *Aspire* ruling, and in response to the thirteen comment letters the Commission received regarding the SPP Proposed Order, "the majority of which argued that the exemptions contained in the RTO-ISO Order extended to include private claims for fraud and manipulation under section 22 of the CEA, and that the exemption in the final SPP exemptive order should also include those private claims," the Commission proposed to amend the text of the RTO-ISO Order itself to clarify that the Covered Entities are not exempt from the private right of action in CEA section 22 with respect to the Exempted Provisions.[281] The proposed addition to the RTO-ISO Order would have come at the end of Paragraph 1[282] and would state that "[t]his exemption also does not apply to actions pursuant to CEA section 22 with respect to the foregoing enumerated provisions."[283]

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276. 81 Fed. Reg. 30,245.

277. *Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, Docket No. 15-20125, 2016 WL 758689 (5th Cir. Feb. 25, 2016).

278. *Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, Docket No. H-14-1111, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015).

279. *Id.* at *5.

280. *Notice of Proposed Amendment to and Request for Comment on the Final Order in Response to a Petition from Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act*, 81 Fed. Reg. 30,245 (May 10, 2016).

281. *Id.* at 30,247.

282. Paragraph 1 of the RTO-ISO Order read "Exempts, subject to the conditions and limitations specified herein, the execution of the electric energy-related agreements, contracts, and transactions that are specified in paragraph 2 of this Order and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect thereto, from all provisions of the CEA, except, in each case, the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180." *RTO-ISO Order*, *supra* note 265, at 19,912.

283. 81 Fed. Reg. 30,245, 30,249.

In coming it its conclusion in the October 17, 2016 order, the CFTC reasoned that the RTO/ISO markets are already regulated and overseen by FERC, the Public Utility Commission of Texas, and the independent market monitors.[284] The CFTC noted that it was "further persuaded" to issue an exemption from private rights of action in the context of the RTO-ISO markets because, when Congress amended the Federal Power Act in 2005 to give FERC the authority to pursue market manipulation claims, it considered whether to provide a private right of action and explicitly declined to do so.[285] The CFTC stated that private actors can participate in the enforcement process in these markets by directing filing a complaint with the CFTC or by employing the whistleblower provision of the CEA.[286]

III. THE PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION

A. Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines, 81 FR 20,721 (Proposed Rule issued Apr. 8, 2016)

On April 8, 2016, in response to the September 9, 2010 pipeline incident in San Bruno, California[287] and the subsequent 2011 Pipeline Safety Act,[288] the Pipeline and Hazardous Materials Safety Adminisstration (PHMSA) issued a Notice of Proposed Rulemaking that significantly expands the safety requirements applicable to natural gas pipelines.[289] The Proposed Rule contemplates a significant change to the PHMSA's regulatory scheme, shifting from two tiers of safety regulation to a three-tiered approach.[290] In addition, the PHMSA proposes a number of new regulations and changes to existing safety regulations, which are summarized at a high level below.

1. Expansion of the Application of the Integrity Management Rules

The PHMSA currently applies one set of rules to all gas transmission pipelines, and applies more stringent Integrity Management rules to a subset of lines that are located within High Consequence Areas (HCA) (i.e., areas where a pipeline leak or rupture could do the most harm).[291] The Integrity Management rules require pipeline operators to: 1) identify each pipeline segment located in an HCA; 2) develop and implement a "baseline" safety assessment plan that identifies the potential threats to each of these "covered segments;" 3) prioritize covered seg-

284. 81 Fed. Reg. 73,062, 73,071.

285. *Id*.

286. *Id*.

287. *See* Advanced Notice of Proposed Rulemaking, Pipeline Safety: Safety of Gas Transmission Pipelines, Docket No. PHMSA-2011-0023, 76 Fed. Reg. 53,086, 53,088 (PHMSA Aug. 25, 2011); NAT'L TRANSP. SAFETY B.D, PACIFIC GAS AND ELECTRIC COMPANY NATURAL GAS TRANSMISSION PIPELINE RUPTURE AND FIRE, SAN BRUNO, CALIFORNIA, SEPTEMBER 9, 2010, PIPELINE ACCIDENT REPORT NTSB/PAR-11/01 (Aug. 30, 2011).

288. Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. 112-90, 125 Stat. 1904 (2011 Pipeline Safety Act).

289. Proposed Rule, *Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines*, 81 Fed. Reg. 20,721 (Apr. 8, 2016).

290. *Id.* at 20,723.

291. 49 C.F.R. § 192.911.

ments for assessment; 4) evaluate preventive and mitigative measures; 5) remediate conditions; and 6) implement a process for continual evaluation and assessment of the integrity of the covered segment.[292]

The Proposed Rule expands the application of some of the Integrity Management requirements (assessment and remediation of defects) to additional pipeline segments by establishing a new third tier of gas transmission pipelines.[293] The proposed three-tier structure includes: 1) pipeline segments located in HCAs; 2) those located in Moderate Consequence Areas (MCA); and 3) those located outside of HCAs and MCAs.[294] MCAs, a new regulatory designation, are defined as pipeline segments where the "potential impact circle" around the segment contains: 1) "five (5) or more buildings intended for human occupancy" (with some exceptions);[295] 2) an "occupied site;" or 3) "a right-of-way for a designated interstate, freeway, expressway, and other principal four-lane arterial roadway" as defined by the Federal Highway Administration.[296]

Pipeline segments located in MCAs constitute a middle tier of segments that will be subject to some, but not all, of the Integrity Management requirements that apply to pipeline segments in HCAs.[297] In shifting to this three-tiered approach, the PHMSA noted its intent "to apply progressively more protection for progressively greater consequence locations."[298]

The PHMSA will also continue to rely on the use of "class" locations to differentiate pipeline segments, ramping up safety requirements as the class location increases.[299] A "class location unit" extends 220 yards on either side of the centerline of any continuous, on-shore one-mile length of pipeline.[300] Class 1 location units contain ten or fewer buildings intended for human occupancy; Class 2 location units contain more than ten but fewer than forty-six such buildings; Class 3 location units contain forty-six or more such buildings; and Class 4 location units contain multiple buildings with four or more above-ground levels.[301] Class location units are broad designations, and pipeline operators can define the potential impact circle that defines HCAs and MCAs with more precision.

