

REPORT OF THE COMPLIANCE AND ENFORCEMENT COMMITTEE

This report summarizes key federal enforcement and compliance developments in 2023, 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).*

I.	The Federal Energy Regulatory Commission	2
	A. Reports, Policy Statements, and Rules.....	2
	1. Annual Enforcement Report.....	2
	B. Enforcement Litigation and Adjudication.....	3
	1. Vitol Inc.....	3
	2. Axon Enterprise, Inc. v. FTC	4
	3. Rover Pipeline Company, LLC	6
	4. TotalEnergies Gas & Power North America, Inc.	6
	5. Powhatan Energy Fund, LLC	8
	C. Settlements	9
	1. Black Hills Corporation.....	9
	2. AES Alamos, LLC	10
	3. Georgia-Pacific Crossett LLC	11
	4. Big River Steel and Entergy Arkansas	12
	5. NRG Energy, Inc.	13
	6. BP America Inc.	14
	7. Pacific Summit Energy LLC	16
	8. Entergy Arkansas	17
	9. OhmConnect, Inc.....	18
	10. Leapfrog Power, Inc.	19
II.	The Commodity Futures Trading Commission.....	20
	A. Advisories and Alerts.....	20
	1. Enforcement Advisory on Penalties, Monitors and Admissions	20
	2. Alert Seeking Tips Relating to Carbon Markets Misconduct	20
	A. Energy-Related Enforcement Cases.....	20
	1. CFTC v. Logista Advisors LLC et al.	20
	2. In the Matter of Adam Cobb-Webb.....	21
	3. CFTC v. Coquest Inc.....	21

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III.	The North American Electric Reliability Corporation	22
IV.	Pipeline & Hazardous Materials Safety Administration	22
V.	The Department of Energy	22
VI.	The Department of Justice	23
	A. Evaluation of Corporate Compliance Programs.....	23
	B. Two-Part Pilot Program Regarding Compensation Incentives and Clawbacks	24
	C. Corporate Enforcement and Voluntary Self-Disclosure Policy	24

I. THE FEDERAL ENERGY REGULATORY COMMISSION

A. Reports, Policy Statements, and Rules

1. Annual Enforcement Report

On November 16, 2023, the FERC Office of Enforcement (Enforcement) issued its annual Report on Enforcement staff activities during the fiscal year 2023¹ that, as in the 2022 report, identified its priorities as focusing on (1) “fraud and market manipulation;” (2) “serious violations of the Reliability Standards;” (3) “anticompetitive conduct;” (4) “threats to the nation’s energy infrastructure and associated impacts on the environment and surrounding communities;” and (5) “conduct that threatened the transparency of regulated markets.”²

In pursuit of these priorities, Enforcement’s Division of Investigations (DOI) opened nineteen new investigations in fiscal year 2023,³ down from twenty-one the prior year,⁴ while bringing nine to closure without further action,⁵ up from seven the prior year.⁶ DOI negotiated twelve settlements that were approved by the Commission, resulting in approximately \$26.84 million in civil penalties and disgorgements of approximately \$21.92 million.⁷ Five of these settlements also required the settling parties to adopt some form of compliance monitoring.⁸ One other settlement resolved litigation pending in federal district court proceedings, and required disgorgement of \$4 million.⁹ These amounts were higher than the

1. FERC, 2023 REPORT ON ENFORCEMENT (Nov. 16, 2023) (Docket No. AD07-13-017) [hereinafter 2023 REPORT ON ENFORCEMENT].

2. *Id.* at 6.

3. *Id.*

4. FERC, 2022 REPORT ON ENFORCEMENT at 6 (Nov. 17, 2022) (Docket No. AD07-13-016) [hereinafter 2022 REPORT ON ENFORCEMENT].

5. 2023 REPORT ON ENFORCEMENT, *supra* note 1, at 6.

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

7. 2023 REPORT ON ENFORCEMENT, *supra* note 1, at 19.

8. *See id.* at 23-26.

9. *Id.* at 87. Given the date of the Commission’s order approving the settlement agreement that resolved *FERC v. Coaltrain Energy, L.P., et al.*, No. 2:16-cv-00732 (S.D. Ohio), the matter was described in last year’s report, but the monies paid will be included in Enforcement’s FY2023 statistics.

approximately \$23.59 million in civil penalties and \$1.8 million in disgorgement that resulted from eleven settlements entered into in 2022.¹⁰

FERC's Division of Audits and Accounting completed nine audits of public utility, natural gas, oil, and regional transmission organization companies covering a wide array of topics, resulting in sixty-eight findings of noncompliance and 332 recommendations for corrective action, the majority of which were implemented within six months, and directing approximately \$33 million in refunds and other recoveries.¹¹ This compares to twelve such audits in 2022 that resulted in fifty-one findings of noncompliance and 258 recommendations for corrective action, the majority of which were implemented within six months, and approximately \$158 million in refunds and other recoveries.¹²

FERC's Division of Analytics and Surveillance (DAS) surveillance staff's activities resulted in twenty-seven natural gas surveillance inquiries, and three referrals to DOI for investigation; and forty-three electric surveillance inquiries, and six referrals to DOI for investigation.¹³ DAS conducted enhanced surveillance related to two disruptive weather events, Winter Storm Elliott and the Winter 2022/2023 Western Energy Price Spike, which have already resulted in referrals to DOI for investigation.¹⁴ DAS closed twenty-five electric surveillance inquiries with no referral and, as of the end of the fiscal year, continued its work on twelve other inquiries.¹⁵ This compares to twenty-six natural gas surveillance inquiries with no referrals to DOI for investigation and thirty-two electric surveillance inquiries with two referrals to DOI for investigation in 2022.¹⁶

B. Enforcement Litigation and Adjudication

1. Vitol Inc.

On August 18, 2023, the U.S. Court of Appeals for the Ninth Circuit addressed the timing of FERC's five-year statute-of-limitations period to bring an action to enforce an order assessing a civil penalty under the Federal Power Act (FPA).¹⁷ In doing so, the Court held that, in the context of a claim for an order to affirm the assessment of a civil penalty, the statute of limitations does not begin to run until FERC assesses the penalty.¹⁸

On January 6, 2020, FERC filed a complaint in federal court for an order affirming the assessment of a penalty issued in October 2019 against Vitol and one

10. 2022 REPORT ON ENFORCEMENT, *supra* note 4, at 6.

11. 2023 REPORT ON ENFORCEMENT, *supra* note 1, at 7.

12. 2022 REPORT ON ENFORCEMENT, *supra* note 4, at 7.

13. 2023 REPORT ON ENFORCEMENT, *supra* note 1, at 7.

14. *Id.* at 7.

15. *Id.* at 82.

16. 2022 REPORT ON ENFORCEMENT, *supra* note 4, at 7.

17. FERC v. Vitol Inc., 79 F.4th 1059 (9th Cir. 2023).

18. *Id.* at 1061.

of its traders.¹⁹ Vitol argued in a motion to dismiss that FERC's action was untimely because the FPA lacks its own statute of limitations and thus FERC's ability to enforce its assessed civil penalty is subject to the general statute of limitations under 28 U.S.C. § 2462.²⁰ According to Vitol, "FERC's claim accrued as soon as the alleged unlawful trading occurred[;]" but to FERC the "claim accrued only once the statutory prerequisites for filing suit were satisfied."²¹

The Court, consistent with the Fourth Circuit's decision in *FERC v. Powhatan Energy Fund, LLC*,²² concluded that the statute was unambiguous as to FERC's claim,²³ providing that only after FERC assessed a civil penalty could the claim accrue and the statute of limitations "begin to run."²⁴ The Court relied on Supreme Court precedent to find "that a statute of limitations can create one limitations period for the claim before the agency and a second for a follow-on federal court action."²⁵ Accordingly, only after FERC completes its agency proceeding—which includes assessing a penalty—may the statute of limitations period for the federal court action commence.²⁶

In sum, *Vitol* (like *Powhatan*) holds that FERC must initiate an enforcement proceeding at the agency within five years of the alleged unlawful conduct (through issuance of a notice of proposed penalty), and, if that proceeding results in the assessment of a civil penalty, FERC must file a complaint in federal court within five years of its penalty assessment.

