REPORT OF THE COMPLIANCE & ENFORCEMENT COMMITTEE

This report of the Compliance & Enforcement Committee summarizes key federal enforcement and compliance developments in 2013, including certain decisions, orders, actions, and rules of the Federal Energy Regulatory Commission, the U.S. Commodity Futures Trading Commission, the Pipeline and Hazardous Materials Safety Administration, the U.S. Department of Energy, and the U.S. Department of Justice.*

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I. THE FEDERAL ENERGY REGULATORY COMMISSION

A. Reports and Rules

1. Annual Enforcement Report

On November 21, 2013, the Federal Energy Regulatory Commission (FERC) Office of Enforcement (Enforcement) issued its Annual Report of Enforcement Staff activities during the fiscal year 2013.[1] In general, the 2013 Report identifies the Enforcement Staff's four primary priorities for 2013: "[(1)] Fraud and market manipulation; [(2)] Serious violations of the Reliability

1. STAFF OF THE OFFICE OF ENFORCEMENT, FED. ENERGY REGULATORY COMM'N, 2013 REPORT ON ENFORCEMENT, Docket No. AD07-13-006 (2013) [hereinafter 2013 REPORT].

Standards; [(3)] Anticompetitive conduct; and [(4)] Conduct that threatens the transparency of regulated markets."[2]

In pursuit of the these priorities, the Enforcement Staff opened twenty-four new investigations in fiscal year 2013, up from twenty-one investigations the year prior, while bringing twenty-nine to closure.[3] The Enforcement Staff obtained over $304 million in civil penalties and disgorgement of almost $141 million in unjust profits.[4] Enforcement's settlements in 2013 include the largest civil penalty assessed by the FERC in its history.[5] The 2013 Report states that Enforcement does not intend to change its priorities in the upcoming year.[6]

2. Division of Analytics and Surveillance

The 2013 Report offers updates involving the recently created Division of Analytics and Surveillance (DAS). The FERC issued Order No. 771[7] and a Notice of Inquiry[8] that enhance the DAS's surveillance capability of the natural gas and electric markets. Order No. 771 provides access, on a non-public and ongoing basis, to electronic tags (e-Tags) used to schedule electric power transactions in wholesale markets, review of which began in March 2013.[9] During 2013, the FERC continued its effort from the previous year to determine whether quarterly reporting of natural gas transactions that involve next-day or next-month physical delivery would improve market transparency.[10] On July 9, 2013, the [FERC] issued a notice of data requests to certain natural gas marketers for information related to natural gas sales in an effort to estimate the volume of natural gas sales that are jurisdictional to the Commission.[11] Through these data requests and the Notice of Inquiry, the FERC is continuing its efforts from 2012 to determine whether quarterly reporting of natural gas transactions that involve next-day or next-month physical delivery would improve market transparency.[12]

B. Notices of Alleged Violations

1. Erie Boulevard Hydropower, L.P.

On July 3, 2013, the Enforcement Staff issued a notice alleging that Erie Boulevard Hydropower, L.P. (Erie) violated part 12 of the FERC's regulations

2. *Id.* at 2.

3. *Id.*; STAFF OF THE OFFICE OF ENFORCEMENT, FERC, 2012 REPORT ON ENFORCEMENT, Docket No. AD07-13-005, at 3 (2012).

4. 2013 REPORT, *supra* note 1, at 3.

5. *Id.* at 2-3. This matter is discussed below in Part I.D.1 of this report.

6. *Id.* at 2.

7. Order No. 771, *Availability of E-Tag Information to Commission Staff*, F.E.R.C. STATS. & REGS. ¶ 31,339, 77 Fed. Reg. 76,367 (2012) (to be codified at 18 C.F.R. pt. 366), *order on reh'g*, Order No. 771-A, 142 F.E.R.C. ¶ 61,181 (2013).

8. Notice of Inquiry, *Enhanced Natural Gas Market Transparency*, 141 F.E.R.C. ¶ 61,124 (2012).

9. 2013 REPORT, *supra* note 1, at 51.

10. *Id.* at 51-52.

11. *Id.* at 52; *Enhanced Natural Gas Market Transparency*, Docket No. RM13-1-000 (FERC July 9, 2013) (Notice of Data Requests).

12. 2013 REPORT, *supra* note 1, at 51-52.

related to public safety.[13] The Enforcement Staff alleged that the violation was related to an incident on September 28, 2010, involving Erie's Varick development and the death of two fishermen.[14]

Erie's Varick development, part of the Oswego River Project (P-2474-NY), is operated remotely out of the National System Control Center (NSCC) located in Marlborough, Massachusetts.[15] The Enforcement Staff alleged that on September 28, 2010, the NSCC operator failed to trigger Varick's Fisherman Alert System (FAS) when a water spillage over the Varick dam appeared imminent.[16] The notice also alleged, among other things, that Erie failed to repair or report within a reasonable time a damaged camera that monitors fisherman in Varick's tailrace area, as well as staggered-height flashboards that were in a condition of partial failure.[17] Lastly, the notice alleged that Erie did not adequately train the NSCC operator monitoring Varick on the FAS or general public safety.[18]

C. Show Cause Proceedings

1. BP America Inc. and Affiliates

The FERC issued an order to show cause (OSC) to BP America Inc. (BP) and multiple affiliates on August 5, 2013.[19] The OSC alleged that BP's trading conduct, involving next-day fixed-price natural gas at the Houston Ship Channel (HSC), violated the FERC's anti-manipulation rule.[20] The FERC is seeking a $28 million civil penalty plus disgorgement of $800,000 against BP and its affiliates.[21]

The order included an Enforcement Staff report and alleged that BP's trading desk "uneconomically used BP's transportation capacity between Katy and HSC, made repeated early uneconomic sales at HSC, and took steps to increase BP's market concentration at HSC as part of a manipulative scheme" between mid-September 2008 and November 2008.[22]

On October 4, 2013, BP filed its answer, denying the FERC's allegations, and requested that the FERC dismiss the proceeding, or alternatively that BP have a full evidentiary hearing before an Administrative Law Judge (ALJ) to contest issues of material fact.[23]

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13. Notice from Kimberly D. Bose, Sec'y, FERC, Staff Notice of Alleged Violations (July 3, 2013), *available at* http://ferc.gov/enforcement/alleged-violation/notices/2013/erie-07-03-2013.pdf.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *BP Am. Inc.*, 144 F.E.R.C. ¶ 61,100 (2013); *see also* 2013 REPORT, *supra* note 1, at 6.

20. 144 F.E.R.C. ¶ 61,100 at P 1 (alleging violations of 18 C.F.R. § 1c.1 (2013)).

21. *Id.*

22. *Id.* at P 2.

23. 2013 REPORT, *supra* note 1, at 6.

D. Enforcement Litigation

1. Barclays Bank PLC, Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith

On July 16, 2013, the FERC assessed civil penalties of $435 million against Barclays and $18 million against the traders.[24] This was preceded by an OSC and notice of proposed penalty issued on October 31, 2012, to Barclays Bank PLC (Barclays) and four individuals, directing them to show cause why they did not violate section 1c.2 of the FERC's regulations and section 222 of the Federal Power Act (FPA).[25] As stated in the OSC, Barclays and the individual traders "are alleged to have violated section 1c.2 by manipulating the electricity markets in and around California from November 2006 to December 2008."[26] On November 29, 2012, Barclays and the individual traders elected for an immediate penalty assessment and de novo review in federal district court under section 31(d)(3) of the FPA.[27]

In the July 16, 2013 order, the FERC also ordered Barclays to disgorge $34.9 million plus interest arising from the matter.[28] The FERC's assessment represents the largest penalty it has assessed to date.[29]

On October 9, 2013, the FERC filed an action to enforce the penalty in the U.S. District Court for the Eastern District of California.[30] Barclays filed a motion to dismiss the FERC's suit on December 16, 2013.[31] In the event the suit is not dismissed, Barclays requested that the case be transferred to New York.[32]

2. Brian Hunter

On March 15, 2013, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) ruled that the FERC acted outside its statutory jurisdiction in issuing an order of violation and civil penalty against former Amaranth Advisors LLC trader Brian Hunter.[33]

Hunter had sought to overturn the FERC's 2011 order assessing him a civil penalty of $30 million for violation of the anti-manipulation rule, 18 C.F.R. § 1c.1, related to his conduct in trading natural gas futures contracts on the New

24. *Barclays Bank PLC*, 144 F.E.R.C. ¶ 61,041 at P 8 (2013); *see also* 2013 REPORT, *supra* note 1, at 5.

25. *Barclays Bank PLC*, 141 F.E.R.C. ¶ 61,084 at P 1 (2012) (noting alleged violations of 16 U.S.C. § 824v(a) (2006) and 18 C.F.R. § 1c.2 (2012)); *see also* 2013 REPORT, *supra* note 1, at 5.

26. 141 F.E.R.C. ¶ 61,084 at P 1.

27. *E.g.*, Notice of Election of Barclays Bank PLC, *Barclays Bank PLC*, FERC Docket No. IN08-8-000 (Nov. 29, 2012) (referencing the alleged violation of the FPA, Federal Power Act § 31(d)(3), 16 U.S.C. § 823b(d)(1) (2012)). All five parties filed a separate Notice of Election on November 29, 2012, in FERC Docket No. IN08-8-000.

28. 144 F.E.R.C. ¶ 61,041 at P 151.

29. 2013 REPORT, *supra* note 1, at 2-3.

30. Petition for an Order Affirming July 16, 2013 Order, FERC v. Barclays Bank PLC, No. 2:13-cv-02093 (E.D. Cal. Oct. 9, 2013).

31. Notice of Motion and Motion to Dismiss, FERC v. Barclays Bank PLC, No. 2:13-cv-02093 (E.D. Cal. Dec. 16, 2013); *see also* Karen Gullo, *Barclays Seeks Dismissal of FERC Suit over $488 Million*, BLOOMBERG (Dec. 16, 2013, 6:37 PM), http://www.bloomberg.com/news/2013-12-17/barclays-seeks-dismissal-of-ferc-suit-over-488-million.html.

