REPORT OF THE COMPLIANCE AND ENFORCEMENT COMMITTEE

This report summarizes key federal enforcement and compliance developments in 2022, including certain decisions, orders, actions, and rules of the Federal Energy Regulatory Commission (the FERC or Commission), the North American Electric Reliability Corporation (NERC), the Commodity Futures Trading Commission (CFTC), the Pipeline and Hazardous Materials Safety Administration (PHMSA), the U.S. Department of Energy (DOE), and the U.S. Department of Justice (DOJ).*

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I. THE FEDERAL ENERGY REGULATORY COMMISSION

A. Reports, Policy Statements, and Rules

1. Annual Enforcement Report

On November 17, 2022, the FERC Office of Enforcement (Enforcement) issued its Annual Report on Enforcement staff activities during the fiscal year 2022[1] that, as in past years, identified its priorities as focusing on (1) fraud and market manipulation"; (2) "serious violations of the Reliability Standards"; (3) "anticompetitive conduct"; and (4) "conduct that threatened the transparency of regulated markets."[2]

In pursuit of these priorities, Enforcement's Division of Investigations (DOI) opened twenty-one new investigations in fiscal year 2021, up from twelve the prior year,[3] while bringing seven to closure without further action,[4] up from four the prior year.[5] DOI negotiated eleven settlements that were approved by the Commission; "eight of these settlements resolved seven investigations," resulting in approximately $23.59 million in civil penalties and disgorgements of approximately $1.8 million.[6] Five of these settlements also required the settling parties to adopt compliance monitoring procedures.[7] Three other settlements resolved litigation pending in two federal district court proceedings, and required disgorgement of $1.975 million.[8] These amounts were higher than the approximately $4.6 million in civil penalties and $1.8 million in disgorgement that resulted from eight settlements entered into in 2021.[9]

1. FERC, 2022 REPORT ON ENFORCEMENT 4 (Nov. 17, 2022) (Docket No. AD07-13-016) (Nov. 17, 2022) [hereinafter 2022 REPORT ON ENFORCEMENT].

2. *Id.* at 6.

3. FERC, 2021 REPORT ON ENFORCEMENT (Nov. 18, 2021) (Docket No. AD07-13-015) [hereinafter 2021 REPORT ON ENFORCEMENT].

4. 2022 REPORT ON ENFORCEMENT, *supra* note 1, at 6.

5. 2021 REPORT ON ENFORCEMENT, *supra* note 3, at 6.

6. 2022 REPORT ON ENFORCEMENT, *supra* note 1, at 6.

7. *Id*.

8. *Id*. at 6-7

9. 2021 REPORT ON ENFORCEMENT, *supra* note 3, at 6-7.

FERC's Division of Audits and Accounting completed 12 audits of public utility, natural gas, oil, and regional transmission organization companies covering a wide array of topics, resulting in fifty-one findings of noncompliance and 258 recommendations for corrective action, the majority of which were implemented within six months, and directing approximately $158 million in refunds and other recoveries.[10] This compares to 12 such audits in 2021 that resulted in sixty-four findings of noncompliance and 250 recommendations for corrective action, the majority of which were implemented within six months, and approximately $18.5 million in refunds and other recoveries.[11]

FERC's Division of Analytics and Surveillance (DAS) surveillance staff's activities resulted in twenty-six natural gas surveillance inquiries, but no referrals to DOI for investigation; and thirty-two electric surveillance inquiries and two referrals to DOI for investigation.[12] DAS closed twenty-six electric surveillance inquiries with no referral and, as of the end of the fiscal year, continued its work on four other inquires.[13] This compares to thirty-four natural gas surveillance inquiries with two referrals to DOI for investigation and thirty-two electric surveillance inquiries with two referrals to DOI for investigation.[14]

2. Duty of Candor Rulemaking

On July 28, 2022, FERC issued a Notice of Proposed Rulemaking (NOPR) seeking comment on a new regulation designed to close claimed gaps in the "patchwork" of existing rules requiring accurate communications by broadly imposing a "duty of candor" on "all entities communicating with the Commission or other specified organizations related to a matter subject to the jurisdiction of the Commission."[15]

The proposed revised regulatory text—to be added as new 18 C.F.R. § 1d.1 under the heading "Accuracy of communications," reads as follows:

> Any entity must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, jurisdictional transmission or transportation providers, or the Electric Reliability Organization and its associated Regional Entities, where such communication relates to a matter subject to the jurisdiction of the Commission, unless the entity exercises due diligence to prevent such occurrences.[16]

Commissioner Danly dissented from the proposal, arguing that it was unlawfully vague and overbroad, gave Enforcement staff too much discretion, and would chill necessary communications.[17] Commissioner Christie did not make a separate written statement but noted that the NOPR was just a proposal and that he expected

10. 2022 REPORT ON ENFORCEMENT, *supra* note 1, at 7.
11. 2021 REPORT ON ENFORCEMENT, *supra* note 3, at 7.
12. 2022 REPORT ON ENFORCEMENT, *supra* note 1, at 7.
13. *Id.*
14. 2021 REPORT ON ENFORCEMENT *supra* note 3, at 7.
15. Notice of Proposed Rulemaking, *Duty of Candor*, 87 Fed. Reg. 49,784, 49,785 (2022).
16. *Id.* at 49,791.
17. *Id*. at 49,791-92 (Danly, Comm'r, dissenting).

plenty of comments. Various comments have been submitted both supporting and opposing the NOPR, with much of the opposition coming from industry trade associations. Some notable entities that do no frequently participate in FERC proceedings, such as the American Bar Association and the U.S. Chamber of Commerce, asked that the NOPR be substantially revised or withdrawn.

B. Enforcement Litigation and Adjudication

1. BP America, Inc., et al. v. FERC

In October 2022, the U.S. Court of Appeals for the Fifth Circuit addressed arguments raised by BP[18] to overturn FERC's 2016 order[19] "finding that BP [had] engaged in market manipulation and imposing a $20 million civil penalty."[20] The Fifth Circuit found that BP's many arguments for reversing the Order Assessing Penalties were "all meritless save one."[21]

Contra BP, the court found that (a) FERC's anti-manipulation prohibition provided legally adequate notice of what conduct was prohibited;[22] (b) FERC's finding that BP engaged in market manipulation was supported by substantial evidence;[23] (c) FERC's penalty assessment was not arbitrary or capricious;[24] (d) FERC did not violate the Administrative Procedures Act's separation of functions rule;[25] and (e) BP waived its right to challenge FERC's penalty assessment on statute of limitations grounds by unjustifiably failing to timely raise that argument.[26]

BP's meritorious contention was that FERC exceeded its authority to address market manipulation.[27] FERC's penalty order was predicated on its view that Natural Gas Act (NGA) section 4A expanded FERC's anti-manipulation authority to

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18. BP Am., Inc. v. FERC, 52 F.4th 204, 210 n.1 (5th Cir. 2022). The Court refers to appellants collectively as "BP" despite acknowledging that the case involves several "BP-related entities." *Id.* at 210 n.1.

19. *BP Am. Inc.*, 156 FERC ¶ 61,031 (2016) (Order Assessing Penalties), *see order on reh'g*, *BP Am. Inc.*, 173 FERC ¶ 61,239 (2020).

20. *BP Am. Inc.*, 52 F.4th at 210.

21. *Id*.

22. *Id*. at 219. "[A] statute forbidding 'any manipulative . . . device or contrivance' 'in connection with the purchase or sale of natural gas' provides more than adequate notice that the conduct of which BP is accused— that is, engaging in repeated natural gas sales with the objective of manipulating prices — is prohibited." *Id*. at 219 n.11 (citing 15 U.S.C. § 717c-1(2005)).

23. *Id.* at 219-21. In this respect, the court found that "BP's contentions ultimately amount to disagreements with FERC's permissible interpretations of the evidence and reasonable resolution of conflicting expert testimony." *Id*. at 219.

24. *BP Am. Inc.*, 52 F.4th at 221-22. Although the court rejected certain of BP's arguments that FERC's application of its penalty guidelines was arbitrary and capricious, it nonetheless observed that "many of the issues pertinent to determining an appropriate penalty, such as the proper calculation of profits and market harm, are ill-suited to our resolution given our holding that FERC has jurisdiction only over some of BP's transactions. The appropriate course therefore is to remand to the Commission for reassessment of the penalty in light of our jurisdictional holding." *Id*. at 221.

25. *Id*. at 223.

26. *Id*. at 224-26.

27. *Id*. at 210.

encompass otherwise non-jurisdictional intrastate transactions employed in connection with a scheme to manipulate jurisdictional interstate transactions.[28] The court held that FERC's reading was not plausible in light of the "carefully defined limitations on FERC's jurisdiction."[29] Rather, read in light of the text, history, and purpose of the NGA, the court concluded that the delineation of state and federal authority antedating enactment of section 4A must be respected.[30] Nonetheless, for some of the ostensibly intrastate manipulative trades, the court upheld FERC's alternative basis for jurisdiction, namely, that gas that has entered interstate commerce remains in interstate commerce for NGA purposes.[31] The court therefore remanded the matter back to FERC for a recalculation of the penalty.[32]

2. FERC v. Coaltrain Energy, L.P., et al.

On March 2, 2022, the U.S. District Court for the Southern District of Ohio issued an order in *FERC v. Coaltrain Energy, L.P., et al*.[33] denying FERC's motion for leave to seek interlocutory appeal of its November 29, 2021 order[34] holding that FERC may not pursue remedies jointly and severally against the individual defendants.

