APPRAISING THE UNIQUE VALUE OF EACH FERC ENFORCEMENT SETTLEMENT AS A WAY TO HARMONIZE FERC'S PENALTY GUIDELINES WITH ITS PRO-SETTLEMENT POLICY PREFERENCE

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Synopsis: The Federal Energy Regulatory Commission (FERC or Commission) has a long-standing policy preference for resolving investigations through settlement rather than litigation. This policy benefits FERC and investigative subjects in numerous ways, most importantly, by promoting FERC's main enforcement mission to encourage compliance with its rules and regulations. Settlements serve to expeditiously send compliance signals to industry, return unjust profits to harmed entities, and allow FERC to reallocate resources to its important compliance-related responsibilities. In contrast, litigation can lead to years of stalemates and lingering questions about compliance obligations.

Most of FERC's enforcement policies work in tandem to support its pro-settlement policy preference. For example, its Penalty Guidelines, adopted in 2010, encourage settlement by providing FERC Enforcement staff and investigative subjects a common dialogue to negotiate terms and find compromise. However, there is one aspect of FERC Enforcement cases that serves as a barrier to settlements, especially in investigations involving high-dollar allegations of complex manipulative trading schemes in natural gas and electric markets. FERC's Penalty Guidelines treat all settlements equally, irrespective of the unique costs and risks associated with litigating each case. Not all settlements are of equal value. Instead, the value varies based on an individualized appraisal of the anticipated costs of the alternative, specifically, expending time and resources in litigation and risking an unfavorable outcome. The Penalty Guidelines fail to account for this litigation risk, resulting, in some cases, in years of inefficient litigation.

This article: (1) explains why the Commission failed to account for litigation risk when developing the Penalty Guidelines model; (2) explains why such failure is inconsistent with the Commission's enforcement program; and (3) proposes a straightforward revision to the Penalty Guidelines to move them closer in line to the Commission's pro-settlement policy preference. By revising the Penalty Guidelines to afford settlement credit based on an individualized appraisal of each settlement's unique value, FERC will make it easier for investigations to settle,

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avoid protracted, wasteful litigation, and take better advantage of its pro-settlement policy benefits.

I. INTRODUCTION

FERC has a strong policy preference for resolving investigations through settlement rather than litigation.[1] This pro-settlement policy benefits the Commission's enforcement program by allowing it to expeditiously alert the regulated industry to compliance expectations, return funds to harmed parties, and reallocate resources to other matters. It also helps investigative subjects learn of the Commission's compliance expectations in a timely manner, reduce costs, and save time and resources. Consistent with this policy, the Commission has adopted numerous measures to promote the settlement process since Congress expanded its penalty authority in the Energy Policy Act of 2005 (EPAct 2005). In 2010, for example, the Commission adopted the Penalty Guidelines, which provide organizations and the Commission's Enforcement staff a common dialogue to engage in settlement negotiations and provide transparency into the factors the Commission considers

1. *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 at P 33 (2008).

when determining penalties.[2] More recently, the Commission enhanced its pro-settlement policy by giving the Enforcement Director the discretion to authorize settlement negotiations without seeking pre-approval from the Commission.[3]

While these measures help advance the Commission's preference for settlements, not all aspects of the Commission's enforcement program support its pro-settlement policy. One of the most significant barriers to the policy involves the way the Commission's Penalty Guidelines afford all settlements a one-point credit, irrespective of the unique costs and risks associated with litigating each case.[4] Not all settlements are of equal value. As with any transaction, the value of a FERC settlement varies based on an individualized assessment of the anticipated costs and risks of the alternative, specifically, expending time and resources in litigation and risking an unfavorable outcome.[5] The Penalty Guidelines fail to account for this litigation risk. Instead, they focus heavily on the alleged harm, or market "loss," caused by alleged violations without adequately considering the strength or weakness of the allegations.[6] Incorporating these harm figures into the Penalty Guidelines' formulas, without corresponding formulas accounting for the costs and likelihood of success in litigation, can lead to excessive settlement demands, prolonged negotiations, and wasteful litigation. What's worse, many of the Commission's cases that have proceeded to litigation ultimately have resulted—after years of significant expense by FERC and private subjects—in pre-trial settlements with penalty amounts that pale in comparison to the amounts FERC sought in litigation and, likely, during nonpublic settlement negotiations prior to the litigation.[7]

This article is not the first critique of the Penalty Guidelines' across-the-board one-point settlement credit and their failure to account for litigation risk. In June 2019, a group of energy trade associations submitted a white paper to the Commission, arguing that "the one-point reduction in the culpability score can be insufficient to incentivize and reward a subject for settling—particularly when the subject thinks it has meritorious legal or factual defenses to the alleged wrongdoing."[8] By failing to consider litigation risk in certain cases, this 2019 White Paper

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2. *See generally Policy Statement on Penalty Guidelines*, 130 FERC ¶ 61,220 (2010); *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 (2010). The Revised Policy Statement on Penalty Guidelines attaches the current version of the FERC Penalty Guidelines. *Id*.

3. *Policy Statement on Process for Resolving Investigations by Settlement*, 186 FERC ¶ 61,109 at P 20 (2024).

4. *See* 132 FERC ¶ 61,216, § 1C2.3(g)(3) ("If the organization resolved the matter without need for a trial-type hearing, subtract 1 point.").

5. *See* Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 23 (1991) ("The value placed on the time is a transaction cost that settlement can avoid incurring."); *id*. at 29 ("The consequence of litigation most influencing a client's choice of settling or proceeding to trial is risk: the risk of losing.").

6. *See* 132 FERC ¶ 61,216, § 2B1.1(b)(1) (factoring "loss" into penalty calculation on an escalating basis).

7. *See infra* Part IV, tbl. III (illustrative table of FERC Enforcement cases comparing settlement amounts to penalties sought in litigation).

8. DAVID A. APPLEBAUM & TODD L. BRECHER, ENHANCING THE TRANSPARENCY, EFFICIENCY, AND FAIRNESS OF THE FEDERAL ENERGY REGULATORY COMMISSION'S ENFORCEMENT PROGRAM 19 (2019) (White Paper prepared on behalf of energy industry trade associations) [hereinafter 2019 WHITE PAPER].

argued, "the consequences of 'losing' in court is only marginally worse than settling," and "[b]y providing only a marginal penalty reduction for settlement, the Penalty Guidelines make it more difficult to settle such cases even though settlement is the Commission's preferred resolution of enforcement cases."[9]

This article expounds on the critique from the 2019 White Paper by (1) theorizing why the Commission failed to account for litigation risk when developing the Penalty Guidelines model; (2) explaining why such failure is inconsistent with the Commission's enforcement program; and (3) proposing a straightforward revision to the Penalty Guidelines to move them closer in line to the Commission's pro-settlement policy preference. To summarize this article's conclusions on these three issues:

- The Commission's failure to consider litigation risk in the Penalty Guidelines stems primarily from two factors: (1) its general view that litigation risk is not a relevant or appropriate consideration in deciding whether to settle a government investigation, and (2) its decision to model the guidelines on the United States Sentencing Guidelines.
- As to the first factor, the Commission's view is misguided. Litigation risk is a relevant and appropriate consideration in all agency enforcement decisions because it impacts agencies' ability to send compliance signals and to successfully carry out their congressionally mandated responsibilities. With respect to the second factor, although the Sentencing Guidelines generally provide a sensible model for FERC's penalty determination process, their failure to specifically account for litigation risk, while reasonable in criminal cases, is inconsistent with the Commission's enforcement regime. This aspect of the Sentencing Guidelines is a poor fit because criminal prosecutors are significantly more risk averse than FERC and its Enforcement staff and because plea agreements more frequently result in sentences outside the Sentencing Guidelines range as compared to Penalty Guidelines departures in FERC investigations.
- To harmonize the Commission's penalty determination process with its strong policy preference for settlements and reduce the number of cases resulting in protracted, inefficient litigation, this article proposes a straightforward revision to the Penalty Guidelines to allow for an appraisal of the value of each settlement. This appraisal would result in a range of settlement credit between one and three points, correlating to a range of 20 to 60% discounts off the base penalty amount.

Part II of this article provides background on the Commission's long-standing policy preference for settlements and the impacts of the Penalty Guidelines—positive and negative—on such policy. Part III describes the factors that have led the Commission to not account for litigation risk during investigative settlement negotiations and the reasons such factors are inconsistent with its enforcement

9. *Id*. at 20.

program. Part IV illustrates the effect of the Penalty Guidelines' failure to account for litigation risk by tracking the case history of a sample enforcement matter. Part V outlines how the Commission can add a litigation risk component into the Penalty Guidelines to help promote its pro-settlement policy and reduce wasteful litigation. Finally, Part VI concludes by recommending that the Commission hold a technical conference—the first on the Penalty Guidelines since 2011—to address issues raised in this article and any others that might be warranted to improve its penalty determination process.

II. THE COMMISSION'S LONG-STANDING PREFERENCE TO RESOLVE INVESTIGATIONS THROUGH SETTLEMENT AND THE PENALTY GUIDELINES' IMPACT ON THE POLICY

A. The Commission Consistently Champions a Settlement First Policy Preference

In the wake of the Western Energy Crisis of 2000-2001 and Northeast Blackout of 2003, Congress passed EPAct 2005, granting FERC enhanced penalty authority of $1 million per day, per violation.[10] Since receiving this expanded penalty authority, the Commission has consistently emphasized its preference to implement it through negotiated settlements, rather than litigation. Nowhere is this more evident than the Commission's 2006 order outlining its process for assessing penalties under its new authority.[11] While the Commission issued this order to describe the *litigation* paths it planned to follow when pursuing penalties, it went out of its way to "emphasize that nothing in this Statement is intended to change the current practice of *negotiating the resolution* of violations, including the imposition of civil penalties, whenever possible."[12] FERC Enforcement staff reiterated this preference in its first Report on Enforcement in 2007 where it "noted that the preferred method of resolving such violations is by settlement."[13] This

10. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 22(a), 119 Stat. 594, 691 (2005); 16 U.S.C. § 825o-1 (2024) (providing penalty authority under the Federal Power Act (FPA)); 15 U.S.C. § 717t-1 (2024) (providing penalty authority under the Natural Gas Act (NGA)); 15 U.S.C. § 3414(b)(6) (2024) (providing penalty authority under the Natural Gas Policy Act of 1978). *See also* 130 FERC ¶ 61,220 at PP 5-6 (detailing FERC's enhanced penalty authority under EPAct 2005). The Commission's penalty authority increases each year under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. *See* Bipartisan Budget Act of 2015, Pub. L. 114-74, § 701, 129 Stat. 584, 599 (2015). Currently, it has authority to assess penalties of $1,584,648 per day, per violation. Order No. 906, *Civil Monetary Penalty Inflation Adjustments*, 190 FERC ¶ 61,006 at P 8 (2025).

