

## REPORT OF THE COMPLIANCE & ENFORCEMENT COMMITTEE

This report of the Compliance & Enforcement Committee summarizes key federal enforcement and compliance developments in 2015, including certain decisions, orders, actions, and rules of the Federal Energy Regulatory Commission (FERC or Commission), the United States (U.S.) 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).\*

|    |  |     |
|----|--|-----|
| I. | The Federal Energy Regulatory Commission .....   | 103 |
|    | A. Reports and Rules .....   | 103 |
|    | 1. Annual Enforcement Report .....   | 103 |
|    | 2. Memorandum of Understanding between the FERC<br>and the Agency for the Cooperation of Energy<br>Regulators (European Union) .....   | 103 |
|    | B. Notices of Alleged Violations.....  | 104 |
|    | 1. Berkshire Power Company LLC and Powerplant<br>Management Services LLC.....  | 104 |
|    | 2. Total Gas & Power, North America, Inc., Therese<br>Nguyen, and Aaron Hall .....   | 104 |
|    | 3. Coaltrain Energy L.P., Peter Jones, Shawn Sheehan,<br>Robert Jones, Jeff Miller, Jack Wells, and Adam Hughes  | 105 |
|    | 4. Etracom LLC and Michael Rosenberg.....  | 105 |
|    | 5. Columbia Gas Transmission, LLC.....   | 105 |
|    | C. Show Cause Proceedings .....  | 106 |
|    | 1. Etracom LLC and Michael Rosenberg.....  | 106 |
|    | D. Enforcement Litigation and Adjudication.....  | 107 |
|    | 1. City Power Marketing, LLC and K. Stephen Tsingas.....   | 107 |
|    | 2. Maxim Power Corporation, Maxim Power (USA), Inc.;<br>Maxim Power (USA) Holding Company Inc.; Pawtucket<br>Power Holding Co., LLC; Pittsfield Generating<br>Company, LP; and Kyle Mitton ..... | 108 |
|    | 3. Houlian Chen; Powhatan Energy Fund, LLC; HEEP<br>Fund, LLC; and CU Fund, Inc. ....  | 109 |
|    | 4. BP America Inc. and Affiliates .....  | 111 |
|    | 5. Barclays Bank PLC, Daniel Brin, Scott Connelly, Karen<br>Levin, and Ryan Smith.....   | 112 |
|    | 6. Competitive Energy Services, LLC; Richard Silkman;<br>and Lincoln Paper & Tissue, LLC .....   | 113 |
|    | E. Settlements.....  | 114 |

---

\* The Compliance and Enforcement Committee sincerely thanks the following authors, in alphabetical order, for their contributions to this report: David Stewart Berman, Candice Castaneda, David Gold, Jesse Halpern, Terence Healey, Ken Irvin, Mark C. Kalpin, Michael Loatman, Patrick L. Morand, Amy Parker, Liam Paskvan, Christopher J. Polito, Randall S. Rich, and Sharon Rose.

|      |   |     |
|------|---|-----|
|      | 1. Columbia Gas Transmission, LLC.....  | 114 |
|      | 2. Western Electricity Coordinating Council .....   | 115 |
| II.  | The Commodity Futures Trading Commission.....   | 115 |
|      | A. Energy-Related Enforcement Cases.....  | 115 |
|      | 1. Aspire Commodities, LP v. GDF Suez Energy North<br>America, 2015 U.S. Dist. LEXIS 13044 (2015) .....   | 115 |
|      | 2. United States v. Coscia, 2015 U.S. Dist. LEXIS 50344<br>(2015).....  | 117 |
|      | 3. In Re Total Gas & Power North America, Inc. ....   | 119 |
|      | B. The Dodd-Frank Wall Street Reform and Consumer<br>Protection Act .....   | 121 |
|      | 1. Trade Options, Notice of Proposed Rulemaking, 80 FR<br>26200 (May 7, 2015).....  | 121 |
|      | 2. Extensions of Time-Limited No-Action Relief with<br>Respect to Certain Commodity Exchange Act Provisions<br>that May Apply to Southwest Power Pool, Inc. and/or<br>Its Participants, 2015 CFTC Ltr. LEXIS 56 (Feb. 27,<br>2015 and Sept. 29, 2015).....                                    | 122 |
|      | 3. Notice of Proposed Order and Request for Comment on an<br>Application for an Exemptive Order from Southwest<br>Power Pool, Inc. from Certain Provisions of the Commodity<br>Exchange Act Pursuant to the Authority Provided in<br>Section 4(c)(6) of the Act, 80 FR 29490 (May 21, 2015) . | 123 |
| III. | The Pipeline and Hazardous Materials Safety Administration .....  | 124 |
|      | A. Pipeline Safety Rulemaking Update .....  | 125 |
|      | 1. Hazardous Materials: Enhanced Tank Car Standards and<br>Operational Controls for High-Hazard Flammable Trains<br>(final rule issued on May 8, 2015) .....  | 125 |
|      | B. Administrative Enforcement .....   | 126 |
| IV.  | The Department of Energy .....  | 126 |
|      | A. Enforcement Actions .....  | 126 |
|      | 1. Perlick Corporation .....  | 126 |
|      | 2. Sunshine Lighting .....  | 127 |
|      | 3. Morris Products .....  | 127 |
| V.   | The Department of Justice .....   | 127 |
|      | A. Energy-Related Investigations .....  | 127 |
|      | 1. Alstom S.A. ....   | 127 |
|      | 2. Pacific Gas & Electric Co. ....  | 127 |
|      | 3. Panther Energy Trading LLC .....   | 128 |
|      | B. Environmental-Related Investigations .....   | 128 |
|      | 1. Subsidiaries of Duke Energy Corporation .....  | 128 |
|      | 2. Virgin Islands Water and Power Authority .....   | 129 |
|      | 3. Interstate Power and Light .....   | 129 |

## I. THE FEDERAL ENERGY REGULATORY COMMISSION

### A. Reports and Rules

#### 1. Annual Enforcement Report

On November 19, 2015, the FERC Office of Enforcement (Enforcement) issued its Annual Report of Enforcement Staff activities during the fiscal year 2015 (2015 Report)<sup>1</sup> 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.”<sup>2</sup>

In pursuit of these priorities, Enforcement opened nineteen new investigations in fiscal year 2015, up from seventeen investigations in 2014, while bringing twenty-two to closure.<sup>3</sup> Enforcement obtained almost \$26.25 million in civil penalties and disgorgement of approximately \$1 million in unjust profits.<sup>4</sup> Enforcement’s penalty amount was slightly higher than the \$25 million it assessed in 2014, but still significantly less than the \$304 million it assessed in 2013, which was the Commission’s largest civil penalty total to date.<sup>5</sup> The 2015 Report reaffirmed that Enforcement does not intend to change its priorities in the upcoming year.<sup>6</sup>

#### 2. Memorandum of Understanding between the FERC and the Agency for the Cooperation of Energy Regulators (European Union)

On January 6, 2015, the FERC and the European Union Agency for the Cooperation of Energy Regulators (ACER) entered into a Memorandum of Understanding (MOU) “regarding consultation, cooperation and exchange of information related to the monitoring and oversight of the wholesale energy markets within the jurisdictions of ACER and FERC.”<sup>7</sup> The MOU sets forth the two agencies’ intent to consult, cooperate and exchange information in an effort to “foster[] market integrity and transparency of wholesale energy markets for the benefit of consumers of energy; monitor[] trading activity in wholesale energy products to detect and prevent trading based on market abuse; [and] maintain confidence in wholesale energy markets.”<sup>8</sup> Under the MOU, consultation will take place at the staff level on a regular basis and will address “(i) general supervisory issues, including with respect to regulatory or oversight developments; (ii) issues

---

1. STAFF OF THE OFFICE OF ENFORCEMENT, FERC, DOCKET NO. AD07-13-009, 2015 REPORT ON ENFORCEMENT (2015) [hereinafter 2015 REPORT].

2. *Id.* at 2.

3. *Id.*; STAFF OF THE OFFICE OF ENFORCEMENT, FERC, DOCKET NO. AD07-13-008, 2014 REPORT ON ENFORCEMENT 3 (2014) [hereinafter 2014 REPORT].

4. 2015 REPORT, *supra* note 1, at 2-3.

5. 2014 REPORT, *supra* note 3, at 3; STAFF OF THE OFFICE OF ENFORCEMENT, FERC, DOCKET NO. AD07-13-006, 2013 REPORT ON ENFORCEMENT 2-3 (2013).

6. 2015 REPORT, *supra* note 1, at 2.

7. Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Monitoring of Wholesale Energy Markets, FERC-ACER, at 2, Jan. 6, 2015, [hereinafter MOU], available at <https://www.ferc.gov/legal/mou/2015/MOU-ACER.pdf>.

8. *Id.* at 2-3.

relevant to the operations, activities, and regulation of Wholesale Energy Markets; and (iii) any other areas of common supervisory interest.”<sup>9</sup>

*B. Notices of Alleged Violations*

1. Berkshire Power Company LLC and Powerplant Management Services LLC

On October 23, 2015, FERC Office of Enforcement Staff (Enforcement Staff) issued a notice alleging that Berkshire Power Company LLC (Berkshire) and Powerplant Management Services LLC violated the Commission’s Anti-Manipulation Rule, 18 CFR 1c.2, Commission-approved reliability standards, and Commission regulations 35.41(a) and (b).<sup>10</sup> Specifically, Enforcement Staff alleged that (1) Berkshire and Powerplant Management Services LLC engaged in a manipulative scheme to conceal maintenance work and associated outages beginning at least as early as January 2008 and continuing through March 2011; (2) Berkshire failed to provide outage information to its Transmission Operator and failed to inform its Transmission Operator and Host Balancing Authority of all generation resources available for use; and (3) Berkshire failed to comply with various provisions of the ISO-New England (ISO-NE) Tariff and made false and misleading statements to ISO-NE regarding its maintenance work and associated outages.<sup>11</sup>

2. Total Gas & Power, North America, Inc., Therese Nguyen, and Aaron Hall

On September 21, 2015, Enforcement Staff issued a notice alleging that Total Gas & Power, North America, Inc. (TGPNA), the Houston-based subsidiary of Paris, France-headquartered Total, S.A., and TGPNA’s West Desk traders and supervisors Therese Nguyen and Aaron Hall violated section 4A of the Natural Gas Act and the Commission’s Anti-Manipulation Rule, 18 C.F.R. § 1c.1.<sup>12</sup> Specifically, Enforcement Staff alleged that TGPNA’s West Desk devised and executed a scheme to manipulate the price of natural gas in the southwest United States between June 2009 and June 2012.<sup>13</sup> That scheme allegedly “involved making largely uneconomic trades for physical natural gas during bidweek designed to move indexed market prices in a way that benefited the company’s related positions.”<sup>14</sup> Enforcement Staff alleged that the West Desk implemented the bidweek scheme on at least 38 occasions during the period of interest.<sup>15</sup> Enforcement Staff further alleged that Therese Nguyen and Aaron Hall each

---

9. *Id.* at 4.

10. Notice from Nathaniel J. Davis, Sr., Deputy Sec’y, FERC, Staff Notice of Alleged Violations (Oct. 23, 2015), available at <http://ferc.gov/enforcement/alleged-violation/notices/2015/Berkshire-Power-Co.pdf>.

11. *Id.*

12. Notice from Kimberly D. Bose, Sec’y, FERC, Staff Notice of Alleged Violations (Sept. 21, 2015), available at <http://ferc.gov/enforcement/alleged-violation/notices/2015/TGPNA-NAV.pdf>.

