124 FERC ¶ 61,050
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Amaranth Advisors L.L.C. — Docket No. IN07-26-000
Amaranth LLC
Amaranth Management Limited Partnership
Amaranth International Limited
Amaranth Partners LLC
Amaranth Capital Partners LLC
Amaranth Group Inc.
Amaranth Advisors (Calgary) ULC
Brian Hunter
Matthew Donohoe

ORDER DENYING REHEARING, MOTIONS FOR STAY, AND MOTIONS FOR SUMMARY DISPOSITION, AND ESTABLISHING HEARING PROCEDURES

(Issued July 17, 2008)

1. This order denies pending requests for rehearing of the Order to Show Cause and Notice of Proposed Penalties (Show Cause Order) issued July 26, 2007,[1] denies motions for stay and summary disposition, and establishes a hearing to determine whether certain natural gas futures trading activities by Amaranth Advisors L.L.C., its affiliated entities, and two individual traders (collectively, Respondents) violated section 1c.1 of the Commission's regulations (Anti-Manipulation Rule).[2] That regulation prohibits natural gas market manipulation in connection with the sale or purchase of natural gas or transportation services that are subject to the Commission's jurisdiction.

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[1] *Amaranth Advisors L.L.C.*, 120 FERC ¶ 61,085 (2007). In an order issued November 30, 2007, the Commission addressed certain requests for rehearing of the Show Cause Order. *Amaranth Advisors L.L.C.*, 121 FERC ¶ 61,224 (2007) (Rehearing Order).

[2] 18 C.F.R. § 1c.1 (2008).

I. **Background and Procedural History**

2. In the wake of the manipulation of prices in western energy markets during 2000-2001, Congress expanded the Commission's anti-manipulation authority through the enactment of the Energy Policy Act of 2005 (EPAct 2005), which significantly amended the Federal Power Act (FPA) and the Natural Gas Act (NGA) with respect to market manipulation and the assessment of penalties for such conduct.[3] In EPAct 2005, Congress also enhanced the remedies available to the Commission to punish and deter violations of Commission regulations, orders, rules, and policies, providing for increased penalties of up to $1,000,000 per violation, per day.[4] To implement the provisions of EPAct 2005, the Commission issued Order No. 670, in which it promulgated the Anti-Manipulation Rule.[5]

3. In the Show Cause Order, the Commission explained that this case involves the nexus between the wholesale interstate natural gas markets subject to the Commission's jurisdiction and the New York Mercantile Exchange (NYMEX) Natural Gas Futures Contract (NG Futures Contract). In the Show Cause Order, the Commission preliminarily concluded that the Respondents manipulated the price of the NYMEX NG Futures Contract on February 24, March 29, and April 26, 2006, by engaging in extensive sales during the last 30 minutes of trading, intentionally producing artificial "settlement prices" for the contracts. The Commission preliminarily found that, by decreasing the settlement price of the contracts, Amaranth was able to profit from actions it previously took in its derivative financial positions. The Commission also preliminarily determined that the two individuals, Hunter and Donohoe, executed the trades at issue. The Commission preliminarily found that the Respondents' actions intentionally or recklessly affected the price of physical natural gas markets subject to the Commission's jurisdiction, which would constitute a violation of the Anti-Manipulation Rule. Accordingly, the Commission directed the Respondents to show cause why they should not be found to have violated the Commission's Anti-Manipulation Rule and why they should not be assessed civil penalties and required to disgorge unjust profits, plus interest, totaling more than $300,000,000.[6]

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[3] 15 U.S.C. § 717c-1 (2006).

[4] *Id*. § 717t-1.

[5] *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, *reh'g denied*, 114 FERC ¶ 61,300 (2006).

[6] Show Cause Order, 120 FERC ¶ 61,085, at Ordering Paras. (A)-(B).