In light of the Ninth Circuit's holding, FERC's complaint proceeding against Vitol and its trader continued to progress in the District Court for the Eastern District of California. On January 4, 2024, FERC approved a Stipulation and Consent Agreement among the parties resolving FERC's claims against Vitol and its trader and FERC's lawsuit in the District Court.²⁷ Vitol agreed to pay \$2,225,000 in civil penalties and its trader agreed to pay \$75,000 in civil penalties.²⁸

2. Axon Enterprise, Inc. v. FTC

On April 14, 2023, the Supreme Court issued a decision on the timing of constitutional challenges to agency enforcement proceedings.²⁹ While the decision does not involve a FERC matter, it has potential relevance to FERC enforcement proceedings as numerous defendants have argued (see discussion below).

19. *Id.* at 1062.

20. *Id.* (quoting the statute, which in relevant part states "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.").

21. *Id.*

22. *FERC v. Powhatan Energy Fund, LLC*, 949 F.3d 891, 899 (4th Cir. 2020).

23. *Id.* at 1063 ("FERC's claim arises under 16 U.S.C. § 823b(d)(3)(B), which gives the agency a cause of action in federal court for 'affirming the assessment of the civil penalty.'").

24. *Id.* ("Until there is a civil penalty, a cause of action for affirming the penalty cannot exist.").

25. *Id.* at 1065.

26. *Id.* at 1066 (relying on *FERC v. Powhatan Energy Fund, LLC*, 949 F.3d 891, 898-99 (4th Cir. 2020)).

27. Order Approving Stipulation and Consent Agreement, *Vitol Inc.*, 186 FERC ¶ 61,008 (2024).

28. *Id.* at P 2.

29. *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890 (2023).

In *Axon*, a consolidated decision in which the Court resolved both the *Axon* case and the companion case, *SEC v. Cochran*, the Court examined whether respondents in Federal Trade Commission (FTC) and Securities and Exchange Commission (SEC) enforcement proceedings would need to wait until those proceedings concluded before they could challenge in federal court the constitutionality of how the proceedings were structured.³⁰

Axon and *Cochran* both involved suits filed by respondents while enforcement proceedings against them were pending. Cochran argued that the administrative law judges (ALJ) in her SEC proceeding “could not constitutionally exercise power” because they were unlawfully protected from the President’s removal power.³¹ *Axon* raised a similar removal-based challenge to the FTC ALJs’ authority while also arguing that the Commission’s enforcement proceedings impermissibly commingled prosecutorial and adjudicative responsibilities.³² The courts below split as to whether these challenges could proceed concurrently with the enforcement proceeding or whether federal courts lack jurisdiction to hear the case until the enforcement proceeding is complete.³³

The Supreme Court concluded that the respondents’ suits could proceed even during the pendency of their enforcement proceedings.³⁴ It did so by evaluating the SEC’s and FTC’s operating statutes under the “*Thunder Basin* factors,” to determine whether the claim “is ‘of the type’ that Congress thought belonged within [the agency’s] statutory [review] scheme”—*i.e.*, the normal process prescribed for how claims should proceed from agency resolution to judicial review.³⁵ Under the *Thunder Basin* factors, courts assess whether an agency’s statutory review process precludes suits filed through other means by asking (1) whether precluding jurisdiction over the parallel suit could “foreclose all meaningful judicial review” of the claim, (2) whether the claim is “wholly collateral to [the] statute’s review provisions,” and (3) whether the claim is “outside the agency’s expertise.”³⁶ The Supreme Court found that these factors all favored allowing the respondents’ parallel suits to proceed, as the injury of being subjected to an unconstitutional agency proceeding is impossible to cure after the fact; the suits challenged “the Commissions’ power to proceed at all, rather than actions taken in the agency proceedings;” and agencies have no special expertise on constitutional separation-of-powers questions.³⁷ The Court accordingly remanded the cases for further proceedings.³⁸

30. *Id.* at 897-99.

31. *Id.* at 898.

32. *Id.* at 899.

33. *Axon Enter., Inc.*, 143 S. Ct. at 899-90. *Compare* *Axon Enter. V. FTC*, 986 F.3d 1173, 1177 (9th Cir. 2021) (“Congress impliedly barred jurisdiction . . . and required parties to move forward first in the agency proceeding”), *with* *Cochran v. SEC*, 20 F.4th 194, 197 (5th Cir. 2021) (en banc) (“[T]he Exchange Act does not disturb the district court’s jurisdiction over such claims.”).

34. *Axon Enter. Inc.*, 598 U.S. at 900.

35. *Id.* at 901-02; *see* *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

36. *Axon Enter. Inc.*, 143 S. Ct. at 900 (quoting *Thunder Basin*, 510 U.S. at 212-13).

37. *Axon Enter. Inc.*, at 902-06.

38. *Id.* at 906.

3. Rover Pipeline Company, LLC

On February 1, 2022, while the Supreme Court was deliberating on *Axon*, Rover Pipeline Company filed a complaint in the United States District Court for the Northern District of Texas.³⁹ The complaint alleged that FERC's administrative enforcement action against Rover is contrary to law because the Natural Gas Act (NGA) grants federal district courts exclusive jurisdiction over violations of the Act.⁴⁰ According to Rover, FERC should have filed an enforcement action in federal district court because the ALJ adjudicative proceedings "deprive accused parties of their statutory right to an Article III tribunal" and violate multiple constitutional provisions.⁴¹ In May of 2022, the Northern District stayed Rover's case pending *Axon*.⁴² On June 14, 2023, while acknowledging the stay order precluded further action in the case, FERC issued an Order on Presiding Officer Reassignment directing the Chief Administrative Law Judge to reassign the ongoing enforcement hearing to another ALJ not previously involved in the proceeding.⁴³

FERC subsequently filed before the District Court a Motion for Clarification or, in the Alternative, to Lift the Stay for Limited Purposes,⁴⁴ and Rover filed an opposition.⁴⁵

On September 13, 2023, the District Court issued an Order denying FERC's motion and staying the case pending resolution of *SEC v. Jarkesy*, an administrative law case currently pending before the Supreme Court.⁴⁶

4. TotalEnergies Gas & Power North America, Inc.

On December 13, 2022, and similar to the Rover matter described above, TotalEnergies and Gas & Power North America, Inc. filed a complaint before the United States District Court for the Southern District of Texas alleging that FERC's enforcement proceeding is unconstitutional, for the same reasons raised in the *Jarkesy* case pending in the Supreme Court, and that these alleged violations

39. Complaint for Declaratory Relief, *Rover Pipeline, LLC, et al. v. FERC*, No. 3:22-CV-00232-S (N.D. Tex. Feb. 1, 2023), ECF No. 1.

40. *Id.*

41. *Id.*

42. Order, *Rover Pipeline, LLC, et al. v. FERC*, No. 3:22-CV-00232-S (N.D. Tex., May 24, 2022), ECF No. 34.

43. *Rover Pipeline, LLC and Energy Transfer Partners, L.P.*, 183 FERC ¶ 61,190 (Jun. 14, 2023).

44. Defendants' Motion for Clarification or, in the Alternative, to Lift the Stay for Limited Purpose, *Rover Pipeline, LLC, et al. v. FERC* (N.D. Tex. Jun. 16, 2023), ECF No. 43.

45. Plaintiffs' Opposition to Defendants' Motion for Clarification or, in the Alternative, to Lift the Stay for Limited Purpose, *Rover Pipeline, LLC, et al. v. FERC* (N.D. Tex. Jun. 27, 2023), ECF No. 45.

46. Order, *Rover Pipeline, LLC, et al. v. FERC* (N.D. Tex. Sept. 13, 2023), ECF No. 52 (administratively closing the district court proceeding without prejudice to reopening upon motion by any party or to enter a judgment and staying the related FERC proceeding without prejudice to reopening upon a motion by any party). The Rover Complaint raises essentially the same issues to be addressed in *Jarkesy*, which involves three constitutional challenges. See *SEC v. Jarskey, Jr. et al.*, Case No. 22-859 (5th Cir. 2023). Specifically, the Court will decide whether: (1) the SEC's in-house adjudication of the case violated the petitioners' Seventh Amendment right to a jury trial, (2) the Commission's statutory ability to opt to bring securities fraud actions within the agency violated the "non-delegation doctrine," and (3) the statutory removal restrictions for SEC ALJs are unconstitutional.

should be addressed in federal court.⁴⁷ In March, the District Court stayed the case pending *Axon*.⁴⁸

On June 14, 2023, also similar to the Rover matter, FERC issued an Order on Presiding Officer Reassignment and Providing Further Direction (Reassignment Order) directing the Chief Administrative Law Judge to reassign the proceeding in Docket No. IN12-17-000 to another ALJ not previously involved in the proceeding.⁴⁹ According to FERC, the proceeding was to otherwise remain suspended pursuant to the District Court's order staying the proceeding pending the Supreme Court decision in *Axon*.⁵⁰ In the Reassignment Order FERC directed the ALJ to offer the parties "the opportunity to specify alleged defects in the hearing procedures to date, request presiding officer approval for further discovery or other relief, and seek reconsideration of past decisions made by the previous [ALJ] before December 30, 2022."⁵¹ FERC directed the new ALJ to not "extend any deference to past decisions made by the previous [ALJ] before December 30, 2022," and to independently evaluate any request for reconsideration or other relief submitted by a participant.⁵² FERC also directed the new ALJ to ratify the relevant past decision made by the previous ALJ to the extent any request for consideration was denied in whole or in part.⁵³

FERC subsequently filed before the District Court a Motion for Clarification or, in the Alternative, to Lift the Stay for Limited Purposes.⁵⁴ On July 14, 2023, the District Court granted FERC's motion as to reassignment of proceedings to a new ALJ who has not previously been involved in those proceedings, although the court did not address the merits on whether that reassignment was lawful under the issues currently before the Supreme Court in *Jarkesy*.⁵⁵

47. Complaint, TotalEnergies Gas & Power N.A., Inc., et al. v. FERC, et al., No. 4:22-CV-04318 (S.D. Tex. Dec. 13, 2022), ECF No. 1.