11. *Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006).

12. *Id*. at P 2 (emphasis added).

13. *Report on Enforcement*, FERC Docket No. AD07-13-000, at n.42 (Nov. 14, 2007).

pro-settlement policy has permeated the Commission's enforcement program since this time,[14] and the FERC enforcement data reflects the strong preference.[15]

The Commission's pro-settlement policy preference benefits the Commission and investigative subjects in numerous important ways. For example, settlements promote the primary mission of FERC's enforcement function—to ensure compliance with its rules and regulations. While EPAct 2005 gave a significant boost to the Commission's penalty authority, the Commission consistently has emphasized that compliance—and not penalties—is the principal purpose of its enforcement program.[16] The Commission and its Enforcement staff have backed up these statements by providing guidance to industry about the tools and procedures necessary to achieve effective compliance.[17]

In addition to these policy guidance documents, settlements are one of the primary tools the Commission relies on to send compliance signals to industry. As the Commission explains, "publication of settlements permits the Commission to expeditiously alert other market participants to potential compliance pitfalls and helps avoid repetition of unlawful conduct."[18] This compliance-centric purpose of settlements is not unique to FERC. A 2022 report prepared for the Administrative Conference of the United States explained that settlements

> transmit important information to stakeholders about how agencies approach enforcement and their interpretation of laws and regulations as they apply to specific cases. Regulated entities rely on agency settlements to guide the formulation of their practices and policies and stakeholders who represent clients rely

14. *See, e.g.*, 123 FERC ¶ 61,156 at P 33 ("Settlement is our preferred resolution to investigations that result in a recommendation of remedial action."); 186 FERC ¶ 61,109 at P 4 ("Settlement is the preferred means for the Commission to resolve investigations that would otherwise result in a recommendation of remedial action.").

15. Since EPAct 2005, the Commission's Enforcement staff has opened 393 investigations. Out of the investigations where Enforcement staff found and pursued sanctions for violations, 152 resulted in Commission-approved settlements compared to 27 resulting in litigated Order to Show Cause ("OSC") proceedings. These figures come from Enforcement staff's Annual Reports on Enforcement and civil penalty matters published on the Commission's website. *See Enforcement Resources, Reports Tab*, FERC (last updated Nov. 21, 2024), https://www.ferc.gov/enforcement-resources; *Civil Penalties*, FERC (last updated Jan. 3, 2025), https://www.ferc.gov/civil-penalties.

16. *See* 132 FERC ¶ 61,216, § 1A1.1(2) ("The Commission views civil penalties as an important tool to achieve compliance. Achieving compliance, not assessing penalties, is the central goal of the Commission's enforcement efforts."); *see also Policy Statement on Compliance*, 125 FERC ¶ 61,058 at P 1 (2008); 123 FERC ¶ 61,156 at P 72 ("Ultimately, it is our desire that our enforcement efforts foster increased compliance with our governing statutes, regulations, and orders, and minimize the occurrence of future violations."); *Statement of Chairman Joseph T. Kelliher*, FERC Docket No. AD07-13-000, at 1 (Nov. 14, 2007) ("Our goal is compliance, not the collection of civil penalties. However, it is sometimes necessary to impose civil penalties in order to encourage maximum compliance.").

17. *See, e.g.*, 132 FERC ¶ 61,216, § 1B2.1 ("Effective Compliance Program"); 125 FERC ¶ 61,058 at PP 13-21; 123 FERC ¶ 61,156 at PP 57-60; FERC, STAFF WHITE PAPER ON EFFECTIVE ENERGY TRADING COMPLIANCE PRACTICES 3, 6 (FERC issued Nov. 2016).

18. 186 FERC ¶ 61,109 at P 4. *See also* FERC, STAFF WHITE PAPER ON ANTI-MARKET MANIPULATION ENFORCEMENT EFFORTS TEN YEARS AFTER EPACT 2005 4 n. 9 (FERC issued Nov. 2016) ("[W]hile staff aims to provide guidance in numerous forms . . . the ultimate and best guidance comes directly from Commission orders, *such as orders approving settlement agreements*. . . ." (emphasis added)).

> on settlements to advise their clients and advocate for them in settlement negotiations.[19]

Settlements also help with government agency efficiency. As the Commission recently emphasized, "[s]ettlements allow the Commission to devote its limited resources to investigating other cases, rather than expending significant resources in protracted litigation, which supports [its] mission of ensuring the jurisdictional markets remain free from fraud, manipulation, and anti-competitive conduct."[20] FERC Enforcement staff has proven in multiple cases to effectively handle the time- and resource-intensive demands of litigation. However, heavy litigation dockets can put a strain on government agencies, such as FERC, impacting their ability to devote sufficient resources to other important tasks. Indeed, settlements' role as a time- and resource-saving mechanism for government agencies has been widely recognized as a key driver of government settlements.[21] Moreover, this rationale for settlements applies equally to investigative subjects, who are able to focus their time and resources not on litigation, but on achieving compliance.[22]

Finally, "the public interest is often better served through settlements because [the Commission is] able to ensure that compliance problems are remedied faster and that disgorged profits may be returned to customers faster. . . ."[23] As a consumer-focused agency, one of FERC's primary objectives includes remedying financial harms to ratepayers, including losses resulting from other entities' violations.[24] When illicit profits are tied up in litigation, it can take years for FERC to

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19. ELYSA DISHMAN, PUBLIC AVAILABILITY OF SETTLEMENT AGREEMENTS IN AGENCY ENFORCEMENT PROCEEDINGS 4 (2022) (Report to the Administrative Conference of the United States). *See also* Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest Rulemaking Settlement*, 51 DUKE L. J. 1015, 1019 (2001) (noting that mediation and settlement in enforcement proceedings "can assist an agency in securing compliance with its regulations").

20. 186 FERC ¶ 61,109 at P 4; *see also* 123 FERC ¶ 61,156 at P 33 (explaining that settlements allow the Commission "to reallocate to other enforcement matters the resources that would have been spent in lengthy litigation"); 132 FERC ¶ 61,216 at P 143 ("A willingness to resolve cases without the need for a trial-type hearing saves the Commission time and resources that can be spent on other matters.").

21. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."); DISHMAN, *supra* note 19, at 4 (noting that "[s]ettlements allow agencies to resolve disputes more efficiently, conserving resources and obtaining relief for the public more expeditiously").

22. *See* 123 FERC ¶ 61,156 at P 33 (noting that settlements allow subjects to avoid "the time and costs of a hearing"); Rossi, *supra* note 19, at 1019 (explaining that settlements "also offer[] private parties the opportunity to avoid protracted litigation").

23. 123 FERC ¶ 61,156 at P 33. *See also* DISHMAN, *supra* note 19, at 4 (noting that settlements allow agencies to "obtain[] relief for the public more expeditiously").

24. *See* 132 FERC ¶ 61,216 at P 216 ("The Commission has always required disgorgement in addition to the assessment of civil penalties. . . Disgorgement involves relinquishing profits illegally obtained, and such profits are distributed to those who were harmed by the violations."); 123 FERC ¶ 61,156 at P 43 ("Requiring disgorgement of unjust profits is consistent with long-standing Commission practice, the 2005 Policy Statement, and the practice of other enforcement agencies such as the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC).").

get these funds back to harmed parties. In contrast, settlements accelerate this remedial process, returning unjust profits to victims much faster.[25]

B. The Penalty Guidelines' Formulaic Approach and Their (Mostly Positive) Impact on FERC's Pro-Settlement Policy

Before describing the Penalty Guidelines' impact on the Commission's pro-settlement policy, it is helpful to provide a summary of the Penalty Guidelines' application to enforcement cases. The Commission detailed this application in its first Policy Statement on Penalty Guidelines.[26] The Penalty Guidelines consist of a series of formulas that produce a penalty range based on the combination of two elements: (1) a base penalty amount that is calculated based on the nature of the specific violation at issue; and (2) the organization's culpability score, which is calculated based on a set of specific characteristics unique to the organization, such as its prior history and commitment to compliance.[27] These two elements play out in five discrete steps that ultimately generate a penalty range.

Step one involves identifying a "base violation level" based on the type of violation at issue.[28] This level is set in the Penalty Guidelines depending on the nature of violation at issue. For example, fraud carries a base violation level of six.[29] Step two involves adjusting the base violation level based on various factors "that account for circumstances that are specific to the type of violation at issue."[30] For example, the section of the guidelines related to fraud "contains adjustments for the monetary gain or loss caused by the violation and the scope of the violation."[31] Combining the base violation level and adjustments generates a total violation level, which correlates to a dollar amount in the guidelines' "Violation Level Penalty Table."[32]

Step three generates the "base penalty," which is "the greater of: (1) the dollar amount from [the Violation Level Penalty Table]; (2) the pecuniary gain to the organization from the violation; or (3) the pecuniary loss from the violation caused by the organization."[33] Step four involves calculating a culpability score by

25. *Compare, e.g., Total Gas and Power N. Am., Inc*., 190 FERC ¶ 61,014 at P 2 (2025) ($5 million restitution payment nearly nine years after initiation of FERC litigation and more than 15 years after alleged conduct began); Opinion No. 549-A, *BP Am. Inc.*, 173 FERC ¶ 61,239 at P 7 (2020) (more than $200,000 in disgorgement ordered more than seven years after initiation of FERC litigation and more than 12 years after alleged conduct began); *Competitive Energy Servs., LLC*, 173 FERC ¶ 61,176 at P 2 (2020) ($160,000 disgorgement payment more than eight years after initiation of litigation and more than 13 years after alleged conduct began), *with Big Rivers Elec. Co.*, 188 FERC ¶ 61,155 at P 2 (2024) (approving settlement including more than $300,000 in disgorgement a little more than a year after the alleged conduct began); *Vista Energy Storage, LLC*, 188 FERC ¶ 61,112 at P 2 (2024) (approving settlement including $1.67 million in disgorgement approximately two years after the alleged conduct began).