Proposed new section 192.710, which would require integrity assessments of pipeline segments in MCAs and certain other class locations outside of HCAs, requires the integrity assessments only if the pipeline segment can be inspected by

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292. *Id*.

293. 81 Fed. Reg. 20,721, 20,732.

294. *Id.*

295. Compared to HCAs, which are defined as containing 20 or more buildings intended for human occupation in the potential impact circle. *Id*.

296. Proposed regulation § 192.3, 81 Fed. Reg. 20,721, 20,826. The Proposed Rule defines an MCA "occupied site" as including: (i) an outside area or open structure that is occupied by five or more persons on at least 50 days in any 12-month period, such as a beach, playground, or camping ground; or (ii) a building that is occupied by five or more persons on at least five days a week for 10 weeks in any 12-month period, such as religious facilities, office buildings, community centers, or general stores. *Id*.

297. Proposed regulation § 192.710, 81 Fed. Reg. 20,721, 20,732, 20,749.

298. 81 Fed. Reg. 20,721, 20,732.

299. *Id.* at 20,743.

300. 49 C.F.R. § 192.5.

301. *Id*.

an instrumented in-line inspection tool (i.e., a smart pig).[302] This provision and other aspects of the proposed new section 192.710 are intended to partially mitigate the new burdens on operators.

2. Revisions to Integrity Management Program

In addition to expanding the applicability of the Integrity Management rules, the PHMSA also proposed new requirements to strengthen the Integrity Management regulations, including:

- Revised Integrity Management repair criteria for pipeline segments in HCAs to address cracking defects, non-immediate corrosion metal loss anomalies, and other defects;[303]
- Functional requirements related to the nature and application of risk models;[304]
- Specific requirements for collecting, validating and integrating pipeline data models;[305]
- Strengthened requirements for applying knowledge gained through Integrity Management Program models (currently invoked by reference to industry standards);[306]
- Enhanced requirements for the selection and use of direct assessment methods;[307]
- Requirements for monitoring gas quality and mitigating internal corrosion and requirements for external corrosion management programs, including above ground surveys, close interval surveys, and electrical interference surveys;[308]
- Additional requirements for managing changes to the physical characteristics of pipelines.[309]

In addition to strengthening and expanding the application of the Integrity Management rules, the PHMSA also revised a number of non-Integrity Management-related rules.

3. Maximum Allowable Operating Pressure (MAOP)

The Proposed Rule revises existing regulations and adds new requirements to pipeline operators' duties to test and verify the highest pressure at which their pipelines can safely operate. The PHMSA proposes to require the operators of onshore steel transmission pipelines to verify the MAOP for pipeline segments if the pipeline segment: 1) is located in an HCA, a Class 3 or Class 4 location, or an MCA (if the segment can be inspected by a smart pig);[310] and 2) meets any of the

302. Proposed regulation § 192.710, 81 Fed. Reg. 20,721, 20,838.
303. 81 Fed. Reg. 20,721, 20,755-57.
304. *Id.* at 20,763-65.
305. *See* Proposed regulation § 192.917(b), 81 Fed. Reg. 20,721, 20,760-62.
306. 81 Fed. Reg. 20,721, 20,767.
307. *Id.* at 20,769-70.
308. Proposed regulation § 192.935(f), (g), 81 Fed. Reg. 20,721, 20,781-90.
309. Proposed regulation § 192.911(k) 81 Fed. Reg. 20,721, 20,745.
310. Proposed regulation §192.624(a), 81 Fed. Reg. 20,721, 20,833-34.

following conditions: (a) has experienced a reportable incident since its last Subpart J pressure test because of a defect related to original manufacturing, or construction, installation, fabrication, or cracking; (b) lacks reliable, traceable, verifiable, and complete MAOP pressure test; or (c) has an MAOP established under section 192.619(c) (the grandfather clause).[311]

If the pipeline meets the above conditions, the operator must establish or verify MAOP using one of several methods, including a pressure test to at least 1.25 x MAOP (plus a spike test for "legacy" pipe), pressure reduction, engineering critical assessments, including an instrumented in-line inspection (ILI) tool, or pipe replacement.[312]

The Proposed Rule requires operators to complete testing of 50% of their affected pipeline mileage within eight years of the effective date of the rule and 100% of mileage within fifteen years.[313] The existing grandfather clause, which has historically allowed certain pipelines to establish MAOP based on the line's five-year high operating pressure before July 1, 1970 without performing a Subpart J pressure test, would be available only for pipeline segments outside of HCAs and MCAs.[314]

The Proposed Rule includes several other non-Integrity Management-related changes, including additional requirements for:

- Monitoring gas quality, mitigating internal corrosion, and creating external corrosion management programs, including above ground surveys, close interval surveys, and electrical interference surveys;[315]
- Management of change;[316] and,
- Repair criteria for pipeline segments not located in an HCA.[317]

4. Regulation of Natural Gas Gathering Lines

The PHMSA proposed to repeal the reporting requirements exemption for operators of unregulated onshore gas gathering lines.[318] Under the Proposed Rule, all operators, including those operating unregulated lines, are required to file annual incident and safety-related conditions reports.[319] The Proposed Rule also requires all gathering line operators to determine and maintain records documenting beginning and end points of each gathering line.[320]

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311. *Id*.
312. Proposed regulation § 192.624(c), 81 Fed. Reg. 20,721, 20,834-36.
313. Proposed regulation § 192.624(b)(2) & (3), 81 Fed. Reg. 20,721, 20,834.
314. Proposed regulation § 192.619(e), 81 Fed. Reg. 20,721, 20,800.
315. 81 Fed. Reg. 20,721, 20,781-89.
316. Proposed regulation § 192.13(d), 81 Fed. Reg. 20,721, 20,795-96.
317. 81 Fed. Reg. 20,721, 20,755-58.
318. Proposed regulation § 191.1(c), 81 Fed. Reg. 20,721, 20,806.
319. Proposed regulation § 191.1(a), 81 Fed. Reg. 20,721, 20,803.
320. Proposed regulation § 192.8(a), 81 Fed. Reg. 20,721, 20,827. These records are to be complete within six months of the effective date of the rule or before the pipeline is placed in operation. Proposed regulation § 192.8(b), 81 Fed. Reg. 20,721.