48. Order, TotalEnergies Gas & Power N.A., Inc., et al. v. FERC, et al. (S.D. Tex. Mar. 10, 2023), ECF No. 52.

49. *Total Gas & Power North America, Inc., Total, S.A., Total Gas & Power, Ltd., Aaron Hall, and Therese Tran f/k/a Nguyen*, 183 FERC ¶ 61,189 (Jun. 14, 2023). In the Reassignment Order, and presumably in response to potential constitutional concerns, FERC explained that the Commission "precautionarily ratified" the appointments of all current ALJs by Commission vote effective December 30, 2022. The Reassignment Order referenced a Declaration of Secretary Kimberly D. Bose wherein the Secretary stated "the Chairman of the Commission called for a vote on whether the Commission would ratify the appointments of the Commission's 12 Administrative Law Judges, and thereby approve the appointments as the Commission's own under the Constitution." In the Response in Opposition to Motion, TotalEnergies Gas & Power N.A., Inc., et al. v. FERC, et al. (S.D. Tex. Feb. 6, 2023), according to the Secretary, the vote was conducted "via email" and by December 28, 2022, "a majority of the Commission voted in the affirmative." *Id.*

50. *Id.* at P 3 (citing Minute Order, TotalEnergies Gas & Power N.A., Inc., et al. v. FERC, et al. (S.D. Tex. Mar. 10, 2023), ECF No. 52); *see also* Order, *TotalEnergies Gas & Power N.A., Inc, et al. v. FERC, et al.*, No. 4:22-cv-04318 (S.D. Tex. Mar. 10, 2023), ECF No. 52.

51. 183 FERC ¶ 61,189 at P 5.

52. *Id.*

53. *Id.*

54. Defendants' Motion for Clarification or, in the Alternative, to Lift the Stay for Limited Purpose, TotalEnergies Gas & Power N.A., Inc., et al. v. FERC et al. (S.D. Tex. Jun. 16, 2023), ECF No. 56.

55. Order, TotalEnergies Gas & Power N.A., Inc., et al. v. FERC et al. (S.D. Tex. Jul. 14, 2023), ECF No. 61.

On July 18, 2023, FERC issued an Order of Chief Judge Substituting Presiding Judge that substituted Judge Patricia M. French and relieved the previous Judge of all duties with respect to the proceeding.⁵⁶

On August 18, 2023, FERC filed before the Southern District a Motion to Lift Stay citing the decision in *Axon*.⁵⁷ In September, TotalEnergies filed a Response arguing that the case should remain stayed pending the Supreme Court's decision in *Jarkesy*.⁵⁸ On October 19, 2023, the Southern District denied FERC's Motion to Lift Stay and continued the stay pending resolution of *Jarkesy*.⁵⁹

5. Powhatan Energy Fund, LLC

On March 22, 2023, the United States District Court for the Eastern District of Virginia issued a Memorandum Opinion⁶⁰ granting a Motion for Default Judgment against Powhatan Energy Fund, LLC, et al. after FERC alleged Powhatan manipulated the day-ahead and real-time energy markets.

According to FERC, Powhatan conducted wash trades⁶¹ that enabled the company to receive excessive credit payments from PJM Interconnection, LLC.⁶² Powhatan disputed those claims at FERC and in federal court, but after “years of discovery,” including expert discovery, “motions practice, and an interlocutory appeal”⁶³ the company filed for Chapter 7 bankruptcy.

The Court determined that because FERC's allegations were well-pleaded and deemed admitted as a result of Powhatan's default, FERC had shown Powhatan to have violated FERC's Anti-Manipulation Rule when it “committed (1) fraud, with the (2) requisite scienter, and (3) in connection with the purchase or sale of electric energy within FERC's jurisdiction.”⁶⁴ The Court also found that

56. Order of Chief Judge Substituting Presiding Judge, *Total Gas & Power North America, Inc., et al.*, FERC Docket No. IN12-17-000 (Jul. 18, 2023).

57. Defendant's Motion to Lift Stay to Decide Plaintiffs' Motion for Preliminary Injunction, TotalEnergies Gas & Power North America, Inc., et al. v. FERC, No. 4:22-cv-04318 (S.D. Tex. Aug. 18, 2023), ECF No. 66.

58. Plaintiffs' Response to Defendants' Motion to Lift Stay, No. 4:22-cv-04318 6 (S.D. Tex. Sept. 8, 2023) ECF No. 67.

59. Order, *TotalEnergies Gas & Power N.A., Inc., et al. v. FERC et al.*, No. 4:22-cv-04318 1 (S.D. Tex. Oct. 19, 2023), ECF No. 77.

60. FERC v. Powhatan Energy Fund, LLC, No. 3:15cv452, slip op. at *1 (E.D. Va. Mar. 22, 2023); *Chen*, 151 FERC ¶ 61,179, at p. 62,138 (2015) (prior to seeking default judgment, FERC issued an Order Assessing Civil Penalties where FERC assessed a civil penalty of \$16,800,000 and profit disgorgement payments of \$3,465,108).

61. *Powhatan Energy Fund, LLC*, slip op. at *1, *4 (quoting FERC's explanation of wash trades to be “trades that are pre-arranged to cancel each other out and involve no economic risk.”).

62. *Id.* at *4.

63. *Id.* at *2 (explaining that Powhatan's trustee agreed to not oppose the bankruptcy stay being lifted and to not oppose or otherwise challenge an entry of a default judgment in exchange for FERC agreeing to not “attempt to enforce or otherwise collect any judgment the Court may issue outside of its claim in the Bankruptcy Court.”); see Order Approving Stipulation for Relief from the Automatic Stay, *Powhatan Energy Fund, LLC*, No. 22-10142-MFW (Bankr. Ct. Del. Feb. 14, 2023), ECF No. 15 (Bankruptcy Court's Order held that FERC is “precluded from enforcing, executing on, or collecting any claim or judgment against [Powhattan] or the Estate by any means other than through the Chapter 7 process in connection with the FERC Proof of Claim.”).

64. *Powhatan Energy Fund, LLC*, slip op. at *4.

no other hearing for damages or any other matter was necessary since the damages claimed in the pleadings were “more than sufficiently supported.”⁶⁵

C. Settlements

1. Black Hills Corporation

On December 5, 2023, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement, Black Hills Corporation (BHC), as the corporate parent of, and on behalf of its three electric public utility subsidiaries, Black Hills Power, Inc. (BHP), Cheyenne Light, Fuel and Power Company (Cheyenne Light), Black Hills Colorado Electric, LLC (Black Hills Colorado Electric) (with BHP, Cheyenne Light and Black Hills Colorado Electric collectively referred to as the “Black Hills Electric Public Utilities”), related to 103 previously unfiled agreements by the Black Hills Electric Public Utilities.⁶⁶

Enforcement determined that BHP submitted a self-report to Enforcement in July 2017, reporting “that it had failed to submit to the Commission six jurisdictional agreements.”⁶⁷ As part of that self-report, BHP stated “that BHC was conducting a comprehensive review for BHP, and also Cheyenne Light and Black Hills Colorado Electric, to identify any other contracts that should have been filed but were not.”⁶⁸ “In November 2021, BHC updated the self-report, explaining that it had completed its review and identified 97 additional unfiled contracts, necessitating an estimated \$1.2 million in refunds at the time of the updated self-report.”⁶⁹ The Black Hills Electric Public Utilities had by then “filed all the agreements identified, some of which had been accepted by the Commission and some of which” were pending.⁷⁰ “Black Hills self-reported all 103 instances of non-filing and cooperated with Enforcement during the Investigation.”⁷¹

“Enforcement determined that Black Hills violated FPA section 205 and Part 35 of the Commission’s regulations by commencing jurisdictional service, and entering into associated agreements, without providing the requisite notice.”⁷² Enforcement further “determined that by failing to file the 103 jurisdictional agreements at issue, Black Hills violated Section 205 and Part 35 of the Commission’s regulations.”⁷³

65. *Id.* at *6.