The Order Denying Interlocutory Appeal observed that the court had previously declined to rule on these same questions, deeming them unripe.[35] The court noted that the parties had represented that a ruling on these issues would facilitate settlement, and that "the only thing remaining to be done in this case is trial."[36] Consequently, the court found that granting interlocutory appeal would not materially advance the termination of the proceeding and thus the test for granting leave for such appeal could not be satisfied.[37]

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28. *BP Am. Inc.*, 52 F.4th at 215 (discussing NGA section 4A, 15 U.S.C. § 717c-1).

29. *Id*. "We are not satisfied . . . that the single statutory phrase 'in connection with' can bear the weight FERC would place upon it; considering the explicit division drawn by the statute between interstate and intrastate transactions, it is plain to us that 'in connection with' does not mean any connection whatsoever, regardless of how indirect or tenuous." *Id.*

30. *Id*. at 216-17.

31. *Id*. at 217. The basis for this holding was contractual language, applicable to 18 of the trades, explicitly stating that they were subject to the NGA. *Id*. at 217-18. As for an additional 36 transactions, for which there was no comparable contractual language, the court found them to be not subject to FERC's NGA jurisdiction. *Id*. at 218 n.10.

32. *BP Am. Inc.*, 52 F.4th at 227.

33. Order Denying Interlocutory Appeal, FERC v. Coaltrain Energy L.P., No. 2:16-cv-732 (S.D. Ohio Oct. 26, 2022), ECF No. 121 [hereinafter Order Denying Interlocutory Appeal].

34. Order and Opinion, FERC v. Coaltrain Energy, No. 2:16-cv-732 (S.D. Ohio Oct. 26, 2022), ECF No. 115.

35. Order Denying Interlocutory Appeal, *supra* note 33, at 2.

36. *Id*. at 2.

37. *Id*.

Subsequently, the court vacated the November 2021 order addressing joint and several liability.[38] Shortly thereafter, it granted FERC's consent motion to dismiss the proceeding with prejudice[39] pursuant to a settlement between Enforcement, Coaltrain, and the individual defendants.[40]

3. FERC v. GreenHat Energy, LLC

On January 6, 2022, FERC filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania, seeking to enforce penalties it had levied against GreenHat Energy, LLC (GreenHat), John Bartholomew, Kevin Ziegenhorn and Luan Troxel, in her capacity as Executor of the Estate of Andrew Kittell (Kittell Estate) (collectively, the GreenHat Entities).[41] On March 16, 2022, FERC and the GreenHat Entities filed a joint motion to stay the proceeding to allow the parties to implement tentative settlements.[42] The court granted the request on March 16, 2022, subject to the requirement that parties provide status reports describing the settlements' status.[43] The parties have provided those reports, and the district court proceeding was still pending in December 2022.[44]

4. Rover Pipeline, LLC v. FERC

On February 1, 2022, Rover Pipeline, LLC (Rover) and parent company Energy Transfer Partners, L.P. (Energy Transfer) (collectively, the Rover Companies) filed a complaint against FERC, seeking a declaratory ruling that FERC must litigate the issues related to the Rover Companies' alleged violations of the Natural Gas Act in district court rather than through the hearing procedures established by FERC.[45] On March 7, 2022, FERC filed a response to the Complaint,[46] and also filed a motion to stay the litigation pending the U.S. Supreme Court's resolution of a case that presented issues that might control resolution of the issues

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38. Order Vacating Denial of Interlocutory Appeal, FERC v. Coaltrain Energy, No. 2:16-cv-732 (S.D. Ohio Oct. 26, 2022), ECF No. 132.

39. Dismissal Order, FERC v. Coaltrain Energy, No. 2:16-cv-732 (S.D. Ohio Oct. 26, 2022), ECF No. 134.

40. *See infra* Part I.D.4.

41. Complaint at 1-2, FERC v. GreenHat Energy, LLC, No. 2:22-cv-00044-MAK, (E.D. Pa. Jan. 6, 2022). Information on the FERC enforcement proceeding initiated against the GreenHat Entities is provided *infra* at Part I.C.3.

42. Motion by All Parties to Defer April 8 Response Deadline and Stay Other Proceedings to Permit Implementation of Tentative Settlement, FERC v. GreenHat Energy, LLC, No. 2:22-cv-00044-MAK (E.D. Pa. Mar. 16, 2022), ECF No. 4.

43. Order on Joint Motion, FERC v. GreenHat Energy, LLC, No. 2:22-cv-00044-MAK (E.D. Pa. Mar. 16, 2022), ECF No. 5.

44. While the settlements have been entered into and approved by FERC, they are still pending approval by the probate court for the Kittell Estate. *See* Joint Status Report at 1-2, FERC v. GreenHat Energy, LLC, No. 2:22-cv-00044-MAK (E.D. Pa. Oct. 7, 2022), ECF No. 17.

45. Complaint for Declaratory Relief at P 24, Rover Pipeline v. FERC, No. 3:22-cv-00232-S (N.D. Tex. Feb. 1, 2022), ECF No. 1. The referenced FERC order, *Rover Pipeline, LLC*, 178 FERC ¶ 61,028 (2022) is discussed *infra* at Part I.C.2.

46. Defendants' Opposition to Plaintiffs' Motion to Expedite and Memorandum in Support of Motion to Stay Litigation, Rover Pipeline v. FERC, No. 3:22-cv-00232-S, (N.D. Tex. Mar. 7, 2022), ECF No. 19.

brought by the Complaint.[47] On April 5, 2022, the Rover Companies filed a response, requesting that the district court either stay both the district court litigation and FERC litigation, or not issue any stay.[48] On May 24, 2022, the district court issued an order stating that neither party opposed staying these cases, and ordering both proceeding stayed pending the outcome the related Supreme Court case.[49]

C. Show Cause Orders and Orders Assessing Civil Penalties

1. Ampersand Cranberry Lake Hydro, LLC

On April 21, 2022, FERC issued an order assessing a civil penalty of $600,000 on Ampersand Cranberry Lake Hydro, LLC (Ampersand) in response to Ampersand's alleged deliberate decision to abandon all project property.[50] Ampersand operated the Cranberry Lake Project under a lease agreement with the Oswegatchie River-Cranberry Reservoir Regulating District Corporation (OR-CRRDC), and had committed to completing certain safety work repairs to the project, including rehabilitation of the project's fuse plug spillway (fuse plug).[51] On July 6, 2021, Ampersand and OR-CRRDC entered into a settlement under which Ampersand terminated its lease agreement with OR-CRRDC, which resulted in Ampersand losing all access to the project site.[52] Ampersand did not perform "any work on the . . . fuse plug" after the date of this settlement.[53]

FERC found that Ampersand had violated the project license by failing to retain possession of the project property, and rejected Ampersand's arguments that its decision to enter into the settlement with OR-CRRDC resulted in the involuntary decision to relinquish control of the project property.[54] FERC imposed a civil penalty of $600,000, finding that Ampersand had economic incentives to avoid undertaking the required repairs and terminate its lease, and also finding that its actions "expose those downstream of its project to the risks of these un-remediated safety issues and at best delayed, and at worst indefinitely postponed, the performance of these necessary safety repairs."[55]

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47. Defendants' Motion to Stay Litigation Pending the Supreme Court's Decision in *Axon Enterprise, Inc. v. Federal Trade Commission*, No. 21-86 (9th Cir., Jan. 24, 2022), Rover Pipeline v. FERC, No. 3:22-cv-00232-S (N.D. Tex. Mar. 7, 2022), ECF No. 20.

48. Plaintiffs' Memorandum in Support of a Stay of Both Proceedings or No Stay at All, Rover Pipeline v. FERC, No. 3:22-cv-00232-S, (N.D. Tex. Apr. 5, 2022), ECF No. 26.

49. Order Granting Motion to Stay, Rover Pipeline v. FERC, No. 3:22-cv-00232-S (N.D. Tex. May 24, 2022), ECF No. 34 (administratively closing the district court proceeding).

50. *Ampersand Cranberry Lake Hydro, LLC*, 179 FERC ¶ 61,037 at P 1 (2022).

51. *Id.* at PP 4, 11.

52. *Id.* at PP 31, 33.

53. *Id.* at P 34.

54. 179 FERC ¶ 61,037, at PP 39-41.

55. *Id.* at P 71.