4. On July 23, 2007, three days before the Commission issued the Show Cause Order, Hunter filed suit in the United States District Court for the District of Columbia seeking a temporary restraining order and preliminary injunction to prevent the Commission from exercising enforcement jurisdiction over him. The court denied the motion, stating in part that a challenge to the Show Cause Order should be made in a United States Court of Appeals pursuant to NGA section 19(b).[7]

5. On July 25, 2007, the Commodity Futures Trading Commission (CFTC) filed a complaint in the United States District Court for the Southern District of New York against Respondents Amaranth Advisors, L.L.C., Amaranth Advisors (Calgary) ULC, and Hunter seeking injunctive and other equitable relief and civil monetary penalties under the Commodity Exchange Act (CEA).[8] Citing the same transactions identified by the Commission in the Show Cause Order, the CFTC alleged price manipulation with respect to the NG Futures Contracts. The defendants to the CFTC complaint sought a preliminary injunction, asking the court to enjoin this Commission from proceeding with its separate administrative action. The court denied the motion for the preliminary injunction, finding that the defendants had not satisfied the requirements for a preliminary injunction.[9] The court also pointed out that NGA section 19(b) requires that a challenge to this Commission's exercise of jurisdiction must be brought in a United States Court of Appeals.[10] On May 21, 2008, the court issued a further order denying motions to dismiss filed by Amaranth Advisors, L.L.C., Amaranth Advisors (Calgary) ULC, and Hunter.[11] The court determined, *inter alia*, that it has personal jurisdiction over Hunter. In an additional order issued June 10, 2008, the court denied the defendants' motion to reconsider the May 21, 2008 decision. The CFTC's complaint against these three Respondents remains pending before the court.

6. Various Respondents filed requests for rehearing of the Show Cause Order and for an extension of the deadline for filing responses to the Show Cause Order. On November 30, 2007, the Commission issued the Rehearing Order denying a joint request for rehearing filed by Amaranth Advisors, L.L.C., Amaranth Advisors (Calgary) ULC,

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[7] *Hunter v. FERC*, 527 F. Supp. 2d 9, 19 (D.D.C. 2007).

[8] 7 U.S.C. §§ 1, *et seq*. (2006).

[9] *CFTC v. Amaranth Advisors, L.L.C.*, 523 F. Supp. 2d 328 (S.D.N.Y. 2007).

[10] *Id*. at 338.

[11] *CFTC v. Amaranth Advisors, L.L.C.,* No. 07 Civ. 6682, 2008 U.S. Dist. LEXIS 40655 (S.D.N.Y. May 21, 2008).

Amaranth Management Limited Partnership, and Amaranth Group Inc.[12] That order addressed at length, and rejected challenges to, the Commission's subject matter jurisdiction in this proceeding. The Commission stated that it would address the remaining requests for rehearing concerning other issues in a subsequent order,[13] and they are discussed below.

7. On December 3, 2007, Amaranth Advisors L.L.C., Amaranth Advisors (Calgary) ULC, Amaranth Management Limited Partnership, Amaranth Partners LLC, Amaranth Capital Partners LLC, and Amaranth Group Inc. filed a motion to stay this proceeding pending review of the Show Cause Order and the Rehearing Order in the court of appeals. Alternatively, these Respondents requested that the Commission extend the time to answer the Show Cause Order until two weeks after any denial of a related motion to stay that certain Respondents anticipated filing with the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). On December 6, 2007, the Commission denied the requested extension of time.[14] The day before that order was

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[12] Rehearing Order, 121 FERC ¶ 61,224.

[13] *Id*. P 1. Amaranth LLC filed a request for rehearing of the Show Cause Order joining the request for rehearing of Amaranth Advisors, L.L.C., Amaranth Advisors (Calgary) ULC, Amaranth Management Limited Partnership, and Amaranth Group. However, Amaranth LLC seeks rehearing on an additional issue: whether the Commission reached a determination that it has jurisdiction over Amaranth LLC without providing Amaranth LLC an opportunity to present its views on that question. For the reasons given below, the Commission denies rehearing on this issue.