66. *Black Hills Corporation*, 185 FERC ¶ 61,072 at P 1 (2023) (stating the Black Hills Electric Public Utilities together with BHC are collectively referred to as “Black Hills”).

67. *Id.* at P 4.

68. *Id.* at P 5.

69. *Id.* at P 6.

70. 185 FERC ¶ 61,072, at P 8.

71. *Id.* at P 9.

72. *Id.* at P 10.

73. *Id.* at P 12.

Black Hills admitted to the violations.⁷⁴ Black Hills agreed “to pay a civil penalty of \$150,000” and⁷⁵ “to submit semi-annual Status Reports detailing the filing status of each of the 103 previously unfiled agreements.”⁷⁶ Black Hills also agreed to submit annual compliance monitoring reports for a period of two years.⁷⁷

2. AES Alamitos, LLC

On October 24 2023, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement, AES Alamitos, LLC and AES Redondo Beach, LLC (collectively, AES) related to AES’s participation in the in the California Independent System Operator, Inc. (CAISO) capacity market.⁷⁸

Enforcement determined that AES owned and operated eight electric generating resources located in Southern California (the Resources). Enforcement alleged that AES provided inaccurate Physical Maximum (Pmax) value submissions related to the Resources.⁷⁹ Enforcement opened its investigation into AES following an August 2019 referral from the CAISO Department of Market Monitoring (DMM), alleging that AES submitted inaccurate Master File parameters to CAISO.⁸⁰ In spring of 2019, CAISO conducted a Pmax test to determine whether most of the resources could reach their Master File Pmax levels.⁸¹ In August 2019 the CAISO DMM informed Enforcement that certain AES units “failed to reach their Pmax values as submitted to CAISO in the Master File during summer readiness tests conducted in May 2019 and exceptional dispatches occurring in July 2019.”⁸²

Enforcement determined that AES violated CAISO Tariff section 4.6.4 when the units failed to reach their Master File Pmax values, which demonstrated “that the Master File Pmax values were not ‘accurate or actually based on the physical characteristics of the resources.’”⁸³ Enforcement further determined that AES violated CAISO Tariff section 37.3.1.1 by regularly bidding a Resource’s full Master File Pmax into the CAISO day-ahead and real-time energy markets and being financially compensated for RA capacity even though the Resources could not “reasonably [be] expected to be available and capable of performing at the levels specified in the Bid, and to remain available and capable of so performing.”⁸⁴ Finally, Enforcement determined that AES violated 18 C.F.R. section 35.41(b) for its “submission of Master File Pmax values to CAISO that were not accurate and

74. 185 FERC ¶ 61,072, at P 14.

75. *Id.* at P 15.

76. *Id.* at P 16.

77. *Id.* at P 17.

78. *AES Alamitos, LLC*, 185 FERC ¶ 61,060 at P 1 (2023).

79. *Id.*

80. *Id.* at P 7.

81. *Id.* at P 8.

82. 185 FERC ¶ 61,060, at P 8.

83. *Id.* at P 15.

84. *Id.* at P 16.

its failure to exercise due diligence to ensure that the submitted Pmax values reflected the actual physical capacity of the Resources” and 35.41 (a) through its “registration of inaccurate Master File Pmax values, bidding up to the Resources’ Master File Pmax value in CAISO’s energy markets, and selling capacity through RA contracts that the Resources could not reasonably provide in violation of the CAISO Tariff.”⁸⁵

AES neither admitted nor denied the violations.⁸⁶ AES agreed to “‘pay \$297 million in disgorgement to CAISO to be distributed pro rata to be network load,’ ‘pay a civil penalty of \$3.03 million,’ and to submit annual compliance monitoring reports for a period of two years.”⁸⁷

3. Georgia-Pacific Crossett LLC

On September 13, 2023, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and Georgia-Pacific Crossett LLC (GPC) related to GPC’s abandonment of the Crossett Pipeline.⁸⁸

Enforcement determined that GPC obtained a certificate to construct and operate the Crossett Pipeline under section 7 of the Natural Gas Act in 1971.⁸⁹ GPC used the pipeline exclusively to supply natural gas to its own plants in Crossett, Arkansas.⁹⁰ In 2019, GPC decided to abandon the pipeline.⁹¹ GPC employees or its agents substantially completed abandonment work by March 2021.⁹²

“On November 15, 2021, GPC approved the filing of an abandonment application with the Commission.”⁹³ The application stated that abandonment work would be undertaken in the future, and did not indicate that any work had already been undertaken.⁹⁴ Enforcement alleged that GPC employees involved in preparing the application knew that work described in the application had already been completed.⁹⁵ On August 5, 2022, GPC filed a supplement explaining that the abandonment activities had already occurred.⁹⁶

Enforcement determined that GPC committed two sets of violations. First, GPC abandoned a pipeline without prior Commission approval, contrary to section 7(b) of the NGA. Second, GPC filed an abandonment application that did not include “‘all pertinent data and information necessary for a full and complete understanding of the proposed project,’” as required under section 157.5(a) of the

85. *Id.* at PP 17-18.

86. 185 FERC ¶ 61,060, at P 20.

87. *Id.* at P 21.

88. *Georgia-Pacific Crossett LLC*, 184 FERC ¶ 61,151 at P 1 (2023).

89. *Id.* at P 3.

90. *Id.* at P 4.

91. *Id.* at P 5.

92. 184 FERC ¶ 61,151, at P 6.

93. *Id.* at P 7.

94. *Id.*

95. *Id.* at P 8.

96. 184 FERC ¶ 61,151, at P 6.

Commission's regulations, "all information and supporting data necessary to explain fully the proposed project," as required under section 157.7(a) of the Commission's regulations, and "a full and complete explanation of the data submitted," as required under section 157.18 of the Commission's regulations.⁹⁷

GPC neither admitted nor denied the violations.⁹⁸ "GPC agree[d] to pay a civil penalty of \$1,200,000."⁹⁹

4. Big River Steel and Entergy Arkansas

On August 21, 2023, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement, Big River Steel, LLC (BRS) and Entergy Arkansas LLC (EAL) related to Big River's and EAL's participation in the demand response market in the Midcontinent Independent System Operator (MISO).¹⁰⁰

Enforcement determined that, from September 2016 to April 2022, while BRS operated a steel mill "that uses as much as 300 megawatts to operate electric arc furnaces and other equipment," it participated in the MISO demand response market as "BRS's load levels at its mill rose and fell in the normal course of business."¹⁰¹ BRS participated in MISO as a Demand Response Resource-Type I (DRR-1) unit.¹⁰² EAL was BRS's Load Serving Entity and sponsored BRS's DRR-1 participation.¹⁰³ "MISO made DRR-1 payments whenever BRS cleared its DRR-1 offers and BRS's load was below its" "baseline" using the MISO baseline calculation methodology.¹⁰⁴

Enforcement determined that EAL and BRS sold energy, "in the form of reduced energy usage, in MISO's Day Ahead and Real Time markets" as a DRR-1.¹⁰⁵ Enforcement determined that BRS generally did not reduce energy consumption levels in response to MISO accepting its demand response offers. Instead, BRS operated at the load levels at which it would have operated if it were not a DRR-1 unit. Enforcement determined that this conduct violated section 38.2.5(d)(ii)(e) of the MISO Tariff "because BRS did not 'respond to [MISO] directives to . . . change output levels' by reducing its load below what it would otherwise have been."

Big River and EAL neither admitted nor denied the violations. Big River paid disgorgement of \$15,940,399 and a civil penalty of \$6,000,000¹⁰⁶ EAL disgorged \$5,033,780 it received, and credited to retail customers and agreed to coordinate as necessary with the Arkansas Public Service Commission to ensure the prompt

97. *Id.* at P 13.

98. *Id.* at P 14.

99. *Id.* at P 2.

100. *Big River Steel LLC*, 184 FERC ¶ 61,111 at P 1 (2023).

101. *Id.* at PP 1, 5.