32. Motion to Dismiss, *supra* note 31, at 3-5.

33. Hunter v. FERC, 711 F.3d 155, 156, 160 (D.C. Cir. 2013).

York Mercantile Exchange, Inc. (NYMEX).[34] In November 2011, the FERC denied rehearing of its order finding that Hunter had violated the anti-manipulation rule.[35]

Hunter next appealed the order and penalty to the D.C. Circuit. In his appeal Hunter asserted that the FERC lacked authority over the matter because the U.S. Commodity Futures Trading Commission (CFTC) had exclusive jurisdiction to enforce anti-manipulation regulations involving exchange-traded futures.[36] Agreeing that the FERC lacked authority over the trading conduct at issue, the D.C. Circuit granted Hunter's petition for review and overturned the FERC's 2011 order and penalty.[37]

3. Quntum Energy, LLC and Moussa I. Kourouma

On July 23, 2013, the D.C. Circuit affirmed the FERC's finding that Moussa I. Kourouma violated 18 C.F.R. § 35.41(b), as well as the FERC's assessed penalty of $50,000.[38]

In February 2011, the FERC issued an OSC against Kourouma, alleging that Kourouma "deliberately submitt[ed] misleading information and knowingly omitt[ed] material facts regarding the true owner of Quntum Energy LLC (Quntum) in communications to the Commission" and in communications to PJM Interconnection L.L.C. (PJM).[39] In response to the FERC's OSC, Kourouma submitted an affidavit to the FERC attesting to and affirming the allegations against him.[40] The FERC determined in summary disposition against Kourouma and assessed a civil penalty of $50,000 to be payable over five years.[41]

The D.C. Circuit rejected all of Kourouma's procedural and substantive challenges to the FERC's finding and penalty award and upheld the FERC's position that intent is not required for a violation of 18 C.F.R. § 35.41(b).[42] Lastly, the D.C. Circuit held that the FERC made a fair assessment in its penalty award and determination of a payment schedule.[43]

E. Settlement Agreements

1. J.P. Morgan Ventures Energy Corporation

The FERC approved a Stipulation and Consent Agreement on July 30, 2013,[44] with J.P. Morgan Ventures Energy Corporation (JPMVEC) relating to a

34. *Hunter*, 130 F.E.R.C. ¶ 63,004 (2010), *aff'd*, 135 F.E.R.C. ¶ 61,054 (assessing a penalty), *reh'g denied*, 137 F.E.R.C. ¶ 61,146 (2011).

35. 137 F.E.R.C. ¶ 61,146.

36. *Hunter*, 711 F.3d at 156-57.

37. *Id.* at 160.

38. Kourouma v. FERC, 723 F.3d 274 (D.C. Cir. 2013).

39. *Kourouma*, 134 F.E.R.C. ¶ 61,105 at P 1 (2011).

40. *Kourouma*, 723 F.3d at 277.

41. *Id.*

42. *Id.* at 277-79.

43. *Id.* at 280.

44. *Make-Whole Payments and Related Bidding Strategies*, 144 F.E.R.C. ¶ 61,068 (2013).

September 20, 2012, OSC.[45] The agreement resolved an investigation into JPMVEC's bidding conduct in the markets administered by the California Independent System Operator (CAISO) and the Midcontinent Independent Transmission System Operator, Inc. (MISO).[46]

The Enforcement Staff determined that JPMVEC violated the FERC's anti-manipulation rule "by intentionally submitting bids to CAISO and MISO that falsely appeared economic to CAISO and MISO's market software but that were intended to, and in almost all cases did, lead CAISO and MISO to pay JPMVEC at rates far above market prices."[47] Additionally, the Enforcement Staff found that JPMVEC violated section 39.2.5.c of the MISO tariff, which requires non-price information to reflect actual known physical capabilities and characteristics of the resource, when JPMVEC increased the Minimum Run Time of one of its units on multiple trade dates.[48]

Under the agreement, JPMVEC agreed to pay a civil penalty of $285 million and to disgorge $125 million in unjust profits.[49] In addition to monetary penalties, it further agreed to implement compliance procedures targeting its power business and to waive any claims for certain payments between April 12, 2012, and the effective date of the agreement.[50] The Enforcement Staff cited several factors related to the size of the penalty involved, such as the size of the financial gains and losses that resulted from the conduct, the involvement of high-level company personnel, the conduct's duration for over 350 days, and the failure to self-report any of the conduct at issue.[51] JPMVEC neither admitted nor denied any of the violations stated in the agreement.[52]

2. Rumford Paper Co., Lincoln Paper and Tissue, LLC, Competitive Energy Services, LLC, and Richard Silkman

On March 22, 2013, the FERC approved a Stipulation and Consent Agreement with Rumford Paper Company (Rumford) that resolved an "investigation into whether Rumford engaged in fraudulent conduct related to ISO-New England, Inc.'s (ISO-NE) Day-Ahead Load Response Program (DALRP)."[53]

In concluding a four-year investigation, the FERC issued OSCs and Notices of Penalty on July 17, 2012 to Rumford, Lincoln Paper and Tissue, LLC (Lincoln), Competitive Energy Services, LLC (CES), and Richard Silkman.[54]

45. *J.P. Morgan Ventures Energy Corp.*, 140 F.E.R.C. ¶ 61,227, *order suspending market-based rate authority*, 141 F.E.R.C. ¶ 61,131 (2012), *order on clarification*, 142 F.E.R.C. ¶ 61,085 (2013).

46. 144 F.E.R.C. ¶ 61,068 at P 2.

47. *Id.* at P 4.

48. *Id.* at PP 51, 64.

49. *Id.* at PP 3, 85.

50. *Id.*

51. *Id.* at P 86.

52. *Id.* at PP 3, 65.

53. *Rumford Paper Co.*, 142 F.E.R.C. ¶ 61,218 at P 1 (2013).

54. *Richard Silkman*, 140 F.E.R.C. ¶ 61,033 (2012), *order assessing penalty*, 144 F.E.R.C. ¶ 61,164 (2013); *Competitive Energy Servs., LLC*, 140 F.E.R.C. ¶ 61,032 (2012), *order assessing penalty*, 144 F.E.R.C. ¶ 61,163 (2013) ; *Lincoln Paper & Tissue, LLC*, 140 F.E.R.C. ¶ 61,031 (2012), *order assessing penalty*, 144 F.E.R.C. ¶ 61,162 (2013); *Rumford Paper Co.*, 140 F.E.R.C. ¶ 61,030 (2012).

The Enforcement Staff alleged that Lincoln and Rumford, both paper mills, fraudulently inflated their energy consumption to receive payment from ISO-NE for "phantom load reductions" under the DALRP.[55] The Enforcement Staff further alleged that CES and Richard Silkman, a CES principal, developed the fraudulent scheme and proposed it to Rumford.[56]

Under the agreement, the Enforcement Staff concluded that Rumford violated the FERC's anti-manipulation rule by knowingly submitting to the ISO-NE "an inflated baseline that did not reflect Rumford's genuine load response capability."[57] Rumford neither admitted nor denied the alleged violations and agreed to a civil penalty of $10 million and disgorgement of over $2.8 million.[58] Rumford further agreed to implement compliance measures, including a commitment to produce an "initial compliance monitoring report one year following the [e]ffective [d]ate of [the a]greement."[59]

3. Deutsche Bank Energy Trading, LLC

On January 22, 2013, the FERC approved a Stipulation and Consent Agreement with Deutsche Bank Energy Trading, LLC (Deutsche Bank) to resolve an investigation into Deutsche Bank's trading conduct in the CAISO markets at the Silver Peak intertie during the time period January 29, 2010, through March 24, 2010.[60]

The Enforcement Staff, relying on a referral from the CAISO Department of Market Monitoring, conducted "a non-public, preliminary investigation of Deutsche Bank to determine whether it violated [FERC] regulations and the CAISO tariff."[61] Following the investigation, the FERC issued an OSC to Deutsche Bank on September 5, 2012.[62]

As a result of its investigation, the Enforcement Staff concluded that Deutsche Bank violated the anti-manipulation rule by engaging in cross-product manipulation.[63] When the CAISO de-rated the Silver Peak intertie in January 2010, import congestion caused Deutsche Bank to lose money on its Congestion Revenue Rights (CRR) position.[64] To negate its losses, Deutsche Bank implemented a strategy whereby it identified most of its physical exports as wheeling-through transactions, despite it not having a resource or a load outside the CAISO.[65] Deutsche Bank's wheel-through strategy (Export Strategy) allegedly "raised prices at [the intertie] and caused its CRR position to gain value."[66] Through implementation of its Export Strategy, Deutsche Bank allegedly violated the anti-manipulation rule by "trading in one product, physical

55. 140 F.E.R.C. ¶ 61,031 at P 2;140 F.E.R.C. ¶ 61,030 at P 2.
56. 140 F.E.R.C. ¶ 61,032 app. A at 1.
57. 142 F.E.R.C. ¶ 61,218 at P 28.
58. *Id.* at P 1.
59. *Id.* at PP 41-42.
60. *Deutsche Bank Energy Trading, LLC*, 142 F.E.R.C. ¶ 61,056 at PP 1, 3, 5 (2013).
61. *Id.* at P 4.
62. *Deutsche Bank Energy Trading, LLC*, 140 F.E.R.C. ¶ 61,178 (2012).
63. 142 F.E.R.C. ¶ 61,056 at P 18.
64. *Id.* at P 10.
65. *Id.* at PP 12, 14.
66. *Id.* at P 12; *see also* 2013 REPORT, *supra* note 1, at 7.

exports at Silver Peak, with the intent to benefit a second product, its CRR position at Silver Peak."[67] Furthermore, the Deutsche Bank allegedly "falsely designated many of its physical transactions as Wheeling-Through transactions" in violation of the accuracy requirements of the FERC's regulations and the identical provision of the CAISO tariff.[68]

Under the agreement, Deutsche Bank neither admitted nor denied the FERC's findings, but it agreed to pay a civil penalty of $1.5 million and disgorge unjust profits of $172,645 plus interest.[69] Additionally, Deutsche Bank agreed to implement additional compliance measures related to the trading of CRRs and other financial transmission rights.[70] The measures include additional training for traders and managers that focuses on adherence to market tariffs.[71] Lastly, Deutsche Bank must complete semi-annual compliance monitoring reports for one year following the Agreement's effective date.[72]

4. Constellation Energy Commodities Group (Exelon Corporation)

On October 18, 2013, the FERC approved a Stipulation and Consent Agreement with Exelon Corporation (Exelon)[73] relating to an alleged violation of 18 C.F.R. § 35.41(b) and a parallel provision of the CAISO tariff, section 37.5.1.[74] The agreement resolved a non-public, preliminary investigation into whether Constellation Energy Commodities Group (CECG) submitted bids and engaged in transactions falsely designated as wheeling-through transactions during the time period from January 22, 2010 through March 24, 2010.[75]

Per the agreement, Exelon admitted that CECG submitted transactions designated as wheeling-through transactions during the relevant time period.[76] Exelon further admitted that the designation as wheeling-through transactions violated 18 C.F.R. § 35.41(b) and the CAISO tariff.[77] Exelon agreed to pay a civil penalty of $500,000 and to disgorge $145,928 in unjust profits plus interest.[78] In determining an appropriate penalty recommendation, the Enforcement Staff considered the level of market interference resulting from CECG's conduct, as well as that "Exelon accepted responsibility for CECG's violations and avoided a trial-type hearing."[79] The Enforcement Staff gave

67. 142 F.E.R.C. ¶ 61,056 at P 5.