The PHMSA proposes to create a new definition for onshore gathering lines, and provides supplementary definitions for onshore production facilities or production operations, gas treatment facilities, and gas processing plants.[321] The definition of "gathering line (onshore)" would be revised to mean "a pipeline, or a connected series of pipelines, and equipment used to collect gas from the endpoint of a production facility/operation and transport it to the furthermost point downstream of" the four defined "endpoints."[322] The effect of the new definitions is to classify lines as gathering lines earlier in the production process and reducing the situations in which a line would be considered incidental gathering, instead of transmission.

5. Other Issues

The Proposed Rule also covers a number of issues outside of the pipeline integrity context that arose after the PHMSA issued its Advanced Notice of Proposed Rulemaking on August 25, 2011,[323] including:

- Requiring inspections by onshore pipeline operators of areas affected by "an extreme weather event such as a hurricane or flood, an earthquake, landslide, a natural disaster, or other similar event that has the likelihood of damage to infrastructure",[324]
- Adding requirements to ensure consideration of seismicity of the area in identifying and evaluating all potential threats;[325]
- Revising the regulations to allow extension of the seven-year reassessment interval upon written notice;[326]
- Adding a requirement to "report each exceedance of the [MAOP] that exceeds the margin (build-up) allowed for operation of pressure-limiting or control devices",[327]
- Adding regulations to require safety features for pipeline launchers and receivers;[328] and
- Incorporating "consensus standards into the regulations for assessing the physical condition of in-service pipelines using in-line inspection."[329]

321. Proposed regulation § 192.3, 81 Fed. Reg. 20,721, 20,723, 20,807.

322. Proposed regulation § 192.3; 81 Fed. Reg. 20,721, 20,803, 20,825.

323. Advanced Notice of Proposed Rulemaking, Pipeline Safety: Safety of Gas Transmission Pipelines, 76 Fed. Reg. 53,086, (Aug. 25, 2011).

324. Proposed regulation § 192.613(c); 81 Fed. Reg. 20,721, 20,832-33.

325. 81 Fed. Reg. 20,721, 20,819-20.

326. Proposed regulation § 192.939(a), 81 Fed. Reg. 20,721, 20,806.

327. Proposed regulation § 191.23, 81 Fed. Reg. 20,721, 20,806.

328. Proposed regulation § 191.750, 81 Fed. Reg. 20,721, 20,806.

329. Proposed regulation § 192.493, 81 Fed. Reg. 20,721, 20,740, 20,810-11.

B. Hazardous Materials: Oil Spill Response Plans and Information Sharing for High-Hazard Flammable Trains, 81 FR 50,067 (Proposed Rule issued Jul. 29, 2016)

The PHMSA, in consultation with the Federal Railroad Administration (FRA) issued a Notice of Proposed Rulemaking (NOPR) on July 29, 2016,[330] proposing revisions to regulations to expand the applicability of comprehensive oil spill response plans (OSRPs) based on thresholds of liquid petroleum oil that apply to an entire train and to modernize the comprehensive OSRP requirements under PHMSA regulations for petroleum oils.[331] The NOPR is intended to improve oil spill response readiness and community preparedness, and to mitigate effects of rail incidents involving petroleum oil and certain high-hazard flammable trains (HHFTs).[332]

Specifically, the proposed rule would expand the applicability of comprehensive OSRPs so that any railroad that transports a single train carrying twenty or more loaded tank cars of liquid petroleum oil in a continuous block, or a single train carrying thirty-five or more loaded tank cars of liquid petroleum oil throughout the train consist, must also have a comprehensive written OSRP.[333] The NOPR also proposes to revise the format of, and clarify and add new requirements for OSRPs;[334] introduce requirements for railroads to share information with state and tribal emergency response commissions (SERCs and TERCs, respectively);[335] and "provide an alternative test method for determining the initial boiling point of a flammable liquid" consistent with industry standard (i.e., the ASTM D7900 test method).[336] The NOPR seeks comments all aspects of the proposed rules including the more onerous spill response planning requirements, such as defining high volume areas and staging resources using alternative response times, including shorter response times for spills that could affect such high volume areas,[337] and on three specific questions: 1) Whether particular public safety improvements could be achieved by requiring railroads to provide the proposed notifications directly to organizations other than designated SERCs, TERCs, or other state delegated agencies; and 2) Whether requiring the information sharing notifications to TERCs is the best approach to provide information to tribal governments or whether providing notification to the National Congress of American Indians to disseminate to affected tribes is more appropriate; and 3) Whether there are alternative means by which PHMSA can fulfill the FAST Act's direction to establish security and confidentiality protections where the information is not subject to protection under Federal standards.[338]

330. Notice of Proposed Rulemaking, Hazardous Materials: Oil Spill Response Plans and Information Sharing for High-Hazard Flammable Trains, 81 Fed. Reg. 50,068 (Jul. 29, 2016).

331. *Id.* at 50,069 (referencing 49 C.F.R. Part 130).

332. *Id.* at 50,069.

333. *Id.* at 50,070, 50,107.

334. *Id.* at 50,070, 50,106.

335. 81 Fed. Reg. 50,068, 50,070, 50,071-72.

336. *Id.* at 50,070, 50,073-74, 50,106.

337. *Id.* at 50,074-75 (Table 3), 50,107-108.

338. *Id.* at 50,108.