13. *Id.*

14. *Id.*

15. *Id.*

## 2016] REPORT OF THE COMPLIANCE AND ENFORCEMENT COMMITTEE 105

implemented the scheme and supervised and directed other traders in implementing the scheme.<sup>16</sup>

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

On September 11, 2015, Enforcement Staff issued a notice alleging that (1) Coaltrain Energy L.P.; its co-owners Peter Jones and Shawn Sheehan; traders Robert Jones, Jeff Miller, and Jack Wells; and analyst Adam Hughes violated the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2, by devising and executing a scheme involving manipulative Up-To Congestion trading in the PJM Interconnection L.L.C. (PJM) Regional Transmission Organization (RTO) between June and September 2010; and (2) Coaltrain violated 18 C.F.R. § 35.41(b) (2015) by making false statements and omitting material information during the investigation.<sup>17</sup> Enforcement Staff alleged that the individuals (on behalf of Coaltrain) planned and executed Up-To Congestion transactions in PJM that were designed to falsely appear to be spread trades but that were in fact a vehicle to collect certain payments (called "Marginal Loss Surplus Allocation," or MLSA) from PJM.<sup>18</sup> Enforcement Staff further alleged that through these trades, Coaltrain sought not to profit from changes in price spreads but rather to profit by clearing large volumes of Up-To Congestion transactions with the goal of collecting MLSA.<sup>19</sup> Finally, Enforcement Staff alleged that Coaltrain's co-owners Peter Jones, Shawn Sheehan, and their agents (on behalf of Coaltrain) made false statements and omitted material information in responding to deposition questions and data requests.<sup>20</sup>

4. Etracom LLC and Michael Rosenberg

On July 27, 2015, Enforcement Staff issued a notice alleging that Etracom LLC (Etracom) and Michael Rosenberg, Etracom's principal trader and majority owner, violated the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2, by engaging in manipulative virtual trading at the New Melones intertie (New Melones) in the California Independent System Operator footprint during May 2011.<sup>21</sup> Enforcement Staff alleged that Etracom's trades were intended to artificially lower the day-ahead locational marginal price (LMP) to benefit Etracom's congestion revenue rights positions sourced at the same location.<sup>22</sup>

5. Columbia Gas Transmission, LLC

On July 16, 2015, Enforcement Staff issued a notice alleging that Columbia Gas Transmission, LLC (Columbia Gas) violated Part 4 of the General Term and

---

16. *Id.*

17. Notice from Kimberly D. Bose, Sec'y, FERC, Staff Notice of Alleged Violations (Sept. 11, 2015), available at <http://ferc.gov/enforcement/alleged-violation/notices/2015/CoaltrainNAV.pdf>.

18. *Id.*

19. *Id.*

20. *Id.*

21. Notice from Nathaniel J. Davis, Sr., Deputy Sec'y, FERC, Staff Notice of Alleged Violations (July 27, 2015), available at <http://ferc.gov/enforcement/alleged-violation/notices/2015/EtracomLLC-07-27-2015.pdf>.

22. *Id.*

Conditions of its FERC Gas Tariff.<sup>23</sup> In the Notice of Alleged Violation, Enforcement Staff explained that Enforcement opened the preliminary investigation in response to a referral from the Division of Audits and Accounting requesting that the Division of Investigations inquire further into the transparency of Columbia Gas' capacity auctions.<sup>24</sup>

Specifically, Enforcement Staff alleged that Columbia Gas violated its FERC Gas Tariff by failing to post the notices of the auctions of its available firm capacity on the public side of its Electronic Bulletin Board (EBB), Navigates, between January 1, 2010 and May 1, 2013.<sup>25</sup> Enforcement Staff alleged that while Columbia Gas posted notices of the auctions on the password-protected portion of its EBB, Columbia Gas' failure to post the notices of the auctions of its available firm capacity on its *public* website for a period of four years posed a serious threat to transparency in the market, and may have compromised the Commission's open-access transportation requirements.<sup>26</sup>

### C. Show Cause Proceedings

#### 1. Etracom LLC and Michael Rosenberg

On December 16, 2015 the FERC issued an order to show cause and notice of proposed penalty to Etracom and its principal member and primary trader, Michael Rosenberg.<sup>27</sup> Enforcement Staff accuse Etracom and Rosenberg of intentionally manipulating prices at New Melones in the California Independent System Operator (CAISO) in violation of the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.2.<sup>28</sup> The FERC has proposed civil penalties of \$2.4 million and \$100,000 to be paid by Etracom and Rosenberg, respectively, and has proposed that Etracom disgorge \$315,072 plus interest in unjust profits.<sup>29</sup>

Etracom "is a small financial trading company owning no physical energy assets."<sup>30</sup> It was founded in 2008 and operates only in the CAISO.<sup>31</sup> Enforcement Staff allege that Etracom, pursuant to a strategy developed by Rosenberg, made a series of virtual supply offers, lowering the day-ahead LMP at New Melones.<sup>32</sup> Enforcement Staff find that these virtual supply offers were not intended to be themselves profitable,<sup>33</sup> but instead were designed by Rosenberg to increase the profitability of Etracom's Congestion Revenue Rights (CRR). Specifically, in May 2011, Etracom frequently made virtual supply offers low enough that it was

---

23. Notice from Kimberly D. Bose, Sec'y, FERC, Staff Notice of Alleged Violations (July 16, 2015), available at <http://ferc.gov/enforcement/alleged-violation/notices/2015/ColumbiaGas-07-16-2015.pdf>.

24. *Id.*

25. *Id.*

26. *Id.*

27. Order to Show Cause and Notice of Proposed Penalty, *Etracom LLC*, 153 F.E.R.C. ¶ 61,314 (2015).

28. *Id.* at P 1 & app. at 1. The Enforcement Staff Report is included as an attachment to the Order to Show Cause and Notice of Proposed Penalty. The pagination used here is that found in the pdf copy available on the FERC's website at <http://www.ferc.gov/enforcement/civil-penalties/actions/2015/153FERC61314.pdf>.

29. *Id.* app. at 1.

30. *Id.* app. at 2.

31. *Id.*

32. *Id.* app. at 1.

33. 153 F.E.R.C. ¶ 61,314 app. at 17.

## 2016] REPORT OF THE COMPLIANCE AND ENFORCEMENT COMMITTEE 107

the marginal bidder, whose offers set the LMP at New Melones.<sup>34</sup> Etracom's New Melones virtual supply offers consistently lost money,<sup>35</sup> however, Etracom simultaneously held CRR positions at New Melones. Etracom's CRR positions profited when New Melones' LMP was low relative to other locations within the CAISO.<sup>36</sup> Enforcement Staff find that Etracom's CRR profits from the low LMP it created at New Melones more than offset its losses from virtual supply offers.<sup>37</sup> Enforcement Staff point to the timing of the offers and the distinctiveness of Etracom's trading at New Melones, in comparison to Etracom's strategy at other locations, in arguing that Etracom and Rosenberg intended to manipulate LMPs.<sup>38</sup> Furthermore, Enforcement Staff reject Etracom's alternative explanations for its trading behavior at New Melones, including its contention that it hoped to profit from a hydroelectric runoff event.<sup>39</sup>

#### D. Enforcement Litigation and Adjudication

##### 1. City Power Marketing, LLC and K. Stephen Tsingas

On July 2, 2015, the FERC issued an order assessing civil penalties finding that City Power Marketing, LLC (City Power) and K. Stephen Tsingas (Mr. Tsingas) (collectively, City Power Respondents) violated section 222 of the Federal Power Act (FPA) and section 1c.2 of the Commission's regulations prohibiting energy market manipulation.<sup>40</sup> The FERC alleges that the City Power Respondents engaged in a scheme to conduct fraudulent Up-To Congestion (UTC) transactions in PJM's energy markets to obtain excessive amounts of certain credit payments to transmission customers. The order also found that in the course of responding to the FERC's Office of Enforcement Staff's investigation, City Power violated section 35.41(b) of the FERC's regulations by making false and misleading statements and material omissions related to instant message communications involving the City Power Respondents' fraudulent UTC transactions. The FERC assessed civil penalties in the following amounts: \$14 million against City Power and \$1 million against Mr. Tsingas. The FERC further directed the disgorgement of unjust profits, plus applicable interest, in the following amount: \$1,278,358.

The FERC alleged that the City Power Respondents entered high volumes of "wash-like" trades, including "round trip" UTC transactions between the same two points (*i.e.*, A to B and B to A) and transactions between points that historically had a very small price spread. The FERC alleged that the City Power Respondents "artificially created these Loss Trades solely to reserve transmission service to enable them to collect excessive MLSA payments during the Manipulation Period."<sup>41</sup>

---

34. *Id.* app. at 17-18.

35. *Id.* app. at 10.

36. *Id.* app. at 15.

37. *Id.* app. at 10-11.

38. 153 F.E.R.C. ¶ 61,314 app. at 23.

39. *See generally id.* app. at 25-38.

40. *See generally* Order Assessing Civil Penalties, *City Power Marketing, LLC*, 152 F.E.R.C. ¶ 61,012 (2015).

41. *Id.* at P 3.

This order assessing civil penalties was preceded by an order to show cause and notice of proposed penalty, issued on March 6, 2015.<sup>42</sup> In their April 7, 2015 answer to the FERC's order to show cause, the City Power Respondents elected for de novo review in federal district court under section 31(d)(3) of the FPA.<sup>43</sup>

On September 1, 2015, the FERC filed an action to enforce the penalty in the United States District Court for the District of Columbia.<sup>44</sup> The City Power Respondents filed a motion to dismiss the FERC's suit on November 2, 2015.<sup>45</sup> On December 22, 2015, the FERC filed its opposition to the motion to dismiss, requesting that the City Power Respondents' motion be denied.<sup>46</sup> As of March 29, 2016, the court has yet to decide on the motion to dismiss the case.

2. Maxim Power Corporation, Maxim Power (USA), Inc.; Maxim Power (USA) Holding Company Inc.; Pawtucket Power Holding Co., LLC; Pittsfield Generating Company, LP; and Kyle Mitton

On May 1, 2015, the FERC issued an order assessing civil penalties finding that Maxim Power Corporation; Maxim Power (USA), Inc.; Maxim Power (USA) Holding Company; Pawtucket Power Holding Co., LLC; and Pittsfield Generating Company, LP (collectively, Maxim or the Maxim Companies) and Kyle Mitton (Mitton), an Energy Marketing Analyst at Maxim (together, the Maxim Respondents) violated section 222 of the FPA and section 1c.2 of the Commission's regulations prohibiting energy market manipulation.<sup>47</sup> The order also found that Maxim violated section 35.41(b) of the FERC's regulations by submitting false or misleading information or omitting information to FERC-approved independent system operators or market monitors.<sup>48</sup> The FERC assessed civil penalties in the following amounts: \$5 million against Maxim and \$50,000 against Mitton.<sup>49</sup>

Commissioner Tony Clark dissented, stating that Office of Enforcement Staff failed to meet its burden of proof (proving by a preponderance of the evidence that the Maxim Respondents intended to engage in a deceptive course of business).<sup>50</sup> Commissioner Clark also took issue with the FERC's decision to penalize and hold accountable just one individual when management itself embraced and took ownership of the actions.<sup>51</sup>

---

42. Order to Show Cause and Notice of Proposed Penalty, *City Power Marketing, LLC*, 150 F.E.R.C. ¶ 61,176 (2015).

43. Respondents' Answer to Order to Show Cause and Notice of Proposed Penalty and Election of De Novo Review, FERC Docket No. IN15-5-000 (Apr. 7, 2015).

44. Petition for an Order Affirming July 2, 2015 Order, *FERC v. City Power Marketing, LLC*, No. 1:15-cv-01428-JDB (D.D.C. Sept. 1, 2015).