2. Rover Pipeline LC and Energy Transfer Partners, L.P.

On January 20, 2022, FERC issued an order[56] establishing a hearing to determine whether Rover and parent company Energy Transfer "violated section 157.5 of the [FERC]'s regulations"[57] and to ascertain facts relevant for application of FERC's Penalty Guidelines.[58] FERC previously issued a certificate of public convenience and necessity authorizing Rover to construct a natural gas pipeline (Rover Pipeline Project) to transport natural gas from shale producing areas to an interconnection with another pipeline in Michigan.[59] The Rover Certificate Order denied Rover authority to undertake routine construction activities and operations because Rover Companies had destroyed an 1843 historical farmstead,[60] and referred the matter to Enforcement for further investigation and action, as appropriate.[61] FERC also issued a show cause order related to the incident that proposed a civil penalty of approximately $20 million.[62] The Rover Companies filed responses to the Rover Show Cause Order and both the Rover Companies and Enforcement staff filed pleadings in response to each other.[63]

The Rover Hearing Order denied the Rover Companies' request to dismiss the Rover Show Cause Order, stating that there were genuine issues of material fact that justify a hearing.[64] FERC also found that the fact it issued the Show Cause Order and commenced a proceeding within five years of when the alleged violations occurred is sufficient for purposes of the five-year statute of limitations applicable to FERC's authority to assess civil penalties, and rejected Rover Companies' claims to the contrary.[65] FERC rejected the Rover Companies' arguments that FERC lacked the authority to assess a civil penalty or that the action should be brought in federal district court,[66] as well as the assertions that the use of a FERC administrative law judge is inconsistent with the Appointments Clause of the U.S. Constitution.[67] FERC also found that section 157.5 of FERC's regulations applied to the alleged omissions and misrepresentations at issue in this proceeding, as they pertain to information necessary for a full and complete understanding of the Rover Pipeline Project.[68]

56. 178 FERC ¶ 61,028.
57. *Id.* at P 1.
58. *See generally Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 (2010).
59. *Rover Pipeline, LLC*, 158 FERC ¶ 61,109, *order on reh'g*, 161 FERC ¶ 61,244 (2017).
60. *Id.* at P 2.
61. *Id.*
62. *Rover Pipeline, LLC*, 174 FERC ¶ 61,208 at P 1 (2021).
63. 178 FERC ¶ 61,028, at P 7.
64. *Id.* at P 19.
65. *Id.* at P 22. Respondents had claimed this statute of limitations required FERC to initiate an action in federal district court to recover the penalties within the five-year period. *Id.*
66. *Id.* at P 37.
67. 178 FERC ¶ 61,028, at P 60.
68. *Id.* at P 95.

FERC indicated the administrative law judge should determine if Rover Companies made misrepresentations or omissions and, if so, if "those misrepresentations and omissions constitute a violation of section 157.5."[69] While stating FERC would make the determination of whether civil penalties or other sanction are warranted, FERC directed the administrative law judge to make certain findings relevant to this determination consistent its Penalty Guidelines, including the number of violations that occurred, what compliance programs the Rover Companies had in effect, and Rover Companies' culpability under the Penalty Guidelines' factors.[70] Commissioner Danly submitted a concurring opinion stating he was unsure whether the Rover Companies did anything illegal or violated any duties to FERC, but stated he looked forward to a hearing to determine these issues.[71]

Finally, on June 13, 2022, the FERC administrative law judge issued an order suspending the procedural schedule in the FERC consistent with the May 24, 2022 order of staying the FERC proceeding.[72]

3. Green Hat Energy, LLC

On January 5, 2002, FERC denied a motion filed on October 5, 2021, by the Kittell Estate requesting that FERC should discontinue enforcement actions against the Kittell Estate due to alleged misconduct and improper communications between one decisional and one non-decision FERC employee.[73] FERC in its order stated:

> We are troubled by the exchange of emails between decisional staff and litigation staff. Commission policy prohibits non-decisional employees from communicating with any member of the Commission or its decisional staff concerning deliberations in the docket; it is one way we ensure that our decisions are unbiased. Thus, compliance with this policy is not optional.[74]

However, FERC found that the communications "did not go to the merits of the Commission's decision," and rejected claims that improper communication amounted to a due process violation.[75] FERC also found that there was no harm done to the Kittell Estate and that even if the communication violated a FERC regulation, the communication did not merit "the extraordinary remedy of dismissal."[76] Commissioner Danly dissented, stating he would have found that the communication was inappropriate, ordered the two attorneys barred from all future

69. *Id.* at P 98.

70. *Id.* at PP 99-100.

71. 178 FERC ¶ 61,028 at P 1 (Danly, Comm'r, concurring). Commissioner Danly also indicated the hearing should help determine whether the penalty was reasonable. *Id*. at P 4 (Danly, Comm'r, concurring).

72. Order Suspending Procedural Schedule, Rover Pipeline, LLC, Docket No. IN19-4-000 (June 13, 2022) (citing Order Granting Motion to Stay, Rover Pipeline, LLC v. FERC, No. 3:22-cv-00232-S (N.D. Tex. May 24, 2022) ECF No. 34).

73. *GreenHat Energy, LLC*, 178 FERC ¶ 61,002 at PP 1, 8 (2022).

74. *Id.* at P 6.

75. *Id.*

76. *Id.* at P 12.

involvement in the investigation, and directed FERC staff to undertake a robust, public investigation with findings to be set forth in a later FERC order.[77]

On August 19, 2022, PJM issued two orders approving stipulation and consent agreements intended to resolve issues related to alleged violations of FERC's anti-market manipulation rules and the PJM Interconnection, LLC. (PJM) tariff.[78] Under the terms of the Bartholomew/Ziegenhorn Agreement, Bartholomew agreed to pay $375,000 in disgorgement and Ziegenhorn agreed to pay $400,000 in disgorgement.[79] Both agreed not to participate in trading transactions in FERC-jurisdictional markets for the next ten years, and not to participate permanently in any transactions in PJM markets or PJM trading platform.[80] Bartholomew also consented to an entry of judgment against GreenHat in favor of PJM in the amount of $179,600,573 in a lawsuit pending in state court in Texas.[81] Both stipulated to the facts set forth in the Bartholomew/Ziegenhorn Agreement but neither admitted nor denied the alleged violations set forth in that agreement.[82] Similarly, under the GreenHat Agreement, GreenHat and the Kittell Estate agreed to pay a disgorgement to PJM of $600,000 and the entry of judgment in the amount of $179,600,573 in favor of PJM in the Texas state court proceeding.[83] The various parties agree to dismiss other claims against each other.[84] GreenHat and the Kittell Estate stipulated to the facts set forth in the GreenHat Agreement but neither admitted nor denied the alleged violations set forth in that agreement.[85]

D. Settlements

1. PacifiCorp

On December 30, 2022, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and PacifiCorp that resolves an Enforcement investigation and Order to Show Cause proceeding related to Reliability Standard Facilities Design, Connections and Maintenance (FAC) 009-1, Requirement R1, and the successor Reliability Standard FAC-008-3, Requirement 6 (together, "FAC-009-1 R1").[86]

An October 2010 NERC Recommendation to Industry (NERC Alert) stated that NERC and "the Regional Entities had 'become aware of discrepancies between the design and actual field conditions of transmission facilities' across the [Bulk Electric System] that might be 'significant and widespread.'"[87] "The NERC

77. 178 FERC ¶ 61,002, at P 1 (Danly, Comm'r, dissenting).

78. *GreenHat Energy, LLC*, 180 FERC ¶ 61,108 (2022); *GreenHat Energy, LLC*, 180 FERC ¶ 61,109 (2022).

79. 180 FERC ¶ 61,108, at P 15.

80. *Id.* at P 16.

81. *Id*. at P 17.

82. *Id.* at P 13.

83. 180 FERC ¶ 61,109, at PP 15-16.

84. *Id*. at PP 17-19.

85. *Id.* at P 13.

86. *PacifiCorp*, 181 FERC ¶ 61,278 (2022).

87. *Id*. at P 15.

Alert recommended that transmission owners, like PacifiCorp, review their Facility Ratings Methodologies (FRMs) 'to verify that the methodology used to determine facility ratings is based on actual field conditions.'"[88] "PacifiCorp responded to the NERC Alert, self-disclosed known clearance conditions, and thereafter remediated them in tranches, pursuant to the multi-year NERC Alert approach."[89]

"Enforcement determined that PacifiCorp violated FPA section 215(b)(1)," 16 U.S.C. § 824o(b)(1), and 18 C.F.R. § 39.2(b), which both require covered entities to comply with NERC Reliability Standards, by failing to comply with FAC-009-1 R1, "which requires a transmission owner, such as PacifiCorp, to establish and have facility ratings that are consistent with its FRM."[90] Enforcement concluded that the clearance conditions on PacifiCorp's transmission lines failed to comply with National Electrical Safety Code standards, which Enforcement concluded was required by PacifiCorp's FRM.[91]

Neither admitting nor denying the alleged violations, PacifiCorp agreed to a civil penalty of $4.4 million, with $1.9 million being paid to the U.S. Treasury and $2.5 million being invested in reliability enhancements that go above and beyond what the NERC Reliability Standards require.[92]

2. FirstEnergy Corp.

On December 30, 2022, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement FirstEnergy Corp. (First Energy) related the company's responses during a 2019 audit of FirstEnergy and its affiliates and subsidiaries, including its ten public utilities.[93] As part of the audit, Enforcement's Division of Audits and Accounting (DAA) inquired about FirstEnergy's "lobbying and governmental affairs expenses and accounting."[94] In 2019 and early 2020, FirstEnergy claimed it fully responded to DAA's requests.[95] Later in 2020, FirstEnergy became involved in a criminal matter involving allegations of a of racketeering conspiracy related to an Ohio state bill that "provided a billion-dollar subsidy for FirstEnergy's two Ohio nuclear plants."[96] FirstEnergy ultimately entered into a deferred prosecution agreement and admitted to paying more than $59 million for the benefit of the then-Speaker of the Ohio House of Representatives and over $22 million to companies owned by an individual who became the Chairman of the Public Utilities Commission of Ohio.[97] FERC determined that information related to these payments was responsive to DAA's audit data