Among the changes and additions proposed to be made to the existing requirements for comprehensive OSRPs are that railroads must: 1) establish response zones describing resources (i.e., personnel and equipment) available to arrive onsite to a worst-case discharge, or the substantial threat of one, which are located within twelve hours of each point along the geographic route used by trains subject to the comprehensive OSRP;[339] 2) include a checklist of necessary notifications, contact information and necessary information to clarify communication procedures;[340] 3) certify and document that employees have been trained to carry out responsibilities and that equipment testing meets manufacturer's minimum requirements;[341] 4) describe activities and responsibilities of railroad personnel prior to arrival of the qualified individual and of the qualified individual and procedures coordinating their actions with the Federal On-Scene Coordinator;[342] 5) review OSRPs internally at least every five years, when new or different conditions or information changes within the plan, or after a discharge requiring plan activation occurs;[343] and 6) obtain explicit approval of OSRPs by the FRA, and respond to deficiencies identified by the FRA, prior to transport of oil.[344]

The NOPR addresses and builds on comments received on an Advance Notice of Proposed Rule issued by PHMSA on August 1, 2014.[345] Comments on the NOPR were due on September 27, 2016; 362 public comments were filed.[346] As of the date of this report, a Final Rule has not yet issued.

C. Hazardous Materials: FAST Act Requirements for Flammable Liquids and Rail Tank Cars, 81 FR 53,935 (Final Rule issued Aug. 15, 2016)

The PHMSA and the Federal Railroad Administration (FRA) issued a Final Rule on August 15, 2016,[347] to codify in the Hazardous Materials Regulations certain mandates and minimum requirements set forth in the "Fixing America's Surface Transportation Act of 2015" (FAST Act)[348] governing trains hauling crude oil and other flammable materials.[349] The implementation of the Final Rule "ensures that all Class 3 flammable liquids are packaged in tank cars meeting improved specifications, thus reducing the likelihood that a train transporting any

339. *Id.* at 50,068, 50,118-19, 50,126-27.

340. Proposed regulation 49 C.F.R. § 130.105, 81 Fed. Reg. 50,068, 50,126.

341. Proposed regulation 49 C.F.R. § 130.107, 81 Fed. Reg. 50,068, 50,127.

342. Proposed regulation 49 C.F.R. § 130.106, 81 Fed. Reg. 50,068, 50,127.

343. Proposed regulation 49 C.F.R. § 130.109, 81 Fed. Reg. 50,068, 50,127-28.

344. Proposed regulation 49 C.F.R. § 130.111, 81 Fed. Reg. 50,068, 50,128.

345. 81 Fed. Reg. 50,068, 50,075-106. The NOPR discusses at length the comments received on the Advance NOPR.

346. This information was noted under the "Enhanced Content" sidebar on the Federal Register website opening page for the OSRP NOPR, which may be viewed at: https://www.federalregister.gov/documents/2016/07/29/2016-16938/hazardous-materials-oil-spill-response-plans-and-information-sharing-for-high-hazard-flammable.

347. *Final Rule, Hazardous Materials: FAST Act Requirements for Flammable Liquids and Rail Tank Cars*, 81 Fed. Reg. 53,935 (Aug. 15, 2016).

348. 129 Stat. 1312.

349. 81 Fed. Reg. 53,935, 53,935.

volume of flammable liquids will release such liquids should it derail", and minimizes "the consequences of an incident should one occur by diminishing the number of tank cars likely to be punctured and the subsequent release of flammable liquids in a derailment."[350]

Specifically, the Final Rule codifies the FAST Act mandate that each tank car built to meet U.S. Department of Transportation (DOT) Specification 117, and that each non-jacketed tank car retrofitted to meet DOT Specification 117R be equipped with a thermal protection blanket that is at least 1/2-inch thick and meets existing thermal protection standards approved by PHMSA.[351] The Final Rule also codifies the FAST Act additional mandate for minimum top fittings protection requirements for tank cars retrofitted to meet the DOT Specification 117R, including a protective housing for the top fittings and a pressure relief device, and allowing for an alternative protection system.[352] These new tank car requirements are expanded to all trains hauling flammable liquids, irrespective of train composition.[353] The estimated cost of these tank car upgrades totals approximately $520 million over twenty years (using a 7% discount rate),[354] based on estimated new tank car cost differential of about $23,000 per car,[355] and estimated retrofit cost of about $27,000 per car.[356] PHMSA estimated that approximately 73,000 tank cars require retrofitting.[357]

The Final Rule requires a faster phase-out of older model, DOT-111 tank cars used to transport unrefined petroleum products, ethanol, and other Class 3 flammable liquids.[358] This phase-out more closely aligns U.S. regulations with corresponding regulations already in place in Canada, allowing for greater international harmonization.[359]

Because the FAST Act instructed DOT to issue conforming regulations immediately or soon after the FAST Act's date of enactment (December 4, 2015), and the actions taken in the Final Rule simply codified these non-discretionary statutory mandates, PHMSA found there was good cause to issue the amended regulations without public notice and comment procedures.[360] Thus, the rule became effective immediately upon its publication in the Federal Register on August 15, 2016.[361]

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350. *Id.* at 53,948.

351. *Id.* at 53,949. These thermal protection standards are set forth in PHMSA regulations at 42 C.F.R.§ 179.18(c). *Id.* at 53,937-38, 53,949.

352. *Id.* at 53,938, 53,949.

353. 81 Fed. Reg. 53,935, 53,949.

354. *Id.* at 53,940 (Table 5), 53,953.

355. *Id.* at 53,944 (Table 9).

356. *Id.*

357. *Id.* at 53,941 (Table 6).

358. 81 Fed. Reg. 53,935, 53,936-937 (Table 1).

359. *Id.* at 53,938.

360. *Id.* at 53,938-39.

361. *Id.* at 53,938.