45. Notice of Motion and Motion to Dismiss, *FERC v. City Power Marketing LLC*, No. 1:15-cv-01428-JDB (D.D.C. Nov. 2, 2015).

46. 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).

47. Order Assessing Civil Penalties, *Maxim Power Corp.*, 151 F.E.R.C. ¶ 61,094 (2015).

48. *Id.* at P 1.

49. *Id.*

50. *Id.* app at 1 (Clark, Comm'r, dissenting).

51. *Id.*



## 2016] REPORT OF THE COMPLIANCE AND ENFORCEMENT COMMITTEE 109

The FERC alleged that during some of the hottest days in 2010, the Maxim Respondents' dual-fuel Pittsfield generating facility offered to sell energy based on high-priced fuel oil, while burning cheaper natural gas.<sup>52</sup> According to the market rules in effect at the time, Pittsfield would receive more money if the grid operator believed that the facility was burning fuel oil rather than natural gas.<sup>53</sup> The FERC further alleged that when questioned by the market monitor, the Maxim Respondents repeatedly referred to pipeline restrictions, indicating that they were unable to obtain natural gas and, thus, were burning fuel oil.<sup>54</sup> The FERC determined that these "misrepresentations" were made in order to ensure that Maxim continued to receive the higher payments based on burning fuel oil instead of natural gas.<sup>55</sup>

This order assessing civil penalties was preceded by an order to show cause and notice of proposed penalty, issued on February 2, 2015.<sup>56</sup> On March 4, 2015, the Maxim Respondents elected for de novo review in federal district court under section 31(d)(3) of the FPA.<sup>57</sup>

On July 1, 2015, the FERC filed an action to enforce the penalty in the U.S. District Court for the District of Massachusetts.<sup>58</sup> The Maxim Respondents filed a motion to dismiss the FERC's suit on September 4, 2015.<sup>59</sup> On September 25, 2015, the FERC filed its opposition to the motion to dismiss, requesting that the Maxim Respondents' motion be denied.<sup>60</sup> Oral argument regarding Maxim Respondents' motion to dismiss was held on December 17, 2015.<sup>61</sup> The Court directed the parties to brief the issue of de novo review by January 20, 2016 and will hold a status conference on February 24, 2016.<sup>62</sup>

3. Houlian Chen; Powhatan Energy Fund, LLC; HEEP Fund, LLC; and CU Fund, Inc.

On May 29, 2015, the FERC issued an order assessing civil penalties finding that Dr. Houlian Chen (Chen), Powhatan Energy Fund, LLC (Powhatan); HEEP Fund, LLC (HEEP); and CU Fund, Inc. (CU Fund and together with Chen, HEEP, and Powhatan, the Powhatan Respondents) violated section 222 of the FPA and section 1c.2 of the Commission's regulations prohibiting energy market

---

52. 151 F.E.R.C. ¶ 61,094 at P 3.

53. *Id.* at P 4.

54. *Id.*

55. *Id.*

56. Order to Show Cause and Notice of Proposed Penalty, *Maxim Power Corp.*, 150 F.E.R.C. ¶ 61,068 (2015).

57. Notice of Election, *Maxim Power Corp.*, FERC Docket No. IN15-4-000 (Mar. 4, 2015).

58. Petition for an Order Affirming May 1, 2015 Order, *FERC v. Maxim Power Corp.*, No. 3:15-cv-30113-MGM (D. MA. July 1, 2015).

59. Defendants' Motion to Dismiss the Federal Energy Regulatory Commission's "Petition," *FERC v. Maxim Power Corp.*, No. 3:15-cv-30113-MGM (D. Mass. Sept. 4, 2015).

60. Federal Energy Regulatory Commission's Opposition to Respondents' Motion to Dismiss, *FERC v. Maxim Power Corp.*, No. 3:15-cv-30113-MGM (D. Mass. Sept. 25, 2015).

61. Motion Hearing, *FERC v. Maxim Power Corp.*, No. 3:15-cv-30113-MGM (D. Mass. Dec. 17, 2015).

62. Defendant's Memorandum of Law on Procedures for District Court Actions Under Section 31(d)(3) of the Federal Power Act, *FERC v. Maxim Power Corp.*, No. 3:15-cv-30113-MGM (D. Mass. Jan. 20, 2016).

manipulation.<sup>63</sup> The FERC alleges that the Powhatan Respondents engaged in a scheme to conduct fraudulent UTC transactions in PJM's energy markets to garner excessive amounts of certain credit payments to transmission customers.<sup>64</sup> The FERC assessed civil penalties in the following amounts: \$16.8 million against Powhatan; \$10.08 million against CU Fund; \$1.92 million against HEEP; and \$1 million against Chen. The FERC further directed the disgorgement of unjust profits, plus applicable interest, in the following amounts: \$3,465,108 for Powhatan; \$1,080,576 for CU Fund; and \$173,100 for HEEP.<sup>65</sup>

The FERC alleged that the Powhatan Respondents entered into large volumes of "wash-like" trades by doing equal and opposite UTC transactions between the same two points (*i.e.*, A to B and B to A) in order to benefit from MLSA, also called "transmission loss credits," allocated based on the transmission reservations made in conjunction with the UTC transactions.<sup>66</sup> The FERC alleged that the Powhatan Respondents "artificially created these round-trip UTC trades solely to reserve transmission service to enable them to collect excessive MLSA payments."<sup>67</sup>

This order assessing civil penalties was preceded by an order to show cause and notice of proposed penalty, issued on December 17, 2014.<sup>68</sup> On January 12, 2015, the Powhatan Respondents elected for an immediate penalty assessment and *de novo* review in federal district court under section 31(d)(3) of the FPA.<sup>69</sup>

On July 31, 2015, the FERC filed an action to enforce the penalty in the U.S. District Court for the Eastern District of Virginia.<sup>70</sup> The Powhatan Respondents filed motions to dismiss the FERC's suit on October 19, 2015.<sup>71</sup> On October 30, 2015, the FERC filed its opposition to the motions to dismiss, requesting that the Powhatan Respondents' motions be denied.<sup>72</sup> The parties filed additional evidence and pleadings, and on January 8, 2016, the court denied the motion to dismiss without prejudice.<sup>73</sup>

---

63. Order Assessing Civil Penalties, *Houlian Chen*, 151 F.E.R.C. ¶ 61,179 (2015).

64. *Id.* at P 1.

65. *Id.*

66. *Id.* at P 84.

67. *Id.* at P 3.

68. See generally Order to Show Cause and Notice of Proposed Penalty, *Houlian Chen*, 149 F.E.R.C. ¶ 61,261 (2014).

69. Notice of De Novo Election, *Houlian Chen*, FERC Docket No. IN15-3-000 (Jan. 12, 2015).

70. Petition for an Order Affirming May 29, 2015 Order, *FERC v. Powhatan Energy Fund LLC*, No. 3:15-cv-00452 (E.D. Va. July 31, 2015).

71. Motion to Dismiss of Defendants *Houlian Chen*, *HEEP Fund, Inc.* and *CU Fund, Inc.*, *FERC v. Powhatan Energy Fund LLC*, No. 3:15-cv-00452 (E.D. Va. Oct. 19, 2015); *Powhatan Energy Fund's Motion to Dismiss the Complaint*, *FERC v. Powhatan Energy Fund LLC*, No. 3:15-cv-00452 (E.D. Va. Oct. 19, 2015).

72. Memorandum of Law in Support of FERC's Opposition to Motion to Dismiss of Defendants *Houlian Chen*, *HEEP Fund, Inc.* and *CU Fund, Inc.*, *FERC v. Powhatan Energy Fund LLC*, No. 3:15-cv-00452 (E.D. Va. Oct. 30, 2015); Memorandum of Law in Support of FERC's Opposition to Motion to Dismiss of Respondent *Powhatan Energy Fund, LLC*, *FERC v. Powhatan Energy Fund LLC*, No. 3:15-cv-00452 (E.D. Va. Oct. 30, 2015).

73. Memorandum Order Denying Without Prejudice Motions to Dismiss, *FERC v. Powhatan Energy Fund LLC*, No. 3:15-cv-00452 (E.D. Va. Jan. 8, 2016).

#### 4. BP America Inc. and Affiliates

On August 13, 2015, the Presiding Administrative Law Judge (ALJ) issued an initial decision (Initial Decision) finding that BP America Inc. (BP) and multiple affiliates violated the Natural Gas Act and FERC's Anti-Manipulation Rule in connection with BP's trading of next-day, fixed-price natural gas at the Houston Ship Channel (HSC) and Katy from September 18, 2008 through November 30, 2008.<sup>74</sup> The Initial Decision follows a hearing that was conducted at FERC from March 30 to April 15, 2015.<sup>75</sup>

In the Initial Decision, the ALJ agreed with Enforcement Staff that BP made uneconomic natural gas sales at HSC as part of a manipulative scheme designed to suppress the HSC *Gas Daily* index in order to benefit BP's related financial positions that settled based on the HSC *Gas Daily* index.<sup>76</sup> The ALJ stated "[t]his is a classic case of physical for financial benefits."<sup>77</sup> The ALJ found that BP's trading during the investigative period was markedly different than BP's trading before the investigative period, and there was no economic or other justification for BP's changed and unprofitable trading patterns.<sup>78</sup>

The Initial Decision concluded that BP's actions were done with the requisite scienter and in connection with jurisdictional transactions.<sup>79</sup> The ALJ held that Enforcement Staff proved jurisdiction through third party transactions and cash-out transactions priced off of the HSC *Gas Daily* index, as well as BP's own next-day, fixed-price sales of gas at HSC made to suppress the index.<sup>80</sup>

The ALJ made the following factual findings, corresponding to those ordered by the FERC in its order establishing hearing, which may be used to ascertain penalties and disgorgement:<sup>81</sup>

- (i) BP committed a minimum of forty-eight violations, which occurred during a period of forty-nine days;
- (ii) During the relevant period, BP's manipulation resulted in financial losses of \$1,375,482 to \$1,927,728 on the next-day natural gas markets at HSC and Katy; BP's sales of next-day, fixed-price physical gas at HSC involved 10,632,400 MMBtus of natural gas; BP's financial natural gas positions at HSC involved 25,310,000 MMBtus of natural gas; and BP's losses occurred during forty-nine trading days;
- (iii) BP's violations occurred less than five years after a prior FERC adjudication and adjudications of similar misconduct by the CFTC and DOJ, which warrants an increase in BP's culpability score;
- (iv) BP's conduct contravened the terms of a permanent injunction with the CFTC, which warrants an increase in BP's culpability score;

---

74. Initial Decision, *BP Am. Inc.*, 152 F.E.R.C. ¶ 63,016 at P 1 (2015) (finding violations of 18 C.F.R. § 1c.1 (2014) and section 4A of the Natural Gas Act (NGA), 15 U.S.C. § 717c-1 (2012)).

75. *Id.* at P 5.

76. *Id.* at PP 33-34, 276.

77. *Id.* at P 276.

78. *Id.*

79. 152 F.E.R.C. ¶ 63,016 at P 277.

80. *Id.* at P 277.