68. *Id.* at PP 14, 23 (citing 18 C.F.R. § 35.41(b) (2012)).

69. *Id.* at PP 2, 24.

70. *Id.* at PP 2, 24-25.

71. *Id.* at Stipulation & Consent Agreement at PP 27-28.

72. *Id.*

73. Constellation Energy Commodities Group (CECG) merged into an Exelon subsidiary, Exelon Generation, in the midst of FERC's investigation. *Exelon Corp.*, 138 F.E.R.C. ¶ 61,167 at PP 1, 17 & n.8 (2012).

74. *Constellation Energy Commodities Grp. Inc.*, 145 F.E.R.C. ¶ 61,062 at P 1 (2013).

75. *Id.* at P 3.

76. *Id.* at PP 1, 4.

77. *Id.* at P 5.

78. *Id.* at P 7.

79. *Id.* at P 8 (referencing the factors considered when assessing a civil penalty discussed in Enforcement of Statutes, Orders, Rules, and Regulations, 132 F.E.R.C. ¶ 61,216 at P 2 (2010)).

CECG no cooperation credit because it allegedly provided two incorrect assertions to the Enforcement Staff during the investigation.[80]

5. DTE Gas Company and Washington 10 Storage Corporation

On May 31, 2013, the FERC approved a Stipulation and Consent Agreement between Enforcement and DTE Gas Company (formerly Michigan Consolidated Gas Company) (DTE Gas) and Washington 10 Storage Corporation (Washington 10).[81] The Agreement resolved an investigation into whether DTE Gas engaged in flipping, in violation of FERC regulations, and whether Washington 10 violated section 311 of the Natural Gas Policy Act (NGPA), FERC regulations, and its Statement of Operating Conditions (SOC).[82]

Both DTE Gas and Washington 10, through parent company DTE Energy, self-reported to the Enforcement Staff that the companies had committed potential violations.[83] DTE Gas reported that it had engaged in fifty-four capacity release transactions "at less than the maximum rate without posting the releases for competitive bidding," in violation of the FERC's competitive bidding requirements.[84] Washington 10 reported that it "had misclassified eleven interstate short-term storage contracts as 'intrastate'" and that it had also "misclassified an unidentified number of [park-and-loan contracts (PAL)] as 'intrastate.'"[85]

The Enforcement Staff later "discovered that the information in the self-report was incomplete as there were a total of thirty-two misclassified storage contracts . . . and seventy-two misclassified PAL contracts" in violation of its interstate SOC.[86]

Both DTE Gas and Washington 10 admitted to committing violations in their agreement with the Enforcement Staff.[87] DTE Gas agreed to pay a civil penalty of $15,000 for its violation of 18 C.F.R. § 284.8(h)(2).[88] DTE Gas further agreed to implement additional compliance measures to monitor its capacity release transactions and to improve employee training.[89] In making a penalty recommendation, the Enforcement Staff considered the effects of DTE Gas's conduct on market transparency but also weighed the company's self-reporting, efforts at self-remediation, and cooperation with the Enforcement Staff's investigation in determining a penalty recommendation.[90] Notably, DTE Gas earned no profits from the capacity release transactions in violation of FERC requirements.[91]

80. *Id.* at PP 6, 8.

81. *DTE Gas Co.*, 143 F.E.R.C. ¶ 61,188 (2013). DTE Gas and Washington 10 are subsidiaries of DTE Energy. *Id.* at P 1.

82. *Id.* at P 1; *see also* 2013 REPORT, *supra* note 1, at 59.

83. 143 F.E.R.C. ¶ 61,188 at PP 4, 17.

84. *Id.* at Stipulation & Consent Agreement at P 2.

85. *Id.* at Stipulation & Consent Agreement at P 24.

86. *Id.* at P 17.

87. *Id.* at PP 2, 3.

88. *Id.* at PP 2, 11.

89. *Id.* at PP 2, 13.

90. *Id.* at PP 14-15.

91. *Id.* at P 7.

Also per the agreement, Washington 10 admitted that it violated its interstate SOC, which did not authorize Washington 10 to provide firm PAL service, and that it violated various FERC regulations which require fair and equitable rates, timely reporting of storage activity, and accurate disclosure of transportation arrangements.[92] Washington 10 agreed to pay a $725,000 civil penalty and to disgorge over $2.5 million in unjust profits plus interest in addition to implementing additional compliance and training measures.[93] In determining an appropriate penalty, the Enforcement Staff emphasized both Washington 10's self-reporting and efforts at self-remediation, as well as the seriousness of Washington 10's "overcharges to its customers" and resulting harm to the market.[94]

6. Progress Energy Florida, Inc.

On January 16, 2013, the FERC approved a Stipulation and Consent Agreement with Progress Energy Florida, Inc. (PEF) related to possible violations of Electronic Quarter Report (EQR) filing requirements and PEF's tariff.[95] The Enforcement Staff opened a non-public investigation of PEF upon referral from Enforcement's Division of Energy Market Oversight (DEMO) during its standard review of EQR filings.[96]

The Enforcement Staff concluded that PEF made eleven power sales in its geographic control area between 2004 and 2010 at prices that exceeded the maximum rate allowed by its tariff.[97] The Enforcement Staff further concluded that these power sales violated PEF's market-based and cost-based rate tariffs and that they violated section 35.1(e) of the FERC's regulations requiring PEF to abide by its tariffs.[98] Additionally, the Enforcement Staff found in its investigation that PEF incorrectly reported 1,300 cost-based transactions as market-based rate transactions in its EQRs between 2004 and 2010.[99] The transactions at issue were priced below the cost-based rate caps and involved power sold in PEF's control area.[100] Consequently, the sales should have been filed as cost-based transactions under EQR filing requirements found in 18 C.F.R. § 35.10(b).[101]

While PEF stipulated that it executed the transactions in question, PEF neither admitted nor denied that the transactions constitute violations of its tariff or FERC regulations.[102] Per the agreement, PEF agreed to pay a civil penalty of $80,000, to make refunds with interest, and to implement remedial measures and additional compliance monitoring.[103]

92. *Id.* at PP 1, 17-23.
93. *Id.* at P 3, Stipulation & Consent Agreement at P 25.
94. *Id.* at P 29.
95. *Progress Energy Fla., Inc.*, 142 F.E.R.C. ¶ 61,041 at PP 1, 3 (2013).
96. *Id.* at P 3.
97. *Id.* at P 4.
98. *Id.* at P 5.
99. *Id.* at P 6.
100. *Id.*
101. *Id.* at P 7.
102. *Id.* at PP 9-10.
103. *Id.* at Stipulation & Consent Agreement at PP 16-18.

In determining an appropriate penalty recommendation, the Enforcement Staff noted that PEF's violations, "though numerous, were not the product of a purposeful refusal to comply with the geographic limits of PEF's market-based rate authority, or with the Commission's EQR requirements."[104] Instead, the violations arose from a "lack of adequate training and familiarity with the Commission's requirements," a factor that Enforcement Staff considered in its penalty recommendation.[105]

7. Westar Energy, Inc.

On January 25, 2013, the FERC approved a Stipulation and Consent Agreement between Enforcement and Westar Energy, Inc. (Westar), resolving an investigation into "whether Westar committed violations of the open access transmission tariff (OATT) of Southwest Power Pool, Inc. (SPP)."[106]

Westar is an electric energy provider and transmission-owning member of SPP, a Regional Transmission Organization (RTO).[107] After investigating Westar for a twenty-month period, the Enforcement Staff concluded that Westar "violated section 28.6 of the SPP OATT, which prohibits the use of secondary network transmission service for purposes other than to serve network load."[108] In its investigation, Enforcement found that Westar made off-system, short-term purchases using secondary network integrated transmission service between July 2006 and February 2008.[109] Some of these purchases facilitated off-system sales and, per the SPP OATT, should have used point-to-point transmission (PTP) service.[110] The Enforcement Staff determined in its investigation that 823 of these violations occurred, resulting in unjust profits valued at $758,816 and net unpaid PTP charges of $395,020.[111]

Under the agreement, Westar neither admitted nor denied violating section 28.6 of the SPP OATT.[112] Westar agreed to pay a civil penalty of $420,000, to disgorge $758,816 in unjust profits to non-affiliated firm transmission customers, to disgorge $395,020 to SPP, and to submit a compliance report.[113] In making its penalty recommendation to the FERC, the Enforcement Staff emphasized that "there was no involvement or toleration of the violations by high-level personnel" and that Westar fully cooperated with the investigation without requesting a trial-type hearing.[114]

104. *Id.* at P 11.
105. *Id.*
106. *Westar Energy, Inc.*, 142 F.E.R.C. ¶ 61,066 at P 1 (2013).
107. *Id.* at P 2.
108. *Id.* at PP 3-4.
109. *Id.*
110. *Id.* at P 4.
111. *Id.* at P 5.
112. *Id.* at P 8.
113. *Id.*
114. *Id.* at P 10.