D. Pipeline Safety: Enhanced Emergency Order Procedures, 81 FR 70,980 (Interim Final Rule issued Oct. 14, 2016)

The PHMSA issued an Interim Final Rule[362] to implement the agency's expanded authority, pursuant to the "Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016" (PIPES Act),[363] to issue emergency orders to address "imminent hazards" caused by unsafe pipeline conditions or practices, including safety concerns affecting multiple pipeline owners or operators. Section 16 of the PIPES Act gave the DOT authority to take emergency action to address an "imminent hazard," and required DOT to implement interim regulations implementing the expanded authority by August 22, 2016.[364]

The PIPES Act defines an "imminent hazard" as pipeline facility conditions that present "a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment that may occur before the reasonably foreseeable completion date of a formal proceeding" to address the condition.[365] Under the interim rule, effective October 14, 2016, PHMSA may impose "restrictions, prohibitions, and safety measures" on pipeline owners and operators without prior notice or an opportunity for an advance hearing, to the extent necessary to address an imminent hazard.[366]

Any such emergency order must reflect the PHMSA's prior consideration of the order's effect on public health and safety, economic or national security, and reliability and continuity of service to pipeline customers.[367] The interim rule also establishes administrative due process procedures to petition for review of an emergency order and to request an informal or formal hearing following the issuance of an emergency order.[368]

The public comment period on the interim rule closed December 13, 2016. Under the PIPES Act, PHMSA must issue a final rule no later than March 19, 2017.[369]

E. Pipeline Safety: Expanding the Use of Excess Flow Valves in Gas Distribution Systems to Applications Other than Single-Family Residences, 81 FR 70,987 (Final Rule issued Oct. 14, 2016)

On October 14, 2016, the PHMSA published a Final Rule expanding existing regulations that require excess flow valves (EFVs) on new or replaced natural gas distribution lines to single family residences (SFRs) to include EFV or manual service line shut-off valves (e.g. curb valves) requirements for new or replaced

362. *Interim Final Rule, Pipeline Safety: Enhanced Emergency Order Procedures*, 81 Fed. Reg. 70,980 (Oct. 14, 2016).

363. Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016, 49 U.S.C. § 60101, 130 Stat. 514 (2016).

364. 81 Fed. Reg. 70,980, 70,982.

365. *Id.* at 70,983.

366. *Id.*; 130 Stat. 514 § 15(o)(8).

367. 81 Fed. Reg. 70,980, 70,986.

368. *Id.* at 70,983.

369. *Id.* at 70,981.

branched service lines to SFRs, multifamily residential and small commercial customers.[370] The Final Rule becomes effective on April 14, 2017.[371]

The rule requires utilities to install EFVs on new or replaced branched service lines to SFRs, multifamily residences and small commercial entities that consume gas volumes of up to 1,000 standard cubic feet per hour (SCGH).[372] An EFV is not required if 1) the service line does not operate at a pressure of at least 10 psig throughout the year; 2) the operator has prior experience with gas stream contaminants that could interfere with the EFV's operation or impede customer service, 3) an EFV could interfere with necessary operation or maintenance activities (e.g. blowing liquids from the line), or 4) an EFV meeting performance standards is not commercially available.[373] For new or replaced service lines with meter capacities exceeding 1,000 SCGH, utilities must install manual service line shut-off valves or EFVs, if appropriate.[374]

Utilities are required to provide written or electronic notification to their customers of customers' right to request EFV installation.[375] The notification must include an explanation of the potential safety benefits of EFV installation and a description of the costs to install and replace EFVs.[376] The rule also requires that curb valves be "accessible to operators and other personnel authorized by the operator to manually shut off gas flow, if needed, in the event of an emergency."[377]

F. Pipeline Safety: Underground Storage Facilities for Natural Gas, 81 FR 243 (Interim Final Rule issued Dec. 14, 2016)

On December 14, 2016, the PHMSA issued an Interim Final Rule adding new regulations, effective January 18, 2017, to address safety issues related to underground natural gas storage facilities.[378] The interim rule establishes for the first time, under the Pipeline Safety Regulations at title 49, CFR parts 191 and 192, minimum federal safety standards for the wells and downhole facilities, including wellbore tubing, and casing, located at both intrastate and interstate underground storage facilities.[379]

The interim rule responds to Congressional mandates set forth in section 12 of the PIPES Act.[380] The interim rule incorporates by reference two American

370. Final Rule, Pipeline Safety: Expanding the Use of Excess Flow Valves in Gas Distribution Systems to Applications Other than Single-Family Residences, 81 Fed. Reg. 70,987 (Oct. 14, 2016).

371. *Id.* at 70,987.

372. *Id.* at 70,991.

373. *Id.* at 70,997.

374. *Id.* at 70,995.

375. 81 Fed. Reg. 70,987, 70,994.

376. *Id.*

377. *Id.* at 70,992.

378. Interim Final Rule, Pipeline Safety: Safety of Underground Natural Gas Storage Facilities, 81 Fed. Reg. 91,860 (Dec. 14, 2016).

379. *Id*. at 91,861.

380. *Id.* at 91,860; 49 U.S.C. § 60141.

Petroleum Institute (API) Recommended Practices issued in 2015,[381] which recommended that operators of underground natural gas storage facilities implement a number of practices, including construction, maintenance, risk-management, and integrity-management procedures.[382] Upon incorporation of the industry-adopted Recommended Practices into the PHMSA's Pipeline Safety Regulations, an operator failing to take any measures described in the Recommended Practices will be required to justify in its written procedures why the measure is impracticable and unnecessary.[383]

The interim rule applies these standards to all intrastate transportation-related underground gas storage facilities, which will be monitored and inspected either by PHMSA or by "a state entity that has chosen to expand its authority to regulate these facilities under a certification filed with PHMSA pursuant to 49 U.S.C. 60105."[384]

Comments on the interim rule must be submitted by February 17, 2017.[385]

G. Administrative Enforcement

The PHMSA initiated 164 pipeline safety enforcement actions in 2016, a slight decrease compared to the 197 cases the agency initiated in 2015.[386] The PHMSA also proposed approximately $8.4 million in total civil penalties in 2016, significantly more than the $3 million proposed in 2015.[387] The PHMSA issued sixty orders and two decisions on petitions for reconsideration in 2016, slightly down from the sixty nine such orders and decisions issued in 2015, and well below the average of 101 orders and decisions per year for the five years prior.[388]

IV. THE DEPARTMENT OF ENERGY

A. Enforcement Actions

The DOE monitors and enforces compliance with the Worker Safety and Health Program regulations at 10 C.F.R. Part 851. The regulations contain directives and technical standards to provide safe and healthful workplaces for DOE

381. *See* AM. PETROLEUM INST., API RECOMMENDED PRACTICE 1170: DESIGN AND OPERATION OF SOLUTION-MINED SALT CAVERNS USED FOR NATURAL GAS STORAGE (Jul. 2015); AM. PETROLEUM INST., API RECOMMENDED PRACTICE 1171: FUNCTIONAL INTEGRITY OF NATURAL GAS STORAGE IN DEPLETED HYDROCARBON RESERVOIRS AND AQUIFER RESERVOIRS (Sept. 2015).