81. Order Establishing Hearing, *BP Am. Inc.*, 147 F.E.R.C. ¶ 61,130 at PP 48-49 (2014).

- (v) BP did not have an effective compliance program because it failed to prevent or detect the manipulation, and BP's purported investigation of the traders' behavior was biased, ineffective, and did not comply with the Commission's seven factors; and
- (vi) BP's gross profits from the manipulation were between \$233,330 and \$316,170, and net profits were between \$165,749 and \$248,589.<sup>82</sup>

The Initial Decision does not impose a specific civil penalty against BP.<sup>83</sup> Rather, in the FERC's order setting matter for hearing, the FERC reserved for its own later consideration the issues of whether civil penalties should be imposed for any BP violations and the amount of such penalties, whether any other sanctions should be imposed, and whether BP should disgorge any unjust profits.<sup>84</sup> Enforcement Staff had proposed a civil penalty of \$28 million, plus \$800,000 in disgorgement.<sup>85</sup>

On September 14, 2015, BP filed its brief on exceptions to the Initial Decision.<sup>86</sup> On October 5, 2015, Enforcement Staff filed its brief in opposition to BP's brief on exceptions.<sup>87</sup> The case is before the Commission, which will consider the Initial Decision and briefs filed by the parties. A request for rehearing of the May 15, 2014 order establishing hearing is also before the Commission.<sup>88</sup>

5. Barclays Bank PLC, Daniel Brin, Scott Connelly, Karen Levin, and Ryan Smith

On October 9, 2013, FERC petitioned the U.S. District Court for the Eastern District of California for an order affirming the FERC's July 16, 2013 order<sup>89</sup> assessing civil penalties against Barclays' Bank PLC and four traders (Barclays) in the amount of \$453 million plus disgorgement of unjust profits for alleged violations of the FPA's prohibition of energy market manipulation, 16 U.S.C. 824v(a) and the corresponding FERC regulation, 18 C.F.R. 1c.2.<sup>90</sup>

FERC alleges that from 2006 to 2008, Barclays made illegal loss-generating trades of next-day fixed-price physical electricity products on the Intercontinental Exchange (ICE) to benefit Barclays' financial swap positions at major trading points in California, Arizona, and Washington.<sup>91</sup> The loss-generating trades

---

82. 152 F.E.R.C. ¶ 63,016 at PP 278-79.

83. *See generally id.*

84. 147 F.E.R.C. ¶ 61,130 at P 48.

85. Order to Show Cause and Notice of Proposed Penalty, *BP Am. Inc.*, 144 F.E.R.C. ¶ 61,100 at P 1 (2013).

86. Brief on Exceptions of BP Am. Inc., FERC Docket No. IN13-15-000 (Sept. 14, 2015) (filed pursuant to 18 C.F.R. § 385.711 (2015)).

87. Office of Enforcement Staff Brief Opposing Exceptions, *BP Am. Inc.*, FERC Docket No. IN13-15-000 (Oct. 5, 2015) (filed pursuant to 18 C.F.R. § 385.711 (2015)).

88. 152 F.E.R.C. ¶ 63,016 at P 3.

89. Order Assessing Civil Penalties, *Barclays Bank PLC*, 144 F.E.R.C. ¶ 61,041 (2013).

90. *FERC v. Barclays Bank PLC*, No. 2:13-cv-02093-TLN-EFB (E.D. Cal. Oct. 9, 2013).

91. *Id.* at 8-9.

influenced the ICE daily index settlements in a manner that benefited Barclays' fixed-for-floating financial swap positions that settled against those indices.<sup>92</sup>

On May 22, 2015, the Court denied Barclays' motion to dismiss, holding that (1) FERC alleged sufficient factual and legal bases to support a claim for manipulation; (2) FERC's claims are not time-barred; (3) FERC's authority to investigate alleged market manipulation of "entities" under the FPA contemplated the FERC's investigation of individuals; (4) FERC, under the FPA, and not the CFTC, has jurisdiction to investigate the alleged manipulation; and (5) the Eastern District of California was proper venue.<sup>93</sup>

On October 2, 2015, the Court issued a scheduling order requiring FERC to file the administrative record from the underlying FERC proceeding and setting an initial briefing schedule in the matter.<sup>94</sup> The scheduling order also held that the Court will base its assessment of Barclays' liability on the administrative record and the parties' briefing of the issues, though the Court "will also consider whether a determination as to this assessment requires supplementation of the record submitted by FERC and/or alternative means of fact-finding."<sup>95</sup> On December 18, 2015, the Court denied a subsequent request by Barclays to seek limited discovery.<sup>96</sup> The Court's orders, particularly the October 2, 2015 scheduling order, provide some of the first federal district court interpretations of the procedures required by 16 U.S.C. section 823b(d)(3)(B), which establishes that the district court "shall have authority to review de novo the law and the fact involved" in a FERC civil penalty assessment, and raise important procedural issues, particularly the extent to which a party is entitled to a de novo trial in federal court or potentially more cursory federal court review of FERC's decision to assess a civil penalty.<sup>97</sup>

Barclays has (1) appealed the Court's October 2, 2015 order to the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit)<sup>98</sup> and (2) requested that the Court stay the district court proceeding until the Ninth Circuit rules on Barclays' interlocutory appeal.<sup>99</sup>

#### 6. Competitive Energy Services, LLC; Richard Silkman; and Lincoln Paper & Tissue, LLC

On December 2, 2013, FERC petitioned the U.S. District Court for the District of Massachusetts for an order affirming the FERC's August 29, 2013

---

92. Petition for an Order Affirming the Federal Energy Regulatory Commission's July 16, 2013 Order Assessing Civil Penalties Against Barclays Bank PLC, Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith paras. 36-38, FERC v. Barclays Bank, No. 2:13-cv-02093-TLN-DAD (E. D. Cal. Oct. 9, 2013).

93. See generally FERC v. Barclays Bank PLC, 105 F. Supp. 3d 1121 (E.D. Cal. 2015).

94. Scheduling Order at 1-2, FERC v. Barclays Bank PLC, No. 2:13-cv-02093-TLN-DAD (E.D. Cal. Oct. 2, 2015).

95. *Id.* at 2.

96. Order at 2, FERC v. Barclays Bank PLC, No. 2:13-cv-02093-TLN-DAD (E.D. Cal. Dec. 18, 2015).

97. 16 U.S.C. § 823(d)(3)(B) (2015).

98. Notice of Appeal at 5, FERC v. Barclays Bank PLC, 2:13-cv-02093-TLN-EFB (E.D. Cal. Nov. 9, 2015). Barclays' appeal also requests the Ninth Circuit's review of the Court's October 28, 2015 order, which denied Barclays' request that the Court clarify the October 2, 2015 scheduling order.

99. Defendants' Notice of Motion and Motion for A Stay of District Court Proceedings, F.E.R.C. v. Barclays Bank PLC, 2:13-cv-02093-TLN-EFP (E.D. Cal. Feb. 11, 2016).

orders<sup>100</sup> assessing civil penalties against Competitive Energy Services, LLC (CES) and its managing member Richard Silkman (Silkman) in the amount of \$7.5 million against CES and \$1.25 million against Silkman plus disgorgement of unjust profits for alleged violations of the FPA's prohibition of energy market manipulation, 16 U.S.C. 824v(a) and the corresponding FERC regulation, 18 C.F.R. 1c.2.<sup>101</sup>

FERC alleges that Silkman and CES advised their client Rumford Paper Company (Rumford)<sup>102</sup> to falsify its average load amount acquired from the New England grid, and thereby fraudulently receive payments as a result of its participation in the Day-Ahead Load Response Program, a load response incentive program offered by ISO-NE.<sup>103</sup>

On December 19, 2013, Silkman and CES filed both a motion to dismiss and motion to transfer venue to the U.S. District Court for the District of Maine. On January 9, 2014, the FERC filed both its opposition to the motion to dismiss and opposition to transfer venue. The Court conducted an oral argument on these issues on July 18, 2014. Further, on October 6, 2015, the FERC filed with the Court in *Silkman* the scheduling order issued by the Eastern District of California in the *Barclays* proceeding the FERC argued that the California district's procedural approach is consistent with the FERC's position in *Silkman*.<sup>104</sup> The Court has issued neither a ruling on any of the above motions nor a scheduling order regarding next steps in the litigation.

### E. Settlements

#### 1. Columbia Gas Transmission, LLC

The FERC approved a stipulation and consent agreement with Columbia Gas that resolved an investigation “into the transparency of Columbia Gas’ auctions of its available firm capacity.”<sup>105</sup> Following a referral from FERC’s Division of Audits and Accounting (Audits), Enforcement Staff determined that Columbia Gas violated section 4 of the General Terms and Conditions of its FERC Gas Tariff by failing to post notices of the auctions of its available firm capacity on the public side of its Electronic Bulletin Board.<sup>106</sup>

Under the agreement, Columbia Gas stipulated and agreed to the facts, admitted the tariff violation, and agreed to pay \$350,000 in civil penalties.<sup>107</sup> In addition, as part of a compliance plan to Audits, Columbia Gas “agreed to

---

100. *Competitive Energy Services, LLC*, 144 F.E.R.C. ¶ 61,163 (2013); *Richard Silkman*, 144 F.E.R.C. ¶ 61,164 (2013).

101. Jury Trial Requested, *FERC v. Silkman*, No. 1:13-cv-13054-DPW (D. Mass. Dec. 2, 2013).

102. Rumford has settled all claims with FERC, agreeing to a \$10 million civil penalty and disgorgement of \$2.8 million in unjust profits, plus interest. *Rumford Paper Co.*, 142 FERC ¶ 61,218 (2013).

103. Order Assessing Civil Penalty, *Silkman*, 144 F.E.R.C. ¶ 61,164 at P 45 (2013); Order Assessing Civil Penalty, *Competitive Energy Services, LLC*, 144 F.E.R.C. ¶ 61,164 at P 43 (2013).

104. Petitioner’s Notice of Supplemental Authority, *FERC v. Silkman*, No. 1:13-CV-13054-DPW (D. Mass. Oct. 6, 2015).

105. Order Approving Stipulation and Consent Agreement, *In re Columbia Gas Transmission*, 152 F.E.R.C. ¶ 61,089 at P 9 (2015).

106. *Id.* at P 8.

107. *Id.* at P 10.

implement written procedures and internal controls to ensure that [it reported] accurate and consistent data in its posted capacity reports.”<sup>108</sup>

## 2. Western Electricity Coordinating Council

The FERC approved a stipulation and consent agreement between Enforcement Staff, the North American Electric Reliability Corporation (NERC), Western Electricity Coordinating Council (WECC), and Peak Reliability. The agreement resolved “an investigation of WECC (as the Reliability Coordinator for the Western Interconnection (WECC RC)) . . . into possible violations of Reliability Standards associated with WECC RC’s oversight of a portion of the Bulk-Power System (BPS) and a blackout that occurred on September 8, 2011.”<sup>109</sup>

The investigation, conducted jointly by Enforcement Staff and NERC, “determined that WECC violated the Facilities Design, Connection and Maintenance (FAC) and Interconnection Reliability Operations and Coordination (IRO) groups of Reliability Standards.”<sup>110</sup> Enforcement Staff and NERC determined that on “September 8, WECC operators failed to respond properly to alarms, issued no reliability directives during the outages, relied on outdated reliability studies, did not review other studies, and were not aware of how certain system and interconnection operating limits could undermine grid system reliability.”<sup>111</sup>

Under the agreement, WECC stipulated to the facts but neither admitted nor denied Enforcement Staff’s and NERC’s findings that WECC RC violated the Reliability Standards.<sup>112</sup> WECC agreed to pay a civil penalty of \$16 million, including \$1.5 million each to the U.S. Treasury and NERC, and \$13 million is to be invested in reliability enhancements.<sup>113</sup> WECC and Peak Reliability (the successor to WECC as RC) also agreed to certain mitigation and reliability activities and compliance monitoring.<sup>114</sup>

## II. THE COMMODITY FUTURES TRADING COMMISSION

### A. Energy-Related Enforcement Cases

#### 1. *Aspire Commodities, LP v. GDF Suez Energy North America*, 2015 U.S. Dist. LEXIS 13044 (2015)

On February 3, 2015, the U.S. District Court for the Southern District of Texas, Houston Division, issued a memorandum and order<sup>115</sup> dismissing the First

---

108. *Id.* at P 1.