8. Oceanside Power, LLC and Robert Scavo

On February 1, 2013, the FERC approved a Stipulation and Consent Agreement with Oceanside Power, LLC (Oceanside) and its principal trader, Robert Scavo, regarding whether Oceanside and Scavo violated the FERC's anti-manipulation rule.[115]

In 2010, PJM observed a suspicious volume of non-firm point-to-point transmission reservations, where the potential for profit was minimal, but the market participants were still entitled to receive a distribution of the Marginal Loss Surplus Allocation (MLSA).[116] Following PJM's request, the Enforcement Staff initiated an investigation into this conduct in August 2010.[117]

Through its investigation, the Enforcement Staff determined that trader Robert Scavo, on behalf of Oceanside, made a series of Up To Congestion transactions at the "South Imp" and "South Exp" node pair in PJM that were not legitimate transactions during the time between July 29, 2010, and August 4, 2010.[118] Even though Oceanside lost $29,450 in its transactions, the company received a credit of $59,012 from PJM pursuant to the MLSA.[119] Thus, Oceanside earned a net profit of $29,563 as a result of the Up to Congestion transactions. The trades purportedly "served as a means to artificially inflate Oceanside's share of the MLSA and thereby pay Oceanside based on trading volume."[120]

Under the agreement resolving the above investigation, Oceanside and Scavo neither admitted nor denied violating the FERC's anti-manipulation rule.[121] Oceanside agreed to disgorge $29,563 plus interest, pay a civil penalty of $51,000, and train all of its personnel in compliance measures.[122] Lastly, Scavo agreed not to trade in FERC-regulated electric markets, or in any products based in the price of electricity, for a one-year period following the date of the agreement.[123]

9. Entergy Services, Inc.

On March 28, 2013, the FERC approved a Stipulation and Consent Agreement between Enforcement and Entergy Services, Inc. (Entergy), resolving an investigation into whether Entergy violated Reliability Standards associated with Entergy's involvement in the bulk power system (BPS).[124]

Enforcement's Division of Audits and Accounting (DAA) encountered reliability concerns while conducting an audit of Entergy.[125] Upon referral from the DAA, the Division of Investigations (DOI) initiated a non-public

115. *PJM Up-To Congestion Transactions*, 142 F.E.R.C. ¶ 61,088 at PP 1-2 (2013).
116. *Id.* at P 6.
117. *Id.* at PP 6-7.
118. *Id.* at P 8; *see also* 2013 REPORT, *supra* note 1, at 12.
119. 142 F.E.R.C. ¶ 61,088 at P 10.
120. 2013 REPORT, *supra* note 1, at 12.
121. 142 F.E.R.C. ¶ 61,088 at P 12.
122. *Id.* at PP 1, 12.
123. *Id.* at P 12.
124. *Entergy Servs., Inc.*, 142 F.E.R.C. ¶ 61,241 at P 1 (2013).
125. 2013 REPORT, *supra* note 1, at 12.

investigation into whether Entergy had violated Reliability Standards within five areas: "1) protection system maintenance; 2) facility ratings; 3) system modeling; 4) operator qualification; and 5) communications systems."[126]

"After conducting its investigation, Enforcement Staff determined that Entergy violated twenty-seven [r]equirements of fifteen [r]eliability [s]tandards related to the five categories listed above."[127] The Enforcement Staff also concluded that these violations are "serious deficiencies undermining [the] reliable operation of Entergy's portion of the BPS."[128] Under the agreement resolving the Enforcement Staff's investigation, Entergy neither admitted nor denied the violations but agreed to pay a civil penalty of $975,000.[129] Additionally, the FERC highlighted Entergy's "history of past violations of the Reliability Standards" in approving a series of additional mitigation measures and compliance monitoring procedures.[130] These measures include improved training for employees, development of a facility ratings methodology, and a commitment to "using Light Detection and Ranging (LiDAR) technology to map the 13,669 miles of transmission lines Entergy operates at 100 [kilovolts (kV)] or above."[131]

10. Seneca Falls Power Corporation

On April 23, 2013, the FERC approved a Stipulation and Consent Agreement with Seneca Falls Power Corporation (SFPC) resolving an investigation into potential non-compliance with its hydropower license.[132]

SFPC owns and operates two hydroelectric facilities under project license P-2438.[133] In 2009, the FERC's Office of Energy Projects issued a compliance order, referring SFPC to Enforcement for an investigation of its failure to comply with SFPC's project license.[134] In its investigation, the Enforcement Staff determined that SFPC violated six license provisions "by failing to obtain adequate property rights, to monitor wetlands, to construct fish passages, to construct a recreational facility, and to properly monitor or maintain lake-level elevations."[135]

Under its agreement with Enforcement, SFPC neither admitted nor denied violating any provisions of its hydropower license.[136] SFPC agreed to pay a civil penalty of $150,000, as well as to invest $300,000 in certain project enhancements, such as the installation of automatic water leveling equipment and an automatic trash rake.[137]

126. *Id.*; 142 F.E.R.C. ¶ 61,241 at P 6.
127. 142 F.E.R.C. ¶ 61,241 at P 7.
128. *Id.*
129. *Id.* at PP 1, 19.
130. *Id.* at P 22.
131. *Id.* at P 21.
132. *Seneca Falls Power Corp.*, 143 F.E.R.C. ¶ 61,063 at P 1 (2013).
133. *Id.* at P 3.
134. *Id.*
135. 2013 REPORT, *supra* note 1, at 12; 143 F.E.R.C. ¶ 61,063 at PP 6-10.
136. 143 F.E.R.C. ¶ 61,063 at PP 2, 5.
137. *Id.* at Stipulation & Consent Agreement at 21-22.

11. Enerwise Global Technologies, Inc.

On June 7, 2013, the FERC approved a Stipulation and Consent Agreement with Enerwise Global Technologies, Inc. (Enerwise) resolving an investigation into potential violations of the PJM Tariff and of the anti-manipulation rule.[138]

After receiving a referral from PJM, the Enforcement Staff initiated an investigation into Enerwise's registration of one of its customers, the Maryland Stadium Authority (MSA), for a commitment in PJM's Interruptible Load for Reliability (ILR) program for the 2009-2010 year.[139] The Enforcement Staff determined that Enerwise registered MSA for a 4.6 megawatt (MW) commitment in the program despite knowing that MSA could not achieve the load reduction amount.[140] Further, Enerwise failed to make the necessary repairs "to ensure that the MSA generators would not trip when operated simultaneously."[141] Enforcement also concluded that Enerwise violated FERC's anti-manipulation rule when it misrepresented MSA's ability to meet demand response and the functionality of MSA's back-up generators in a test event on August 18, 2009.[142]

Enerwise neither admitted nor denied that it violated the FERC's anti-manipulation rule or the PJM Tariff,[143] but agreed to pay a civil penalty of $780,000, disgorge $20,726 plus interest, contribute $500,000 in demand response improvements for PJM customers during 2013, implement an additional compliance program, and complete additional compliance monitoring.[144]

In determining its penalty assessment, Enforcement considered, among several factors, that "Enerwise had no prior history of such violations," that it "caused less than $200,000 of market harm," and that a "member of senior management was involved in the violations."[145] Notably, the FERC also mentioned in its order approving of the settlement that MSA did otherwise meet demand response during three emergency events in 2010.[146]

12. Southwest Power Pool, Inc.

On July 10, 2013, the FERC approved a Stipulation and Consent Agreement between Enforcement, staff of the North American Electric Reliability Cooperation (NERC), and SPP.[147] The Agreement resolved an investigation into whether SPP had violated Reliability Standards when it served in its capacity as a Reliability Coordinator (RC).[148]

138. *Enerwise Global Techs., Inc.*, 143 F.E.R.C. ¶ 61,218 at P 1 (2013).
139. *Id.* at P 4.
140. *Id.* at PP 5-6.
141. *Id.* at P 5.
142. *Id.* at P 6.
143. *Id.* at P 9.
144. *Id.* at P 10.
145. *Id.* at P 12.
146. *Id.* at P 6.
147. *Southwest Power Pool, Inc.*, 144 F.E.R.C. ¶ 61,019 at P 1 (2013).
148. *Id.* at PP 3, 5.

Through a 2008 audit of SPP, FERC Enforcement and NERC learned that an event in December 2007 impaired SPP's performance as an RC.[149] As a result of a firewall configuration change, SPP lost all communications and visibility for a period of time on December 26, 2007.[150] The Enforcement Staff conducted a non-public investigation into whether SPP had failed to comply with Reliability Standards regarding the event.[151] The Enforcement Staff determined that SPP had not followed its own emergency procedures, such as notifying neighboring RCs and NERC of the emergency, and that this violation "posed a risk that no RC had the immediate visibility and situational awareness necessary to respond to an emergency condition" in sufficient time.[152]

In resolving the investigation, SPP agreed to pay a $50,000 civil penalty, half of which will be paid to NERC, in addition to implementing additional mitigation and compliance measures.[153] In determining its penalty recommendation, the Enforcement Staff gave considerable attention to the "significant efforts" that SPP has made to address reliability concerns arising from the investigation.[154] SPP neither admitted nor denied that it had committed any violations related to the incident.[155]

13. Enterprise Texas Pipeline LLC

On August 26, 2013, the FERC approved a Stipulation and Consent Agreement with Enterprise Texas Pipeline LLC (Enterprise Texas) regarding potential violations of section 311 of the NGPA and FERC regulation 18 C.F.R. § 284.123.[156]

The Enforcement Staff's investigation of Enterprise Texas arose from a self-report from the company in September 2012.[157] Enterprise Texas discovered that it had been charging shippers an unauthorized Title Transfer Tracking (TTT) fee for over seven years, but the fee had never been included in its SOC filed with the FERC.[158] Enterprise Texas explained to the Enforcement Staff that a former owner of the company had instituted the TTT fee and that Enterprise had failed to determine whether the fee was in compliance with FERC regulations.[159]

In the Stipulation and Consent Agreement, the Enforcement Staff concluded that Enterprise Texas violated section 311 of the NGPA when the company, as an interstate pipeline, did not seek FERC authorization to charge the TTT fee.[160] Additionally, Enforcement concluded that Enterprise Texas violated section 284.123(b)(2) of the FERC's regulations, which require all

149. *Id.* at P 5; 2013 REPORT, *supra* note 1, at 13.
150. 144 F.E.R.C. ¶ 61,019 at PP 5, 8.
151. *Id.* at P 6.
152. *Id.* at PP 13, 18.
153. *Id.* at PP 1, 15-16.
154. *Id.* at P 17.
155. *Id.* at P 15.
156. *Enterprise Tex. Pipeline LLC*, 144 F.E.R.C. ¶ 61,156 at P 1 (2013).
157. *Id.* at P 4.
158. *Id.* at PP 4-5.
159. *Id.* at P 5.
160. *Id.* at Stipulation & Consent Agreement at P 6.