102. *Id.* at P 7.

103. *Id.* at PP 6, 9-10.

104. 184 FERC ¶ 61,111, at P 15.

105. *Id.* at P 22.

106. *Id.* at P 23.

return to its customers of the net amount (\$8,181,899) they were charged in connection with BRS's participation as a DRR-1 unit.¹⁰⁷ The Order noted that Enforcement considered "that an informal MISO presentation to BRS may have suggested that planned outages could qualify to receive demand response payments" and that, while not a defense to a tariff violation, this was considered in evaluating the appropriate penalty.¹⁰⁸

5. NRG Energy, Inc.

On July 20, 2023, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement, and NRG Energy, Inc. (NRG) related to NRG's participation in the PJM Interconnection, LLC (PJM) capacity market.¹⁰⁹

Enforcement determined that NRG failed to operate its combustion turbine facilities (Fisk Units) in accordance with the parameter limits contained in its offers into the PJM capacity market. Specifically, Enforcement determined that NRG had not complied with the notification time component of its Parameter Limited Schedule (PLS), which represents the time needed by a generation resource to commence generating once it has received dispatch instructions from PJM.¹¹⁰

NRG's PLS notification time was 0.1 hours.¹¹¹ However, NRG was unable to meet this notification time because NRG did not staff the Fisk Units full-time and did not have remote start capabilities. Attachment K-Appendix, section 6.6 of the PJM Tariff allows a capacity market seller to request (for one-time temporary exception, lasting thirty days or less) "adjusted unit-specific parameter limitations" if it believes it cannot meet the parameters contained in its PLS due to an "actual operating constraint."¹¹² NRG previously sought approval from PJM to modify the 0.1-hour notification time for the Fisk Units due to their limited staffing, but "PJM denied NRG's request, advising NRG that capacity performance resources were 'expected to be staffed 24/7[/]365 or have remote-start capabilities.'"¹¹³ Thereafter, NRG had "used hourly updates through the PJM Markets Gateway to reflect a three-hour notification time for the Fisk Units," which represented the actual time NRG needed to be able to start the units following a dispatch order.¹¹⁴ The PJM Independent Market Monitor (IMM) "inquired about the temporary parameter limited exception and use of the three-hour notification time" in June and September of 2018.¹¹⁵

Enforcement determined that NRG violated Attachment K-Appendix, section 6.6 of the PJM Tariff, which requires that resources [meet their parameter limits

107. *Id.* at PP 30, 32.

108. 184 FERC ¶ 61,111, at P 34.

109. *NRG Energy, Inc.*, 184 FERC ¶ 61,026 at P 1 (2023).

110. *Id.* at P 17.

111. *Id.* at P 8.

112. *Id.* at P 16.

113. 184 FERC ¶ 61,026, at PP 8-9.

114. *Id.* at P 10.

115. *Id.* at P 12.

on cost-based offers and certain price-based offers.¹¹⁶ Enforcement determined that, notwithstanding NRG's use of Real Time Values to communicate the actual notification time of the Fisk Units, NRG violated Attachment K-Appendix, sections 6.6 (a) and (b) of the PJM Tariff by operating on a different notification time than what was contained in its PLS.¹¹⁷ Enforcement determined that the three-hour notification time NRG adopted informally was not caused by an "operating constraint": per Attachment K-Appendix, section 6.6 (c), but was "the result of an NRG business decision not to staff the Fisk Units 24/7/365 or to install remote start capability."¹¹⁸ Enforcement also determined that NRG violated 18 C.F.R. section 35.41(a), which requires sellers participating in organized wholesale markets to "operate and schedule generating facilities. . . . or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable market."¹¹⁹

NRG neither admitted nor denied the violations.¹²⁰ NRG agreed to pay a civil penalty of \$37,342, disgorge \$32,658 to PJM (inclusive of interest), and to submit an annual compliance monitoring report for a period of one year, with a second year at Enforcement's sole discretion.¹²¹

6. BP America Inc.

On July 7, 2023, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement, and BP America Inc., BP Corporation North America, Inc., BP America Production Company, and BP Energy Company (collectively BP) resolving remaining issues in the case after it was remanded by the United States Court of Appeals for the Fifth Circuit, which in October 2022 affirmed in part and reversed in part the Commission's ruling in the case.¹²² The Order related to BP's Southeast Gulf Texas Team's physical, next-day fixed price natural gas trading at Houston Ship Channel and related transport of natural gas from Katy, Texas to Houston Ship Channel during the period of September 18 to November 30, 2008 in the aftermath of Hurricane Ike.¹²³

The Commission previously issued an Order to Show Cause and Notice of Proposed Penalty on August 5, 2013.¹²⁴ It then established a hearing before an ALJ to determine whether BP violated section 4A of the NGA and 18 C.F.R. sec-

116. *Id.* at P 15.

117. 184 FERC ¶ 61,026, at P 17.

118. *Id.* at P 18.

119. *Id.* at P 20.

120. *Id.* at P 22.

121. 184 FERC ¶ 61,026, at PP 23-25.

122. *BP America Inc.*, 184 FERC ¶ 61,016 at P 1 (2023).

123. *Id.* at P 4.

124. *Id.* at P 5.

tion 1c.1 and to ascertain certain facts relevant for any application of the Commission’s Penalty Guidelines.¹²⁵ After the ALJ issued an initial decision, the Commission issued an order on the Initial Decision,¹²⁶ and assessed a civil penalty against BP in the amount of \$20.16 million and disgorgement of \$207,169.¹²⁷ BP paid both the civil penalty and disgorgement under protest.¹²⁸ BP appealed to the Fifth Circuit,¹²⁹ and after briefing by both parties, the Fifth Circuit issued its ruling on October 20, 2022.¹³⁰ The Fifth Circuit affirmed the Commission in part, reversed the Commission in part, and remanded for the Commission to reassess the civil penalty in accordance with the Fifth Circuit’s ruling partially in favor of BP regarding the scope of the Commission’s jurisdiction over the challenged conduct.¹³¹ The Fifth Circuit found that the Commission’s authority to address market manipulation does not “extend[] to any natural gas transaction which affects the price of a transaction under the NGA[,]” but rather “only over transactions in interstate natural gas directly regulated by the [NGA].”¹³² On remand, the Court directed the Commission to reassess its civil penalty calculation to account for the transactions that were outside of the Commission’s jurisdiction.

On remand, the Commission affirmed its finding that BP engaged in market manipulation for the reasons set forth in the original order on the Initial Decision and the rehearing of that order.¹³³ BP acknowledged that the Fifth Circuit upheld the Commission’s finding of manipulation as to 18 jurisdictional transactions and remanded the case to the Commission for reassessment of the penalty amount in light of its jurisdictional holding.¹³⁴ BP agreed to a civil penalty of \$10,750,000, and agreed that it would not seek return of the disgorgement it already paid pending the appeal.¹³⁵ Because BP paid its prior civil penalty under protest and that penalty exceeded the Civil Penalty agreed to by the parties, BP was not obligated to make any additional payment.¹³⁶ Moreover, Enforcement agreed it would not object should BP choose to seek to reclaim the excess payment of \$13,606,686 via suit.¹³⁷ BP agreed to promptly notify Enforcement if it takes any actions to reclaim the excess payments.¹³⁸

125. *Id.* at P 6.

126. 184 FERC ¶ 61,016, at P 8.

127. *Id.*

128. *Id.* at PP 10-11.

129. *Id.* at P 14.

130. 184 FERC ¶ 61,016, at P 14; *see also* BP Am., Inc. v. FERC, 52 F.4th 204 (5th Cir. 2022).

131. 184 FERC ¶ 61,016, at P 15.

132. *BP Am.*, 52 F.4th at 210.

133. 184 FERC ¶ 61,016, at P 18.

134. *Id.* at P 20.

135. *Id.* at P 21.

136. *Id.* at P 22.

137. 184 FERC ¶ 61,016, at P 22.

138. *Id.* at P 23.