382. 81 Fed. Reg. 91,860, 91,863.

383. *Id*.

384. *Id*.

385. *Id.* at 91,861.

386. *Summary of Enforcement Activity-Nationwide*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN. (Dec. 7, 2016), http:// primis.phmsa.dot.gov/comm/reports/enforce/EnfHome.html.

387. *Summary of Cases Involving Civil Penalties*, PIPELINE & HAZARDOUS MATERIALS ADMIN. (Dec. 7, 2016), http://primis.phmsa.dot.gov/comm/reports/enforce/CivilPenalty_opid_0.html?nocache=8032.

388. *Summary of Enforcement Actions*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN. (Dec. 7, 2016), http://primis.phmsa.dot.gov/comm/reports/enforce/Actions_opid_0.html?nocache=226#_TP_1_tab_2.

contractors and their employees at DOE sites.[389] The regulations also provide procedures for investigating violations.[390] The DOE engaged in a series of investigations in 2016, including the following matters resulting in consent orders:

1. Washington River Protection Solutions

In November 2016, the DOE executed a consent order with Washington River Protection Solutions (WRPS), a DOE contractor, resolving an investigation of potential noncompliance with the worker safety and health requirements of 10 C.F.R. Part 851.[391] The DOE initiated the investigation after a fall incident at a DOE nuclear waste storage site managed by WRPS.[392] The Office of Enforcement identified several possible violations, involving hazard assessment, personnel training and emergency response.[393]

In lieu of an enforcement action with the proposed imposition of a civil penalty, the DOE and WRPS agreed that WRPS would pay a $45,000 monetary remedy and undertake several corrective actions, including the inspection of inactive septic tanks and development of a field worker training program.[394] The DOE cited WRPS's thorough causal analysis and comprehensive corrective actions as support for the settlement.[395]

2. Los Alamos National Security, LLC

In June 2016, the DOE, National Nuclear Security Administration (NNSA) and Los Alamos National Security, LLC (LANS) executed a consent order to resolve potential noncompliance issues in lieu of an enforcement action.[396] LANS voluntarily reported potential violations associated with a contamination event that occurred at a DOE site where LANS conducted nuclear operations.[397]

The parties to the consent order agreed that LANS would implement certain corrective actions, including review of its corrective actions by an independent party.[398] The NNSA imposed a $500,000 contract fee reduction; the consent order

389. *Chronic Beryllium Disease Prevention Program; Worker Safety and Health Program*, 71 Fed. Reg. 6,858, 6,865 (Feb. 9, 2006), *corrected*, 71 Fed. Reg. 36,661 (June 28, 2006) (implementing 10 C.F.R. §§ 851.1-851.45), *amended*, 80 Fed. Reg. 69,564 (Nov. 10, 2015).

390. 10 C.F.R. § 851.1 (2016).

391. *In re Washington River Protection Solutions*, Consent Order WCO-2016-02 9 (U.S. Dep't Energy Nov. 4, 2016), http://www.energy.gov/sites/prod/files/2016/11/f34/WRPS%20Consent%20Order%20%28WCO-2016-02%29.pdf.

392. *Id.* at 1.

393. *Id.* at 2.

394. *Id.* at 4.

395. *Id.* at 2.

396. *In re Los Alamos National Security, LLC*, Consent Order NCO-2016-03 (U.S. Dep't Energy June 14, 2016), http://www.energy.gov/sites/prod/files/2016/06/f33/NCO-2016-03%20LANS%20Signed%20Consent%20Order%206-22-16.pdf.

397. *Id.* at 1.

398. *Id.* at 4.

does not provide for an additional monetary remedy.[399] In support of the settlement, the DOE placed considerable weight on LANS's cooperation throughout the investigation and corrective actions to prevent reoccurrence.[400]

3. National Security Technologies, LLC

In June 2016, the DOE and NNSA executed a consent order with National Security Technologies, LLC (NSTec), a DOE contractor, to settle an investigation arising from the same contamination event involving LANS.[401] NSTec is responsible for managing the DOE site where the contamination occurred.[402]

NSTec voluntarily reported the event to the DOE.[403] The parties to the consent order agreed that NSTec would implement certain corrective actions, including review of its corrective actions by an independent party.[404] The NNSA imposed an $87,000 contract fee reduction; the consent order does not provide for an additional monetary remedy.[405]

4. Battelle Energy Alliance, LLC

In April 2016, the DOE and Battelle Energy Alliance, LLC (BEA) executed a consent order to resolve potential compliance violations resulting from an arc flash incident at a federal research facility.[406] BEA voluntarily reported the event and potential noncompliance with the federal Worker Safety and Health Program regulations.[407] BEA also conducted a common cause analysis and implemented several corrective measures, including improved lineman training, safety performance monitoring and ongoing effectiveness assessments.[408]

The Consent Order provides for a $60,000 monetary remedy.[409] As part of the settlement, BEA committed to perform assessments of its corrective action plan.[410]

5. Savannah River Nuclear Solutions, LLC

In April 2016, the DOE executed a consent order with Savannah River Nuclear Solutions, LLC (SRNS) after initiating an investigation into a series of events

399. *Id.* at 4.

400. *Id.* at 2.

401. *In re National Security Technologies, LLC*, Consent Order NCO-2016-02 (U.S. Dep't Energy June 14, 2016), http://www.energy.gov/sites/prod/files/2016/06/f33/NCO-2016-02%20NSTec%20Signed%20Consent%20Order%206-22-16.pdf.

402. *Id.* at 1.

403. *Id.* at 2.

404. *Id.* at 3.

405. *Id.* at 4.

406. *In re Battelle Energy Alliance, LLC*, Consent Order WCO-2016-01 (U.S. Dep't Energy April 27, 2016), https://energy.gov/sites/prod/files/2016/05/f31/BEA%20Signed%20Consent%20Order%20%28WCO-2016-01%29_0.pdf.

407. *Id.* at 1.

408. *Id.* at 2.

409. *Id.* at 3.