NGPA pipelines to seek FERC approval of their proposed rates and charges by filing a SOC with the FERC.[161] The Enforcement Staff determined that Enterprise Texas improperly collected over $7 million in unauthorized TTT fees over a period of almost eight years.[162]

Enterprise Texas neither confirmed nor denied that it violated the NGPA or FERC regulations, but it agreed to pay a civil penalty of $315,000, which the company will not pass on to current or future customers.[163] Enterprise Texas has already refunded its customers with respect to the $7 million in unauthorized fees, plus interest.[164] In making its penalty recommendation, the Enforcement Staff noted that it did not find any evidence that Enterprise Texas acted with the intent to misrepresent the TTT fees to either its customers or to the FERC.[165]

F. Updates

1. Constellation Energy Commodities Group

As noted in last year's report, the FERC approved a Stipulation and Consent Agreement between Enforcement and the CECG that resolved two investigations concerning CECG's trading behavior in the day-ahead markets of ISO-NE and the New York Independent System Operator (NYISO) that required CECG to pay $135 million in civil penalties and to disgorge $110 million of unjust profits.[166] Of the disgorgement funds, $104 million was to be invested into a fund for electric consumers in states within the NYISO, ISO-NE, and PJM markets.[167] The last $6 million of the disgorgement fund was to be divided equally among the NYISO, ISO-NE, PJM, MISO, SPP, and CAISO, so that the six RTOs/Independent System Operators (ISOs) could enhance their market surveillance capabilities.[168]

In 2013, the Enforcement Staff participated in a proceeding before Deputy Chief ALJ Bobbie McCartney to finalize the distribution of disgorged funds arising from the settlement.[169] Judge McCartney issued a final report on May 22, 2013, describing the apportionment process.[170] The final report detailed the approval process involving the various state agencies that were to receive funds, as well as the agencies' proposed applications and purposes for the funds per market and per state.[171] Disbursement of the disgorged funds began in November 2012, and the final disbursement was completed in June 2013.[172]

161. *Id.* at Stipulation & Consent Agreement at P 7.

162. *Id.* at P 5.

163. *Id.* at PP 2, 10.

164. *Id.* at P 10.

165. *Id.* at P 12.

166. *Constellation Energy Commodities Grp., Inc.*, 138 F.E.R.C. ¶ 61,168 at PP 1, 22 (2012), *reh'g denied*, 145 F.E.R.C. ¶ 61,203 (2013).

167. *Id.* at P 22.

168. *Id.*

169. 2013 REPORT, *supra* note 1, at 7.

170. *Constellation Energy Commodities Grp., Inc.*, 143 F.E.R.C. ¶ 63,008 (2013) (final report).

171. *Id.*

172. 2013 REPORT, *supra* note 1, at 7.

II. THE U.S. COMMODITY FUTURES TRADING COMMISSION

A. Energy-Related Enforcement Cases

The CFTC concluded one energy commodity enforcement matter in 2013 in *Panther Energy Trading LLC*.[173] This was the first disruptive trading practice case under the prohibition added by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[174] Also of note during 2013, the CFTC began using section 6(c)(2) of the Commodity Exchange Act, which prohibits false or misleading statements of material fact to the CFTC and false statements made to the CFTC Staff during enforcement investigations.[175] This is another provision that was added by the Dodd-Frank Act.[176] Although the first cases using this prohibition on false statements were outside the energy sector, this is a development that will be relevant in energy sector cases.

1. Panther Energy Trading LLC (Disruptive Trade Practice)

The CFTC issued an order initiating and simultaneously settling an investigation of Panther Energy Trading LLC and its sole owner, Michael J. Coscia, concerning the disruptive trading practice called "spoofing" in connection with eighteen futures contracts involving a number of commodities, including light sweet crude oil and natural gas.[177] In addition to other prohibited trading practices, section 4c(a)(5) of the Commodity Exchange Act prohibits trading that "is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)."[178] The order found that from August 2011 to October 2011, the Respondents used an algorithmic trading program to rapidly place bids and offers on Globex, an electronic trading platform, with the intent of canceling those bids or offers prior to execution.[179] The CFTC found that the trading program was designed to give the market "the impression of market interest on [one] side of the market . . . to increase the likelihood that [the Respondents'] smaller orders . . . on the opposite side of the market would be filled."[180] The use of the spoofing algorithm was found to have netted profits of approximately $1.4 million.[181] The CFTC imposed a civil penalty of $1.4 million, trading bans of one year, and required the disgorgement of the $1.4 million net profit.[182]

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173. Panther Energy Trading LLC, Docket No. 13-26 (CFTC July 22, 2013).

174. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered sections of 7, 12, 15, 18, 22, 31 & 42 U.S.C.).

175. Commodities Exchange Act § 6(c)(2), 7 U.S.C. § 9(2) (2012).

176. Dodd-Frank Act § 753.

177. *Panther Energy*, Docket No. 13-26, slip op. at 2.

178. 7 U.S.C. § 6c(a)(5)(C).

179. *Panther Energy*, Docket No. 13-26, slip op. at 2.

180. *Id.* at 3.

181. *Id.*

182. *Id.* at 6-7.

2. False Statements

On September 16, 2013, the CFTC issued an order simultaneously initiating and settling proceedings against Susan Butterfield, a back-office employee of an introducing broker who falsely testified during a CFTC deposition.[183] During a CFTC Staff investigation of the practices of Butterfield's employer for documenting customer orders, Butterfield was subpoenaed to provide testimony.[184] The order reports that she repeatedly testified that she never pre-stamped order tickets, a practice that may violate the CFTC and Chicago Board of Trade rules because it may facilitate unlawful trade allocations enabling brokers to profit at their customers' expense.[185] Later in the day, Butterfield admitted to pre-stamping order tickets after she was shown documents that contradicted her earlier testimony.[186] The CFTC found this to be a violation of section 6(c)(2) of the Commodity Exchange Act, which makes it unlawful to make false or misleading statements of material fact to the CFTC.[187] Butterfield was assessed a civil penalty of $50,000.[188]

The CFTC also added similar false statement claims to some of its other enforcement cases in 2013. For example, midway through the year it amended a complaint in an existing fraud case concerning Arista LLC to add an allegation that the defendants had misrepresented certain financial information in a letter to the CFTC's Division of Investigation during an investigation.[189] The case was subsequently settled with significant civil penalties and a permanent trading ban on the principals involved.[190]

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

1. Update on Implementation

Throughout 2013, the CFTC continued to issue rules implementing the Dodd-Frank Act as well as interpretive guidance and no-action letters. Of relevance to the energy sector from a compliance and enforcement perspective were the issuance of final orders granting exemptions applicable to (i) the markets operated by RTOs or ISOs, (ii) government and cooperatively owned electric utilities, and (iii) swaps between certain affiliated entities within a

183. Butterfield, Docket No. 13-33 (CFTC Sept. 16, 2013).

184. *Id.* at 2.

185. *Id*. at 2-3.

186. *Id.* at 3.

187. *Id.* at 4; Commodity Exchange Act § 6(c)(2), 7 U.S.C. § 9(2) (2012) ("It shall be unlawful for any person to make any false or misleading statement of a material fact to the Commission . . . or to omit to state in any such statement any material fact that is necessary to make any statement of a material fact made not misleading in any material respect, if the person knew, or reasonably should have known, the statement to be false or misleading.").

188. *Butterfield*, Docket No. 13-33, slip op. at 5.

189. Amended Complaint for Injunctive and Other Equitable Relief and Civil Monetary Penalties, CFTC v. Arista LLC, No. 12-CV-9043 (S.D.N.Y. May 28, 2013).

190. *Arista*, No. 12-CV-9043, slip op. at 28-29, 35 (S.D.N.Y. Dec. 3, 2013) (imposing $6.45 million civil penalty on Defendant Abdul Sultan Walji, $5.925 million civil penalty on Defendant Reniero Francisco, and a $1.54 million civil penalty on Arista LLC).

corporate group.[191] In addition, the CFTC issued interpretative guidance and a policy statement on its antidisruptive practices authority and also proposed new rules establishing speculative position limits.[192]

2. RTO/ISO Exemption Final Order

On March 28, 2013, the CFTC issued a final order on the petition filed by RTOs and ISOs under section 4(c)(6) of the Commodity Exchange Act for an exemption from swap regulation.[193] The exemption applies to the RTOs and ISOs, the market participants in their markets trading the covered products, and others providing advice or services in connection with those transactions.[194] Covered products are (i) financial transmission rights; (ii) energy transactions in the day-ahead and real-time market of the RTO or ISO; (iii) forward capacity transactions for generation capacity, demand response, or energy efficiency; and (iv) reserve or regulation transactions.[195] The order includes definitions of the relevant characteristics of these products and permits the exemption to apply to new products that are consistent with the terms of the order.[196]

The exemption is limited to transactions by appropriate persons, as defined in the order.[197] As a result, each RTO or ISO must limit the market participants that can participate in its market.[198] An entity is an appropriate person if it can satisfy one of the following: (i) net worth of $1 million; (ii) total assets of $5 million; (iii) credit support from another entity that qualifies as an appropriate person; (iv) is a governmental entity; (v) is an eligible contract participant as defined in Commodity Exchange Act section 1a(18)(A); or (vi) is in the business of generating, transmitting or distributing electric energy or providing energy services that support reliability for the transmission system, such as demand response providers.[199] The transactions must be pursuant to the RTO or ISO's tariff approved by the FERC or the Public Utility Commission of Texas.[200] Each of the petitioning RTOs and ISOs must comply with CFTC informational requests, including those that may be made through the FERC under an information sharing memorandum of understanding, and the tariffs cannot require disclosure to the market participant of an information request from the CFTC.[201] An RTO or ISO has to provide the CFTC with a legal opinion or memorandum of outside counsel providing the CFTC assurance that the netting arrangements used to comply with FERC regulatory requirements provide the

191. *Infra* Parts II(B)(2)-(4).

192. *Infra* Parts II(B)(5)-(6).

193. Final Order in Response to a Petition from Certain ISOs and RTOs to Exempt Specified Transactions, 78 Fed. Reg. 19,880 (CFTC Apr. 2, 2013). The petitioning entities were the CAISO, the Electric Reliability Council of Texas, ISO-NE, PJM, MISO, and the NYISO.

194. *Id.* at 19,912-13.

195. *Id.* at 19,912-14.

196. *Id.* at 19,885, 19,913-14.

197. *Id.* at 19,913.

198. *Id.* at 19,889.