7. Pacific Summit Energy LLC

On June 30, 2023, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and Pacific Summit Energy LLC (PSE) related to PSE's physical trading of natural gas at Transco Zone 6.¹³⁹

Enforcement determined that during the October 2017 Bidweek, which occurs monthly during the last five days of the month immediately preceding the delivery month,¹⁴⁰ PSE engaged in a related-positions fraudulent scheme that violated Section 4A of the Natural Gas Act, 15 U.S.C. section 717c-1 and the Commission's corresponding regulation, 18 C.F.R. § 1c.1.¹⁴¹ Specifically, in June 2017, a PSE trader purchased financial basis positions that settled on the Transco Zone 6 (NY and NNY) Inside FERC (IFERC) indexes for the September and October 2017 Bidweeks.¹⁴² PSE's financial basis positions were "long," so the value of the positions would increase as the price of the Transco Zone 6 indexes increased.¹⁴³ On September 25, 2017 (the first day of Bidweek), a PSE trader made physical purchases of gas that were higher than the prevailing market price for both that day and the remainder of the Bidweek. PSE suffered a loss on the physical purchases but realized a net profit on its related financial positions tied to the Transco Zone 6 (NY and NNY) IFERC indexes.¹⁴⁴

Enforcement determined that PSE's October 2017 Bidweek physical trading had the effect of inflating physical natural gas prices in Transco Zone 6 resulting in increases in the value of PSE's existing financial basis positions.¹⁴⁵ Enforcement determined that the inflation was increased by PSE purchasing physical gas at prices that were uneconomical and concentrating its purchases to "the first house of the first day of Bidweek," thus signaling later trades.¹⁴⁶ "Enforcement further determined that PSE was, or should have been, aware of the effect" the physical trading would have on its financial basis positions.¹⁴⁷ Enforcement also determined that "PSE made its uneconomic purchases of physical gas," "with either the intent or with a reckless disregard for how such trading would inflate the value of its existing financial positions."¹⁴⁸ "Enforcement [determined] that, on net, PSE's October 2017 physical First of Month index positions, financial index swap positions, and financial basis swap positions improperly benefited PSE by \$154,623."¹⁴⁹

139. *Pacific Summit Energy LLC*, 183 FERC ¶ 61,236 (2023).

140. *Id.* at 6; Stipulation and Consent Agreement, *Pacific Summit Energy LLC*, 183 FERC ¶ 61,236 at P 12 (2023).

141. Stipulation and Consent Agreement, 183 FERC ¶ 61,236, at P 12; 183 FERC ¶ 61,236, at PP 6-7.

142. 183 FERC ¶ 61,236, at P 4.

143. *Id.*

144. *Id.* at P 5.

145. *Id.* at P 8.

146. 183 FERC ¶ 61,236, at P 8.

147. *Id.*

148. *Id.*

149. *Id.*

PSE neither admitted nor denied the violations.¹⁵⁰ PSE agreed to pay a civil penalty of \$360,000, to disgorge \$154,623, and to submit annual compliance monitoring reports for a period of two years.¹⁵¹ “The disgorgement payments [will] be made at the direction of Enforcement pro rata to market participants who had financial instruments settle based on the effected indexes in October 2017.”¹⁵²

8. Entergy Arkansas

On June 22, 2023, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement and EAL related to energy offers into MISO for the EAL Hot Springs generation facility (Hot Springs).¹⁵³

Enforcement determined that Hot Springs is a combined cycle gas turbine that uses supplemental “duct-firing” which increases the heat energy in the generation process and ultimate output of electricity.¹⁵⁴ Enforcement determined that, on four days in 2020, EAL submitted real-time energy offers into MISO for Hot Springs that communicated that Hot Springs was in a control mode that would respond to MISO’s dispatch instructions.¹⁵⁵ However, during certain hours on those days “when the unit was in duct-firing range or dispatched into or out of the duct-firing range,” EAL did not follow MISO’s dispatch instructions for Hot Springs “in a timely manner.”¹⁵⁶ Enforcement determined that the “dispatchers responsible for making energy market offers for” Hot Springs “relied on certain internal guidelines with respect to the operations” while in duct-firing mode and that the EAL structured the offers sometimes “in order to ‘block’ or ‘pin’ the unit to restrict MISO’s ability to dispatch the unit.”¹⁵⁷ However, Enforcement also determined that EAL did not financially benefit from the blocking or pinning.¹⁵⁸

Enforcement determined that EAL violated section 40.2.5.e of the MISO Tariff and sections 35.41(a) and 35.41(b) of the Commission’s regulations.¹⁵⁹ Specifically, Enforcement determined that EAL violated Tariff section 40.2.5.e s that, which requires “[t]he values in Offers representing the non-price information [] shall reflect the actual known physical capabilities and characteristics of the Generation Resources. . . .”¹⁶⁰

150. 183 FERC ¶ 61,236, at P 10.

151. *Id.* at P 1.

152. 183 FERC ¶ 61,236, at P 1; Stipulation and Consent Agreement, 183 FERC ¶ 61,236, at P 18.

153. *Entergy Arkansas, LLC*, 183 FERC ¶ 61,207 at P 1 (2023).

154. *Id.* at P 3.

155. *Id.* at PP 4-5.

156. *Id.* at P 6.

157. 183 FERC ¶ 61,207, PP 4, 7.

158. *Id.* at P 8.

159. *Id.* at P 10.

160. *Id.* at PP 10-11.

EAL neither admitted nor denied the violations.¹⁶¹ EAL paid a civil penalty of \$52,000 and agreed to be subject to compliance monitoring for a period of 2 years.¹⁶²

9. OhmConnect, Inc.

On May 22, 2023, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement, and OhmConnect, Inc. (Ohm) related to Ohm's participation in the CAISO demand response market.¹⁶³

Ohm participated in the Demand Response Auction Mechanism (DRAM) pilot program, under which demand response providers contract with Load-Serving Entities (LSEs) to provide given amounts of demand response.¹⁶⁴ Under the program, demand response providers communicate the amount of demand response they will provide to the LSEs, who then build those load reductions into their supply plans.¹⁶⁵ "The LSEs submit their supply plans to CAISO to substantiate Resource Adequacy capacity contracted by the LSE."¹⁶⁶

Enforcement determined that between January and June 2018, Ohm submitted bids into the Day Ahead market the amount of demand response for which it had contracted with the LSEs.¹⁶⁷ However, Enforcement also determined that Ohm could not fulfill those bids based on its metered registered load.¹⁶⁸ Enforcement determined that Ohm violated section 37.3.1.1 of the CAISO Tariff, which requires Market Participants to submit bids "from resources that are reasonably expected to be available and capable of performing at the levels specified in the bid."¹⁶⁹ Enforcement determined that as a result of its actions, Ohm received \$8,906 in Resource Adequacy Availability Incentive Mechanism (RAAIM) payments it would not have received if it had submitted accurate bids.¹⁷⁰

Ohm neither admitted nor denied the violations.¹⁷¹ Ohm agreed to pay a civil penalty of \$141,094 and to disgorge \$8,906 to CAISO.¹⁷² The Order directed "CAISO to distribute the disgorgement pro rata to network load."¹⁷³ Ohm also agreed to submit to compliance monitoring for at least one year, with a second or third year at Enforcement's discretion.¹⁷⁴

161. 183 FERC ¶ 61,207, at P 15.

162. *Id.* at PP 2, 15; Stipulation and Consent Agreement, *Entergy Arkansas, LLC*, 183 FERC ¶ 61,207 at P 16 (2023).

163. *OhmConnect, Inc.*, 183 FERC ¶ 61,136 at P 1 (2023).

164. *Id.* at P 4.

165. *Id.*

166. *Id.*

167. 183 FERC ¶ 61,136, at P 5.

168. *Id.*

169. *Id.* at P 9.

170. *Id.* at P 6.

171. 183 FERC ¶ 61,136, at P 11.

172. *Id.* at P 12.

173. *Id.* at P 17.

174. *Id.* at P 12; Stipulation and Consent Agreement, *OhmConnect, Inc.*, 183 FERC ¶ 61,136 at P 16.