26. *See* 130 FERC ¶ 61,220 at PP 37-51.

27. *See generally id*.

28. *Id*. at P 38.

29. *Id*.

30. 130 FERC ¶ 61,220 at P 39.

31. *Id*. at P 40.

32. 132 FERC ¶ 61,216, § 1C2.2(b).

33. 130 FERC ¶ 61,220 at P 42.

"start[ing] with a base score of five and . . . then adjust[ing it] upward or downward depending on six separate considerations."[34] The final culpability score equates to a set of "minimum and maximum multipliers" outlined in a table in the Penalty Guidelines.[35] Finally, the "fifth and final step involves multiplying the 'base penalty' amount (from step three) by the 'minimum and maximum multipliers' (from step four) to produce the applicable penalty range."[36]

The following table (Table I) provides an illustrative example of a Penalty Guidelines calculation, assuming a hypothetical investigation involving allegations of a two-year manipulative trading scheme in an organized electric market that resulted in market harm of $1.2 million and unjust profits of approximately $150,000. The hypothetical investigative subject is a 250-employee trading firm with a CEO who condoned the conduct and a compliance program that covers most FERC regulations. The firm did not self-report the issue but fully cooperated in the investigation.

Table I

Violation Level Calculation		
Violation Level Inputs	**Points**	**Notes**
Base Violation Level	6	§2B1.1(a) (base violation level for manipulation)
Loss from violation	16	§2B1.1(b)(1)(I) (alleged loss of $1.2M)
Duration	6	§2B1.1(b)(2)(F) (violations lasted 2 years)
Total Violation Level	**28**	§1C2.2(b) (Violation Level Penalty Table shows that a Total Violation Level of 28 corresponds to $6.3M).

Base Penalty Calculation	
Base Penalty	**Notes**
$6.3M	§1C2.2(a) (Base Penalty is the greater of (a) the amount from the Violation Level Penalty Table ($6.3M); (b) the alleged pecuniary gain ($150K); or (c) the alleged pecuniary loss ($1.2M)

34. *Id*. at P 43.
35. *Id*. at P 50; 132 FERC ¶ 61,216, § 1C2.4.
36. 130 FERC ¶ 61,220 at P 51.

Culpability Score Calculation		
Culpability Score Inputs	**Points**	**Notes**
Base Score	5	§1C2.3(a) (base culpability score)
Senior-level involvement	3	§1C2.3(b)(3) (The company has 250 employees and its CEO condoned the conduct)
Compliance credit	-2	§1C2.3(f)
Cooperation	-1	§1C2.3(g)(2)
Settlement	-1	§1C2.3(g)(3)
Total Culpability Score	**4**	**§1C2.4 (Culpability score of 4 corresponds to minimum and maximum multipliers of 0.8 and 1.6).**

Final Penalty Calculation		
Base Penalty	**Minimum and Maximum Multipliers**	**Penalty Range**
$6.3M	0.8-1.6	$6.3M x 0.8 = $5.04M $6.3M x 1.6 = $10.08M **Final range = $5.04M-$10.08M**

The Penalty Guidelines, thus, involve a detailed process of inputting relevant facts into several formulas to generate a penalty range. This fact-intensive, formulaic model generally supports the Commission's pro-settlement policy by providing Enforcement staff and investigative subjects a common and transparent language and framework for settlement negotiations. Prior to issuance of the Penalty Guidelines in 2010, the Commission determined penalties on a case-by-case basis, which the Commission itself described as "a complex process, made more difficult and time consuming by the present and inevitable lack of uniformity of the analyses in cases."[37] This complexity and lack of uniformity made for disjointed settlement negotiations in which Enforcement staff and subjects were not necessarily on the same page about the relevant factors or the weight afforded to such factors.

In contrast, the Penalty Guidelines now provide a uniform and transparent analysis to guide negotiations. Under this formulaic model, penalties are calculated based on "a set of uniform factors that are assigned transparent values and weighted similarly for similar types of violations and similar types of violators."[38]

37. *Id*. at P 30.

38. *Id*. at P 2.

Enforcement staff and subjects may disagree on the specific weight to afford various factors, but they at least are on the same page regarding which factors to consider and the formulas used to evaluate them. It is easier and more efficient under this narrower, straightforward framework to find ways to "meet in the middle" when the scope and parameters of the penalty determination framework are known to all participants.

While this framework under the Penalty Guidelines supports the settlement process in the majority of the Commission's investigations,[39] there remains one aspect of the guidelines that has proven, in some cases, to work against settlement—specifically, their failure to conduct an individualized appraisal of the value of settlements based on the anticipated costs and risks of litigation. These cases typically involve allegations of market manipulation and claims of significant market harm, or "loss," which tends to be the largest driver of penalties under the Penalty Guidelines.[40] This tiered "loss" calculation is modeled on the loss table in the Sentencing Guidelines, which was designed by the U.S. Sentencing Commission "to drive the severity of sentences for fraud offenders based primarily on the magnitude of the loss."[41]

Factoring harm into penalty determinations is supported by some as a way to reflect the moral weight of the wrongdoing and serve as an appropriate deterrent.[42] However, factoring harm figures on an escalating basis and based on speculative calculations, without due consideration of the strength of such claims—the litigation risk involved with such claims—can result in excessive penalty demands that stymie settlement negotiations and lead to protracted litigation. This is particularly true of the loss table in the Penalty Guidelines because it is modeled on the tiered table in the Sentencing Guidelines, which has been widely criticized by scholars and judges for its harsh and draconian results.[43] In their law review article, *How*

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39. *See supra* note 15 and accompanying text (comparing number of investigations that result in settlement versus OSC proceedings).

40. *See* 132 FERC ¶ 61,216, § 2B1.1(b)(1) (table showing increasing levels of aggravating enhancements to incorporate into formula based on the amount of claimed market "loss"); *id*. at P 2 ("[W]e will continue to base penalties on the seriousness of the violation, measured in large part by the harm or risk of harm caused, an organization's efforts to remedy the violation, as well as other culpability factors…").

41. Barry Boss & Kara Kapp, *How the Economic Loss Guideline Lost its Way, and How to Save It*, 18 OHIO ST. J. CRIM. L. 605, 608 (2021).

42. *See* Jessica Bregant et al., *Crime Because Punsihment? The Inferential Psychology of Morality and Punishment*, 2020 U. ILL. L. Rev 1177, 1185 (2020) ("Harm is the central feature of retributive theories of punishment. Under a retributive view, punishment is morally justified—indeed, morally required—to balance the harm done by the offender."); U.S. SENT'G GUIDELINES MANUAL § 2B1.1, at 106 (2024) ("[O]rdinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes."). *But see* 2019 WHITE PAPER, *supra* note 8, at 18 (noting that unjust gain, as opposed to harm, is a "useful metric" for determining appropriate penalties and arguing that "absent compelling case-specific factors, penalties that are dozens the times the amount of gain can appear to be beyond what is required to promote deterrence and achieve compliance").

43. *See* Boss & Kapp, *supra* note 41, at 618 (arguing that "the calculation of loss often fails to directly address the underlying policy concerns justifying reliance on this factor," and that "the current loss table, which is often the determining factor in an economic crime offender's sentence, has an outsized role in influencing such sentences"); *id*. (citing numerous federal court cases to support claim that "a broad judicial consensus has developed that section 2B1.1's loss table overstates culpability in a great many cases"); David Debold & Matthew

the Economic Loss Guideline Lost its Way, and How to Save It, Barry Boss and Kara Kapp argue that that the Sentencing Guidelines' tiered loss table "serves as a [poor] proxy for" seriousness of offenses and culpability of wrongdoers.[44] As to seriousness, they point out that "the manner in which loss is calculated in economic crimes cases is often necessarily imprecise," noting that "[m]any factors make it difficult to accurately calculate this sum."[45] For example, they explain how courts "must, among other things, separate out the loss attributable to an economic crime from other complicating causal factors, such as independent market events."[46] This complication is true of many FERC enforcement matters, as well. For example, in a case of an alleged manipulation of an index price in the natural gas or electric market, the alleged impact on price may stem from the alleged manipulator's actions, but it may also stem from other market forces, such as weather events and transportation constraints. It is often complicated, if not impossible, to account for the various causal factors with any form of precision or accuracy. FERC Enforcement staff's market harm calculations, subject to these causal factors, are subject to reasonable and strong defenses, for which the Penalty Guidelines do not account.

Boss and Kapp also explain that the loss table "is likewise a poor proxy for relative culpability in many cases [because,] [f]or example, the loss calculation fails to account for the extent to which the offender personally profited from the offense."[47] This issue similarly affects many FERC enforcement cases. As observed in the 2019 White Paper submitted to the Commission, "[i]n many cases, Enforcement has put forward market harm calculations that substantially exceed the alleged unjust profits—resulting in penalty ranges that substantially exceed what the range would have been if unjust profits were used in the calculation."[48] This can lead to absurdly large penalties and raise doubts about the reasonableness of a case. This type of risk is not accounted for in the Penalty Guidelines. As described *infra* Part III.B.ii, these concerns with the Sentencing Guidelines' loss table have led "courts [to] routinely conclude that these Guidelines do not serve as a reliable proxy for culpability and issue sentences below the Guideline range."[49]

As applied to FERC cases, the loss table, without a corresponding accounting of litigation risk, has effectively blocked any chance of resolving investigations through settlement in many high-dollar cases. As a result, the benefits of settlement, including sending compliance signals to industry and remedying violations,

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Benjamin, *"Losing Ground"—In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 U. PA. L. REV. PENNUMBRA 141, 154–55 (2011); Alan Ellis et al., *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 CRIM. JUST. MAG., 34, 35 (Winter 2011); United States v. Adelson, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006) (stating that "the calculations under the [loss table of the] guidelines have so run amok that they are patently absurd on their face").