199. *Id.* at 19,899, 19,913; *see also* Commodity Exchange Act, 7 U.S.C. § 6(c)(3)(A)-(K) (2012).

200. *Id.* at 19,913.

201. *Id.*

RTO or ISO with enforceable set-off rights in bankruptcy.[202] The CFTC retained its general anti-fraud and anti-manipulation authority as well as certain scienter-based prohibitions with respect to the exempt transactions.[203]

3. Government and Cooperatively Owned Electric Utility Exemption

On March 28, 2013, the CFTC issued a final order granting an exemption from the Commodity Exchange Act for Exempt Non-Financial transactions between government-owned electric utilities, electric facilities or utilities wholly owned by an Indian tribe, and any electric facility or utility owned by a cooperative.[204] Exempt Non-Financial transactions are commodity transactions to manage supply and/or price risk of the electric utility business.[205] The order specifically excludes transactions concerning interest rates, credit, equities, currency, metal, agricultural products, and oil or gasoline not used as fuel for electric generation.[206] The CFTC reserved its anti-fraud and anti-manipulation enforcement authority as well as its ability to inspect books and records.[207]

4. Clearing Exemption for Swaps Between Certain Affiliated Entities

The CFTC finalized its rule providing an exemption from the clearing requirement for inter-affiliate transactions if various conditions are fulfilled.[208] The inter-affiliate exemption is available if one party to the swap directly or indirectly holds a majority ownership interest in the other and prepares financial statements for both parties on a consolidated basis.[209] Alternatively, if the two counterparties are under common control, the exemption is available if the company with the majority control of both prepares consolidated financial statements that include the two subsidiaries.[210] The swap must be subject to a centralized risk management program for monitoring and managing risks associated with the swap.[211] If one affiliate engages in a related swap with an unaffiliated entity (such as a back-to-back swap with a financial institution), the affiliate must either engage in the swap on a cleared basis or choose not to have the swap cleared, for example, under the end-user exception.[212] Other conditions apply to the election to use the inter-affiliate transaction exemption, and there is a reporting requirement.[213] This exemption is available for inter-affiliate

202. *Id.* at 19,914.

203. *Id.* at 19,912.

204. Order Exempting Certain Transactions Between Entities Described in the Federal Power Act, and Other Electric Cooperatives, 78 Fed. Reg. 19,670 (CFTC Apr. 2, 2013).

205. *Id.* at 19,675.

206. *Id.* at 19,682 n.140.

207. *Id.* at 19,684.

208. Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 Fed. Reg. 21,750 (2013) (to be codified at 17 C.F.R. pt. 50).

209. *Id.* at 21,783.

210. *Id.*

211. *Id.*

212. *Id.* at 21,750 n.3, 21,752 (referencing the end-user exception of section 2(h)(7) of the Commodity Exchange Act, 7 U.S.C. § 2(h)(7) (2012)).

213. *Id.* at 21,767-69, 21,784.

transactions between financial entities that are not eligible for the end-user exception.[214]

Separately, the CFTC Staff issued a no-action letter providing relief from reporting requirements for affiliates in the same corporate group (intra-group swaps) if the parties are not affiliated with a swap dealer or major swap participant and are eligible for the end-user exception.[215] The relief granted is different for wholly-owned and majority-owned affiliates, with an exemption provided for the wholly-owned affiliates and less frequent reporting for majority-owned affiliates.[216]

5. Antidisruptive Practices Authority Interpretative Guidance and Policy Statement

The CFTC issued final interpretative guidance and a policy statement concerning disruptive practices.[217] The interpretative statement is intended to provide guidance as to how the CFTC intends to apply the statutory prohibitions in new Commodity Exchange Act section 4c(a)(5) prohibiting disruptive practices in futures markets or on swap execution facilities.[218] New section 4c(a)(5) declares it unlawful to engage in any trading that,

> (A) violates bids or offers;
> (B) demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or
> (C) is, is of the character of, or is commonly known to the trade as, "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution).[219]

The interpretative statement provides important guidance as to the CFTC's view of the intent required to establish a violation of these provisions. The CFTC specifically declined requests to read a manipulative intent requirement into these provisions, stating that it views these provisions to be distinct from the anti-manipulation provisions of the Commodity Exchange Act.[220] However, the CFTC applies different standards of scienter to each of the prohibited practices. It applies a per se standard to the violation of bids and offers, so that no intent is required.[221] Consistent with the language of the orderly execution provision, reckless disregard is the level of scienter that will establish a violation of that

214. *Id.* at 21,770 n.105.

215. DIV. OF CLEARING & RISK, COMMODITY FUTURES TRADING COMM'N, CFTC LETTER NO. 13-09, NO-ACTION RELIEF FOR SWAPS BETWEEN AFFILIATED COUNTERPARTIES THAT ARE NEITHER SWAP DEALERS NOR MAJOR SWAP PARTICIPANTS FROM CERTAIN SWAP DATA REPORTING REQUIREMENTS UNDER PARTS 45, 46, AND REGULATION 50.50(B) OF THE COMMISSION'S REGULATIONS (2013), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-09.pdf.

216. *Id.* at 4-7.

217. Antidisruptive Practices Authority, 78 Fed. Reg. 31,890 (CFTC May 28, 2013) (interpretive guidance and policy statement).

218. *Id.* at 31,890.

219. 7 U.S.C. § 6c(a)(5) (2012).

220. 78 Fed. Reg. at 31,892.

221. *Id.* at 31,893; 7 U.S.C. § 6c(a)(5)(A).

provision.[222] With respect to spoofing, proof of specific intent to engage in the conduct is required.[223]

6. Proposed Rule on Position Limits

Towards the end of 2013, the CFTC proposed a new rule to establish speculative position limits to apply to twenty-eight futures contracts for physical commodities, including four energy contracts, and economically equivalent futures, options, and swaps.[224] The CFTC's first attempt to impose speculative position limits under the Dodd-Frank Act was vacated and remanded in 2012 on the grounds that the agency was required to make a finding that such position limits were necessary but the agency had failed to do so.[225] In issuing the new proposed position limits rule, the CFTC continued to take the position that the establishment of position limits is mandated by the statute, but to remedy the flaw identified by the court, the CFTC also included a finding that such limits are necessary to curb excessive speculation.[226] The proposed position limits rule was also accompanied by a separate proposed rule to amend the aggregation standards applicable to position limits.[227] Both of these proposed rules are similar to earlier CFTC proposals for futures, options, and swaps position limits that failed to go into effect because of the court's decision.

The proposed rules would establish speculative position limits for twenty-eight core referenced futures contracts, as well as futures, options and swaps that are economically equivalent to such contracts (collectively, the referenced contracts).[228] The energy futures contracts included in the proposal are the NYMEX Henry Hub Natural Gas (NG) contract, the NYMEX Light Sweet Crude Oil (CL) contract, the NYMEX RBOB Gasoline (RB) contract, and the NYMEX NY Harbor ULSD (HO) contract.[229] Specifically excluded from the proposed definition of a referenced contract are a guarantee of a swap, a basis contract, and a commodity index contract.[230] The proposed rules list spot-month, single-month, and all-months-combined position limits for the referenced contracts.[231] Economically equivalent contracts subject to the proposed limits would include those directly or indirectly linked to or priced at a fixed differential to the price of a referenced contract or the price of the same commodity to be delivered at the same location or locations as a referenced contract.[232]

The proposed rules limit the bona fide hedging exemption to certain enumerated hedges, including hedges of inventory and cash commodity purchase

222. 78 Fed. Reg. at 31,895; 7 U.S.C. § 6c(a)(5)(B).

223. 78 Fed. Reg. at 31,896; 7 U.S.C. § 6c(a)(5)(C).

224. Position Limits for Derivatives, 78 Fed. Reg. 75,680 (CFTC proposed Dec. 12, 2013).

225. *Id.* at 75,682 (discussing International Swaps & Derivatives Ass'n v. CFTC, 887 F. Supp. 2d 259 (D.D.C. 2012)).

226. *Id.* at 75,682-83.

227. Aggregation of Positions, 78 Fed. Reg. 68,946 (CFTC proposed Nov. 15, 2013).

228. 78 Fed. Reg. at 75,725.

229. *Id.* at 75.725 & n.396.

230. *Id.* at 75.765 n.753.

231. *E.g.*, *id.* at 75,731 tbl.11.

232. *Id.* at 75,723 n.378.

contracts, of cash commodity sales contracts, of unfilled anticipated requirements, by agents, of unsold anticipated production, of offsetting unfixed-price cash commodity sales and purchases, of anticipated royalties, of services, and cross-commodity hedges.[233] Various limitations are proposed to apply to some of these enumerated hedges.[234] Additional exemptions were proposed for financial distress positions, pre-enactment and transition period swaps, and a conditional spot-month limit exemption up to five times the applicable level if the trader does not hold or control spot-month physical-delivery contracts in the same referenced contract.[235] The CFTC requested comment whether trade options, which are exempt from the swap clearing requirements, should be exempt from the position limits also.[236]

With respect to the proposed aggregation rules, the CFTC proposed to continue to require the aggregation of all positions a person controls or holds a 10% or greater ownership interest with certain defined exemptions.[237] Among the proposed exemptions were an exemption for persons with an ownership or equity interest no greater than 50% in an entity that trades independently and an exemption when the sharing of information between the person and the owned entity creates a reasonable risk that either could violate state, federal, or foreign law.[238] Eligibility for both of these exemptions would require prior notice to be given to the CFTC.[239]

III. THE PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION

The federal pipeline safety laws provide the U.S. Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) with the authority to establish and enforce minimum federal safety standards for gas and hazardous liquid pipelines and liquefied natural gas (LNG) facilities.[240] Those safety standards, which are codified in 49 C.F.R. parts 190 to 199, apply to most pipelines and LNG facilities in the United States, and they are the only safety standards that apply to interstate pipeline facilities.[241]

A. Pipeline Safety Rulemakings

1. Final Rule Amending Pipeline Safety Enforcement Procedures, Docket No. PHMSA-2012-0102

On September 25, 2013, the PHMSA published a final rule amending its administrative procedures for the pipeline safety program.[242] The amendments,

233. *Id.* at 75,712 tbl.4.

234. *Id.* at 75,712-17.

235. *Id.* at 75,829-30.

236. *Id.* at 75,711.

237. Aggregation of Positions, 78 Fed. Reg. 68,946, 68,946 (CFTC proposed Nov. 15, 2013).

238. *Id.* at 68,947

239. *Id.* at 68,977-78.