88. *Id*.
89. *Id.* at P 16.
90. 181 FERC ¶ 61,278, at P 17.
91. *Id.*
92. *Id.* at P 2.
93. *FirstEnergy Corp.*, 181 FERC ¶ 61,277 (2022).
94. *Id.* at P 5.
95. *Id.*
96. *Id.* at P 6.
97. 181 FERC ¶ 61,277, at P 6.

requests but was not provided by FirstEnergy as part of its initial responses.[98] Enforcement determined that FirstEnergy's conduct "violated the Commission's Duty of Candor rule,"[99] and the audit provisions of the Public Utility Holding Company Act of 2005,[100] FPA section 301,[101] and related provisions of the Commission's regulations at 18 C.F.R. § 366.2.[102] FirstEnergy agreed to pay a civil penalty of $3,860,000 and to be subject to compliance monitoring for a two-year period.[103]

3. Todd Meinershagen

On December 21, 2022, FERC approved a Stipulation and Consent Agreement between Enforcement and Todd Meinershagen, co-owner of a demand response aggregator of retail customers, related to whether Mr. Meinershagen's company engaged in a fraudulent scheme to register demand response resources with MISO without those resources' knowledge or consent and cleared capacity in MISO's annual Planning Resource Auctions that would not have performed if the resources were dispatched during the period June 2019 through October 2021.[104] Mr. Meinershagan, a computer programmer with no prior experience in the energy industry, created an automated web scraping tool to log into a utility's website to obtain data about existing customer accounts that were eligible to provide demand response to MISO.[105] FERC alleged that his co-owner used that data to register those customers with MISO as Load Modifying Resources, and their company obtained a total of $1 million in capacity payments, despite never contacting or contracting with the customers.[106] Enforcement concluded that Mr. Meinershagen received funds arising from the violations, but that he had been unaware of the fraudulent activity and that upon becoming aware of the violations he assisted in ending the scheme and cooperating with Enforcement.[107] Mr. Meinershagen agreed to pay $525,452 in disgorgement, inclusive of interest, as restitution to MISO.[108]

4. Coaltrain Energy, L.P.

On October 11, 2022, FERC approved a Stipulation and Consent Agreement (Settlement)[109] resolving claims that Coaltrain L.P. and certain of its owners and

98. *Id.* at P 7.
99. *Id.* at P 12.
100. *Id.* at P 13.
101. 181 FERC ¶ 61,277, at P 13.
102. *Id.*
103. *Id.* at PP 13-14.
104. *Todd Meinershagen*, 181 FERC ¶ 61,251 at P 1 (2022).
105. *Id.* at P 4.
106. *Id.* at PP 7, 9-10.
107. *Id.* at P 11-13, 20.
108. 181 FERC ¶ 61,251, at P 23.
109. *Coaltrain Energy, L.P.,*181 FERC ¶ 61,031 at P 1 (2022).

traders[110] (collectively, the Coaltrain Defendants) violated the anti-manipulation provisions in FPA section 222,[111] and the Commission's implementing regulations,[112] by engaging in Up-To Congestion (UTC) transactions in PJM Interconnection LLC (PJM) in 2010 for the purpose of obtaining marginal loss surplus allocation payments,[113] and that Coaltrain violated the Commission's Duty of Candor regulation[114] by failure to exercise due diligence in producing material information sought during the investigation.[115]

The Settlement provides that Coaltrain shall pay disgorgement of $4,000,000 as restitution to PJM in five equal installments of $800,000 and that PJM shall allocate such disgorgement as restitution to its members in a manner to be approved by the Director of Enforcement.[116] No civil penalties are imposed under the Settlement, nor are any sanctions imposed on the individual defendants.[117]

5. Enerwise Global Technologies, LLC

On August 25, 2022, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and Enerwise Global Technologies, LLC d/b/a CPower (CPower), a third party aggregator of demand response assets, regarding CPower's compliance with its offer obligation into the ISO-NE energy market.[118] Enforcement determined that CPower violated ISO-NE's tariff by failing to submit demand reduction offers for certain demand response resources.[119] Enforcement found that CPower's demand reduction offers were deficient because CPower "failed to enroll sufficient capacity by the start of the delivery month to meet its offer obligation."[120] By maintaining capacity supply obligations in excess of its demand reduction offers, CPower allegedly earned excess monthly capacity revenues.[121] CPower agreed to pay a civil penalty of $2,539.372, disgorge $2,460,628, and to be subject to compliance monitoring (one annual report with a second at Enforcement's option).[122]

110. *Id.* at P 1; *see Coaltrain Energy, L.P.,* 155 FERC ¶ 61,204 at P 1 (2016). The owners were Peter Jones and Shawn Sheehan; Robert Jones, Jeff Miller, and Jack Wells were traders. *Id.*

111. 181 FERC ¶ 61,031, at P 1.

112. *Id.*

113. *Id.* at PP 3, 6.

114. *Id.* at P 1 (citing 155 FERC ¶ 61,204, at PP 4, 10). *See* 18 C.F.R. § 35.41(b); *see supra* at Part I.A.2. Coaltrain's violation of the duty of candor regulation pertained to its failure to produce material information sought during the investigation without exercising due diligence. *See* FERC v. Coaltrain Energy, L.P., No. 2:16-cv-732 (S.D. Ohio Nov. 18, 2020).

115. 181 FERC ¶ 61,031 at P 1 (citing 155 FERC ¶ 61,204, at PP 4, 10).

116. *Id.* at P 9(a)-(b).

117. *Id.* at PP 9(a)-(b), 10. The court had previously ruled that recovery from the individual defendants under a theory of joint-and-several liability was not available and denied FER's request for interlocutory appeal. *See supra* Part I.B.2

118. *Enerwise Global Techs., LLC*, 180 FERC ¶ 61,126 at PP 1, 3 (2022).

119. *Id.* at P 17.

120. *Id.*

121. *Id.* at P 18.

122. 180 FERC ¶ 61, 126, at P 2.

6. Salem Harbor Power Development LP

On June 27, 2022, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and Salem Harbor Power Development LP (DevCo) related to DevCo's receipt of capacity payments from ISO-New England Inc. (ISO-NE) for DevCo's New Salem Harbor Generating Station project during the 2017-18 Capacity Commitment Period.[123] During that time, DevCo's project "had neither been built nor commenced commercial operation."[124] Enforcement found that from September 2016 through February 2017, DevCo failed to provide the updated construction schedules required under ISO-NE's tariff and instead submitted old schedules claiming that the project would meet its 2017 milestones.[125] Enforcement concluded that DevCo made false claims regarding the status of the project, knew the project was not progressing on time, and failed to include relevant information in its updates to ISO-NE, all in violation of FERC's duty of candor rule, 18 CFR § 35.41(b).[126] Subject to bankruptcy proceedings, DevCo agreed to pay a civil penalty of $17.1 million and disgorge approximately $26.7 million in profits.[127]

7. ISO New England, Inc.

On September 30, 2022, FERC issued an order[128] approving a Stipulation and Consent Agreement between Enforcement and ISO-NE that involved the same underlying facts as the *Salem Harbor Development LP* matter addressed above. Enforcement concluded that ISO-NE had violated its tariff by failing to update project milestone dates in response to the information it had received from DevCo,[129] by failing to enter a mandatory demand bid on DevCo's behalf,[130] by assigning DevCo an inaccurate qualified capacity value,[131] and restricting its Internal Market Monitor's access to information about DevCo.[132] ISO-NE agreed to pay a civil penalty of $500,000, make specific investments in its compliance program at an estimated cost of up to $350,000, and be subject to compliance monitoring (one annual compliance report with a second at Enforcement's option).[133]

The order is unusual because it involves the imposition of a financial penalty on a not-for-profit Regional Transmission Organization. Enforcement recognized that: (i) ISO-NE was not the only entity that contributed to harming the market, (ii) ISO-NE is a non-profit entity funded by market participants and transmission

123. *Salem Harbor Power Dev. LP*, 179 FERC ¶ 61,228 at P 1 (2022).
124. *Id*.
125. *Id*. at P 46.
126. *Id*. at PP 49-53.
127. 179 FERC ¶ 61,228, at P 56.
128. *ISO-New England, Inc.*, 180 FERC ¶ 61,223 at P 1 (2022).
129. *Id*. at PP 88-89.
130. *Id*. at P 90.
131. *Id*. at PP 91-92.
132. 180 FERC ¶ 61,223, at PP 93-95.
133. *Id.* at P 2.

customers, (iii) a penalty might be passed on to ISO-NE market participants.[134] Enforcement therefore recommended a "downward departure from the Penalty Guidelines."[135]

FERC concluded that:

> a larger civil penalty might otherwise be appropriate given the magnitude of the capacity payments that ISO-NE made to Footprint. However, such a penalty likely would be passed on to the fee-paying entities, potentially compounding the harm to those entities and undermining the deterrent value of a larger civil penalty.[136]