10. Leapfrog Power, Inc.

On May 22, 2023, FERC issued an order approving a Stipulation and Consent Agreement between Enforcement, and Leapfrog Power, Inc. (Leapfrog) related to Leapfrog’s participation in the CAISO demand response market.¹⁷⁵

Enforcement determined that from February to August of 2019, Leapfrog, “a ‘virtual aggregator’ that connects electric vehicle, battery storage, smart thermostat, and other flexible technologies to grids and electricity markets,”¹⁷⁶ “submitted bids into the Day Ahead market that it could not fulfill with its registered load.”¹⁷⁷ Leapfrog participated in the DRAM pilot program, under which demand response providers contract with LSEs to provide given amounts of demand response.¹⁷⁸ Under the program, demand response providers communicate the amount of demand response they will provide to the LSEs, who then build those load reductions into their supply plans.¹⁷⁹ The LSEs submit their supply plans to CAISO to substantiate Resource Adequacy capacity contracted by the LSE.¹⁸⁰

Enforcement determined that from February to August 2019, Leapfrog bid into the Day Ahead market the amount of demand response for which it had contracted with the LSEs.¹⁸¹ However, Enforcement also determined that Leapfrog could not fulfill those bids based on its metered registered load.¹⁸² Enforcement determined that Leapfrog’s actions violated section 37.3.1.1 of the CAISO Tariff, which requires Market Participants to submit bids from resources that are reasonably expected to be available and capable of performing at the levels specified in the bid.¹⁸³ Enforcement determined that as a result of Leapfrog’s actions, it received \$46,120 in RAIM payments it would not have received if it had submitted accurate bids.¹⁸⁴

Leapfrog neither admitted nor denied the violations.¹⁸⁵ Leapfrog agreed to pay a civil penalty of \$73,880 and to disgorge \$46,120 to CAISO.¹⁸⁶ The Order directed CAISO to distribute the disgorgement pro rata to network load.¹⁸⁷ Leapfrog also agreed to submit to compliance monitoring for at least one year, with a second or third year at Enforcement’s discretion.¹⁸⁸

175. *Leapfrog Power, Inc.*, 183 FERC ¶ 61,137 at P 1 (2023).

176. Stipulation and Consent Agreement, *Leapfrog Power, Inc.*, 183 FERC ¶ 61,137 at P 3.

177. 183 FERC ¶ 61,137, at P 1.

178. *Id.* at P 4.

179. 183 FERC ¶ 61,137, at P 4.

180. *Id.*

181. *Id.* at P 5.

182. *Id.*

183. 183 FERC ¶ 61,137, at P 9.

184. *Id.* at P 6.

185. *Id.* at PP 10-11.

186. *Id.* at PP 2, 16.

187. 183 FERC ¶ 61,137, at P 17.

188. Stipulation and Consent Agreement, 183 FERC ¶ 61,137, at P 16.

II. THE COMMODITY FUTURES TRADING COMMISSION

A. *Advisories and Alerts*

1. Enforcement Advisory on Penalties, Monitors and Admissions

On October 17, 2023, the CFTC's Division of Enforcement issued an advisory providing staff guidance on determining whether proposed civil monetary penalties are sufficient; when to impose a corporate compliance monitor or consultant; what duties that monitor or consultant should have; and whether admissions should be recommended in an enforcement action.¹⁸⁹ With regard to penalties, the Division of Enforcement is recalibrating how it is assessing proposed penalties to ensure that they "are at the level necessary to achieve general and specific deterrence, which may result in the Division recommending higher penalties in resolutions than may have been imposed in similar cases previously."¹⁹⁰ With regard to admissions and denials, the Division of Enforcement states that "respondents should no longer assume that no-admit, no-deny resolutions are the default. Rather, in each case, the Division will discuss with respondents whether admissions are appropriate."¹⁹¹

2. Alert Seeking Tips Relating to Carbon Markets Misconduct

On June 20, 2023, the CFTC's Whistleblower Office in the Division of Enforcement issued an alert notifying the public on how to identify and report potential Commodity Exchange Act (CEA) violations connected to fraud or manipulation in the carbon markets.¹⁹² In those markets, high-quality carbon credits, also known as carbon offsets, are purchased and sold bilaterally or on spot exchanges, and the CFTC has determined that there exists the potential for fraud and manipulation.

A. *Energy-Related Enforcement Cases*

1. CFTC v. Logista Advisors LLC et al.

On September 7, 2023, the CFTC filed a civil complaint in the U.S. District Court for the Northern District of Illinois against Logista Advisors LLC (Logista) and its head trader/principal/CEO, charging them with spoofing, engaging in a manipulative and deceptive scheme, failing to supervise, and for violating a prior

189. COMMODITY FUTURES TRADING COMM'N, ADVISORY REGARDING PENALTIES, MONITORS AND CONSULTANTS, AND ADMISSIONS IN CFTC ENF'T ACTIONS (2023), https://www.cftc.gov/media/9466/EnfAdv_Resolutions/download.

190. *Id.* at 2.

191. *Id.* at 5.

192. COMMODITY FUTURES TRADING COMM'N, CFTC WHISTLEBLOWER ALERT: BLOW THE WHISTLE ON FRAUD OR MARKET MANIPULATION IN THE CARBON MARKETS (2023), <https://www.cftc.gov/PressRoom/PressReleases/8723-23>.

CFTC order.¹⁹³ The alleged scheme involved crude oil and natural gas futures contracts—specifically, calendar spread contracts—traded on CME and ICE Futures Europe.¹⁹⁴ The CFTC charged that such alleged conduct violated CEA sections 4c(a)(5)(C) and 6(c)(1), 7 U.S.C. sections 6c(a)(5)(C), 9(1), Regulations 166.3 and 180.1(a)(1) and (3), 17 C.F.R. sections 166.3, 180.1(a)(1), (3), and a 2017 order finding that, for several months in 2013 and 2014, Logista gave inadequate training, direction, and supervision to an employee trading crude oil futures.¹⁹⁵

2. In the Matter of Adam Cobb-Webb

On August 1, 2023, the CFTC issued an order simultaneously filing and settling charges against UK-based trader Adam Cobb-Webb for engaging in multiple instances of spoofing in West Texas Intermediate (WTI) light sweet crude oil futures contracts traded on New York Mercantile Exchange, Inc. (NYMEX).¹⁹⁶ Specifically, the CFTC alleged that Cobb-Webb “placed bids and offers for WTI futures with the intent to cancel his bids or offers before execution, *i.e.*, spoofing” and thereby violated sections 4c(a)(5)(C) and 6(c)(1) of the CEA, 7 U.S.C. sections 6c(a)(5)(C), 9(1), and CFTC Regulation 180.1(a)(1),(3), 17 C.F.R. section 180.1(a)(1), (3).¹⁹⁷ The order requires Cobb-Webb to pay a \$150,000 civil monetary penalty and imposes a one-year ban from trading on or subject to the rules of any CFTC-designated exchange and all other CFTC-registered entities and in all commodity interests.¹⁹⁸ Cobb-Webb is also ordered to cease and desist from violating the spoofing prohibition the CEA.¹⁹⁹

3. CFTC v. Coquest Inc.

On March 7, 2023, the U.S. District Court of the Northern District of Texas issued a consent order imposing monetary sanctions and injunctive relief against Coquest Inc. (Coquest), a registered introducing broker, and Coquest’s owners and affiliated trading firms.²⁰⁰ The order resolves an October 20, 2021 complaint filed by the CFTC and finds the defendants liable for misappropriating the block trade order information of Coquest’s brokerage customers without their knowledge or consent.²⁰¹ Coquest had facilitated the block trades for its brokerage customers “in futures contracts and options, including natural gas futures listed on CME and

193. Complaint for Injunctive Relief and Other Equitable Relief and for Civ. Monetary Penalties Under the Commodity Exchange Act and Comm’n Regulations, CFTC v. Logista Advisors LLC, No. 1:23-cv-07485, 1-2 (N.D. Ill. Sept. 7, 2023), ECF No. 1.

194. *Id.* at 26-31.

195. *Id.* at 1-2.

196. *In re Adam Cobb-Webb*, CFTC No. 23-32, 2 (Aug. 1, 2023).

197. *Id.*

198. *Id.* at 5.

199. *Id.*

200. Consent Order for Permanent Injunction, Civ. Monetary Penalty and Other Equitable Relief Against Coquest Inc., Buttonwood LLC, Weva Props. Ltd., Dennis Weinman, and John Vassallo, CFTC v. Coquest Inc., et al., No. 3:21-cv-2599 (N.D. Tex. Mar. 7, 2023), ECF No. 51.

201. *Id.* at 1, 6.

ICE.”²⁰² The order requires the defendants to disgorge \$496,021 in illicit profits and pay an additional \$2.5 million civil monetary penalty.²⁰³ The order also imposes six-month trading and registration bans on one of Coquest’s owners, and bans him and Coquest from brokering block trades on behalf of other people for two years.²⁰⁴ Additionally, the order permanently enjoins the defendants from engaging in further violations of the CEA and CFTC regulations.²⁰⁵

III. THE NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION

In 2023, NERC submitted notices of penalty to FERC regarding forty-two violations of reliability standards, for which registered entities agreed to pay roughly \$3.7 million in penalties.²⁰⁶ This represents a slight increase from the number of violations identified in notices of penalty during the previous year, and a slight decrease in the dollar value of penalties collected.²⁰⁷

IV. PIPELINE & HAZARDOUS MATERIALS SAFETY ADMINISTRATION

PHMSA initiated 198 pipeline safety enforcement cases as of December 2023, which is a decrease from the 227 cases initiated in 2022.²⁰⁸ PHMSA also closed 185 enforcement actions in 2023, down from 213 actions closed in 2022.²⁰⁹ PHMSA actively employed its civil penalty authority, proposing nearly \$12.1 million in penalties across forty-seven civil penalty cases, slightly exceeding the \$11.6 million across forty-four civil penalty cases in 2022.²¹⁰

V. THE DEPARTMENT OF ENERGY

DOE enforcement activities fall within three categories.²¹¹ “Conservation standards cases deal with manufacturers that distributed products in the U.S. that DOE has found do not meet the required energy standards.”²¹² “Compliance certification cases deal with manufacturers that either have not certified that the products that they manufacture and distribute in the U.S. have been tested and meet the applicable energy conservation standards or have submitted invalid compliance

202. *Id.* at 6.