109. Order Approving Stipulation and Consent Agreement, *Western Electricity Coordinating Council*, 151 F.E.R.C. ¶ 61,175 at P 1 (2015).

110. *Id.* at P 20.

111. STAFF OF THE OFFICE OF ENFORCEMENT, FED. ENERGY REGULATORY COMM’N, 2015 STAFF REPORT ON ENFORCEMENT 14, Docket No. AD07-13-009 (2015), available at <http://www.ferc.gov/legal/staff-reports/2015/11-19-15-enforcement.pdf>.

112. 151 F.E.R.C. ¶ 61,175 at P 21.

113. *Id.* at P 1.

114. *Id.*

115. Memorandum and Order, *Aspire Commodities, LP v. GDF SUEZ Energy N. Am. Inc.*, No. H-14-1111, 2015 U.S. Dist. LEXIS 13044 (S.D. Tex. Feb. 3, 2015) [hereinafter Memorandum and Order I].

Amended Complaint filed by Aspire Commodities, LP (Aspire) and Raiden Commodities, LP (Raiden) (collectively, Plaintiffs) against GDF SUEZ Energy North America, Inc. (GSENA) and certain of its Texas-based subsidiaries (Generation Defendants) (collectively, GDF SUEZ).<sup>116</sup> GDF SUEZ owned and controlled generation resources located in the Electric Reliability Council of Texas (ERCOT region).<sup>117</sup> Plaintiffs are traders who claimed that they had been harmed by GDF SUEZ's derivative commodities markets.<sup>118</sup>

ERCOT operates both a Real-Time Market and Day-Ahead Market, and balances the real time supply with the demand for electricity by use of Locational Marginal Pricing mechanisms.<sup>119</sup> ERCOT's energy markets are subject to regulation primarily by the Public Utility Commission of Texas (PUCT), and under the PUCT's rules, a generator that controls less than 5% of the installed generating capacity in ERCOT is deemed not to have ERCOT-wide market power.<sup>120</sup> GDF SUEZ controlled slightly less than 5% of such capacity.<sup>121</sup> In March of 2013, it entered into a settlement agreement and voluntary mitigation plan (VMP) with the PUCT, in which the PUCT agreed that by adherence to the VMP, GDF SUEZ has "an absolute defense against an allegation pursuant to Texas law and the PUCT regulations of an abuse of market power through economic withholding."<sup>122</sup>

Plaintiffs filed their original complaint on April 22, 2014 and their first amended complaint on July 14, 2014, alleging that GDF violated the federal Commodity Exchange Act (CEA) by withholding generation during times of tight supply in order to drive up prices in the Real-Time Market and manipulate contract prices in the derivative commodities market.<sup>123</sup> Plaintiffs claimed that GDF SUEZ engaged in physical withholding by placing its generation offline unnecessarily, and economic withholding by raising its offer to as much as \$5,000/MWh, the then-current ERCOT System Wide Offer Cap, during periods of peak demand.<sup>124</sup> Plaintiffs claimed GDF's actions had the effect of manipulating prices in secondary futures markets such as the InterContinental Exchange (ICE), allegedly for the benefit of positions in such markets.<sup>125</sup> Plaintiffs alleged that GDF SUEZ's conduct caused Aspire to lose substantial sums on its trades on ICE and Raiden to suffer damages on its trades in ERCOT's virtual market.<sup>126</sup>

GDF SUEZ filed a motion to dismiss the complaint, arguing, among other things, that no private right of action was available to Plaintiffs under the CEA

---

116. The Generation Defendants are Ennis Power Company, LLC; Wise County Power Company, LLC; Midlothian Energy, LLC; Hays Energy, LLC; Wharton County Generation, LLC; and Coletto Creek Power, LP. *Id.* at \*2 n.2.

117. *Id.* at \*2.

118. *Id.*

119. *Id.* at \*2-3.

120. Memorandum and Order I, *supra* note 115, at \*3 (citing P.U.C. Subst. R. 25.504(c)).

121. Memorandum and Order I, *supra* note 115, at \*3.

122. *Id.* at \*3-4.

123. *Id.* at \*4-5. The Plaintiffs later amended their complaint and the court's ruling generally addresses the amended complaint.

124. *Id.* at \*5.

125. *Id.* at \*5-6.

126. Memorandum and Order I, *supra* note 115, at \*6-7.



because the private right of action had been exempted for all energy transactions undertaken in the ERCOT market pursuant to a Final Order issued by the CFTC on April 2, 2013.<sup>127</sup>

The court granted the motion to dismiss. The court noted that while the CEA created a private right of action in certain circumstances,<sup>128</sup> the CEA allows the CFTC<sup>129</sup> to exempt from CEA requirements contracts and transactions entered into under tariffs and rate schedules approved by state electricity regulators.<sup>130</sup> The court noted that the Final Order generally exempted transactions in ERCOT's energy markets "from all provisions of the CEA," including the specific provision upon which Plaintiffs relied as the basis for their private cause of action, excepting only the provisions pertaining to the CFTC's own general anti-fraud and anti-manipulation authority.<sup>131</sup> The court found that the transactions that occurred in ERCOT are exempted transactions, and, thus, Plaintiffs had no private right of action under the CEA.<sup>132</sup> The court also rejected Plaintiffs' argument that the Final Order did not preclude their claims because the exemption does not extend to ICE transactions, stating the complaint does not identify a single ICE transaction in which GDF SUEZ participated.<sup>133</sup> The court dismissed Plaintiffs' other claims on the basis that they were premised on a valid claim under the CEA, which Plaintiffs did not have.<sup>134</sup> Plaintiffs have appealed to the U.S. Court of Appeals for the Fifth Circuit.<sup>135</sup>

## 2. United States v. Coscia, 2015 U.S. Dist. LEXIS 50344 (2015)

On April 16, 2015, the U.S. District Court for the Northern District of Illinois, Eastern Division, issued a Memorandum Opinion and Order<sup>136</sup> rejecting the motion to dismiss indictment (Motion) filed by Michael Coscia, the defendant charged with six counts of "spoofing" under the CEA and six counts of commodities fraud under 18 U.S.C. section 1348.<sup>137</sup> Coscia was a trader and the principal at Panther Energy Trading LLC, a high-frequency futures trading firm.<sup>138</sup> According to the indictment (Indictment), Coscia developed and implemented in August 2011:

---

127. *Id.* at \*7, 10; *see also* Final Order in Response to a Petition to Exempt Specified Transactions Authorized by a Tariff or Protocol from Certain Provisions of the Commodity Exchange Act, 78 Fed. Reg. 19,879 (Apr. 2, 2013) [hereinafter Final Order or RTO-ISO Order].

128. Memorandum and Order I, *supra* note 115, at \*10-11 n.34 (citing Commodity Exchange Act (CEA), 7 U.S.C. § 25(a)(1) (2011), which provides that any person that engages in an act of market manipulation barred under the statute can be liable for actual damages).

129. The CFTC is the federal agency having authority to regulate matters under the CEA.

130. Memorandum and Order I, *supra* note 115, at \*13 (citing CEA, 7 U.S.C. § 6(c)(6) (2011)). The CFTC can also exempt contracts and transactions entered into tariffs and rate schedules approved by the FERC.

131. *Id.* at \*14 (referencing CEA, 7 U.S.C. § 25); *see also* Final Order, *supra* note 127.

132. Memorandum and Order I, *supra* note 115, at \*15-16.

133. *Id.* at \*16.

134. *Id.* at \*17.

135. *Aspire Commodities, L.P. v. GDF SUEZ Energy North America, Inc.*, No. 15-20125 (5th Cir. Feb. 25, 2016).

136. Memorandum Opinion and Order, *United States v. Coscia*, 100 F. Supp. 3d 653 (N.D. Ill. Apr. 16, 2015) [hereinafter Memorandum and Order II].

137. *Id.* at 655.

138. *Id.*

[A] high-frequency trading strategy that allowed him to enter into and cancel large-volume orders in a matter of milliseconds . . . such that [he] was able to purchase contracts at lower prices, or sell contracts at higher prices . . . than the prices available in the market before the large-volume orders were entered and canceled.<sup>139</sup>

The Indictment also alleged Coscia would then repeat the strategy in the opposite direction, in order “to create a false impression regarding the number of contracts available in the market, and fraudulently inducing other market participants to react to this deceptive market information.”<sup>140</sup> The Indictment charged Coscia with violating the CEA’s anti-spoofing provision and the anti-fraud provisions under 18 U.S.C. § 1348. Coscia sought to dismiss the Indictment on the basis that the CEA’s anti-spoofing provision is void for vagueness, and the fraud counts are legally invalid and similarly vague.<sup>141</sup>

In discussing the appropriate legal standard, the court stated that a legally sufficient indictment is one that states all of the elements of the crime charged and adequately informs the defendant of the nature of the charges.<sup>142</sup> It added that an indictment that states the elements of the crime by tracking the statute’s language is generally acceptable.<sup>143</sup>

The CEA’s anti-spoofing provision prohibits “any trading, practice or conduct [that] . . . is of the character of, or is commonly known to the trade as, ‘spoofing’ (bidding or offering with the intent to cancel . . . before execution).”<sup>144</sup> In his Motion, Coscia argued that the anti-spoofing provision is unconstitutionally vague because it fails to offer any ascertainable standard to differentiate spoofing from acceptable practices as partial-fill and stop-loss orders.<sup>145</sup> Coscia also asserted that there is no commonly understood meaning of the word “spoofing,” and that at the time the transactions occurred, the CFTC had issued only limited proposed interpretative guidance regarding spoofing.<sup>146</sup> The government argued that the term spoofing has been defined in other contexts before the CFTC issued its proposed guidance, and the proposed guidance indicated that there was at least some degree of consensus as to what activities constituted spoofing.<sup>147</sup>

The court rejected Coscia’s arguments, stating that the conduct alleged in the Indictment tracks the language of the statute and constitutes spoofing as defined in the statute—“bidding or offering with the intent to cancel the bid or offer before execution.”<sup>148</sup> While Coscia cited to other cases where courts found that

---

139. *Id.* The court treated the allegations in the Indictment as true for purposes of its analysis. *Id.* at 656.

140. *Id.*

141. Memorandum and Order II, *supra* note 136, at 656.

142. *Id.* at 655-656.

143. *Id.* at 656.

144. 7 U.S.C. § 6c(a)(5)(C) (2011). These provisions were added to the CEA as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and, thus, were a relatively recent addition to the CEA. *See also* Memorandum and Order II, *supra* note 136, at 656. The relevant portions of section 1348 were added by the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617.

145. Memorandum and Order II, *supra* note 136, at 656. Partial orders are larger than necessary orders entered into to ensure an adequate quantity is obtained. *Id.* Stop-loss orders are orders that are programmed to execute when the market reaches a certain price. *Id.*

146. *Id.* at 657. The CFTC’s proposed guidance, issued in March 2011, gave three examples of spoofing. *Id.* The final guidance, issued in May 2013, added a fourth example. *Id.*

147. Memorandum and Order II, *supra* note 136, at 658.

148. *Id.* at 656.