240. 49 U.S.C. §§ 60101-60140 (2012).

241. 49 C.F.R. pts. 190-199 (2013).

242. Pipeline Safety: Administrative Procedures; Updates and Technical Corrections, 78 Fed. Reg. 58,897 (Dep't of Transp. Sept. 25, 2013) (to be codified at 49 C.F.R. pts. 190, 192, 193, 195 & 199). For additional information on the history of this rulemaking proceeding, see generally Pipeline Safety:

which became effective on October 25, 2013, are primarily intended to satisfy certain mandates in the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Pipeline Safety Act), the most recent reauthorization of the federal pipeline safety laws.[243]

Specifically, the Pipeline Safety Act directed the PHMSA to reform its administrative enforcement process by issuing regulations that (1) require hearings to be convened before a "presiding official," a term defined by statute as "an attorney on the staff of the Deputy Chief Counsel . . . [who] is not engaged in investigative or prosecutorial functions;" (2) ensure the expedited review of corrective action orders (CAOs) in cases where a pipeline facility is deemed to be hazardous to life, property, or the environment; (3) create a separation of functions between agency personnel who perform investigatory and prosecutorial duties and those who are responsible for deciding the final outcome of cases; and (4) prohibit ex parte communications with those decision-makers.[244]

In addition, the Pipeline Safety Act doubled the maximum amount of administrative civil penalties that the PHMSA can impose in federal enforcement actions to $200,000 per day, per violation, not to exceed $2,000,000 for any related series of violations,[245] and provided the PHMSA with additional authority to enforce the onshore facility response plan requirements in the Oil Pollution Act of 1990.[246] Finally, the Pipeline Safety Act included a judicial review provision that gives the U.S. courts of appeal jurisdiction to hear challenges to the PHMSA's orders and other final agency actions.[247]

The PHMSA's September 2013 final rule addressed each of these issues. Of particular significance, the PHMSA (1) established a new provision that allows for the imposition of administrative civil penalties on any person who obstructs the conduct of a pipeline safety investigation or inspection;[248] (2) adopted a new regulation that specifies the materials to be provided in the case file for an enforcement action, including the Regional Director's recommendation for the disposition of the matters presented in a case;[249] (3) created a requirement that implements the Pipeline Safety Act's mandates relating to the separation of functions and prohibitions on ex parte communications;[250] (4) extended its enforcement proceedings to alleged violations of the onshore facility response plan requirements in the Oil Pollution Act of 1990;[251] (5) promulgated a regulation that describes the presiding

Administrative Procedures; Updates and Technical Corrections, 77 Fed. Reg. 48,112 (Dep't of Transp. proposed Aug. 13, 2012) (to be codified at 49 C.F.R. pts. 190, 192, 193, 195 & 199).

243. 78 Fed. Reg. at 58,897; Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, 125 Stat. 1904 (codified at 49 U.S.C. §§ 6010-60140).

244. Pipeline Safety Act § 20, 49 U.S.C. § 60117.

245. *Id*. § 2(a)(1), 49 U.S.C. § 60122(a).

246. *Id*. § 10, 33 U.S.C. § 1321(m)(2) (2012).

247. *Id*. § 2(d), 49 U.S.C. § 60119.

248. 78 Fed. Reg. at 58,899, 58,909.

249. *Id*. at 58,900, 58,910-11.

250. *Id*. at 58,901, 58,911.

251. *Id*. at 58,899, 58,908-09, 58,912.

official's powers and duties in the PHMSA's enforcement proceedings;[252] (6) increased the maximum administrative civil penalties that can be imposed for pipeline safety violations to the new, higher amounts specified in the Pipeline Safety Act, but only for violations that occur after January 3, 2012, the effective date of the Pipeline Safety Act;[253] and (7) amended the regulation that applies to the issuance of CAOs in cases involving pipeline facilities that are hazardous to life, property, or the environment.[254]

Although industry groups submitted comments calling for additional changes to the enforcement process, the PHMSA declined to adopt most of these proposals in its September 2013 final rule. Among other things, the PHMSA refused to provide pipeline operators with a copy of the presiding official's recommended decision to the Associate Administrator in enforcement cases;[255] to establish specific timelines and deadlines for the issuance of final orders;[256] to provide additional information on the calculation of civil penalties;[257] or to modify its proposal for ensuring the "expedited review" of CAOs.[258]

B. Administrative Enforcement

The PHMSA initiated 266 pipeline safety enforcement actions in 2013, slightly less than the 274 cases the agency initiated in 2012 and its second highest total in the past seven years.[259] The PHMSA also proposed over $9.7 million in total civil penalties in 2013, $1 million more than the agency proposed in 2012 and its highest total for any single year on record.[260] The PHMSA issued 85 orders and decisions on reconsideration in 2013, well below the level of activity that the agency maintained during any of the four previous years, all of which included the issuance of more than 110 orders and decisions.[261]

C. Advisory Bulletins & Guidance Documents

1. Time Limit for Incident and Accident Notifications

On January 30, 2013, the PHMSA issued an advisory bulletin on the time limit for providing the National Response Center (NRC) with notice of reportable pipeline accidents and incidents.[262] As explained in the bulletin, the federal pipeline safety regulations require operators to make a telephonic report to the NRC at the "earliest practicable" moment after discovery of a pipeline

252. *Id.* at 58,903, 58,911.

253. *Id.* at 58,904, 58,912.

254. *Id.* at 58,904-05, 58,912-13.

255. *Id.* at 58,901.

256. *Id.* at 58,903.

257. *Id.* at 58,904.

258. *Id.* at 58,904-05.

259. *Summary of Enforcement Activity*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN. (Mar. 11, 2014, 9:58 AM), http://primis.phmsa.dot.gov/comm/reports/enforce/EnfHome.html?nocache=4209.

260. *Id.*

261. *Id.*

262. Pipeline Safety: Accident and Incident Notification Time Limit, 78 Fed. Reg. 6,402 (Dep't of Transp. Jan. 30, 2013) (advisory bulletin).

incident or accident.[263] The PHMSA noted that it has traditionally interpreted this provision to mean one to two hours after discovery but that a mandate in the recent reauthorization requires the agency to issue a new regulation limiting the timeframe to no more than one hour.[264] While acknowledging that it had not yet issued such a regulation, the PHMSA encouraged pipeline operators to begin reporting incidents and accidents to the NRC "within one hour of confirmed discovery."[265]

D. Litigation

The PHMSA has defended three enforcement-related cases in the federal courts during the past year: a citizen suit filed by the representative of a municipal government, a jurisdictional challenge brought by the operator of a natural gas liquids fractionation plant, and a petition for review of a final order and decision on reconsideration in an enforcement action.

1. *San Francisco v. U.S. Department of Transportation*

In 2012, the City and County of San Francisco (San Francisco) filed a pipeline safety citizen suit against the DOT, the Secretary of Transportation, the PHMSA, and the PHMSA Administrator (DOT Defendants).[266] The basis for the suit, according to the allegations in San Francisco's prior notice letters and its complaint, was the failure of the DOT Defendants to exercise proper oversight of the California Public Utilities Commission, the state authority in California that has a certification to regulate intrastate gas pipelines.[267] San Francisco relied heavily on a string of recent pipeline accidents to substantiate its claims, including a natural gas transmission line failure that occurred in San Bruno, California, in 2010, as well as two other gas pipelines failures that occurred in Rancho Cordova, California, in 2008, and in Cupertino, California, in 2011.[268]

In July 2012, the district court issued an order dismissing San Francisco's complaint.[269] Although the court concluded that San Francisco had standing to bring its claims, it agreed with the DOT Defendants that those claims could not be filed under the citizen suit provision.[270] The critical flaw in the complaint, according to the court, is that the citizen suit provision in the pipeline safety laws does not specifically authorize a mandamus-type action against a governmental authority for failing to administer properly the pipeline safety laws.[271] Rather, it only includes a mechanism for ensuring that the entities who are engaged in regulated activities—that is, persons who are designing, constructing, and

263. *Id.* at 6,402.

264. *Id*. (discussing requirements of Pipeline Safety Act § 9, 49 U.S.C. § 60117 (2012)).

265. *Id.*

266. Complaint for Injunctive Relief and Declaratory Relief for Violations of the Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 60101 et Seq., San Francisco v. U.S. Dep't of Transp., No. CV-12-0711, 2012 WL 467707 (N.D. Cal. Feb. 14, 2012).

267. *Id.* at ¶¶ 66-68.

268. *Id.* at ¶ 5.

269. *San Francisco v. DOT*, No. C 12-0711 (N.D. Cal. July 25, 2012) (dismissing with leave to amend).

270. *Id.* at 1-2, 5.

271. *Id.* at 6-7.

operating gas pipelines—are complying with the pipeline safety laws and regulations.[272]

In February 2013, the district court issued another order dismissing an amended complaint that San Francisco filed against the DOT Defendants under the Administrative Procedure Act (APA).[273] The district court concluded that San Francisco had not demonstrated that the DOT Defendants failed to perform any mandatory or non-discretionary duties, a threshold requirement for pursuing any claims under the APA.[274]

Shortly thereafter, in April 2013, San Francisco filed a notice appealing the district court's decision to the U.S. Court of Appeals for the Ninth Circuit.[275] The case is docketed on appeal as 9th Cir. No. 13-15855.

2. *ONEOK Hydrocarbon, L.P. v. U.S. Department of Transportation*

In 2012, ONEOK Hydrocarbon, L.P (ONEOK) filed an action in federal district court challenging PHMSA's authority to regulate the facilities located on the grounds of natural gas liquids (NGL) fractionation plants.[276]

In April 2013, the federal district court issued its decision in the case.[277] Citing a provision enacted in the most recent reauthorization of the federal pipeline safety laws, the district court stated that judicial review of a PHMSA-issued "regulation or order" must be initiated within eighty-nine days "by filing a petition for review" in the D.C. Circuit or in the court of appeals where a "person resides or has its principal place of business."[278] The district court reasoned that, as with other similar statutes, the term "order" should be interpreted broadly for purposes of the Pipeline Safety Act's judicial review provision to encompass any PHMSA decision that has sufficient finality, i.e., that "imposes an obligation, denies a right, or fixes some legal relationship."[279] The district court found that the agency action being challenged by ONEOK, i.e., the PHMSA's decision to inspect its NGL plant, was an order that could only be reviewed in the federal courts of appeal.[280] Therefore, the district court dismissed the matter for lack of subject-matter jurisdiction.[281]

ONEOK did not appeal the district court's decision, but has filed a separate petition for review of PHMSA's action in the D.C. Circuit.[282] That case is docketed on review as D.C. Cir. No. 13-1040.