203. *Id.* at 16, 18.

204. *Coquest*, No. 3:21-cv-2599 at 15-16.

205. *Id.*

206. N. AM. ELEC. RELIABILITY CORP., SEARCHABLE SPREADSHEET (2023), <https://www.nerc.com/pa/comp/CE/Pages/Enforcement-and-Mitigation.aspx>.

207. *Id.*

208. U.S. DEP’T OF TRANSP., SUMMARY OF ENF’T ACTIVITY-NATIONWIDE (last visited Feb. 12, 2024), <https://primis.phmsa.dot.gov/comm/reports/enforce/EnfHome.html>.

209. *Id.*

210. U.S. DEP’T OF TRANSP., SUMMARY OF CASES INVOLVING CIVIL PENALTIES (last visited Feb. 12, 2024), https://primis.phmsa.dot.gov/comm/reports/enforce/CivilPenalty_opid_0.html.

211. U.S. DEP’T OF ENERGY, ENF’T CASES (last visited Feb. 12, 2024), <https://www.energy.gov/gc/enforcement-cases>.

212. *Id.*

certifications.”²¹³ Finally, DOE continues to support the enforcement of the Environmental Protection Agency’s ENERGY STAR appliance rating program. However, the DOE Office of the General Counsel’s (GC) practice is now to refer “to the EPA any products DOE tests that do not meet Energy STAR specifications.”²¹⁴ DOE GC has not initiated new ENERGY STAR enforcement actions of its own since 2015.²¹⁵

DOE’s enforcement activity in 2023 increased significantly compared to 2022, with the agency’s Office of the General Counsel (GC) resolving eleven conservation standards noncompliance cases²¹⁶ and thirty-four compliance certification enforcement cases.²¹⁷

VI. THE DEPARTMENT OF JUSTICE

This year, the Criminal Division of DOJ released several revisions to its corporate criminal enforcement policies and procedures. These revisions follow Deputy Attorney Lisa Monaco’s September 22 memorandum (Monaco Memo) providing “guidance on how prosecutors should ensure individual and corporate accountability, including through evaluation of: a corporation’s history of misconduct; self-disclosure and cooperation provided by a corporation; the strength of a corporation’s existing compliance program; and the use of monitors, including their selection and the appropriate scope of a monitor’s work.”²¹⁸ The memorandum also emphasized “the importance of transparency in corporate criminal enforcement.”²¹⁹

A. Evaluation of Corporate Compliance Programs

On March 3, 2023, the Criminal Division published revised guidance on the Evaluation of Corporate Compliance Programs (ECCP).²²⁰ The 2023 revision to the ECCP for the first time (1) adds guidance “for the use of personal devices, communications platforms, and messaging applications;” (2) notes that companies should track data related “to disciplinary actions to measure effectiveness of investigations and consequences;” and (3) emphasizes the importance of adequate

213. *Id.*

214. ENF’T CASES, *supra* note 211.

215. U.S. DEP’T OF ENERGY, SUPPORT FOR ENERGY STAR ENF’T (last visited Feb. 12, 2024), <https://www.energy.gov/gc/support-energy-star-enforcement>.

216. *See generally*, U.S. DEP’T OF ENERGY, CONSERVATION OF STANDARDS ENF’T (last visited Feb. 12, 2024), <https://www.energy.gov/gc/listings/conservation-standards-enforcement?page=0>.

217. *See generally*, U.S. DEP’T OF ENERGY, COMPLIANCE CERTIFICATION ENFORCEMENT (last visited Feb. 12, 2024), <https://www.energy.gov/gc/listings/compliance-certification-enforcement>.

218. U.S. DEP’T OF JUST., FURTHER REVISIONS TO CORP. CRIM. ENF’T POLICIES FOLLOWING DISCUSSIONS WITH CORP. CRIME ADVISORY GRP., 2 (Sep. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

219. *Id.*

220. U.S. DEP’T OF JUST. CRIM. DIV., EVALUATION OF CORP. COMPLIANCE PROGRAMS, 1 (Mar. 2023), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

discipline for misconduct, and leveraging corporate compensation structures and clawbacks to promote a culture of compliance.²²¹

B. Two-Part Pilot Program Regarding Compensation Incentives and Clawbacks

On March 3, 2023, the Criminal Division also announced a two-part pilot program regarding compensation incentives and clawbacks (Pilot Program).²²² The Pilot Program requires companies entering into criminal resolutions to implement “compliance-related criteria in their compensation and bonus system and to report” about such implementation.²²³ It also “directs prosecutors to consider possible fine reductions where companies seek to recoup compensation from culpable employees, and others who supervised the employee or knew of, or were willfully blind to, the misconduct.”²²⁴

C. Corporate Enforcement and Voluntary Self-Disclosure Policy

On January 17, 2023, the Criminal Division released a new Enforcement and Voluntary Self-Disclosure Policy (Self-Disclosure Policy) (previously known as the FCPA Corporate Enforcement Policy).²²⁵ The Self-Disclosure Policy establishes a presumption that (absent aggravating circumstances and with disgorgement) the company will receive a declination when a company has voluntarily self-disclosed misconduct to the Criminal Division, fully cooperated, and timely and appropriately remediated.²²⁶ The Self-Disclosure Policy also provides for increased credit for voluntary self-disclosure in cases where a declination is not granted.²²⁷ Specifically, DOJ may recommend a reduction of at least 50% and up to 75% off the low end of the U.S. Sentencing Guidelines (U.S.S.G.) range as part of the criminal resolution where a party voluntarily self-disclosed the misconduct

221. *Id.* at 4, 12, 17, 18.

222. U.S. DEP’T OF JUST. CRIM. DIV., THE CRIM. DIV. PILOT PROGRAM REGARDING COMP. INCENTIVES AND CLAWBACKS, (Mar. 3, 2023), <https://www.justice.gov/criminal-fraud/file/1571941/download>.

223. *Id.*

224. *Id.*

225. U.S. DEP’T OF JUST. CRIM. DIV., CRIM. DIV. CORP. ENF’T AND VOLUNTARY SELF-DISCLOSURE POL’Y, 1 (Jan. 17, 2023), <https://www.justice.gov/criminal-fraud/file/1562831/download>. The Criminal Division’s policy was followed by similar, though not identical, announcements from other DOJ offices and components. *See, e.g.*, U.S. DEP’T OF JUST., U.S. ATT’YS’ OFFICES VOLUNTARY SELF-DISCLOSURE POL’Y, 1 (Feb. 22, 2023), https://www.justice.gov/d9/2023-07/usao_voluntary_self-disclosure_policy_0.pdf. On October 4, 2023, Deputy Attorney General Monaco also announced a “Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions,” which establishes a presumption of a declination for acquiring companies that promptly and voluntarily disclose criminal misconduct within 6 months from date of closing, that cooperate with the ensuing investigation, and engage in requisite, timely and appropriate remediation, restitution, and disgorgement. *See* U.S. DEP’T OF JUST., DEPUTY ATT’Y GEN. LISA O. MONACO ANNOUNCES NEW SAFE HARBOR POL’Y FOR VOLUNTARY SELF-DISCLOSURES MADE IN CONNECTION WITH MERGERS AND ACQUISITIONS, (Oct. 4, 2023), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self>. That policy also provides that the presence of aggravating factors at the acquired company will not lessen the acquiring company’s ability to receive a declination. *Id.*

226. U.S. DEP’T OF JUST., *supra* note 218, at 1.

227. U.S. Dep’t of Just. Crim. Div., *supra* note 225 at 1-2.

and cooperated, and to “up to a 50% reduction off of the low end of the U.S.S.G. fine range” where the party did not voluntarily self-disclose but did cooperate.²²⁸

228. *Id.* at 2.