## 2016] REPORT OF THE COMPLIANCE AND ENFORCEMENT COMMITTEE 119

certain language in the CEA was unconstitutionally vague, these cases were distinguishable because in those instances, Congress had not defined the challenged term in the statute.<sup>149</sup> The court also stated that “intent to cancel” language in the statute is significant, and that Coscia’s intent to cancel sets his behavior apart from legitimate trading activities that result in cancelled transactions.<sup>150</sup>

The commodity fraud provisions of 18 U.S.C. § 1348 make it unlawful to execute, or attempt to execute, a scheme or artifice to defraud person in connection with any commodity for future delivery or obtain, by fraudulent pretenses, any money in connection with the purchase or sale of such commodities. Coscia alleged that the commodity fraud counts of the Indictment were invalid because: (1) his actions cannot constitute fraud because they were not unlawful under the CEA’s anti-spoofing provisions; (2) the Indictment fails to allege that he made any affirmative or implied misrepresentations to other market participants, which a scheme to defraud would require; and (3) the statute is impermissibly vague as applied to the alleged trading activity.<sup>151</sup>

The court rejected Coscia’s first assertion on the basis that it previously found that the CEA’s anti-spoofing provisions are not vague.<sup>152</sup> With respect to Coscia’s second claim, the Indictment fails to allege that he made any affirmative or implied misrepresentations, the court found that while the making of a false statement or misleading representation is an essential element of fraud under other statutes with similar language, the Indictment contained sufficient allegations to demonstrate an intent to defraud.<sup>153</sup> The court also stated that Coscia’s narrow interpretation of section 1348 is inconsistent with the statute’s broad wording, and that in a number of cases, courts have found that false representations or material omissions are not necessary if there is fraudulent intent and a scheme or artifice to defraud in connection with a security.<sup>154</sup> Finally, the court rejected Coscia’s arguments that section 1348 was impermissibly vague as applied to his alleged conduct, holding that the statute provides a person of “reasonable intelligence” with notice of the prohibited conduct, and the allegations contained in the Indictment are consistent with a scheme to defraud as described in the statute.<sup>155</sup>

### 3. In Re Total Gas & Power North America, Inc.

On December 7, 2015, the CFTC issued an order bringing and settling charges against Total Gas & Power North America, Inc. and one of its individual natural gas traders (collectively, TGPNA) for attempting to manipulate the natural

---

149. *Id.* at 658-59.

150. *Id.* at 659.

151. *Id.*

152. Memorandum and Order II, *supra* note 136, at 659.

153. *Id.* at 660.

154. *Id.*

155. *Id.* at 661.

On November 3, 2015, the jury convicted Coscia of the anti-spoofing charges brought against him. Brian Louis & Jonan Hanna, *Swift Guilty Verdict in Spoofing Trial May Fuel New Prosecutions in U.S.*, BLOOMBERG BUS. (Nov. 3, 2015, 6:00 PM), <http://www.bloomberg.com/news/articles/2015-11-03/commodities-trader-coscia-found-guilty-in-first-spoofing-trial>. The article indicates that the government’s success in prosecuting Coscia may encourage other anti-spoofing cases.

gas monthly index settlement prices at several trading hubs in Texas and the Southwest in violation of section 6(c) of the CEA.<sup>156</sup> TGPNA allegedly executed a high volume of fixed-price physical natural gas trades during bid week with the intent to affect monthly index settlement prices at the relevant trading hubs and thereby benefit related financial positions.<sup>157</sup> Transaction data obtained by the CFTC indicated that TGPNA's fixed-price trades accounted for "well over half of the total market by volume" during the time periods at issue "even though TGPNA had no material customer business, physical assets, or transportation at the relevant hubs."<sup>158</sup> The transaction data also exhibited a "strong correlation" between an increase in TGPNA's share of the fixed-price physical market and an increase in its financial exposure to (and potential to benefit from) the monthly index settlement prices at the relevant hubs.<sup>159</sup> The order asserts that TGPNA's conduct violated both the CEA's anti-fraud and price-based manipulation prohibitions contained in sections 6(c)(1) and 6(c)(3) of the Act (as implemented by Final Rules 180.1 and 180.2, respectively).<sup>160</sup>

In order to prove an attempted price-based manipulation under section 6(c)(3), the CFTC indicated that it needed to show "(1) an intent to affect the market price, and (2) an overt act in furtherance of that intent."<sup>161</sup> The CFTC considered the trading data and other evidence sufficient to show that TGPNA "specifically intended to execute enough fixed-price trades during bid week to affect the monthly index settlement prices . . . at the relevant hubs."<sup>162</sup> Evidence of a motive to benefit related financial positions was also critical to the CFTC's finding of intent. cite The CFTC considered TGPNA's establishment of related financial positions prior to bid-week and its active trading in the fixed-price physical market during bid week "despite [its lack of] material customers, assets, or transportation" to be overt acts in furtherance of its intent to manipulate the market.<sup>163</sup>

The CFTC additionally concluded that TGPNA "intentionally employed a manipulative device" in violation of section 6(c)(1) "by purchasing and/or selling large volumes of fixed-price natural gas at the relevant hubs before and during bid-week that were intended to benefit [its] related financial positions."<sup>164</sup> Although the CFTC considered the circumstantial evidence sufficient to show a specific intent to manipulate the market, it noted that under Final Rule 180.1, it "need only find recklessness."<sup>165</sup> The CFTC concluded that TGPNA "at a minimum[, had] acted recklessly or with reckless disregard for the potential impact of their trading on natural gas prices and the integrity of the natural gas

---

156. *In re Total Gas & Power N. Am., Inc.*, CFTC Docket No. 16-03, 2015 WL 8296610, at \*1 (Dec. 7 2015).

157. *Id.* at \*3, 4.

158. *Id.* at \*3.

159. *Id.*

160. *Id.* at \*6-11.

161. *Total Gas & Power*, 2015 WL 8296610, at \*7.

162. *Id.*

163. *Id.*

164. *Id.* at \*9.

165. *Id.*

market.”<sup>166</sup> TGPNA “knew that [its] fixed-priced trading during bid-week had the potential to affect . . . monthly index prices,” and it “structur[ed its financial] trades in a manner that was intended to take advantage of that relationship.”<sup>167</sup>

In anticipation of the institution of administrative enforcement proceedings, TGPNA submitted an offer of settlement, which the CFTC determined to accept.<sup>168</sup> The terms of the agreement, as set forth in the order, require TGPNA to pay a civil monetary penalty of \$3.6 million.<sup>169</sup> The order also imposes a two-year trading limitation prohibiting TGPNA from trading in the fixed-price physical natural gas market during bid-week when it also holds financial natural gas positions whose value is derived in any material part from natural gas bid-week index prices.<sup>170</sup>

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

#### 1. Trade Options, Notice of Proposed Rulemaking, 80 FR 26200 (May 7, 2015)

On May 7, 2015, the CFTC issued a notice of proposed rulemaking in which it proposed several amendments to the trade option exemption to facilitate use of trade options by commercial market participants to hedge against commercial and physical risks (Trade Options NOPR).<sup>171</sup> The trade option exemption, 17 C.F.R. § 32.3, is an exception to the general rule that commodity option transactions must be conducted in compliance with the rules applicable to swaps, and is limited to physically delivered commodity options purchased by commercial users of the commodities underlying the options.<sup>172</sup> However, such transactions are subject to certain conditions, including: recordkeeping and reporting requirements; large trader reporting requirements; position limits; certain recordkeeping, reporting, and risk management duties applicable to swap dealers (SDs) and major swap participants (MSPs); capital and margin requirements for SDs and MSPs; and antifraud and anti-manipulation rules.<sup>173</sup>

In the Trade Options NOPR, the CFTC proposed modifications to the recordkeeping and reporting requirements applicable to trade option counterparties that are neither SDs nor MSPs (Non-SD/MSPs), as well as a non-substantive amendment to eliminate reference to the now-vacated part 151 position limits requirements.<sup>174</sup> Specifically, the CFTC proposed the following amendments to its regulations (17 C.F.R. § 32.3): (1) eliminate all 17 C.F.R. part 45 reporting requirements for Non-SD/MSPs with respect to their trade option

---

166. *Total Gas & Power*, 2015 WL 8296610, at \*10.

167. *Id.*

168. Order Instituting Proceeding Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions at 12-13, *Total Gas & Power N. Am., Inc.*, CFTC Docket No. 16-03 (Dec. 7, 2015).

169. *Id.* at 13.

170. *Id.* at 15.

171. Notice of Proposed Rulemaking, Trade Options, 80 Fed. Reg. 26,200 (May 7, 2015) [hereinafter Trade Options].

172. *Id.* at 26,201.

173. *Id.*

174. *Id.* at 26,202.

activities; (2) no longer require Non-SD/MSPs to provide notice of unreported trade options in an annual Form TO filing (and to delete Form TO from the CFTC's regulations); (3) require Non-SD/MSP trade option counterparties to provide notice within thirty days after entering into, or reasonably expecting to enter into, trade options that have an aggregate notional value in excess of \$1 billion in any calendar year; (4) no longer require a Non-SD/MSP trade option counterparty to identify its trade options in recordkeeping by means of either a unique swap identifier or unique product identifier, but instead require only compliance with the applicable recordkeeping provisions in 17 C.F.R. § 45.2 so long as the Non-SD/MSP trade option counterparty obtains a legal entity identifier (LEI) and provides such LEI to its counterparty if that counterparty is an SD/MSP; and (5) delete the requirement subjecting trade options to 17 C.F.R. part 151 position limits, as part 151 has been vacated by the U.S. District Court for the District of Columbia.<sup>175</sup> Comments on the Trade Options NOPR were due on or before June 22, 2015.<sup>176</sup> The CFTC has not yet issued a final order.

2. Extensions of Time-Limited No-Action Relief with Respect to Certain Commodity Exchange Act Provisions that May Apply to Southwest Power Pool, Inc. and/or Its Participants, 2015 CFTC Ltr. LEXIS 56 (Feb. 27, 2015 and Sept. 29, 2015)

On February 27, 2015, the CFTC's Divisions of Clearing and Risk, Market Oversight, and Swap Dealer and Intermediary Oversight (Divisions) issued a No-Action Letter<sup>177</sup> extending the expiration date of no-action relief previously granted to Southwest Power Pool, Inc. (SPP).<sup>178</sup> Specifically, by letter dated August 1, 2014 (Request Letter), SPP requested an extension of the previously granted no-action relief that the Divisions not recommend that the CFTC take enforcement action against SPP, its members and certain market participants for failure to comply with provisions of the CEA and the CFTC's regulations with respect to:

(1) contracts, agreements and transactions for the purchase or sale of certain "transmission congestion rights," "energy transactions," and "operating reserve transactions," if such transactions are offered or entered into pursuant to a FERC-approved tariff ("Subject Transactions"); and (2) certain preliminary activities related to [SPP]'s transmission congestion right market necessary to support the launch of its Integrated Marketplace.<sup>179</sup>

The Request Letter also requested that the no-action relief be extended until the date the CFTC takes final action on SPP's amended application for certain

---

175. *Id.* at 26,203-04.

176. Notice of Proposed Rulemaking, Extension of Comment Period, Trade Options, 80 Fed. Reg. 31,326, 31,327 (June 2, 2015).

177. DIV. OF CLEARING AND RISK, U.S. COMMODITY FUTURES TRADING COMM'N, CFTC LETTER ORDER NO. 15-5, EXTENSION OF NO-ACTION RELIEF WITH RESPECT TO CERTAIN COMMODITY EXCHANGE ACT PROVISIONS THAT MAY APPLY TO SOUTHWEST POWER POOL, INC. AND/OR ITS PARTICIPANTS, Comm. Fut. L. Rep. (CCH) ¶ 33,411, 2015 CFTC Ltr. LEXIS 4 (2015), available at <http://www.cftc.gov/LawRegulation/CFTCStaffLetters/15-05> [hereinafter FEB. 27 NO-ACTION LETTER].

178. *Id.* at 1 & n.1.