44. Boss & Kapp, *supra* note 41, at 615.

45. *Id*.

46. *Id*.

47. *Id*. at 617.

48. 2019 WHITE PAPER, *supra* note 8, at 19; *see also e.g.*, *Total Gas & Power N. Am., Inc.*, 155 FERC ¶ 61,105 at P 1 (2016) (seeking penalty of $213.6 million and disgorgement of alleged unjust profits of approximately $9 million); *Barclays Bank PLC*, 141 FERC ¶ 61,084 at P 1 (2012) (proposing penalty of $435 million and disgorgement of only $34.9 million).

49. Boss & Kapp, *supra* note 41, at 620.

take a back seat to years of discovery battles, motions practice, and delays common in complex litigation.

III. THE PRIMARY FACTORS BEHIND THE COMMISSION'S FAILURE TO ACCOUNT FOR LITIGATION RISK IN THE PENALTY GUIDELINES

Why did the Commission not account for an individualized assessment of litigation risk when it adopted the Penalty Guidelines in 2010? This failure stems primarily from two factors. First, the Commission and its Enforcement staff have a general view, reflected in orders and settlements, that litigation risk is not a relevant or appropriate consideration when deciding whether to resolve an investigation through settlement. Second, like many aspects of the Penalty Guidelines, the Commission's failure to consider litigation risk stems from its decision to model them on the Sentencing Guidelines,[50] which also do not account for litigation risk.

This section of the article details these two factors and explains why the Commission's general aversion to consider litigation risk is misguided and why the Sentencing Guidelines, while generally a good model for FERC's penalty determination process, are a poor fit with respect to their failure to consider litigation risk.

A. Factor One: FERC's General Aversion to Consider Litigation Risk During the Investigative Stage of Enforcement Matters

Although not expressly stated, the Commission and its Enforcement staff have indirectly conveyed a general view that litigation risk is an irrelevant and inappropriate factor to consider in evaluating the terms of a settlement during an investigation. For example, whereas the Commission lists avoidance of litigation risk as a benefit of settlements *for investigative subjects*, it does not list it among the benefits *to the Commission*.[51] Similarly, multiple enforcement settlement agreements resolving investigations have listed the avoidance of litigation risk as a factor for the investigative subjects deciding to settle the matters, but not as a factor for Enforcement staff or the Commission.[52] The Commission's failure to consider litigation risk during settlement discussions is also reflected in the high level of risk it has been willing to take commencing OSC proceedings in several cases seeking huge penalties and resting on factual and legal claims in unsettled areas.[53] This is not to suggest that FERC should never take difficult cases to trial.

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50. *See* 132 FERC ¶ 61,216 at P 15 ("[W]e believe 'that the Sentencing Guidelines provide the best model to adapt to the Commission purposes because they focus on factors—such as seriousness and remediation of a violation—that reflect the requirements of EPAct 2005 and that we believe are the centerpiece of our penalty regime.'") (internal citations omitted).

51. *See* 123 FERC ¶ 61,156 at P 33 (explaining that "[f]rom the subject's point of view, settlement . . . avoids litigation risk," but not listing the same factor under list of Commission benefits); 186 FERC ¶ 61,109 at P 6.

52. *See, e.g.*, *Alliance Pipeline L.P.*, 141 FERC ¶ 61,182, at Stipulation and Consent Agreement, P 28 (2012); *National Energy & Trade, L.P.*, 134 FERC ¶ 61,072, at Stipulation and Consent Agreement, P 14 (2011); *Tenaska Mktg. Ventures*, 126 FERC ¶ 61,040, at Stipulation and Consent Agreement, P 13 (2009).

53. *See, e.g.*, *American Efficient, LLC*, 189 FERC ¶ 61,196 at P 1 (2024) (seeking penalty of $722 million in first FERC case alleging manipulation in energy efficiency market where the market administrator did not

Litigating such cases can be an effective way to develop law, especially in a relatively new area like energy market manipulation. However, this benefit of establishing legal precedent should be balanced against other considerations, such as the risk of a negative outcome, the time and costs of litigation, and the fairness to investigative subjects of seeking criminal-like sanctions for hard-to-prove or novel claims.[54] During settlement negotiations, the Commission has not effectively balanced these considerations leading to years of inefficient litigation in some of its cases.

The Commission's general aversion to considering litigation risk during the settlement negotiation stage of investigations is misguided. Litigation risk is a relevant and appropriate factor for the agency to consider in each case because it impacts its enforcement policies and overall compliance message to the energy industry. Specifically, accounting for litigation risk makes it easier to reach settlements, which, in turn, allows the Commission to more expeditiously send compliance signals to industry to comply with rules. In contrast, adverse outcomes in litigation can leave questions regarding compliance obligations. This potential for unfavorable outcomes in litigation should be considered. Indeed, "[j]udicial behavior is notoriously unpredictable, and the stakes of many agency actions are significant. Just as firms gauge legal risks of corporate decisions, it seems logical that agencies must gauge the legal risks of their policy decisions."[55] It is especially important for the Commission to consider litigation risk in order to effectively implement its statutory obligations, which can be impacted by adverse judicial decisions. "Congress clearly wants agency implementations of its statutes to have legal effect. Since those implementations will not have legal effect if they are set aside by a court, this would seem to require agency analysis of whether decisions will withstand judicial scrutiny."[56]

The Supreme Court has recognized the relevance of litigation risk to agency decisions, identifying it as one of the factors that is relevant to an agency's decision on how it chooses to advance its policies. When deciding whether to pursue an enforcement matter, the Supreme Court in *Heckler v. Chaney* emphasized that

> the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, *whether the agency is likely to succeed if it acts*, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.[57]

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prevent the company from participating in the market); 155 FERC ¶ 61,105 at P 7 (2016) (seeking penalty of more than $213 million in case relying heavily on complicated economic theory of market harm and the credibility of two former employee whistleblowers); *BP Am. Inc.*, 144 FERC ¶ 61,100 at P 1 (2013) (seeking $28 million penalty in case relying on novel theory of jurisdiction to try to capture non-jurisdictional intrastate transactions); *Amaranth Advisors L.L.C.*, 120 FERC ¶ 61,085 at P 1 (2007) (seeking total sanctions of $300 million based on novel theory of jurisdiction to capture solely non-jurisdictional transactions).

54. As discussed *infra* Part III.B.i, there is an argument that, because of the significant litigation risk involved and the potential for criminal-like sanctions and reputational harm, the Commission should not pursue some of these case at all, or that if it does pursue them, it should be subject to a heightened burden of proof.

55. Timothy G. Duncheon, *Litigation Risk as a Justification for Agency Action*, 95 N.Y. UNIV. L. REV. 193, 209-210 (2020).

56. *Id*. at 209.

57. Heckler v. Chaney, 470 U.S. 821, 831 (1985) (emphasis added).

In addition to its relevance to and impact on FERC's enforcement policies and compliance messaging, there is a second reason the Commission should consider litigation risk during investigative settlement negotiations. After failing to consider litigation risk at the settlement stage of investigations, FERC seems willing to consider it later in litigation, sometimes on the eve of trial, after years of time- and resource-intensive motions and discovery practice.[58] If the Commission were to consider the same litigation risk during investigative settlement negotiations that it eventually has proven to consider during litigation, it would have a better chance of resolving investigations during the settlement negotiation stage. This, in turn, would save significant time and resources and would send valuable compliance signals to industry much earlier.

B. Factor Two: The Sentencing Guidelines on Which the Penalty Guidelines are Modeled Do Not Account for Litigation Risk

The Commission directly attributed its decision to adopt a one-point settlement credit to the Sentencing Guidelines. Specifically, the Commission explained that

> [t]his Guideline is designed to provide a reduction in the culpability score to organizations willing to resolve cases without the need for a trial-type hearing that is comparable to the reduction in the Sentencing Guidelines for acceptance of responsibility with an additional incentive for companies willing to affirmatively recognize their violations.[59]

While FERC based the one-point credit on the Sentencing Guidelines, two key differences between the criminal and civil enforcement contexts, described below, highlight why this model is not a good fit for FERC's penalty determination process.

i. Difference in Risk Aversion Between FERC and Criminal Prosecutors

The difference in risk aversion between FERC and criminal prosecutors explains why the Sentencing Guidelines do not need to account for litigation risk in the way the Penalty Guidelines should. There is a documented and well-known reality that criminal prosecutors are risk averse. Compared to their counterparts on the civil enforcement side, including FERC, criminal prosecutors stare down a lofty burden of proof and the restrictive nature of the Double Jeopardy Clause, leading them to typically pursue only the strongest of cases. Because they typically pursue only the cases they believe they can win, there is less of a need for

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58. *See, e.g.*, *Amaranth Advisors L.L.C.*, 128 FERC ¶ 61,154, at Joint Offer of Settlement, at 2 (2009) (approving a joint offer of settlement of $7.5 million more than two years after issuing an OSC proposing total sanctions of almost $300 million, with the joint offer of settlement noting that "[s]ettlement avoids litigation risk"); 190 FERC ¶ 61,014 at P 2 (2025) (approving settlement for no penalty and $5 million restitution payment "[i]n light of" a recent Supreme Court decision about nine years after issuing an OSC proposing a penalty of more than $213 million).