FERC also emphasized that "each ISO/RTO and its management must adhere to the requirements of its Commission-approved tariff, which includes permitting any market monitor the ability to function in a manner consistent with that market monitor's role and obligations under that tariff."[137]

8. M3 Ohio Gathering, et al.

On June 24, 2022, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and M3 Ohio Gathering LLC (M3), Utica East Ohio Midstream LLC (Utica East) and UEOM NGL Pipelines LLC (UEOM) related to M3's and Utica East's failure to submit FERC Form No. 6s and FERC Form No. 6-Qs over a six-year period from 2013 to 2019 as required by Part I, Section 20(1) of the Interstate Commerce Act and 18 C.F.R. § 357.2(a).[138] In its order, the Commission emphasized that "[t]he filing of FERC Form No. 6 is a fundamental requirement of the Commission's regulatory oversight authority. The Commission expects pipelines to understand such basic requirements and comply with the requirements in a timely manner."[139] M3 agreed to pay a civil penalty of $30,000 and Utica East and UEOM agreed to certify and submit all of the outstanding FERC Form No. 6s and FERC Form No. 6-Qs.[140]

9. sPower Development Company, LLC

On June 24, 2022, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and sPower Development Company, LLC (sPower) related to information sPower provided to PJM during the interconnection process.[141] Enforcement determined that sPower violated the PJM tariff because it submitted interconnection study agreements that inaccurately stated that sPower had site control over the property for the proposed interconnection of a solar project.[142] sPower agreed to pay a civil penalty of $24,000 and to be subject

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134. *Id.* at P 101.
135. *Id*. at P 102.
136. 180 FERC ¶ 61,223, at PP 103.
137. *Id*. at P 104.
138. *M3 Ohio Gathering LLC*, 179 FERC ¶ 61,221 at P 1 (2022).
139. *Id*. at P 9.
140. *Id.* at PP 12-13.
141. *sPower Dev. Co.*, 179 FERC ¶ 61,220 at P 1 (2022).
142. *Id*. at PP 13-14.

to compliance monitoring (two annual reports with a third at Enforcement's option).[143]

10. Constellation NewEnergy, Inc.

On March 29, 2022, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and Constellation NewEnergy, Inc. (CNE) related to CNE's treatment of imports for resource adequacy (RA) purposes under the California Independent System Operator (CAISO) tariff.[144] The CAISO tariff allows load serving entities (LES) to import electricity sourced outside the CAISO footprint to meet their RA.[145] The tariff governs how much RA an LSE may offer and requires "LSEs using import RA to offer into the CAISO energy market on a daily basis."[146] Entering 2017, CNE did not source specific imports to meet their RA and instead "rel[ied] on the bilateral spot energy market if needed."[147] In June and August 2017, CNE did not meet its RA requirements "because it was unable to secure electricity in the bilateral spot market."[148] Enforcement concluded that "CNE violated 18 C.F.R. § 35.41(a)" and the CAISO tariff because "it could not respond to RA-related dispatches by CAISO in June and August 2017."[149] Enforcement also determined that CNE should not have replied on the spot market to support its RA imports.[150] CNE agreed to pay a civil penalty of $2.4 million, disgorge $2.3 million to CAISO, and only use specific generation resources or firm contracts in connection with import RA moving forward.[151]

11. Dynergy Marketing and Trade, LLC

On March 28, 2022, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and Dynegy Marketing and Trade, LLC (Dynegy) related to Dynegy's real-time energy market offers by ten dual-fuel combustion turbines (CTs) that were owned and operated by Dynegy in 2017.[152] The ten units were split among three facilities and operated as PJM Interconnection LLC (PJM) capacity resources.[153] Capacity resources are required to demonstrate they can achieve their maximum output (ICAP) in a summer capacity test.[154] Enforcement concluded that Dynegy violated FERC's duty of candor rule, 18 CFR § 35.41(b), when it misrepresented that the units could ramp to their maximum *oil*-based output attained during their summer capacity tests while running on *gas,*

143. *Id*. at PP 17-18.
144. *Constellation NewEnergy, Inc.*, 178 FERC ¶ 61,231 at P 1 (2022).
145. *Id*. at PP 3-4.
146. *Id*. at P 4.
147. *Id*. at P 5.
148. 178 FERC ¶ 61,231 at P 6.
149. *Id*. at PP 7, 9.
150. *Id*. at P 10.
151. *Id*. at P 13.
152. *Dynegy Mktg. & Trade, LLC*, 178 FERC ¶ 61,230 at P 1 (2022).
153. *Id*. at PP 3-4.
154. *Id*. at P 4.

and that it violated the PJM Operating Agreement and OATT provisions that required the units to be able to change output at the ramping rate specified in the offer data.[155] Enforcement also concluded that Dynegy violated § 35.41(b) when it maintained a prospective 16 MW capacity increase for one of the three dual-fuel unit facilities, based on (a) unit upgrades that were never completed by the previous owner and (b) the use of auxiliary generators, which was prohibited by PJM.[156] Dynegy agreed to pay a civil penalty of $450,000 and disgorgement totaling $119,425, and be subject to compliance monitoring (two annual reports with a third at Enforcement's option).[157]

II. THE COMMODITY FUTURES TRADING COMMISSION

A. *Energy-Related Enforcement Cases*

1. In the Matter of Glencore International AG, et al.

On May 24, 2022, the CFTC issued an order filing and settling charges of manipulation and attempted manipulation against Glencore International A.G. of Switzerland, Glencore Ltd. of New York, and Chemoil Corporation of New York (collectively, Glencore).[158] Glencore was ordered to pay fines and disgorgement totaling $1.186 billion.[159] According to the order, Glencore engaged in the manipulation or attempted manipulation of four U.S. based S&P Global Platts physical oil benchmarks (1) by submitting increasing bids or decreasing offers and (2) at times conveying misleadingly incomplete, "cherrypicked," or inaccurate information to Platts with the intent to affect the benchmark indices to obtain favorable pricing for its fuel oil purchases and sales and derivatives priced against the indices.[160]

The CFTC found that Glencore improperly obtained nonpublic information from employees and agents of state-owned entities (SOEs) that was material to Glencore's business and trading.[161] The CFTC found that SOE agents who had access to confidential information—and who owed a duty to the SOE under law and applicable employment policies to keep the information confidential—disclosed to Glencore traders nonpublic information, including information material to Glencore's transactions with the SOE or to related physical and derivatives trades, which the traders used in connection with physical and derivatives transactions and other U.S.-based transactions and business.[162]

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155. *Id*. at P 1.

156. 178 FERC ¶ 61,230 at P 1.

157. *Id*. at PP 18-20.

158. *CFTC Orders Glencore to Pay $1.186 Billion for Manipulation and Corruption*, CFTC (May 24, 2022), https://www.cftc.gov/PressRoom/PressReleases/8534-22; In re Glencore International AG, CFTC No. 22-16, 2022 WL 1963727 (May 24, 2022).

159. *CFTC Orders Glencore to Pay $1.186 Billion for Manipulation and Corruption*, *supra* note 158.

160. *In re Glencore International AG*, 2022 WL 1963727, at *2.

161. *CFTC Orders Glencore to Pay $1.186 Billion for Manipulation and Corruption*, *supra* note 158.

162. *In re Glencore International AG*, 2022 WL 1963727, at *1.

The CFTC also found that at various times Glencore made corrupt payments to employees and agents working at SOEs of Brazil, Cameroon, Nigeria, and Venezuela.[163] The order also charged that "Glencore or its affiliates made the corrupt payments in exchange for improper preferential treatment and access to trades with the SOEs."[164]

The CFTC's charges included violating the Commodity Exchange Act (CEA) by: (1) engaging in a manipulative or deceptive device or contrivance; (2) price manipulation; and (3) making false, misleading, inaccurate reports concerning oil products.[165]

2. CFTC v. Coquest Inc., et al.

In October 2021, the CFTC filed a civil enforcement action against Coquest, Inc., an introducing broker, and its owners, Dennis Weinmann and John Vassallo, and their trading firms, Buttonwood LLC and Weva Properties Ltd., for misappropriating customer information to benefit the owners' trading firms.[166] Specifically, the CFTC charged that between May 2015 and November 2019, the defendants "used material, nonpublic information relating to Coquest's customers, such as their identities, trading activity, positions, and the prices at which they were willing to buy or sell" crude oil futures in order to execute block trades for Coquest's owners' trading firms opposite the Coquest customers to benefit the owners' firms.[167] The Complaint alleges that, "rather than seeking out the best market price and offering it to Coquest's customers," one of Coquest's owners routinely quoted customers only inferior prices available in the market which would provide favorable prices for Coquest's owners' firms.[168] The complaint alleges that the owner failed to disclose to Coquest customers that, instead of acting as a broker, the owner was acting as a counterparty on behalf of the owner's trading firms that were trading opposite Coquest customer orders.[169] The complaint also charged the defendants with failure to supervise and for failing to institute policies or procedures to monitor the owners' block "trading to minimize the readily apparent conflicts of interest," including procedures that would prevent an owner from misappropriating Coquest customer information or trading against customers without prior consent.[170]

The complaint charged defendants with violation of CEA sections 4b(a)(1)(A), (B), and (C), and 6(c)(1), 7 U.S.C. §§ 6b(a)(1)(A)-(C) and 9(1), and 17 C.F.R. §§ 180.1(a)(1)-(3) (fraud), 155.4 and 166.3 (failure to supervise).[171]

163. *CFTC Orders Glencore to Pay $1.186 Billion for Manipulation and Corruption*, *supra* note 158.