179. FEB. 27 NO ACTION LETTER, *supra* note 177, at 1-2.

exemptions under the CEA and Dodd-Frank Act (Amended Application).<sup>180</sup> The no-action relief granted in the prior no-action letters expired on February 28, 2015.cite

In its February 27 No-Action Letter, the Divisions granted the requested relief, to expire on the earlier of September 30, 2015, or the date on which the CFTC takes final action on the Amended Application.<sup>181</sup>

Finally, while the CFTC has not taken final action on the Amended Application, on May 21, 2015, it published in the Federal Register a notice of proposed order and request for comment on SPP's Amended Application (Proposed Order).<sup>182</sup> Accordingly, on September 29, 2015, the Divisions issued a further extension of the no-action relief, which will expire on the earlier of December 31, 2015 or the date on which the CFTC takes final action on the Proposed Order.<sup>183</sup>

3. 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 FR 29490 (May 21, 2015)

On May 21, 2015, the CFTC published a notice of proposed order and request for comment concerning SPP's Amended Application for exemption from certain portions of the CEA.<sup>184</sup> SPP had requested, and the CFTC proposed to grant, that certain Transmission Congestion Rights, Energy Transactions, and Operating Reserve Transactions (Covered Transactions) be exempted from the CEA and the CFTC's regulations issued thereunder, with the exception of the CFTC's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions.<sup>185</sup> The Covered Transactions would be limited to those offered or entered into in a market administered by SPP, pursuant to SPP's FERC-approved Tariff, for the purposes of allocating SPP's physical resources.<sup>186</sup> The Covered Transactions would also be required to be offered or entered into by persons who are "appropriate persons" or "eligible contract participants" as defined in the CEA and the CFTC's regulations, or persons who are in the business of:

---

180. *Id.* at 2. Action on the Amended Application is still pending before the CFTC. A description of that proceeding is provided in section II.B.4 below.

181. *Id.* at 4.

182. The Proposed Order is described in section II.B.4 below.

183. DIV. OF CLEARING AND RISK, U.S. COMMODITY FUTURES TRADING COMM'N, CFTC LETTER ORDER NO. 15-53, EXTENSION OF NO-ACTION RELIEF WITH RESPECT TO CERTAIN COMMODITY EXCHANGE ACT PROVISIONS THAT MAY APPLY TO SOUTHWEST POWER POOL, INC. AND/OR ITS PARTICIPANTS 4, 2015 CFTC Ltr. LEXIS 56 (2015), available at <http://www.cftc.gov/LawRegulation/CFTCStaffLetters/15-53>.

184. 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 Authority Provided in section 4(c)(6) of the Act, 80 Fed. Reg. 29,489 (May 21, 2015) [hereinafter Proposed Order], available at <https://www.gpo.gov/fdsys/pkg/FR-2015-05-21/pdf/2015-12346.pdf>. SPP's Amended Application was filed on August 2, 2014, and amended the initial application filed on October 17, 2013. *Id.* at 29,491 n.6. The deadline for comments in response to the Proposed Order was June 22, 2015. *Id.* at 29,491.

185. *Id.* at 29,490. The Covered Transactions would involve contracts, agreements and transactions for the purchase or sale of the limited electric energy-related products that are specifically described within the Amended Application. *Id.*

186. *Id.*

(1) “[g]enerating, transmitting, or distributing electric energy,” or (2) “providing electric energy services that are necessary to support the reliable operation of the transmission system.”<sup>187</sup> Additional conditions of the proposed exemption included the requirement that neither the SPP Tariff nor its governing documents include a requirement that SPP notify a member prior to providing information to the CFTC in response to a subpoena or other request for information, and that information-sharing arrangements that are satisfactory to the CFTC between it and FERC remain in full force and effect.<sup>188</sup>

In proposing to grant the exemptions, the CFTC noted that the exemptions are subject to the same limitations imposed in its so-called RTO-ISO Order,<sup>189</sup> which granted similar relief to other regional transmission organizations.<sup>190</sup> As required by CEA section 4(c), the CFTC found that the proposed exemptions are consistent with the public interest and the CEA’s purposes, and will not have a material adverse effect on the ability of the CFTC or any contract market to discharge its regulatory or self-regulatory duties under the CEA.<sup>191</sup>

Finally, the CFTC clarified that nothing in the Proposed Order is intended to limit the right of individuals to bring a private right of action under CEA section 22.<sup>192</sup> While noting that this issue had not been addressed or discussed in the RTO-ISO Order, the CFTC stated that given that Congress had granted individuals private rights of action under the CEA, it would be “highly unusual” for the CFTC to deprive persons of such rights, especially when it is reserving for itself the right to pursue fraud and manipulation claims.<sup>193</sup> The CFTC stated it “did not intend to create such a limitation, and believes that the RTO-ISO Order does not prevent private claims for fraud or manipulation.”<sup>194</sup> The CFTC added “[f]or the avoidance of doubt” this clarification applies to SPP’s proposed exemptions as well.<sup>195</sup>

### 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 facilities.<sup>196</sup> Those safety standards, which are codified in 49 C.F.R. parts 190 to

---

187. Proposed Order, *supra* note 184, at 24,490. An “appropriate person” can be a bank, investment company, commodities pool, certain types of corporations or futures commission merchants, and other similar entities. *Id.* (citing CEA section 4(c)(3), 7 U.S.C. § 6(c)(3) (2011)). An “eligible contract participant” is an entity, such as a financial institution, insurance company, or commodity pool that satisfies certain minimum financial assets, as well as certain governmental and regulated entities. *Id.* (citing CEA section 1a(18), 7 U.S.C. § 1a(18) (2011)).

188. *Id.* at 29,494.

189. RTO-ISO Order, *supra* note 127, at 19,879, 19,887.

190. Proposed Order, *supra* note 184, at 29,494.

191. *Id.* at 29,495.

192. *Id.* at 29,493.

193. *Id.*

194. *Id.*

195. Proposed Order, *supra* note 184, at 29,493.

196. 49 U.S.C. §§ 60101-60140 (2012).



199, apply to most pipelines and LNG facilities in the U.S., and they are the only safety standards that apply to interstate pipeline facilities.<sup>197</sup>

#### A. Pipeline Safety Rulemaking Update

##### 1. Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains (final rule issued on May 8, 2015)

The PHMSA addressed safety concerns stemming from the increased transport of crude oil and ethanol by rail in a May 8, 2015 final rule.<sup>198</sup> PHMSA said the rule, which was effective July 7, 2015, would reduce the likelihood of train accidents involving flammable liquids and mitigate the consequences when such accidents occur.<sup>199</sup>

The rule amends federal hazardous materials regulations (HMR)<sup>200</sup> for a “high-hazard flammable train” (HHFT), defined as “a train comprised of 20 or more loaded tank cars of a Class 3 flammable liquid in a continuous block or 35 or more loaded tank cars of a Class 3 flammable liquid across the entire train.” The HMR generally define a Class 3 flammable liquid as one having a flash point of not more than 60 °C (140 °F) or any material in a liquid phase with a flash point at or above 37.8 °C (100 °F).<sup>201</sup>

The rule requires HHFTs to meet enhanced braking system safety standards and conduct an analysis that considers the factors listed in appendix D to part 172 of the HMR in order to establish the safest, most secure route.<sup>202</sup> Rail carriers must provide a point of contact to the appropriate state and local officials regarding routing issues.<sup>203</sup> HHFT speeds are generally limited to 50 mph and reduced to 40 mph in high-threat urban areas designated by the Transportation Security Administration<sup>204</sup> if certain tank car standards are not met. Tank cars constructed after October 1, 2015 must meet enhanced DOT standards, and existing tank cars must be upgraded to DOT specifications within the rule’s retrofitting timeline.<sup>205</sup> Companies that offer or ship unrefined petroleum-based products are required to provide more accurate classification of their materials.

PHMSA said that crude oil and ethanol comprised about 68% of the flammable liquids transported by rail.<sup>206</sup> According to data cited from the U.S. Energy Information Administration, rail delivery of oil rose from approximately 0.7 million barrels per day in 2011 to over 1.5 million barrels per day in 2014.<sup>207</sup>

---

197. 49 C.F.R. pts. 190-199 (2013).

198. Final Rule, Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 80 Fed. Reg. 26,644 (PHMSA May 8, 2015) [hereinafter Hazardous Materials].

199. *Id.*

200. 49 C.F.R. pts. 171-180 (2011).

201. 49 C.F.R. § 173.120(a).

202. Hazardous Materials, *supra* note 198, at 26,651.

203. *Id.*

204. 49 C.F.R. pt. 1580 app. A (2011).

205. Hazardous Materials, *supra* note 198, at 26,666.

206. *Id.* at 26,718.

207. *Rail Deliveries of U.S. Oil Continue to Increase in 2014*, U.S. ENERGY INFO. ADMIN. (Aug. 28, 2014), <http://www.eia.gov/todayinenergy/detail.cfm?id=17751>.

### B. Administrative Enforcement

The PHMSA initiated 184 pipeline safety enforcement actions in 2015, a slight increase over the 154 cases the agency initiated in 2014.<sup>208</sup> The PHMSA also proposed approximately \$2.8 million in total civil penalties in 2015, slightly more than the \$2.7 million proposed in 2014, but the second lowest total since 2004.<sup>209</sup> The PHMSA issued 60 orders and decisions on reconsideration in 2015, down from the seventy-one such orders issued in 2014 and well below the average of 109 orders and decisions in the five years prior.<sup>210</sup>

## IV. THE DEPARTMENT OF ENERGY

### A. Enforcement Actions

Pursuant to the Energy Policy and Conservation Act of 1975 (EPCA) and its implementing regulations, the DOE monitors and enforces compliance with energy and water conservation standards for certain covered consumer products.<sup>211</sup> Further, the DOE is authorized to assess civil penalties for violations of the EPCA and to seek judicial action to prohibit further distribution of noncompliant products.<sup>212</sup>

In November 2015, the DOE and LG Electronics USA, Inc. modified a 2008 agreement that required LG to make annual payments to purchasers of certain models of LG-manufactured refrigerators for energy usage in excess of the amount stated on the Energy Guide labels on the refrigerators.<sup>213</sup> Under the modified agreement, LG agreed to make a lump-sum payment to each of the purchasers, rather than annual payments, and to send letters to approximately 48,000 previously unidentified purchasers that may be eligible for payments.<sup>214</sup> In addition, LG agreed to pay each eligible customer \$4.54 more than under the original agreement, as an “additional goodwill payment.”<sup>215</sup>

The DOE also engaged in a series of enforcement actions in 2015, including the following matters resulting in compromise agreements:

#### 1. Perlick Corporation

In May 2015, the DOE accepted a compromise agreement with Perlick Corporation, resolving a civil penalty case for distribution of freezers that did not

---

208. *Summary of Enforcement Activity-Nationwide*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN. (Dec. 31, 2015), <http://primis.phmsa.dot.gov/comm/reports/enforce/EnfHome.html?nocache=4280>.

209. *Summary of Cases Involving Civil Penalties*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN. (Dec. 31, 2015), [http://primis.phmsa.dot.gov/comm/reports/enforce/CivilPenalty\\_opid\\_0.html?nocache=6758](http://primis.phmsa.dot.gov/comm/reports/enforce/CivilPenalty_opid_0.html?nocache=6758).

210. *Summary of Enforcement Actions*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN. (Jan. 6, 2015), [http://primis.phmsa.dot.gov/comm/reports/enforce/Actions\\_opid\\_0.html?nocache=7257#\\_TP\\_1\\_tab\\_2](http://primis.phmsa.dot.gov/comm/reports/enforce/Actions_opid_0.html?nocache=7257#_TP_1_tab_2).

211. *See generally* Energy Policy and Conservation Act of 1975, 42 U.S.C. §§ 6291-6309; 10 C.F.R. pts. 430-431 (2015).

212. 42 U.S.C. §§ 6302-6304 (2014).