59. 132 FERC ¶ 61,216, § 1C2.3, Application Note 12. Chapter Eight of the Sentencing Guidelines, in fact, does not expressly provide credit to organizations for resolving cases without the need for a trial-type hearing (i.e., settlements), but the Commission treated the Sentencing Guidelines' "acceptance of responsibility" credit as comparable to its settlement credit. *See* U. S. Sent'g Co., Guidelines Manual (U.S.S.G.) § 8C2.5(g) (2023).

them to consider litigation risk during settlement negotiations. James Comey, former U.S. Attorney for the Southern District of New York, provided a critical pronouncement of this phenomenon in a speech to a group of prosecutors during his tenure in the early 2000s. Comey asked them, "'[w]ho here has never had an acquittal or a hung jury? Please raise your hand.'"[60] He then continued, "'Me and my friends have a name for you guys,' . . . 'You are members of what we like to call the Chickenshit Club."[61]

Comey's perception was, and continues to be, reflected in stark prosecutorial statistics. The conviction rate for criminal prosecutors sat at "91 percent in [] 2012-15, compared with 87 percent in the early 1990s."[62] Turning to more recent statistics, for all districts combined, 2024 saw the sentencing of 48,666 guilty pleas and verdicts, 130 not guilty dispositions, 2,627 dismissed criminal cases, eight-one Rule 20 dispositions, and sixty cases resulting in other actions such as transfer, non-court dismissals, pretrial diversion, or suspension.[63] This means over 94% of criminal cases resulted in a guilty plea or verdict, demonstrating that criminal prosecutors' win rate, or aversion to risk, has stayed steady, or even strengthened, since Comey's speech.[64]

This reality is supported not just by statistics but has been recognized by the courts and reinforced through criminal prosecution standards and guidelines advising prosecutors to consider the strength of a case when deciding whether to pursue prosecution. Whereas FERC discusses its pursuit of matters in terms of the "[l]ikelihood that staff could assemble a legally and factually *sufficient* case,"[65] the Department of Justice Manual's guidance considers "the strength of the government's case relative to the anticipated defense case, bearing in mind legal and evidentiary problems that might be expected, as well as the credibility of witnesses."[66] Similarly, when deciding whether entering a plea agreement is appropriate, "the attorney for the government should weigh all relevant considerations, including . . . [t]he likelihood of obtaining a conviction at trial. . . ."[67] The American Bar Association likewise recognizes that a criminal prosecutor can weigh the strength of a case during proper exercise of discretion over initiation, declination, or dismissal of criminal charges.[68] These advisements are not ignored by prosecutors, who habitually implement them into actual practice, as highlighted by one perceptive district court noting that "[i]n [its] experience, the government never

60. JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE xiv (2017).

61. *Id*.

62. *Id*. at xviii.

63. U.S. DEP'T OF JUST., EXEC. OFF. FOR U. S. ATT'YS., UNITED STATES ATTORNEY'S ANNUAL STATISTICAL REPORT 7 tbl. 2A (2024), https://www.justice.gov/usao/media/1399686/dl?inline.

64. *See id*. The guilty disposition statistics report the number of guilty dispositions sentenced during 2024, meaning the dispositions could have been obtained in a prior year from a guilty plea or guilty verdict. *Id*.

65. 123 FERC ¶ 61,156 at P 25 (emphasis added).

66. U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-27.420(B)(6) (2024).

67. *Id*. § 9-27.420(A)(6).

68. AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-4.4 (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/.

even commences a criminal prosecution against a corporation unless it has a very strong case."[69]

Prosecutors are thus hyper-focused, and told to focus, on their ability to win a case before pursuing it. Likely reasons for this are the demanding evidentiary standards and constraints introduced by their burden of proof and Double Jeopardy restrictions that the civil and administrative contexts do not face. "While the fact finder in both civil and criminal matters is impartial, the criminal prosecutor faces a steeper test in establishing facts."[70] Civil and administrative litigants, including FERC Enforcement staff, must meet the burden of a preponderance of the evidence.[71] This standard requires that when their evidence is compared and considered alongside opposing evidence, it must amass sufficient convincing force to create "the belief that what is sought to be true is more likely true than not true."[72] Put simply, "something is more likely so than not so."[73] In other words, as recently articulated by the Supreme Court, "[t]he preponderance standard allows both parties in the mine-run civil case to share the risk of error in roughly equal fashion."[74] Beyond a reasonable doubt—a criminal prosecutor's burden—is far stricter. It requires the trier of fact to find guilt "with utmost certainty."[75] It is "proof of such a convincing character that a reasonable person, after careful consideration, would not hesitate to rely and act upon that proof in life's most important decisions."[76] There is justifiable constitutional significance behind the requirement of a higher burden in the criminal context, so the existence of a stronger burden is not arbitrary, but that does not detract from the reality that beyond a reasonable doubt is a tougher hurdle, and "significantly more accurate than preponderance of the evidence."[77]

Similarly, the Fifth Amendment's Double Jeopardy Clause acts as a restraint on prosecutors.[78] "The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial."[79] This bar is placed by the Constitution to limit the continued expense, embarrassment, and worry defendants would face if prosecutors could attempt a second conviction

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69. United States v. Aegerion Pharms., 280 F. Supp. 3d 217, 226 (Mass. Dist. Ct. 2017).

70. Uzair Kayani, *Law Done Backwards: The Tightening of Civil and Loosening of Criminal Protections*, 42 Nova L. Rev. 179, 188 (2018).

71. 132 FERC ¶ 61,216 at P 206; *Maxim Power Corp.*, 151 FERC ¶ 61,094 (2015) (Cmr. Clark, dissenting) ("In a market manipulation case such as the one before us, Enforcement Staff bears the burden of proving by a preponderance of the evidence that the respondent intended to engage in a deceptive course of business.").

72. United States v. Bullard, 38 Fed. Appx. 753, 755 (3d Cir. 2002).

73. *Id*.

74. E.M.D. Sales, Inc. v. Carrera, 604 U.S. 45, 50 (2025) (citation and quotations omitted).

75. *In re* Winship, 397 U.S. 358, 364 (1970).

76. JUD. COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIR., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT 82 (2023); *see also In re Winship*, 397 U.S. at 364 (explaining that the beyond a reasonable doubt standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue").

77. United States v. Tosh, 141 F.Supp. 2d 738, 745 (W.D. Ky. 2001).

78. U.S. CONST. amend. V; Brown v. Ohio, 432 U.S. 161, 165 (1977).

79. *Brown*, 432 U.S. at 165.

or a second attempt following an acquittal.[80] For prosecutors, this means proceeding with only the strongest of cases due to the risk of losing all chances at conviction if the first attempt fails.

Criminal prosecutors' demonstrated risk aversion is also reflected in the fact that there has been only one prosecution under the criminal provisions of the FPA and NGA.[81] Due to the complicated nature of FERC cases, criminal prosecutors do not appear particularly interested in pursuing criminal referrals from FERC. This is likely due to the high burdens to overcome in the criminal context and the risk that complex evidentiary and conceptual issues introduced in FERC matters could result in acquittal, even with strong evidence. The first, and only, criminal prosecution under the FPA came in 2016, nearly 100 years after Congress passed the statute.[82]

Put simply, criminal prosecutors' mentality of pursuing only the strongest cases explains why the model they use to determine appropriate sanctions does not need to consider litigation risk (i.e., because there is minimal risk in the cases they pursue). In contrast, given FERC Enforcement staff's willingness to pursue the most difficult cases, in light of their easier burden of proof, it is reasonable and fair that they should account for the specific litigation risk involved when seeking a penalty from investigative subjects. In fact, there is a case to be made that it is inappropriate for FERC and its Enforcement staff to pursue certain high-risk cases at all, for example, where they rest on particularly weak or attenuated facts or novel legal theories. In light of the severe, quasi-criminal nature of sanctions it is authorized to impose and the resultant reputational harm, there is a good argument that it is unfair that FERC pursues these types of cases under the preponderance of evidence standard used in civil cases.[83] As long as FERC continues to pursue them under this lenient standard, the Penalty Guidelines should accurately and fairly account for the cost and risks these cases carry.

ii. Difference in Departures Between the Sentencing and Penalty Guidelines

Another factor reducing the need for criminal prosecutors to consider litigation risk during plea negotiations is the frequency with which criminal sanctions

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80. Ohio v. Johnson, 467 U.S. 493, 498-499 (1984).

81. *See* Press Release, Western Massachusetts Power Plant Owner and Management Companies Agree to Plead to Tampering and False Reporting; Operations & Maintenance Company Enters Into Consent Judgment, U.S. Att'ys Off. Dist. of Mass. (Mar. 30, 2016), https://www.justice.gov/usao-ma/pr/western-massachusetts-power-plant-owner-and-management-companies-agree-plead-tampering ("PPMS also agreed to plead guilty to charges that it violated the Federal Power Act, the first ever criminal charges under this statute, for making false statements to the regional power grid administrator, ISO-New England, regarding the plant's availability to produce power.").

82. *Id*. In this case, Power Plant Management Services pled guilty to violating the statute after making false statements about the plant's power production availability to a regional power grid administrator. *Id*.

83. *See* Russell Ryan, *Uncivil Procedure: The Need for Heightened Due Process Protection in SEC Enforcement Prosecutions*, 38 CRIM. JUST. 12, 14 (2023) (arguing that, in light of the SEC's quasi-criminal authority, "there is no legitimate reason to continue allowing [it] to prosecute its cases under a mere preponderance-of-evidence burden of proof"). *But see* Herman & MacLean v. Huddleston, 459 U.S. 375, 389-90 (1983) (noting the proper use of the preponderance of evidence standard for cases involving "severe civil sanctions," including SEC antifraud proceedings that "included an order permanently barring an individual from practicing his profession").

are imposed outside the sentences generated under the Sentencing Guidelines. Both the Sentencing Guidelines and Penalty Guidelines are purely advisory in nature and FERC and criminal prosecutors are free to depart from them.[84] However, FERC, by design, departs much less frequently. Upon adoption of the guidelines, FERC declared that it does "not intend to depart from the Penalty Guidelines regularly…."[85] The Commission made clear that it is for the Commission, not staff, to allow for departures when applicable.[86] This reluctance to depart from the Penalty Guidelines has persisted throughout their fifteen-year history, as illustrated by a recent Commission statement that "departures from the Penalty Guidelines are uncommon."[87] The reluctance to depart also is reflected in the relevant statistics. When adopting the Penalty Guidelines, the Commission explained that it "will set out on the record the considerations that caused [it] to conclude a departure was appropriate."[88] Since FERC began applying the Penalty Guidelines, there have been 109 cases where the Penalty Guidelines are eligible to apply.[89] Out of these 109 cases, there have been only four cases, or approximately 4% of eligible cases, where FERC has set out on the record that it is departing.[90]

In sharp contrast, there are two mechanisms in the criminal context to set sentences outside of the Sentencing Guidelines ranges—departures and variances—and they are used in a majority of criminal cases to reduce the sentences imposed under the Sentencing Guidelines. Departures to the Sentencing Guidelines are "sentences outside of the guideline range authorized by specific policy statements in the *Guidelines Manual*," while variances "are sentences outside of the guideline range that are not imposed within the guidelines framework."[91] The Sentencing Guidelines contain "a comprehensive list of departure provisions,"

84. United States v. Booker, 543 U.S. 220, 245 (2005) (declaring the Sentencing Guidelines advisory after striking down the provisions of the Sentencing Reform Act that made the Sentencing Guidelines mandatory); 132 FERC ¶ 61,216, § 1A1.1(1). ("The Commission reserves the right to depart from these Guidelines where it deems appropriate.").