164. *Id.*

165. *In re: Glencore International AG,* WL 1963727, at *1; *see* 7 U.S.C. §§ 9(1), 9(3), 13 (2010).

166. Complaint for Injunctive Relief, Civil Monetary Penalties, and Other Equitable Relief, CFTC v. Coquest, Inc., No. 3:21-cv-2599, 2022 WL 1963727 (Oct. 20, 2021).

167. *Id.*

168. *Id.*

169. *Id.*

170. *CFTC v. Coquest, Inc.*, 2022 WL 1963727, at *4.

171. *Id.* at *5.

3. In the Matter of Asset Risk Management, LLC

In September 2022, the CFTC issued a settlement order charging Asset Risk Management, LLC (ARM), a registered commodity trading advisor, "for failing to register as a swap execution facility (SEF)."[172] The order required ARM to pay a $200,000 civil monetary penalty and to cease and desist from any further violations of the CEA and CFTC regulations, as charged.[173] ARM entered into the settlement "without admitting or denying the findings and conclusions" of the order.[174] The order found that ARM operated as an unregistered SEF "by providing clients the ability to execute swaps by accepting bids and offers made by multiple participants on a trading system or platform in various swap tenors and volumes."[175]

The ordered included the following allegations.[176] "ARM marketed its services through face-to-face meetings with clients and potential clients."[177] "When onboarding clients, ARM provided a list of potential swap counterparties with whom ARM had a relationship."[178] If a client expressed interest, ARM "would introduce clients to counterparties so they could enter into enabling agreements, such as an International Swaps and Derivatives Association (ISDA) master agreement to allow them to enter into swap transactions with each other."[179] "ARM often recommended that clients execute swap transactions in which the underlying commodity was natural gas, natural gas liquids, or crude oil."[180] In a typical swap transaction, ARM received a request for swap pricing from a client and then submitted the pricing request (and sometimes other terms) to counterparties with whom the relevant client had an ISDA agreement.[181] After potential swap counterparties responded to ARM with a proposed price, ARM, if authorized by the client, would approve or reject a price based on the client's pre-approved threshold, including by communicating "done" via chat or email.[182] ARM would then separately confirm the swap execution with the client.[183] If ARM did not have authority to execute the swap on behalf of the client, ARM would typically join the client on a phone call with the relevant counterparty, during which ARM's client would agree to the terms.[184]

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172. In re: Asset Risk Mgmt., LLC, 2022 WL 4597772, at *1 (Sept. 26, 2022); *CFTC Orders Texas Commodity Trading Advisor to Pay $200,000 for Failing to Register as a Swap Execution Facility*, COMMODITY FUTURES TRADING COMM'N (Sept. 26, 2022), https://www.cftc.gov/PressRoom/PressReleases/8596-22.

173. *In re: Asset Risk Mgmt., LLC*, 2022 WL 4597772, at *4.

174. *Id.* at *1.

175. *Id.*

176. *Id.* at *1-2.

177. *In re: Asset Risk Mgmt., LLC*, 2022 WL 4597772, at *1.

178. *Id.* at *1.

179. *Id.*

180. *Id.*

181. *CFTC Orders Texas Commodity Trading Advisor to Pay $200,000 for Failing to Register as a Swap Execution Facility*, *supra* note 172.

182. *Id*.

183. *Id*.

184. *Id*.

The order found that by engaging in those activities, ARM acted as a SEF without registering as one, in violation of CEA section 5h(a)(1), 7 U.S.C. § 7b-3(a)(1), and 17 C.F.R. § 37.3(a)(1).[185]

B. CFTC and criminal cases alleging unlawful trading on material, nonpublic information and execution of fictitious sales

In 2022, the CFTC instituted a trio of related cases involving, among other types of alleged violations, an alleged scheme by an energy trading firm to trade on the basis of material nonpublic information received from an employee of an energy trading broker.[186] The cases are parallel cases to federal criminal indictments against the same entities and individuals brought by the Department of Justice's Criminal Division Fraud Section.[187]

1. In the Matter of Lee Tippett

On November 16, 2022, the CFTC filed and settled charges against Lee Tippett, a former energy broker with Classic Energy, LLC (Classic), for participating in a scheme to pay kickbacks to Matthew Clark, a trader employed by one of Classic's brokerage customers denominated in the settlement order as "Energy Trading Company A."[188] Pursuant to the settlement, Tippett admitted to having brokered natural gas futures block trades for Clark's employer and then paid a portion of the commissions generated by the trades back to Clark in exchange for Clark sending more brokerage business to Classic.[189]

The settlement order also stated that Tippett engaged in a scheme to misappropriate material, nonpublic block trade order information from Energy Company A, including information about the price and quantity at which Energy Company A sought to execute block trades in certain natural gas futures contracts listed on NYMEX.[190] As part of the alleged scheme, Clark directed a trader at Energy Company A to provide Tippett with confidential block trade order information, and instead of using this information to solicit counterparties and broker trades in the ordinary course of business, Tippett allegedly disclosed this information only to Peter Miller, an individual proprietary trader (Miller), who traded based on the basis of this information and shared his trading profits with other participants (but not Tippett) in the alleged scheme.[191] The order states that Tippett further defrauded Energy Company A by creating the false impression that he was brokering

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185. *In re: Asset Risk Mgmt., LLC*, 2022 WL 4597772, at *1.

186. *Former President of Energy Company Indicted for Commodities Insider Trading and Kickback Schemes*, U.S. DEP'T OF JUSTICE (Feb. 3, 2022), https://www.justice.gov/opa/pr/former-president-energy-company-indicted-commodities-insider-trading-and-kickback-schemes.

187. *Id*.

188. *CFTC Charges Former Energy Broker with Paying Brokerage Kickbacks and Misappropriating Nonpublic Information*, COMMODITY FUTURES TRADING COMM'N (Nov. 16, 2022), https://www.cftc.gov/PressRoom/PressReleases/8627-22; In re Lee Tippett, 2022 WL 17090923 (Nov. 16, 2022).

189. *In re Lee Tippett*, 2022 WL 17090923, at *2.

190. *Id*.

191. *Id*.

block trades for the Energy Company A in the ordinary course of business, when in fact, he was facilitating and executing fictitious, non-arm's length block trades at non-bona fide prices designed to enable Miller to make a profit on offsetting trades.[192]

Finally, the order also alleged that on September 15, 2016, Tippett made false statements to the Intercontinental Exchange (ICE) in connection with ICE's inquiry regarding certain block trades brokered by Mathew D. Webb (Webb), Classic's owner and president who took the other side of these trades in his proprietary account in the name of MDW Capital, LLC (MDW).[193] The order states that Tippett made these false statements to conceal the fact that Webb made him an employee of MDW to facilitate unlawful payments between Webb and Clark.[194]

The CFTC order found that Tippett's alleged misconduct constituted fraud, the misappropriation of material, nonpublic information, the confirmation of the execution of fictious sales, and the making of false statements to ICE in violation of CEA sections 4b(a)(1)(A) and 6(c)(1), 7 U.S.C. §§ 6b(a)(1)(A) and 9(1), and CFTC regulations 180.1(a)(1) and (2), 17 C.F.R. § 180.1(a)(1) and (3) (fraud and misappropriation); CEA section 4c(a)(1)-(2), 7 U.S.C. § 6c(a)(1)-(2) (fictitious sales), and CEA section 9(a)(4), 7 U.S.C. § 13(a)(4) (false statements).[195] The order required Tippett to disgorge $695,000 in alleged ill-gotten gains and pay a $500,000 fine.[196] Tippet separately in 2021 pled guilty to one count of conspiracy to commit honest services wire fraud and commodities fraud in violation of 18 U.S.C. § 371.[197]

2. CFTC v. Miller, et al.

In December 2022, the CFTC filed an amended complaint against defendants Peter Miller and Omerta Capital LLC (Omerta), alleging that the defendants engaged in fraudulent schemes to misappropriate material, nonpublic information from two different energy companies, where Miller was the last link in a tipping chain that enabled him, through Omerta, to trade on the basis of this material, nonpublic information, and to enter into fictitious trades at non-bona fide prices.[198] The amended complaint alleged that in virtually identical but separate schemes the defendants received tipped confidential information belonging to two different energy companies, then traded natural gas futures on the basis of this information and entered into non-arm's length, fictitious block trades.[199]

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192. *Id*.

193. *In re Lee Tippett,* 2022 WL 17090923, at *2.

194. *Id*.

195. *Id*. at *1.

196. *CFTC Charges Former Energy Broker with Paying Brokerage Kickbacks and Misappropriating Nonpublic Information, supra* note 188.

197. *Classic Energy and Associated Cases*, U.S. DEP'T OF JUSTICE (Sept. 30, 2022), https://www.justice.gov/criminal-vns/classic-energy-and-associated-cases; *Former President of Energy Company Indicted for Commodities Insider Trading and Kickback Schemes*, *supra* note 186.