213. *Modification to an Agreement between the U.S. Department of Energy and LG Electronics U.S.A., Inc.*, ENERGY.GOV 1 (Nov. 6, 2015), available at <http://energy.gov/sites/prod/files/2015/11/f27/2015%20Modification%20Agreement%20signed%20by%20DOE%20and%20LG.pdf>.

214. *Id.* at 2.

215. *Id.* at 5.

## 2016] REPORT OF THE COMPLIANCE AND ENFORCEMENT COMMITTEE 127

comply with the applicable standard for energy usage.<sup>216</sup> The compromise agreement reflected a civil penalty of \$168,200.<sup>217</sup>

## 2. Sunshine Lighting

In July 2015, the DOE accepted a compromise agreement with Sunshine Lighting Company, resolving a civil penalty case for distribution of metal halide lamp fixtures that did not meet the applicable energy conservation standard.<sup>218</sup> The compromise agreement reflected a civil penalty of \$150,000.<sup>219</sup>

## 3. Morris Products

In July 2015, the DOE accepted a compromise agreement with Morris Products, Inc., resolving a civil penalty case for distribution of metal halide lamp fixtures that did not meet the applicable energy conservation standard.<sup>220</sup> The compromise agreement reflected a civil penalty of \$170,720.<sup>221</sup>

# V. THE DEPARTMENT OF JUSTICE

## A. Energy-Related Investigations

### 1. Alstom S.A.

Alstom S.A., a French power and transportation company, was sentenced to pay approximately \$772 million in fines for criminal charges related to violations of the Foreign Corrupt Practices Act and at least \$75 million in bribes paid to government officials in countries around the world (such as Indonesia, Saudi Arabia, Egypt, the Bahamas, and Taiwan).<sup>222</sup>

### 2. Pacific Gas & Electric Co.

In December of 2015, a California federal judge ruled that the maximum fine the government can seek in a criminal case against Pacific Gas & Electric Co. (PG&E) is \$562 million.<sup>223</sup> This determination partially granted a motion by PG&E seeking to block the DOJ from applying the Alternative Fines Act.<sup>224</sup> This determination is reported as not addressing whether the DOJ can base a fine on

---

216. In the Matter of Perlick Corp., No. 2013-SE-14001 (U.S. Dep't of Energy May 14, 2015), available at [http://energy.gov/sites/prod/files/2015/06/f22/2013-SE-14001\\_Perlick\\_Order.pdf](http://energy.gov/sites/prod/files/2015/06/f22/2013-SE-14001_Perlick_Order.pdf).

217. *Id.* at 1.

218. In the Matter of Sunshine Lighting, No. 2014-SE-54008 (U.S. Dep't of Energy July 7, 2015), available at [http://energy.gov/sites/prod/files/2015/07/f24/2014-SE-54008\\_Sunshine\\_Order.pdf](http://energy.gov/sites/prod/files/2015/07/f24/2014-SE-54008_Sunshine_Order.pdf).

219. *Id.* at 4.

220. In the Matter of Morris Products, Inc., No. 2013-SE-5403 (U.S. Dep't of Energy July 20, 2015), available at [http://energy.gov/sites/prod/files/2015/07/f25/2013-SE-5403\\_Morris\\_Order.pdf](http://energy.gov/sites/prod/files/2015/07/f25/2013-SE-5403_Morris_Order.pdf).

221. *Id.* at 4.

222. *Alstom Sentenced to Pay \$772 Million Criminal Fine to Resolve Foreign Bribery Charges*, U.S. DEP'T OF JUSTICE (Nov. 13, 2015), available at <http://www.justice.gov/opa/pr/alstom-sentenced-pay-772-million-criminal-fine-resolve-foreign-bribery-charges>.

223. Jody Godoy, *Judge Cuts Max Criminal Fine to \$562M in PG&E Pipeline Blast*, LAW360 (Dec. 9, 2015), available at <http://www.law360.com/articles/736087/judge-cuts-max-criminal-fine-to-562m-in-pg-e-pipeline-blast>.

224. *Id.*

amounts PG&E is alleged to have saved through non-compliance with the Natural Gas Pipeline Safety Act.<sup>225</sup> Proceedings regarding potential fines and the case are continuing.<sup>226</sup>

### 3. Panther Energy Trading LLC

Michael Coscia, a high frequency trader of Panther Energy Trading LLC, was convicted in November of 2015 of disrupting commodity futures through the criminal acts of “spoofing” and commodities fraud. Each count of commodities fraud carries a maximum sentence of twenty-five years in prison and a \$250,000 fine and each count of spoofing carries a maximum sentence of ten years in prison and a \$1 million fine. A sentencing hearing is scheduled for March 2016.<sup>227</sup>

## B. Environmental-Related Investigations

As discussed below, investigations by the DOJ in 2015 included investigation of power companies for environmental violations, such as those under the Clean Water Act and Clean Air Act.<sup>228</sup>

### 1. Subsidiaries of Duke Energy Corporation

In March 2015, subsidiaries of Duke Energy Corporation pled guilty to violations of the Clean Water Act and were sentenced to pay \$102 million in criminal fines and environmental projects in North Carolina and Virginia. Four of the underlying charges stem from a coal ash spill in the Dan River in 2014.<sup>229</sup> In addition, Duke Energy Corporation entered into a settlement with the DOJ and the Environmental Protection Agency (EPA) to resolve outstanding claims under the Clean Air Act related to modifications to thirteen coal-fired generation units.<sup>230</sup>

---

225. *Id.*

226. *Id.*

227. *High-Frequency Trader Convicted of Disrupting Commodity Futures Market in First Federal Prosecution of “Spoofing”*, U.S. DEP’T OF JUSTICE (Nov. 3, 2015), available at <http://www.justice.gov/usao-ndil/pr/high-frequency-trader-convicted-disrupting-commodity-futures-market-first-federal>.

228. Companies engaged in oil, coal, and natural gas operations also agreed to financial penalties and measures to address alleged violations of environmental regulation investigated by the DOJ, such as under the Clean Air Act, Clean Water Act, and Oil Pollution Act. See, e.g. *Noble Energy Inc. Agrees to Make System Upgrades and Fund Projects to Reduce Air Pollution in Colorado*, U.S. DEP’T OF JUSTICE (Apr. 22, 2015), available at <http://www.justice.gov/opa/pr/noble-energy-inc-agrees-make-system-upgrades-and-fund-projects-reduce-air-pollution-colorado> (including an agreement to spend approximately \$75 million on system upgrades, environmental projects, and civil penalties); *U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit Over Deepwater Horizon Oil Spill*, U.S. DEP’T OF JUSTICE (Oct. 5, 2015), available at <http://www.justice.gov/opa/pr/us-and-five-gulf-states-reach-historic-settlement-bp-resolve-civil-lawsuit-over-deepwater>; *Deepwater Horizon*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/enrd/deepwater-horizon> (last visited Mar. 25, 2016) (addressing civil claims through a settlement, subject to court approval, worth \$20.8 million and recorded as the largest settlement with a single entity in the DOJ’s history); *Arch Coal Subsidiaries to Make System-Wide Upgrades to Reduce Pollution Entering U.S. Waters*, U.S. DEP’T OF JUSTICE (Aug. 6, 2015), available at <http://www.justice.gov/opa/pr/arch-coal-subsidiaries-make-system-wide-upgrades-reduce-pollution-entering-us-waters> (including a \$2 million civil penalty).

229. *Duke Energy Subsidiaries Plead Guilty and Sentenced to Pay \$102 Million for Clean Water Act Crimes*, U.S. DEP’T OF JUSTICE (May 14, 2015), available at <http://www.justice.gov/opa/pr/duke-energy-subsidiaries-plead-guilty-and-sentenced-pay-102-million-clean-water-act-crimes>.

230. *Duke Energy Corporation to Reduce Emissions from Power Plants in North Carolina, Fund Environmental Projects*, U.S. DEP’T OF JUSTICE (Sept. 10, 2015), available at

The consent decree included Duke's commitment to permanently shut down eleven of those units and application of certain environmental controls prior to retiring additional units.<sup>231</sup> Further, the settlement included commitments to pay a \$975,000 civil penalty and spend \$4.4 million on environmental mitigation projects.<sup>232</sup>

## 2. Virgin Islands Water and Power Authority

In 2015, the Virgin Islands Water and Power Authority (VIWAPA) entered into an agreement with the DOJ and EPA to comply with the Clean Air Act at certain facilities on St. John, U.S. Virgin Islands.<sup>233</sup> VIWAPA agreed to spend approximately \$12.2 million to comply with requirements under the agreement, and will also pay a \$1.3 million penalty.<sup>234</sup> Further, VIWAPA is in the process of converting certain oil-fired turbines to be capable of burning liquefied natural gas or petroleum gas.<sup>235</sup> The DOJ reported that “[t]he settlement requires that at least 85[%] of the power VIWAPA generates from the converted units be from burning liquefied petroleum gas or liquefied natural gas at the converted units and renewable sources.”<sup>236</sup>

## 3. Interstate Power and Light

Interstate Power and Light (IPL) entered into a settlement with the DOJ and EPA to reduce emissions from seven coal-fired power plants located in Iowa, spend \$6 million to fund environmental projects, and pay a \$1.1 million civil penalty for alleged violations of the Clean Air Act. Cite IPL also agreed to install pollution control technology at two projects in Lansing and Ottumwa, Iowa, and to retire or convert the remaining five plants to burn natural gas.<sup>237</sup>

---

<http://www.justice.gov/opa/pr/duke-energy-corporation-reduce-emissions-power-plants-north-carolina-fund-environmental>.

231. *Id.*

232. *Duke Energy Subsidiaries Plead Guilty*, *supra* note 229; *Duke Energy Corporation to Reduce Emissions*, *supra* note 230.

233. *Virgin Islands Water and Power Authority Signs Legal Agreement with EPA and U.S. Department of Justice to Reduce Air Pollution at Two Power Plants*, U.S. DEP'T OF JUSTICE (Sept. 24, 2015), available at <http://www.justice.gov/opa/pr/virgin-islands-water-and-power-authority-signs-legal-agreement-epa-and-us-department-justice>.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Settlement with Interstate Power and Light to Reduce Emissions from Iowa Power Plants, Fund Projects to Benefit Environment and Communities*, U.S. DEP'T OF JUSTICE (July 15, 2015), available at <http://www.justice.gov/opa/pr/settlement-interstate-power-and-light-reduce-emissions-iowa-power-plants-fund-projects>.

**COMPLIANCE & ENFORCEMENT COMMITTEE**

Candice Castaneda, Co-Chair  
Patrick L. Morand, Co-Chair  
Rabeha S. Kamaluddin, Vice Chair  
Jimmy C. Cline, Board Committee Liaison

Alejandro Becker  
David Stewart Berman  
Todd L. Brecher  
Douglas M. Canter  
Francesca E. Ciliberti-Ayres  
Kristen Connolly McCullough  
Adam Eldean  
Eugene R. Elrod  
Doron Ezickson  
Robert Fleishman  
Benjamin M. Fred  
Michael J. Fremuth  
Alexander Goldman  
Valerie L. Green  
Jesse Halpern  
Jacquelynn B. Huges  
Norma R. Iacovo  
Paula N. Johnson

Scott Daniel Johnson  
Mark C. Kalpin  
Gregory M. Kusel  
Michael Loatman  
Kenneth McCracken  
Bradley R. Miliuskas  
Thomas Millar  
Amy Parker  
Kay Pashos  
Christopher J. Polito  
Randall S. Rich  
Mary-Kaitlin Rigney  
Alan J. Rukin  
F. Alvin Taylor  
Jonathan P. Trotta  
George Vegh  
Andrea Wolfman  
Gizelle Wray