85. 130 FERC ¶ 61,220 at P 32.

86. *Id*.

87. 186 FERC ¶ 61,109 at P 13, n.27.

88. 132 FERC ¶ 61,216 at P 32.

89. The Penalty Guidelines do not apply to penalty determinations involving individuals, hydroelectric violations, or instances with multiple types of violations falling under different sections of the Penalty Guidelines (*e.g.*, fraud and Reliability Standard violations). *See* 130 FERC ¶ 61,220 at P 32 ("[T]he Commission will continue to determine penalties based on the individual facts and circumstances for certain violations, such as for natural persons as opposed to organizations, and for cases involving multiple types of violations."); 18 C.F.R. § 385.1505 (2025) (listing relevant penalty factors for hydroelectric violations).

90. *See In re Xcel Energy Inc.*, 138 FERC ¶ 61,026 at P 13 (2012); *National Energy & Trade, L.P.*, 156 FERC ¶ 61,154 at P 26 (2016); *Vitol Inc.*, 169 FERC ¶ 61,070 at P 226 (2019); *ISO-New England, Inc.*, 180 FERC ¶ 61,223 at PP 102-104 (2022). The vast majority of FERC-approved settlements applying the Penalty Guidelines also include language noting that the approved penalty is consistent with the Penalty Guidelines. *See, e.g.*, *Northwestern Corp.*, 193 FERC ¶ 61,011 at P 32 (2025) ("The Commission also concludes that NorthWestern's civil penalty is consistent with the Revised Policy Statement on Penalty Guidelines.").

91. U.S. SENT'G COMM'N, DEPARTURES AND VARIANCES 1 (2024) [hereinafter DEPARTURES AND VARIANCES] (internal citations omitted).

which are "based on various circumstances of the offense, specific personal characteristics of the offender, and certain procedural history of the case."[92] For example, one section of the Sentencing Guidelines allows for a downward departure "[i]f reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."[93] On the other hand, a court may also "determine that a sentence outside of the guideline framework is warranted based upon the statutory sentencing factors found at 18 U.S.C. § 3553(a)."[94] These are called variances, which courts consider after considering whether to apply a departure under the Sentencing Guidelines.[95]

"[D]epartures and variances have the same ultimate result (a sentence above or below the applicable guideline range),"[96] and, the statistics reflect that this result, unlike in FERC enforcement cases, occurs in most criminal cases. In fiscal year 2024, there were 61,331 total criminal cases nationally and 28,038 were within the Sentencing Guidelines range (45.7%), while 33,293 resulted in either a departure or variance from the Sentencing Guidelines range (54.3%).[97]

This tendency to sentence cases outside the Sentencing Guidelines range is prominently reflected in cases involving the economic loss table, discussed *supra* Part II.B, that the Commission modeled in its Penalty Guidelines. As detailed by Barry Boss and Kara Kapp in *How the Economic Loss Guideline Lost its Way, and How to Save It*,

> courts depart or vary below the Guidelines in the majority of cases to which the Section 2B1.1 loss enhancement applies. For example, from 2015 through 2019, more than 50 percent of sentences issued to fraud offenders were below the Guideline range. The downward variances given to such offenders, moreover, are typically significant. The mean sentences imposed on fraud offenders in 2018 and 2019 were 21 and 20 months respectively, more than 50 percent below the low end of the Guideline range.[98]

As Boss and Kapp observe, "[t]his significant trend of substantial downward variances under section 2B1.1, accordingly, underscores the substantial degree to which this particular Guideline has lost judicial confidence."[99] The Penalty Guidelines modeled their loss table, found in section 2B1.1 of the guidelines, on this same loss table from section 2B1.1 of the Sentencing Guidelines. But, FERC does not have nearly the same departure rate as criminal cases.

In sum, due to criminal prosecutors' well-documented risk aversion and the tendency of criminal cases to be sentenced outside the Sentencing Guidelines range, there is less of a need for criminal prosecutors to consider litigation risk in their plea negotiations.

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92. *Id*. at 5.

93. U. S. Sent'g Co., Guidelines Manual (U.S.S.G.) § 4A1.3(b)(1) (2023).

94. DEPARTURES AND VARIANCES, *supra* note 91, at 2; s*ee also* Rita v. United States, 551 U.S. 338, 344 (2007).

95. DEPARTURES AND VARIANCES, *supra* note 91, at 2.

96. *Id.* at 3.

97. U.S. SENT'G COMM'N, 2024 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 29 (2025).

98. Boss & Kapp, *supra* note 41, at 621-22.

99. *Id*. at 622.

IV. *BP AMERICA INC.*, DOCKET NO. IN13-15-000: AN ILLUSTRATIVE CASE STUDY OF THE IMPACT ON FERC'S PRO-SETTLEMENT POLICY OF THE PENALTY GUIDELINES' FAILURE TO SPECIFICALLY CONSIDER LITIGATION RISK

The Commission's failure to account for litigation risk in settlement negotiations has real impacts on its pro-settlement policy preference. In some cases, the failure leads to prolonged settlement negotiations, protracted litigation, and inefficient results for FERC, its staff, and the subjects of investigations. The history of FERC's case against BP America Inc. and its affiliates (referred to collectively as "BP") illustrates this inefficiency.

In or around late 2008 or early 2009, FERC Enforcement staff commenced an investigation to determine whether BP manipulated natural gas prices at the Houston Ship Channel trading hub, in the aftermath of Hurricane Ike in the fall of 2008.[100] Enforcement staff investigated whether BP engaged in a trading scheme to sell physical natural gas—both intrastate and interstate natural gas products—for the purpose of benefiting related financial positions.[101] After close to five years investigating this conduct,[102] Enforcement staff received settlement authority from the Commission and engaged in negotiations with BP, pursuant to the typical path of FERC investigations.[103] Although those negotiations were nonpublic, two important facts, relevant to this article, are publicly understood. First, Enforcement staff and BP's negotiations—as with all settlement negotiations between staff and organizations to resolve investigations—centered around the Penalty Guidelines.[104] Second, the negotiations failed to produce a settlement, leading staff to recommend, and the Commission ultimately to initiate, a litigated OSC proceeding against BP.[105]

In addition to these two facts, there is some level of public awareness of the relevant inputs to the Penalty Guidelines analysis discussed during the negotiations. This awareness is based on Enforcement staff's Penalty Guidelines analysis in its Staff Report and Recommendation (BP Staff Report) attached to the Commission's OSC, which issued directly after the failed settlement negotiations with BP.[106] The following analysis and calculation (below in Table II), based on the

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100. *BP Am. Inc.*, 184 FERC ¶ 61,016 at P 4 (2023).

101. *Id*.

102. BP Am., Inc. v. FERC, 52 F.4th 204, 226 (5th Cir. 2022) (referencing investigation of "about five years").

103. *See* 123 FERC ¶ 61,156 at P 34 (explaining that "[i]f the subject's response to staff's presentation of its case does not persuade staff to close the investigation, staff requests settlement authority from the Commission," and that "[i]f settlement authority is granted, staff and the subject proceed to settlement negotiations…").

104. *See* 186 FERC ¶ 61,109 at P 13 (explaining that "Enforcement staff has used the Penalty Guidelines to analyze and calculate an appropriate penalty range" for purposes of "engaging in settlement negotiations"); *2019 Annual Report on Enforcement*, FERC Docket No. AD07-13-013, at 10 (Nov. 21, 2019) (explaining how Enforcement staff's Penalty Guidelines analysis forms part of its request for authority to engage in settlement negotiations).

105. *See generally* 144 FERC ¶ 61,100 (OSC against BP). *See also* 123 FERC ¶ 61,156 at P 35 ("If Enforcement staff and the subject of the investigation are unable to reach a settlement, staff may recommend that the Commission initiate enforcement proceedings.").

106. *See Enforcement Staff Report and Recommendation*, *in* 144 FERC ¶ 61,100, at 72-73 [hereinafter "*BP Staff Report*"]. While it is possible that Enforcement staff might change parts of its Penalty Guidelines analysis

factors described in the BP Staff Report, show how Enforcement staff likely considered the various Penalty Guidelines factors during settlement negotiations.

Table II[107]

Violation Level Calculation		
Violation Level Inputs	**Points**	**Notes**
Base Violation Level	6	§2B1.1(a) (base violation level for manipulation).
Loss from violation	20	§2B1.1(b)(1) (alleged loss of $9,480,600).
Volume of natural gas	6	§2B1.1(b)(2)(C) (violations allegedly involved more than 700,000 MMBtu of natural gas).
Total Violation Level	**32**	§1C2.2(b) (Violation Level Penalty Table shows that a Total Violation Level of 32 corresponds to $17.5M).

Base Penalty Calculation	
Base Penalty	**Notes**
$17.5M	§1C2.2(a) (Base Penalty is the greater of (a) the amount from the Violation Level Penalty Table ($17.5M); (b) the alleged pecuniary gain ($800,000); or (c) the alleged pecuniary loss ($9,480,600)

between settlement negotiations and recommending an OSC proceeding, significant deviations would be unusual, especially because the OSC recommendation comes directly after the failed settlement negotiations. The one main exception is the one-point credit for settlement, which would be eliminated in the Staff Report analysis.

107. All citation references in Table II are to the *BP Staff Report*, *in* 144 FERC ¶ 61,100, at 72-73, 73 n. 209-210, 212.