198. Amended Complaint for Injunctive Relief, Civil Monetary Penalties, Restitution, Disgorgement, & Other Equitable Relief at 1, CFTC v. Miller, No. 4:21-cv-04023 (S.D. Tex. Dec. 1, 2022).

199. *Id.* at *1-2.

The amended complaint also charged Miller with making false statements to the Chicago Mercantile Exchange (CME).[200] It alleges that in a 2017 interview related to the conduct alleged in the original and amended complaints, CME asked Miller whether, in violation of CME rules, he "pre-hedged" trades (i.e., made offsetting trades after receiving block trade order information, but before consummating the block trade), and that Miller told CME he never pre-hedged.[201] According to the amended complaint, this statement was false because many times throughout the alleged conduct, Miller executed trades onscreen on behalf of Omerta after receiving block trade order information, but before consummating the block trades.[202]

The charges included misappropriation of material nonpublic information and fictious sales in violation of 7 U.S.C. §§ 6c(a)(1) and (2) and 9(1); and 17 C.F.R. § 180.1(a)(1), (3).[203] In February 2022, Miller entered a guilty plea to one count of conspiracy to commit commodities fraud in violation of 18 U.S.C. §1349.[204]

3. CFTC v. Clark

On February 3, 2022, the CFTC filed a complaint in the Southern District of Texas against Matthew Clark, charging him with misappropriating confidential natural gas block trade order information from his employer and providing it to Peter Miller, knowing that Miller would execute fictitious trades and that Miller would share the profits from trading on this information.[205] Clark's employer engaged in the trading of natural gas products, including natural gas futures contracts on the New York Mercantile Exchange. Clark was also accused of directing natural gas block trades to broker Lee Tippett at Classic Energy, LLC (Classic) in exchange for a share of the brokerage commissions charged to his employer for these trades.[206] The complaint also charged Clark with making false statements to the CFTC.[207] The CFTC charged that such alleged conduct violated Commodity Exchange Act Sections 4b(a)(1)(A) and (C) (fraud), 4c(a) (fictitious sales), 6(c)(1) and (2) (fraud), 7 U.S.C. §§ 6b(a)(1)(A), (C), 6c(a), 9(1) and (2), and CFTC Regulation 180.1(a)(1) and (3), 17 C.F.R. 180.1(a)(1) and (3).[208]

200. *Id.* at *3.

201. *Id.* at *32.

202. Amended Complaint for Injunctive Relief, Civil Monetary Penalties, Restitution, Disgorgement, & Other Equitable Relief at 32, CFTC v. Miller, No. 4:21-cv-04023 (S.D. Tex. Dec. 1, 2022).

203. *Id.* at *35.

204. *Former President of Energy Company Indicted for Commodities Insider Trading and Kickback Schemes*, *supra* note 186.

205. *CFTC Charges Texas Resident with Misappropriating Confidential Information and Participating in a Brokerage Kickback Scheme*, COMMODITY FUTURES TRADING COMM'N (Feb. 3, 2022) https://www.cftc.gov/PressRoom/PressReleases/8490-22.

206. Amended Complaint for Injunctive Relief, Civil Monetary Penalties, Restitution, Disgorgement, & Other Equitable Relief at 1-2, CFTC v. Clark, No. 4:22-cv-00365 (S.D. Tex. Feb. 3, 2022).

207. *Id.* at *24-26.

208. *Id.* at *26.

III. THE NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION

In 2022, NERC submitted notices of penalty to the FERC regarding 37 violations of reliability standards, for which registered entities agreed to pay roughly $5.1 million in penalties.[209] This represents a slight decrease from the number of violations identified in notices of penalty during the previous year, and a slight increase in the dollar value of penalties collected.[210]

IV. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMINISTRATION

The Pipeline & Hazardous Materials Safety Administration (PHMSA) initiated 227 pipeline safety enforcement cases in 2022, a decrease from 264 cases initiated in 2021.[211] IPHMSA also closed 213 enforcement actions in 2022, down from 246 actions closed in 2021.[212] PHMSA actively employed its civil penalty authority, proposing a record high of $11.6 million in penalties across 44 civil penalty cases, up from $10.6 million across 50 civil penalty cases in 2021.[213]

PHMSA's enforcement priorities in 2022 were largely consistent with prior years, focusing on integrity management, conformance to operators' internal procedures, Control Room Management and operating personnel qualification.[214] The agency has expressed particular concern over the country's aging infrastructure.[215] The largest individual penalties proposed by PHMSA in 2022 were $3.87 million for Denbury Gulf Coast Pipeline's alleged poor handling of a pipeline rupture caused by land subsidence and subsequent large carbon dioxide release in a populated area;[216] $986,400 for Colonial Pipeline Company's alleged Control

209. NERC, SEARCHABLE NOTICE OF PENALTY (NOP) (2022), https://www.nerc.com/pa/comp/CE/Pages/Enforcement-and-Mitigation.aspx.

210. *Id*.

211. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., SUMMARY OF ENFORCEMENT ACTIVITY-NATIONWIDE (2022), https://primis.phmsa.dot.gov/comm/reports/enforce/EnfHome.html.

212. *Id.*

213. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., SUMMARY OF CASES INVOLVING CIVIL PENALTIES (2022), https://primis.phmsa.dot.gov/comm/reports/enforce/CivilPenalty_opid_0.html.

214. *Enforcement Activity*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN. (2023), https://primis.phmsa.dot.gov/comm/reports/enforce/Enforcement.html?nocache=6308.

215. Tristan Brown, *Managing Thorough a Crisis: Energy Transition and Upheaval*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN. (2022), https://www.phmsa.dot.gov/news/remarks-deputy-administrator-tristan-brown-energy-bar-association; *see* Final Rulemaking, *Pipeline Safety: Safety of Gas Transmission Pipelines: Repair Criteria, Integrity Management Improvements, Cathodic Protection, Management of Change*, 87 Fed. Reg. 52,224 (2022) (to be codified at 49 C.F.R. pt. 192).

216. Denbury Gulf Coast Pipeline, CPF 4-2022-017-NOPV (2022) (PHMSA's investigation identified a number of probable violations in connection with the accident, including: (i) the lack of timely notification to the National Response Center to ensure the nearby communities were informed of the threat; (ii) the absence of written procedures for conducting normal operations, as well as those that would allow the operator to appropriately respond to emergencies, such as guidelines for communicating with emergency responders; and (iii) a failure to conduct routine inspections of its rights-of-way, which would have fostered a better understanding of the environmental conditions surrounding Denbury's facilities that could pose a threat to the safe operation of the pipeline).

Room Management failures relating to the May 7, 2021 cyberattack which required the immediate shutdown of the entire pipeline system;[217] and $834,400 for Florida Gas Transmission Company's alleged failure to inspect and maintain the integrity of a natural gas pipeline in the Florida marshlands, resulting in a large release and fire in a populated area.[218] In June, the agency also finalized its jurisdiction over nearly 400,000 miles of additional "gas gathering" pipelines largely built as a result of the fracking boom that began in the 2000s, but which remained unregulated at the federal level until this year.[219]

V. THE DEPARTMENT OF ENERGY

The DOE is tasked with implementing and enforcing the energy and water conservation standards for covered consumer products authorized in the Energy Policy and Conservation Act of 1975 (EPCA) and set forth in 10 C.F.R. §§429, 430. Some of the better-known covered products and equipment include refrigerators, furnaces, and commercial air conditioning.[220] DOE typically sets these standards and issues test procedures by rulemaking. DOE may also classify additional consumer products as "covered."[221] The EPCA and its accompanying regulations give DOE authority to engage in enforcement activities, initiate enforcement testing, and assess civil monetary penalties for violations of the Act.[222] DOE also has authority to seek a judicial order restraining further distribution of a noncompliant product.[223] EPCA makes manufacturers responsible for certifying that their products and equipment comply with the applicable standards.[224] Compliance certification cases focus on manufacturers that either have submitted invalid compliance certifications or have not certified that the products have been tested and are in compliance.[225]

DOE's enforcement activity in 2022 slowed compared to 2021, with the agency's Office of the General Counsel (GC) resolving only four noncompliance

217. Colonial Pipeline Co., CPF 3-2022-026-NOPV (2022). The bulk of the penalty was assessed for Colonial Pipeline's alleged failure to test and verify its internal communication plan to provide adequate means for manual restart and manual operation of the pipeline, which failure, following the cyberattack, created the potential for increased risks to the pipeline's integrity as well as additional delays in restart. *Id.*

218. Florida Gas Transmission Co., CPF 4-2022-032-NOPV (2022).

219. *Pipeline Safety: Safety of Gas Gathering Pipelines: Extension of Reporting Requirements, Regulation of Large, High-Pressure Lines, and Other Related Amendments: Technical Corrections*, 87 Fed. Reg. 35,675 (2022) (to be codified at 49 C.F.R. pt. 191).

220. *See generally* 10 C.F.R. § 430.

221. *Id.*; 10 C.F.R. § 431.

222. 42 U.S.C. §§ 6298-6305, 6316 (1975); 10 C.F.R. § 429 (Subpart C); *Enforcement for Consumer Products and Commercial and Industrial Equipment*, 76 Fed. Reg. 12434 (2011) (to be codified at 49 C.F.R. pts. 429, 431).