410. *Id.* at 3.

involving procedure violations for storing and handling nuclear material.[411] The Consent Order provides for a $175,000 monetary remedy.[412] SRNS agreed to implement corrective actions, including an independent assessment of its Nuclear Criticality Safety Program and an obligation to report the effectiveness of its corrective actions to the DOE.[413] The DOE's willingness to enter a Consent Order was based on SRNS's through self-investigation, timely reporting and prompt corrective actions.[414]

V. THE DEPARTMENT OF JUSTICE

A. Aubrey K. McClendon

In March 2016, a federal grand jury indicted Aubrey K. McClendon for antitrust violations under the Sherman Act.[415] The Department of Justice (DOJ) filed the indictment in the U.S. District Court for the Western District of Oklahoma.[416] The indictment alleged that McClendon orchestrated a conspiracy between two large oil and gas companies not to bid against each other for the purchase of certain oil and natural gas leases in northwest Oklahoma.[417] Under the alleged scheme, the winning bidder would then allocate an interest in the leases to the other company.[418] Shortly after being indicted, McClendon died in a car accident.[419] DOJ promptly moved to dismiss the case,[420] and the court granted the motion.[421]

B. Andrew Martingano

In February 2016, the U.S. District Court for the Southern District of New York (Batts, J.) sentenced Andrew Martingano to thirty-two months and a day in prison for antitrust conspiracy violations.[422] The court also ordered Martingano's company to pay a $150,000 criminal fine.[423] Martingano, the owner of an indus-

411. *In re Savannah River Nuclear Solutions, LLC*, Consent Order No. NCO-2016-01 (U.S. Dep't Energy, April 19, 2016), https://energy.gov/sites/prod/files/2016/04/f30/Signed%20SRNS%20Consent%20Order%20%28NCO-2016-01%29.pdf.

412. *Id.* at 5.

413. *Id.* at 4.

414. *Id.* at 2.

415. Press Release, U.S. Dep't Justice, Former CEO Indicted for Masterminding Conspiracy Not to Compete for Oil and Natural Gas Leases (March 1, 2016), https://www.justice.gov/opa/pr/former-ceo-indicted-masterminding-conspiracy-not-compete-oil-and-natural-gas-leases.

416. *Id*.

417. *Id*.

418. *Id*.

419. David Wethe, *Death of a Shale Man: The Final Days of Aubrey McClendon*, BLOOMBERG (Mar. 9, 2016), https://www.bloomberg.com/news/articles/2016-03-09/death-of-a-shale-man-the-final-days-of-aubrey-mcclendon.

420. Motion to Dismiss by United States, Docket No. 16-cr-00043-M, (E.D. Okla. Mar. 3, 2016).

421. Order Granting Motion to Dismiss, Docket No. 16-cr-00043-M (E.D. Okal. Mar. 7, 2016).

422. Press Release, U.S. Dep't Justice, New Jersey Pipe Supply Company Owner Sentenced to 32 Months in Prison for Role in Fraud and Bribery Conspiracy in Power Generation Industry (Feb. 2, 2016), https://www.justice.gov/opa/pr/new-jersey-pipe-supply-company-owner-sentenced-32-months-prison-role-fraud-and-bribery.

423. *Id*.

trial pipe supply company, pled guilty to committing wire fraud and to a conspiracy to defraud from January 2009 to August 2010.[424] Martingano and others agreed to pay approximately $510,000 in cash bribes to a Consolidated Edison Electric (Con Ed) employee.[425] In exchange for the bribes, the Con Ed employee provided competitor bid information to Martingano and steered contracts to Martingano's company.[426] Con Ed suffered losses resulting from paying higher, non-competitive prices for materials.[427] The court also ordered Martingano's company and Martingano to pay $1.6 million in restitution to Con Ed.[428]

C. Philip Joseph Rivkin

In March 2016, the U.S. District Court for the Southern District of Texas (Rosenthal, J.) sentenced Phillip Joseph Rivkin, aka Felipe Poitan Arriaga, to 121 months in prison and three years of supervised release for committing one count of fraud and one count of making a false statement under the Clean Air Act.[429] The Court also ordered him to pay $87 million in restitution and to forfeit $51 million.[430] In his plea agreement, Rivkin admitted to creating false records and statements in connection with several federally-funded programs that create monetary incentives for the production of renewable fuels.[431] The programs rely on Renewable Identification Numbers (RINs).[432] RINs are credits used for compliance, and are the "currency" of one of the major programs.[433] In his plea agreement, Rivkin admitted that he falsely claimed to produce millions of gallons of biodiesel at a certain facility, and then sold RINs based on this claim.[434] In reality, no biofuel was produced at the facility.[435] Rivkin then sold the RINs, resulting in millions of dollars in sales.[436]

D. Don Blankenship

In April 2016, the U.S. District Court for the Southern District of West Virginia (Berger, J.) sentenced Donald Blankenship, the former CEO of Massey Energy, to one year in prison and ordered him to pay a $250,000 fine after a jury found Blankenship guilty of conspiracy to willfully violate mine health and safety

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424. *Id*.

425. *Id*.

426. *Id*.

427. Press Release, U.S. Dep't Justice, *supra* note 422.

428. *Id*.

429. Press Release, U.S. Dep't Justice, Houston Man Sentenced to More Than 10 Years in Prison for Biodiesel Fraud Scheme (Mar. 7, 2016), https://www.justice.gov/opa/pr/houston-man-sentenced-more-10-years-prison-biodiesel-fraud-scheme.

430. *Id*.

431. *Id*.

432. *Renewable Identification Numbers (RINs) Under the Renewable Fuel Standard Program*, ENVTL. PROT. AGENCY, https://www.epa.gov/renewable-fuel-standard-program/renewable-identification-numbers-rins-under-renewable-fuel-standard (last visited Dec. 27, 2016).

433. Press Release, U.S. Dep't of Justice, *supra* note 429.

434. *Id*.

435. *Id*.