Culpability Score Calculation		
Culpability Score Inputs	**Points**	**Notes**
Base Score	5	§1C2.3(a) (base culpability score)
Prior history	2	§1C2.3(c)(2) (BP had prior adjudication of similar misconduct by another enforcement agency).
Violation of order	2	§1C2.3(d) (BP allegedly violated an order directed at it).
Compliance credit	-1	§1C2.3(f) (BP was given a one-point credit for its compliance program).
Self-report	-2	§1C2.3(g)(1) (BP self-reported the conduct).
Cooperation	-1	§1C2.3(g)(2) (BP cooperated during investigation).
Settlement	-1	§1C2.3(g)(3) (BP would have earned the one-point credit had it settled)
Total Culpability Score	**4**	**§1C2.4 (Culpability score of 4 equates to minimum and maximum multipliers of 0.8 and 1.6).**

Final Penalty Calculation		
Base Penalty	**Minimum and Maximum Multipliers**	**Penalty Range**
$17.5M	0.8-1.6	$17.5M x 0.8 = $14M $17.5M x 1.6 = $28M **Final range = $14M-$28M**

While it is not known precisely how much FERC Enforcement staff sought in settlement negotiations, based on the above analysis, it most likely would have been between $14-$28 million, unless it sought and obtained authority to depart, which is very rare in FERC cases.[108] The BP Staff Report sought a penalty of $28 million.[109] Most importantly for purposes of this article, during the settlement negotiations, BP would have received the maximum one-point credit for settlement that *all* other settling subjects are entitled to, regardless of the costs and risks

108. *See supra* Part III.B.ii.

109. 144 FERC ¶ 61,100 at P 1.

involved in their cases. In other words, under the Penalty Guidelines, Enforcement staff's case against BP—a case that relied on a complicated calculation of market harm and a legally unsettled jurisdictional theory[110]—earned the same settlement credit as cases, for example, involving simple, *admitted* violations causing no financial harm for failing to timely file jurisdictional agreements.[111]

Enforcement staff's jurisdictional argument, alone, warranted additional settlement credit to account for the litigation risk associated with the claim. Specifically, Enforcement staff relied on an unsettled legal argument—long-asserted by the Commission, but never before decided by a court—that BP's allegedly manipulative trading "need not be subject to the Commission's NGA jurisdiction," claiming that "[i]f the Commission establishes that the scheme was 'in connection' with NGA jurisdictional sales, purchase or transportation, and scienter is found, the entity engaged in the fraudulent or manipulative conduct will have violated" FERC's Anti-Manipulation Rule.[112] Enforcement staff relied on this claim based on the Commission's interpretation of "in connection with" to mean circumstances in which "the entity . . . intended to affect, or . . . acted recklessly to affect, a jurisdictional transaction."[113] But this interpretation had never been confirmed by courts and conflicted with other relevant statutory language in the NGA.[114]

Despite being subject to this difficult, novel claim, BP still was entitled only to the 1-point settlement credit under the Penalty Guidelines. The Penalty Guidelines' failure to conduct an individualized and meaningful assessment of the litigation risk involved in the *BP* case—instead affording BP the same credit as straightforward, and even uncontested violations—does not make practical sense because all settlements are not of equal value. More importantly, it likely played a large role in preventing settlement and led to a nearly ten-year period—on top of the five years already exhausted on the investigation—of Enforcement staff and BP expending significant time and resources on a roller-coaster ride of protracted litigation. This ride included the following windy path in litigation to an eventual settlement that included a penalty of $10,750,000, a more than 60% reduction in the penalty proposed in the OSC and likely also much less than the penalty Enforcement staff sought during settlement negotiations.[115]

- **August 2013-December 2013**: Following FERC's issuance of the OSC in August 2013, BP submitted an Answer on October 4, 2013,

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110. *See BP Staff Report*, *in* 144 FERC ¶ 61,100, at 72 n.208 (alleging $9,480,600 in market harm based on an economic theory and calculation of "price distortion" allegedly caused by BP's trades); *id*. at 71 n.207 (alleging that BP's alleged manipulative trading in non-jurisdictional intrastate markets subjected BP to FERC's jurisdiction because the trades allegedly "altered" FERC-jurisdictional index prices).

111. *See, e.g.*, *American Transmission Co.,* 160 FERC ¶ 61,030 at P 1 (2017) ($205,000 settlement with admission for failing to file jurisdictional agreements).

112. *See BP Staff Report*, *in* 144 FERC ¶ 61,100, at 71 n.207.

113. Order No. 670, *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047 at P 22 (2006).

114. *See* 15 U.S.C. § 717(b) (2025) ("The provisions of this chapter shall apply to . . . the sale in *interstate commerce* of natural gas for resale . . . but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution. . . .").

115. This bulleted timeline comes from the public FERC docket and a detailed description of the litigation from Enforcement staff's 2015 Annual Report on Enforcement. *See 2015 Annual Report on Enforcement*, FERC Docket No. AD07-13-009, at 8-9 (Nov. 19, 2015).

with a 120-page brief and expert analysis of over 100 pages. Enforcement staff then submitted a reply brief on December 4, 2013 of more than eighty pages. BP submitted a response to the reply on December 19, 2013.

- **December 2013-May 2014**: OSC fully briefed and pending before FERC.
- **May 15, 2014**: FERC issued an order, establishing a hearing before an administrative law judge (ALJ) to determine factual issues relevant to the Anti-Manipulation Rule and the calculation of a civil penalty and disgorgement. FERC maintained its authority over the trading conduct, holding "even if BP's conduct was not jurisdictional, nevertheless it was intertwined with, and affected, jurisdictional sales."[116]
- **May 2014-March 2015**: After FERC issued its order establishing a hearing, Enforcement staff and BP engaged in a long, extensive discovery period before commencement of the hearing. During this period, they exchanged millions of pages of written discovery, deposed twenty-three witnesses, and received voluminous additional discovery from twenty-seven third parties.
- **March 30, 2015-April 15, 2015**: The ALJ held a two-week hearing, which included direct and cross examination of many fact and expert witnesses leading to the entry of 325 exhibits and 2,657 pages of transcripts.
- **April 15, 2015-August 2015**: BP and FERC Enforcement staff filed post-hearing briefs and waited for ALJ's decision.
- **August 13, 2015**: The ALJ issued an Initial Decision, finding in favor of Enforcement staff on all substantive issues.
- **September 2015-October 2015**: BP filed exceptions to the Initial Decision and Enforcement staff filed an opposition.
- **October 2015-December 2020**: During this period of more than five years, (1) FERC issued an order affirming the ALJ's finding of manipulation and assessing a penalty of $20.16 million and disgorgement of $207,165;[117] (2) BP sought rehearing of FERC's order; (3) FERC granted rehearing purely to allow it more time for consideration; and (4) BP filed a timely appeal with the Fifth Circuit, which was held in abeyance pending FERC's decision on BP's rehearing request.
- **December 17, 2020**: FERC issued an order denying rehearing.[118]BP filed a timely appeal with the Fifth Circuit. On jurisdiction, FERC held that it was not "asserting general regulatory authority over BP's sales of non-jurisdictional natural gas under

116. 147 FERC ¶ 61,130 at P 26.
117. 156 FERC ¶ 61,031 (2016).
118. 173 FERC ¶ 61,239 (2020).

section 4," but "[i]nstead, . . . that BP's manipulative conduct directly affected natural gas transactions that [were], in fact, subject to our jurisdiction."[119]

- **October 10, 2022**: The Fifth Circuit issued an opinion, affirming FERC's finding of manipulation, but remanding to FERC for reassessment of the penalty amount after finding that a majority of the allegedly manipulative trades occurred in intrastate commerce and, therefore, were not jurisdictional to FERC.[120]

Most significantly, the Fifth Circuit held, "FERC asserts that it has jurisdiction over otherwise non-jurisdictional intrastate transactions if those transactions manipulate the price of interstate gas bought and sold under the NGA. But . . . the NGA clearly forbids FERC from exercising jurisdiction over intrastate transactions."[121] While invalidating most transactions based on this ruling, the court held that FERC could assert jurisdiction over eighteen separate transactions found to be in interstate commerce.[122] The court then remanded the case for FERC to reassess the penalty amount in light of this holding.[123] On remand, the matter settled for a penalty of $10.75 million.[124]

The *BP* matter provides a good illustration of the impact of failing to adequately account for litigation risk during settlement negotiations. Despite the difficult jurisdictional argument FERC faced in litigation, as well as the complicated factual allegations of fraudulent trading, the Penalty Guidelines afforded BP only the one-point settlement credit. This is not the only example where this minimal credit obstructed the settlement process, led to years of litigation, and ultimately resulted in very small settlement amounts relative to the amounts FERC initially sought during settlement negotiations and litigation. There are several enforcement cases at FERC where an individualized appraisal of the value of settlement could potentially have helped to resolve the matters earlier, avoid protracted litigation, and support the Commission's pro-settlement policy.

119. *Id.* at P 230.
120. BP Am., Inc. v. FERC, 52 F.4th 204 (5th Cir. 2022).
121. *Id.* at 215.
122. *Id*. at 218.
123. *Id*. at 221.
124. 184 FERC ¶ 61,016 at P 2.

Table III

Case	OSC Date	OSC-Proposed Penalty Under Penalty Guidelines	Duration of Litigation Post-OSC	End Result
TOTAL Gas & Power North America, Inc., Docket No. IN12-17[125]	4/28/2016	$213.6M	4/28-2016-1/10/2025 (more than 8.5 years)	Settlement of $0 penalty; $5M restitution (100% penalty discount)
Competitive Energy Services, Docket No. IN12-12[126]	7/17/2012	$7.5M	7/17/2012-11/25/2020 (close to 8.5 years)	Settlement of $708,158.87 penalty (more than 90% discount)
Coaltrain Energy, L.P., Docket No. IN16-4[127]	1/6/2016	$26M	1/6/2016-10/11/2022 (more than 6.5 years)	Settlement of $0 penalty; $4M in restitution (100% penalty discount)
Barclays Bank PLC, Docket No. IN08-8[128]	10/31/2012	$435M	10/31/2012-11/7/2017 (more than 5 years)	$70M (more than 80% discount)
PacifiCorp, Docket No. IN21-6[129]	4/15/2021	$42M	4/15/2021-12/30/2022 (more than 1.5 years)	$4.4M (nearly 90% discount)

125. *Compare* 155 FERC ¶ 61,105 at P 1 (proposing penalty of $213.6 million), *with* 190 FERC ¶ 61,014 at P 2 (approving settlement with no penalty and $5 million in restitution).