223. 42 U.S.C. § 6304 (2015).

224. 10 C.F.R. § 429 (Subpart B).

225. *Id.*

cases[226] and no compliance certification enforcement cases.[227] GC has closed no cases enforcing the Environmental Protection Agency's ENERGY STAR appliance rating program since 2015.[228] GC proposed large civil penalties in three of the four cases resolved in 2022, but settled each for significantly less than its initial proposal.[229] In the fourth case, GC ordered immediate cessation of the noncompliant product's distribution.[230]

The year's low closure rate may reflect ongoing changes in GC's approach to enforcement. In September 2022, DOE issued a Notice of Intent to commence on-the-record hearings before Administrative Law Judges (ALJs) in civil penalty cases for violations of the conservation standards and certification requirements.[231] The agency had earlier noted that "DOE remains committed to offering settlement as an option for resolution in all cases, but expects that it will offer fewer reductions in penalties as DOE's enforcement program continues to mature."[232] This is a change of course from GC's previous procedures, under which, if rejecting a settlement offer, a noncompliant entity could choose either an ALJ hearing or immediate issuance of an order assessing penalties.[233]

VI. THE DEPARTMENT OF JUSTICE

The DOJ announced various complaints and settlements regarding alleged criminal and civil matters involving energy companies.[234] DOJ made announcements regarding environmental violations, including settlement agreements, guilty pleas, and criminal charges to address oil and produced water spills;[235] Clean Air

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226. *Conservation Standards Enforcement*, U.S. DEP'T OF ENERGY, https://www.energy.gov/gc/listings/conservation-standards-enforcement?page=0.

227. *Compliance Certification Enforcement*, U.S. DEP'T OF ENERGY, https://www.energy.gov/gc/listings/compliance-certification-enforcement.

228. *Support for Energy Star Enforcement*, U.S. DEP'T OF ENERGY, https://www.energy.gov/gc/listings/support-energy-star-enforcement.

229. Hansgrohe, Inc., Case No. 2021-SW-29002 (Nov. 29, 2021) (initially proposing $18.4 million in penalties but ultimately assessing only $189,220); Islandaire, Inc., Case Nos. 2015-SE-43007, 2015-SE-43008, 2015-SE-43009 (Jan. 18, 2022) (proposing $3.8 million but assessing only $12,000); Lennox Indus., Inc., Case No. 2020-SE-43005 (Apr. 20, 2022) (proposing $917,472 but assessing only $587,500).

230. Felix Storch, Inc., Case No. 2022-SE-42001 (May 9, 2022) (commercial refrigeration equipment).

231. Notice of Inquiry, *Notice of Intent to Commence Administrative Law Judge Hearings for Regulatory Enforcement Cases*, 87 Fed. Reg. 59,407 (2022).

232. U.S. DEP'T OF ENERGY, CIVIL PENALTIES FOR ENERGY CONSERVATION STANDARDS PROGRAM VIOLATIONS (2022), https://www.energy.gov/sites/default/files/2022-01/PenaltyPolicy2022.pdf.

233. FERC v. Etracom LLC, No. 2:16-cv-01945-SB, 2017 U.S. Dist. LEXIS 33430, at *8 (E.D. Cal. Mar. 7, 2017). "[U]nder Option 2 of the NECPA, the 'Administrator would issue a penalty order on the basis of the evidence before him but without a hearing and file a petition in district court seeking a judgment assessing the civil penalty.'" *Id.*

234. *False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022*, U.S. DEP'T OF JUSTICE (Feb. 7, 2023), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022.

235. *Kentucky Oil Operator Pleads Guilty to Negligent Violation of Clean Water Act*, U.S. DEP'T OF JUSTICE (Nov. 28, 2022), https://www.justice.gov/opa/pr/kentucky-oil-operator-pleads-guilty-negligent-violation-clean-water-act; *Charges Filed in Connection With Texas Oilfield Deaths*, U.S. DEP'T OF JUSTICE (Mar. 8, 2022), https://www.justice.gov/opa/pr/charges-filed-connection-texas-oilfield-deaths; *Big Lake Gas Ordered to*

Act violations involving natural gas plants,[236] oil and gas production wells,[237] and a refinery;[238] violations of the Migratory Bird Treaty Act at a wind farm;[239] and violations of the Clean Water Act stormwater runoff during the construction (clearing and grading) of four solar farms.[240] DOJ also announced criminal charges, guilty pleas and sentences in connection with tax fraud,[241] a conspiracy to steal trade secrets to benefit China-based turbine companies,[242] violations of the Foreign Corrupt Practices Act, foreign bribery and money laundering schemes,[243] and garden-variety financial fraud.[244] Finally, the agency also made announcements regarding two cases involving attacks on the U.S. power grid—the first by Russian state-sponsored hackers and the other by domestic terrorists.[245]

Pay $3 Million Fine, U.S. DEP'T OF JUSTICE (Feb. 17, 2022), https://www.justice.gov/usao-ndtx/pr/big-lake-gas-ordered-pay-3-million-fine.

236. *EPA and State of Colorado Settlement with DCP Operating Company LP Resolves Clean Air Violations at Natural Gas Plants in Colorado*, U.S. DEP'T OF JUSTICE (July 25, 2022), https://www.justice.gov/opa/pr/justice-department-epa-and-state-colorado-settlement-dcp-operating-company-lp-resolves-clean.

237. *Utica Resource Operating Agrees to Pay $1 Million Penalty and Mitigate Past Excess Air Pollution at Oil and Gas Production Wells*, U.S. DEP'T OF JUSTICE (Nov. 4, 2022), https://www.justice.gov/opa/pr/utica-resource-operating-agrees-pay-1-million-penalty-and-mitigate-past-excess-air-pollution.

238. *Petrochemical Producer Altivia Agrees to Comprehensive Program to Reduce Harmful Air Pollution From Leaking Equipment to Resolve Clean Air Act Violations in Ohio,* U.S. DEP'T OF JUSTICE (Sept. 22, 2022), https://www.justice.gov/opa/pr/petrochemical-producer-altivia-agrees-comprehensive-program-reduce-harmful-air-pollution.

239. *ESI Energy LLC, Wholly Owned Subsidiary of Nextera Energy Resources LLC is Sentenced After Pleading Guilty to Killing and Wounding Eagles in its Wind Energy Operations in Violation of the Migratory Bird Treaty* Act, U.S. DEP'T OF ENERGY (Apr. 5, 2022), https://www.justice.gov/opa/pr/esi-energy-llc-wholly-owned-subsidiary-nextera-energy-resources-llc-sentenced-after-pleading.

240. *Settlements Resolve Clean Water Act Violations at Four Solar Farm Construction Sites in Alabama, Idaho and Illinois*, U.S. DEP'T OF JUSTICE (Nov. 14, 2022), https://www.justice.gov/opa/pr/settlements-resolve-clean-water-act-violations-four-solar-farm-construction-sites-alabama.

241. *Action Man Sentenced to Seven Years in Prison for Scheme to Defraud the Treasury Department of Over $50 Million in Tax-Free Energy Grant*, U.S. DEP'T OF JUSTICE (Dec. 7, 2022), https://www.justice.gov/usao-ma/pr/acton-man-sentenced-seven-years-prison-scheme-defraud-treasury-department-over-50.

242. *Former GE Power Engineer Convicted of Conspiracy to Commit Economic Espionage*, U.S. DEP'T OF JUSTICE (Apr. 1, 2022), https://www.justice.gov/opa/pr/former-ge-power-engineer-convicted-conspiracy-commit-economic-espionage.

243. *Two Financial Asset Managers Charged in Alleged $1.2 Billion Venezuelan Money Laundering Scheme*, U.S. DEP'T OF JUSTICE (July 12, 2022), https://www.justice.gov/usao-sdfl/pr/two-financial-asset-managers-charged-alleged-12-billion-venezuelan-money-laundering; *Turkish Businessman Extradited From Austria to Face Money Laundering and Wire Fraud Charges*, U.S. DEP'T OF JUSTICE (July 15, 2022), https://www.justice.gov/usao-ut/pr/turkish-businessman-extradited-austria-face-money-laundering-and-wire-fraud-charges; *Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes,* U.S. DEP'T OF JUSTICE (May 24, 2022), https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes.

244. *Former Chairman and Managing Partner of Energy Company Pleads Guilty to $15 Million Ponzi Scheme*, U.S. DEP'T OF JUSTICE (June 14, 2022), https://www.justice.gov/opa/pr/former-chairman-and-managing-partner-energy-company-pleads-guilty-15-million-ponzi-scheme.

245. *Four Russian Government Employees Charged in Two Historical Hacking Campaigns Targeting Critical Infrastructure Worldwide*, U.S. DEP'T OF JUSTICE (Mar. 24, 2022), https://www.justice.gov/opa/pr/four-russian-government-employees-charged-two-historical-hacking-campaigns-targeting-critical; *Domestic Terrorism Plot was in Furtherance of White Supremacist Ideology*, U.S. DEP'T OF JUSTICE (Feb. 23, 2022), https://www.justice.gov/opa/pr/three-men-plead-guilty-conspiring-provide-material-support-plot-attack-power-grids-united.