436. *Id*.

standards.[437] The jury acquitted Blankenship of securities fraud charges.[438] In 2010, an explosion occurred at Massey's West Virginia Upper Big Branch that caused the deaths of twenty-nine miners.[439] During the trial, the jury heard from a former employee who testified that Blankenship ignored or defrauded the Mine Safety and Health Administration and had a practice of rampant violations.[440] Blankenship was not accused of direct responsibility for the accident.[441] The court imposed the maximum prison sentence and penalty under the statute.[442] In its sentencing memorandum, the prosecution stated that it did not know of any other case in which a major company CEO was convicted under worker protection laws. [443]

E. Szuhsiung Ho and China General Nuclear Power Company

In April 2016, a grand jury indicted Allen Ho for conspiracy to unlawfully engage in the production and development of special nuclear material outside the United States and conspiracy to act as an agent of a foreign government.[444] A Chinese state-owned nuclear energy company employed Ho, a naturalized U.S. citizen, to provide assistance in developing and producing special nuclear material in China, according to the indictment.[445] Ho did not register with the Department of Energy or with the Department of Justice as an agent of a foreign nation.[446] The indictment alleges that the conspiracy began in 1997 and continued through April 2016.[447] The first count, conspiracy to produce and develop special nuclear material, carries a maximum life sentence.[448] The second count, conspiracy to act as an agent of a foreign government, carries a maximum sentence of ten years in prison.[449]

F. Chemoil Corporation

In September 2016, the Department of Justice and EPA announced a settlement with Chemoil Corporation over its alleged violations of the Renewable Fuel

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437. Press Release, U.S. Dep't of Justice, Blankenship Sentenced to a Year in Federal Prison (April 6, 2016), https://www.justice.gov/usao-sdwv/pr/blankenship-sentenced-year-federal-prison.

438. *United States v. Philip Joseph Rivkin*, Docket No. 4:14-CR-00250 (S.D. Tex. 2016) (Sentencing Hr'g, 55:13-15, April 6, 2016, No. 634).

439. Alan Blinder, *Donald Blankenship Sentenced to a Year in Prison in Mine Safety Case*, N.Y. TIMES, April 6, 2016.

440. Press Release, U.S. Dep't of Justice, *supra* note 437.

441. *See* Blinder, *supra* note 439.

442. 30 U.S.C. § 820(d) (2006).

443. Sentencing Memorandum, *United States v. Donald L. Blankenship*, Docket No. 5:14-cr-00244 at 4 (S.D.W. Va. March 28, 2016).

444. Press Release, U.S. Dep't Justice, U.S. Nuclear Engineer, China General Nuclear Power Company and Energy Technology International Indicted in Nuclear Power Conspiracy against the United States (Apr. 14, 2016), https://www.justice.gov/opa/pr/us-nuclear-engineer-china-general-nuclear-power-company-and-energy-technology-international.

445. *Id*.

446. *Id*.

447. *Id*.

448. *Id*.

449. Press Release, U.S. Dep't Justice, *supra* note 444.

Standard (RFS) program.[450] Congress created the RFS program under the Energy Policy Act of 2005.[451] The RFS program requires a certain volume of renewable fuel to replace or reduce the quantity of petroleum-based transportation fuel, heating oil or jet fuel.[452] RINs are credits used for compliance, and are the "currency" of the RFS program.[453] Exporters are required to retire RINs for compliance within one month of the export event.[454] If an exporter does not retire RINs after exporting renewable fuel, it artificially inflates the number of RINs available to meet the renewable fuel volume mandate, according to the Department of Justice.[455] DOJ and EPA alleged that Chemoil exported at least 48.5 million gallons of biodiesel from 2011 to 2013, but did not retire RINs generated for the export fuel.[456] Under the settlement, Chemoil Corporation agreed to retire 65 million fuel credits.[457] The market value of the retired credits, in addition to 7.7 million additional credits retired before the settlement, is more than $71 million.[458] Chemoil also agreed to pay a $27 million civil penalty, the largest in the history of EPA's fuel program.[459]

G. Joseph Furando

In January 2016, the U.S. District Court for the Southern District of Indiana (Barker, J.) sentenced Joseph Furando to twenty years in prison and three years of supervised release for his role in a scheme to fraudulently sell biodiesel incentives.[460] The court also ordered Furando to pay more than $56 million in restitution, jointly and severally with the other defendants in the case.[461] Under the Energy Independence and Security Act, biodiesel is eligible for a one-time tax credit, as well as a RIN credit that refiners and importers can use to demonstrate compliance with federal renewable fuel obligations.[462] According to the Department of Justice, Furando and his companies bought fuel that had already claimed the credits at low prices and supplied it to a biodiesel manufacturing plant in Middletown,

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450. Press Release, U.S. Dep't of Justice, Chemoil Agrees to Pay Civil Penalty of $27 Million and to Retire a Total of More Than $71 Million in Credits from Renewable Fuels Market Under Settlement with United States (Sept. 29, 2016), https://www.justice.gov/opa/pr/chemoil-agrees-pay-civil-penalty-27-million-and-retire-total-more-71-million-credits.

451. Program Overview: Renewable Fuel Standard Program, ENVTL. PROT. AGENCY, https://www.epa.gov/renewable-fuel-standard-program/program-overview-renewable-fuel-standard-program (last visited Dec. 27, 2016).

452. *Id*.

453. *Renewable Identification Numbers (RINs) Under the Renewable Fuel Standard Program*, *supra* note 432.

454. *Id*.

455. Press Release, U.S. Dep't Justice, *supra* note 450.

456. *Id*.

457. *Id*.

458. *Id*.

459. *Id*.

460. Press Release, U.S. Dep't of Justice, New Jersey Man Sentenced in Indiana to 20 Years for Biodiesel Fraud Scheme (Jan. 8, 2016), https://www.justice.gov/opa/pr/new-jersey-man-sentenced-indiana-20-years-biodiesel-fraud-scheme.

461. *Id*.

462. *Id*.

Indiana.[463] They then illegally re-certified the fuel and re-sold it at much higher prices, claiming the fuel was eligible for the tax credits.[464] Over the course of two years, the defendants fraudulently sold more than 35 million gallons of fuel and realized more than $55 million in gross profits.[465]

463. *Id*.
464. *Id*.
465. Press Release, U.S. Dep't Justice, *supra* note 460.