272. *Id.*

273. *San Francisco v. DOT*, No. 12-0711, 2013 WL 772652 (N.D. Cal. Feb. 28, 2013).

274. *Id.* at *3-4.

275. Notice of Appeal, *San Francisco v. DOT*, No. 12-0711 (N.D. Cal. Apr. 26, 2013).

276. Complaint, ONEOK Hydrocarbon, L.P. v. U.S. Dep't of Transp., No. 12-cv-660 (N.D. Okla. Dec. 3, 2012).

277. *ONEOK*, No. 12-cv-660, 2013 WL 1412823 (N.D. Okla. Apr. 8, 2013).

278. *Id.* at *2-3. (citing the Pipeline Safety Act, 49 U.S.C. § 60119 (2012)).

279. *Id.* at *4 (quoting Gilmore v. Gonzales, 435 F.3d 1125, 1132 (9th Cir. 2006)) (internal quotation marks omitted).

280. *Id.* at *5.

281. *Id.*

282. Petition for Review, *ONEOK*, No. 13-1040 (D.C. Cir. Feb. 25, 2013).

3. *Bridger Pipeline, LLC v. Pipeline & Hazardous Materials Safety Administration*

On October 25, 2013, the PHMSA and Bridger Pipeline, LLC (Bridger) executed a consent agreement that resolved a long-standing pipeline safety enforcement action.[283] Under the terms of the agreement, Bridger agreed to pay the PHMSA a reduced civil penalty of $45,000 for failing to perform a timely review of its employee's activities following a prior release of hazardous liquids and to implement certain revisions to the company's operations and maintenance procedures.[284] More importantly, Bridger also agreed to dismiss a petition for review that the company previously filed in the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit).[285] That petition, the first action brought under the Pipeline Safety Act's new judicial review provision,[286] challenged the underlying findings and civil penalty that the PHMSA assessed in the case.[287]

It is worth noting that the Tenth Circuit had previously asked the parties to address certain jurisdictional issues in the case, namely, "whether [Bridger's] petition for reconsideration was timely filed," whether the filing of that petition tolled the time for filing a separate petition for review of the final order in the U.S. courts of appeal, and whether the PHMSA's "decision on reconsideration [was] a separately appealable order" under the new judicial review provision.[288] The PHMSA and Bridger executed their consent agreement before the Tenth Circuit had an opportunity to rule on these issues, however, which remain open questions that could arise in future litigation.

IV. THE U.S. DEPARTMENT OF ENERGY

Pursuant to the Energy Policy and Conservation Act of 1975 (EPCA) and its implementing regulations, the U.S. Department of Energy (DOE) monitors and enforces compliance with energy and water conservation standards for certain covered consumer products.[289] The DOE is also authorized to assess civil penalties for violations of the EPCA and to seek judicial action to prohibit further distribution of noncompliant products.[290]

A. Rulemaking Restricting Import of Non-compliant Products

In 2013, the DOE completed its proposed rulemaking on restriction of the importation of non-compliant products (initially reported last year while the rulemaking was pending). The proposed rule was the result of collaboration

283. Bridger Pipeline, LLC, CPF No. 5-2009-5034, 2013 WL 6815130 (Dep't of Transp. Oct. 25, 2013).

284. *Id.* at *3.

285. *Id.* at *1; Petition for Review of Final Agency Action, Bridger Pipeline, LLC v. Pipeline & Hazardous Materials Safety Admin., No. 13-9517 (10th Cir. Feb. 15, 2013).

286. 49 U.S.C. § 60119 (2012).

287. Decision on Petition for Reconsideration, *Bridger Pipeline*, CPF No. 5-2009-5034, 2012 WL 7177139 (PHMSA Dec. 31, 2012); *Bridger Pipeline*, CPF No. 5-2009-5034 (PHMSA Aug. 30, 2012) (final order).

288. Bridger Pipeline LLC v. PHMSA, No. 13-9517, slip op. at 2 (10th Cir. Mar. 5, 2013).

289. Energy Policy and Conservation Act of 1975, 42 U.S.C. §§ 6291-6422 (2012); 10 C.F.R. pts. 430-431 (2013).

290. 42 U.S.C. §§ 6302-6304.

between the DOE, U.S. Customs and Board Protection (CBP), and the U.S. Department of the Treasury.[291] On March 26, 2012, the DOE issued a notice of proposed rulemaking to prohibit imports into the United States of covered products failing to meet applicable DOE energy conservation standards or Federal Trade Commission (FTC) labeling requirements.[292]

On July 5, 2013, the final rule was issued to allow the CBP to refuse covered products failing to meet applicable DOE energy conservation standards into the U.S. customs territory for sale within the United States and for failure to comply with applicable FTC labeling requirements.[293] The final rule also provides that upon notice from the DOE or the FTC, the CBP may conditionally release, under bond, the non-compliant products to the importer for mitigation, in order to bring the products into compliance.[294] The rule became effective August 5, 2013.[295]

B. *Enforcement Activities and Penalties*

The DOE engaged in a series of enforcement actions in 2013, including an enforcement action against Ningbo Hicon International Industry Company, Ltd. for manufacture and distribution of chest freezers which consumed more energy than permitted under energy conservation standards.[296] The enforcement action resulted in a settlement for $1,927,097.[297] It was reported by the DOE as the second largest penalty since the enforcement office was created.[298]

The DOE announced that several other companies (including manufacturers of distribution transformers, external power supplies, and lighting products) also entered into settlements with the DOE for the improper manufacture and sale of products that failed to meet DOE energy conservation standards between 2010 and 2013.[299] The DOE stated that when considering the appropriate civil penalty for these settlements, the "DOE considered various factors including the nature and scope of the violations, a violator's history of compliance or noncompliance, whether a violator is a small business, a violator's ability to pay, a violator's

291. *E.g.*, *Rule Proposed to Prohibit Importation of Products That Fail to Comply with DOE Energy Conservation Standards*, DEP'T ENERGY(Mar. 30, 2012, 10:45 AM), http://energy.gov/gc/articles/rule-proposed-prohibit-importation-products-fail-comply-doe-energy-conservation-1.

292. Inadmissibility of Consumer Products and Industrial Equipment Noncompliant with Applicable Energy Conservation or Labeling Standards, 77 Fed. Reg. 17,364 (Mar. 26, 2012) (to be codified at 19 C.F.R. pt. 12).

293. Inadmissibility of Consumer Products and Industrial Equipment Noncompliant with Applicable Energy Conservation or Labeling Standards, 78 Fed. Reg. 40,388, 40,388 (July 5, 2013) (to be codified at 19 C.F.R. pt. 12).

294. *Id.*

295. *Id.*; *see also Rule Issued to Prohibit Importation of Products That Fail to Comply with Federal Energy Conservation Standards*, DEP'T ENERGY(July 12, 2013, 4:08 PM), http://energy.gov/gc/articles/rule-issued-prohibit-importation-products-fail-comply-federal-energy-conservation.

296. *DOE Reaches $1.9M Settlement*, U.S. DEP'T ENERGY (Sept. 30, 2013, 3:19 PM), http://energy.gov/gc/articles/doe-reaches-19m-settlement.

297. *Id.*

298. *Id.*

299. *Manufacturers of Noncompliant Products Agree to Civil Penalties to Resolve Enforcement Actions*, DEP'T ENERGY(July 1, 2013), http://energy.gov/gc/articles/manufacturers-noncompliant-products-agree-civil-penalties-resolve-enforcement-actions.

timely self-reporting of the violation, and any self-initiated corrective action by a violator."[300] Further, the DOE assessed civil penalties against companies for failure to submit "required certification reports that their covered products or equipment compl[ied] with . . . conservation standards."[301] The most recent settlement reported by the DOE entailed the DOE's order that AeroSys, Inc. pay a $100,000 civil penalty for its two-part failure to meet certification requirements and manufacture and distribution of noncompliant products.[302]

V. THE U.S. DEPARTMENT OF JUSTICE

A. Energy-Related Investigations

In August of 2013, the U.S. Department of Justice (DOJ) announced that it would investigate whether JPMVEC obstructed a federal investigation regarding the manipulation of U.S. energy markets.[303] Specifically, the DOJ's criminal investigation will focus on whether certain bank employees misled regulators during the recent FERC investigation (discussed above in Part I.E.1), which resulted in a $410 million civil settlement.[304] During the FERC investigation, the Enforcement Staff alleged that the employees made false representations under oath regarding energy trading schemes and the strategies behind the schemes.[305] Although the FERC did not pursue individual sanctions against the employees, the DOJ is examining whether JPMVEC employees obstructed the FERC's investigation.[306]

300. *Id.*; *see also Conservation Standards Enforcement*, U.S. DEP'T ENERGY, http://energy.gov/gc/conservation-standards-enforcement (last visited Mar. 21, 2014) (including case documents and orders); *Guidance on the Imposition of Civil Penalties for Violations of EPCA Conservation Standards and Certification Obligations*, U.S. DEP'T ENERGY, http://energy.gov/gc/downloads/guidance-imposition-civil-penalties-violations-epca-conservation-standards-and (last visited Mar. 21, 2014) (including guidance on civil penalties by the DOE).

301. *DOE Collects Civil Penalties for Failure to Certify*, U.S. DEP'T ENERGY (June 12, 2013, 5:51 PM), http://energy.gov/gc/articles/doe-collects-civil-penalties-failure-certify-0; *see also Compliance Certification Enforcement*, U.S. DEP'T ENERGY, http://energy.gov/gc/compliance-certification-enforcement (last visited Mar. 21, 2014) (including case documents and orders).

302. AeroSys, Inc., Case No. 2011-SCE-1624, slip op. at 3 (Dep't of Energy Dec. 20, 2013).

303. Dan Fitzpatrick & Devlin Barrett, *U.S. Probes Whether J.P. Morgan Employees Misled Regulators*, WALL ST. J. (Sept. 4, 2013, 2:57 PM), http://online.wsj.com/news/articles/SB10001424127887324123004579055210603000736.

304. *Id.*

305. *Id.*

306. *Id.*

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