126. *Compare Competitive Energy Servs., LLC*, 140 FERC ¶ 61,032 at P 1 (2012) (proposing penalty of $7.5 million), *with Competitive Energy Servs., LLC*, 173 FERC ¶ 61,176 at P 2 (2020) (approving settlement with penalty of approximately $708,000).

127. *Compare Coaltrain Energy, L.P.*, 154 FERC ¶ 61,002 at P 1 (2016) (proposing penalty of $26 million), *with Coaltrain Energy, L.P.*, 181 FERC ¶ 61,031 at P 2 (2022) (approving settlement with no penalty and $4 million in restitution).

128. *Compare* 141 FERC ¶ 61,084 at P 1 (2012) (proposing penalty of $435 million), *with Barclays Bank PLC*, 161 FERC ¶ 61,147 at P 10 (2017) (approving settlement with penalty of $70 million).

129. *Compare PacifiCorp*, 175 FERC ¶ 61,039 at P 1 (2021) (proposing penalty of $42 million), *with PacifiCorp*, 181 FERC ¶ 61,278 at P 2 (2022) (approving settlement with penalty of $4.4 million).

V. A STRAIGHTFORWARD FIX TO FERC PENALTY GUIDELINES § 1C2.3(G)(3): A TIERED APPROACH THAT APPRAISES THE VALUE OF EACH SETTLEMENT

If FERC had afforded settlement credit to BP and the other entities listed in Table III based on an individualized appraisal of the settlements' actual value—factoring in the risks and costs of litigation—the cases may have settled earlier, and FERC could have reaped the benefits of its pro-settlement policy preference. Specifically, the Commission might have benefitted from more expeditiously sending important compliance signals to industry, returning funds to victims of the alleged wrongdoing, and reallocating valuable staff time and resources to other important enforcement matters. Subjects of investigations similarly would have benefitted, most significantly, by avoiding the high costs of protracted litigation. Instead, they wasted years on litigation, only to eventually settle at a fraction of what FERC originally sought.

There is a straightforward fix to the Penalty Guidelines that would allow these types of cases to more readily reach resolution during settlement negotiations. As emphasized in this article, the Penalty Guidelines, in section 1C2.3(g)(3), currently afford all settlements a one-point credit irrespective of their value. FERC should revise this section of the guidelines as follows to assign varying gradations of credit based on an appraisal of the actual value of the settlement (proposed revisions in underline):

FERC Penalty Guidelines § 1C2.3(g)(3):[130]

If the organization resolved the matter without need for a trial-type hearing and:

> (i) the resolution resulted in the avoidance of a minor level of projected costs and minor risk of a negative outcome in litigation, subtract 1 point;
>
> (ii) the resolution resulted in the avoidance of a moderate level of projected costs and moderate risk of a negative outcome in litigation, subtract 2 points; or
>
> (iii) the resolution resulted in the avoidance of a major level of projected costs and major risk of a negative outcome in litigation, subtract 3 points.

The effect of conducting an individualized appraisal under this proposed model would be significant, allowing the Commission to more easily and quickly resolve matters and reap the benefits of its pro-settlement policy. In the *BP* matter, for example, this proposed model would give BP and FERC Enforcement staff the following ranges to discuss and negotiate, leading to enhanced transparency during negotiations and more options to help reach compromise.

130. 132 FERC ¶ 61,216, § 1C2.3(g)(3).

Table IV

Likely Range During Settlement Negotiations Based on Factors in OSC, With 1-Point Settlement Credit[131]	Range Under Proposed Revision with 2-Point Settlement Credit	Range Under Proposed Revision with 3-Point Settlement Credit
$14-28 million	$10.5-$21 million	$7-$14 million

There is some precedent at the Commission for adapting the Sentencing Guidelines' bright-line model that exists in certain sections of the Penalty Guidelines to a scaled approach. For example, under the original Penalty Guidelines issued in March 2010, FERC gave three points of credit for an effective compliance program.[132] This bright-line three-point credit was based on the Sentencing Guidelines, which gives organizations three points credit "[i]f the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program."[133] However, after reviewing industry comments, FERC revised its Penalty Guidelines to allow for partial compliance credit, awarding organizations between zero and three points depending on their level of compliance.[134] In agreeing to revise its Penalty Guidelines, FERC emphasized the importance of reviewing each situation on its own merits, explaining, "[o]ur decision to grant partial compliance credit is consistent with our prior statement that 'the facts and circumstances of each situation should be evaluated to determine the appropriate amount of credit given.'"[135] Consistent with FERC's approach to conduct individualized assessments of organizations' compliance programs, it should similarly weigh the unique value of each prospective settlement when affording settlement credit. This approach would recognize that each case should be assessed based on its unique facts and circumstances.[136]

Modifying its Penalty Guidelines to afford settlement credit based on a resolution's value also is consistent with the Commission's long-standing commitment to continually evaluate the effectiveness of its enforcement program and to make

131. *See supra* tbl. II.

132. 130 FERC ¶ 61,220 at P 48.

133. U. S. Sent'g Co., Guidelines Manual (U.S.S.G.) § 8C2.5(f)(1) (2023).

134. 132 FERC ¶ 61,216 at PP 115-117; *id*. § 1C2.3(f)(1) ("If the violation occurred even though the organization had in place at the time of the violation an effective compliance program, as provided in §1B2.1 (Effective Compliance Program), subtract *up to 3 points*." (emphasis added)).

135. *Id*. at P 117 (citation omitted).

136. Because the Penalty Guidelines generate a penalty range, the Commission also has some flexibility to consider each case's unique litigation risk in deciding where within the range to set its ultimate penalty demand. *See* 130 FERC ¶ 61,220 at P 32 ("[W]e also retain some discretion because the Penalty Guidelines produce a penalty *range*, rather than an absolute figure. Specific facts of each case will determine where in the range the ultimate penalty might fall."). This article's proposed revision to Penalty Guidelines § 1C2.3(g)(3) is not intended to replace this flexibility that is built into the Penalty Guidelines. Rather, it is intended to supplement this discretion, to give the Commission more durable, consistent, and transparent flexibility to consider litigation risk, and to give Enforcement staff and investigative subjects a common dialogue to engage on this critical issue.

improvements as warranted. Indeed, when adopting the Penalty Guidelines in 2010, it stated,

> Since Congress expanded our civil penalty authority in EPAct 2005, we have carefully considered our responsibility to implement our new authority and to improve our application of it in light of experience. To that end, we have continuously strived to add greater fairness, consistency, and transparency to our penalty determinations, and we have always sought to consider industry's recommendations to achieve these goals.[137]

The Commission also made clear that it "anticipate[d] that the Penalty Guidelines will be adjusted and amended as necessary and appropriate in light of reason and experience, as well as to reflect changes in the law and enforcement practice and policy."[138] In light of the experience applying the Penalty Guidelines' one-point settlement credit over the last fifteen years, FERC should adapt this provision to ensure that each settlement is properly valued so that it can take greater advantage of the benefits of its pro-settlement policy preference.

VI. CONCLUSION

The Commission is prudent to consistently push a policy that encourages settlements over litigation. The benefits of this pro-settlement policy are numerous. Most importantly, the policy serves as a major boost to FERC Enforcement's primary mission to ensure compliance with the nation's energy laws. Through this policy, FERC promotes compliance by more expeditiously sending compliance signals to industry and allowing its Enforcement staff to devote its limited resources to its functions aimed at preventing and detecting unlawful conduct. The policy also promotes compliance by allowing industry to focus on compliance efforts, rather than litigation. For the most part, FERC's enforcement program works in tandem to support its pro-settlement policy.

This article points out one area where the Commission can improve its enforcement program to further support its pro-settlement policy. Affording all settlements a one-point credit works against FERC's pro-settlement policy—and, as a result, its broader compliance mission—by hindering settlements in some cases and leading to years of wasteful litigation. That all settlements are not of equal value is readily apparent from a basic sampling of FERC settlements. On one end of the spectrum, some cases involve simple, uncontested violations involving failures to file agreements or actions that clearly violate basic tariff provisions.[139] On the opposite end of the spectrum, there are complicated manipulation claims involving complex financial and physical trading patterns, blurred issues relevant to the intent of traders, and complex jurisdictional questions.[140] There also are cases

137. 132 FERC ¶ 61,216 at P 229.

138. 130 FERC ¶ 61,220 at P 34.

139. *See, e.g.*, 160 FERC ¶ 61,030 at P 1 ($205,000 settlement with admission for failing to file jurisdictional agreements).

140. *See, e.g.*, 144 FERC ¶ 61,100, at 72 n.208 (alleging $9,480,600 in market harm based on an economic theory and calculation of "price distortion" allegedly caused by BP's trades).

in the middle, for example, involving relatively straightforward violations complicated by policy questions or questions of whether certain exceptions should apply.[141] That all categories of cases earn a one-point credit is not fair or reasonable.

Fortunately, there is a straightforward solution. As described in Part V, the Commission should revise the Penalty Guidelines to allow for individualized appraisals of the value of each settlement. This article offers one idea for revising the Penalty Guidelines to account for this appraisal, but it is not the only option. The Commission should hold a technical conference to discuss this and other reasonable options to allow for an individualized appraisal with the ultimate goal of harmonizing the guidelines with its very important pro-settlement policy. The Commission held a technical conference approximately one year after issuing the Penalty Guidelines "to discuss how they . . . worked in practice and to permit comments and questions from the industry."[142] The Commission has not held a technical conference on the Penalty Guidelines since this first conference in 2011. Having implemented the guidelines in cases over the past fifteen years, the Commission and industry would benefit from further discussion on the issues raised in this article and any other issues it wishes to discuss related to the Penalty Guidelines.

141. *See, e.g.*, *Salem Harbor Power Development LP*, 179 FERC ¶ 61,228 at P 58 (2022) (approving penalty for alleged violations of tariff and duty of candor rule based not only on conduct of the investigative subject, but also on "the roles that multiple [other] individuals and entities played" in the alleged violations).

142. 132 FERC ¶ 61,216 at P 226. *See also Technical Conference on Penalty Guidelines*, FERC Docket No. PL10-4-000 (Nov. 2, 2011) (technical conference held on Nov. 17, 2011).