Amaranth International Limited (AIL) filed a request for rehearing, also adopting the arguments presented in the joint request for rehearing but raising three additional issues: (1) whether the Commission has personal jurisdiction over AIL, (2) whether the Show Cause Order alleges that AIL violated the statute prohibiting manipulation of natural gas markets, and (3) whether it is appropriate for the Commission to seek to extract penalties from a "passive investor." For the reasons given below, the Commission denies rehearing on these issues.

In a late-filed request for rehearing, Respondent Donohoe argued that the Commission does not have the authority to bring market manipulation claims against a natural person. As discussed below, the Commission denies Donohoe's request for rehearing because it was filed out-of-time, but the Commission also finds that Donohoe's request for rehearing has no merit.

[14] *Amaranth Advisors L.L.C.*, 121 FERC ¶ 61,238 (2007).

issued, Respondents Hunter and Donohoe filed additional motions to stay or, alternatively, requests for extensions of time.[15] Those motions remain pending and also are discussed below.

8. On December 13, 2007, the D.C. Circuit denied motions filed by Amaranth Advisors L.L.C., Amaranth Advisors (Calgary) ULC, Amaranth Management Limited Partnership, and Amaranth Group, Inc. in Case No. 07-1491 and filed by Donohoe in Case No. 07-1504 seeking to stay the Commission's proceedings pending judicial review.[16] On April 23, 2008, the same court granted the Commission's motion to dismiss Case No. 07-1504, stating that a party may not simultaneously seek agency rehearing and judicial review of the same agency order.[17]

9. The Respondents filed their responses to the Show Cause Order on December 14, 2008. They generally challenged all aspects of the Show Cause Order, including, *inter alia*, subject matter and personal jurisdiction, whether the Anti-Manipulation Rule can be applied to natural persons, whether the facts alleged show violations of the Anti-Manipulation Rule, the liability of the fund entities for the actions of other Respondents, and the calculation of the proposed penalties.

10. On February 1, 2008, the Commission issued an Order Designating Commission Staff as Non-Decisional and Ordering Brief.[18] With the exception of certain positions within the Office of Enforcement, the Commission designated the staff of that office (Enforcement Litigation Staff) as non-decisional, thus prohibiting the Enforcement Litigation Staff from advising the Commission during its deliberations in this proceeding. The Commission further directed Enforcement Litigation Staff to file a brief addressing (a) the issues that Enforcement Litigation Staff recommends setting for an evidentiary hearing before an Administrative Law Judge (ALJ) and (b) the issues that Enforcement Litigation Staff recommends for decision by the Commission without an evidentiary

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[15] *Id*. P 1 n.1.

[16] *Amaranth Advisors L.L.C. v. FERC*, Nos. 07-1491, 07-1504, 2007 U.S. App. LEXIS 29247 (D.C. Cir. Dec. 13, 2007).

[17] *Amaranth Advisors L.L.C. v. FERC*, Nos. 07-1491, 07-1504, 2008 U.S. App. LEXIS 9095 (D.C. Cir. Apr. 23, 2008).

[18] *Amaranth Advisors L.L.C.*, 122 FERC ¶ 61,087 (2008). By notice issued May 6, 2008, the Commission named an additional member of the Office of Enforcement as an exception to the designation of members of that office who are non-decisional in this proceeding.

hearing. The Commission also afforded Respondents the opportunity to file responsive briefs. Enforcement Litigation Staff filed its brief on March 18, 2008, and Respondents filed their briefs on May 19, 2008.[19]

11. Enforcement Litigation Staff argues on brief that the Show Cause Order contains substantial evidence that the Respondents violated the Anti-Manipulation Rule. Enforcement Litigation Staff requests that the Commission enter an order finding that the Commission has subject matter and personal jurisdiction in this proceeding, that the Anti-Manipulation Rule proscribes the type of activity alleged in the Show Cause Order, and that this proceeding is not barred by procedural limitations. Enforcement Litigation Staff also requests that the Commission set for hearing whether any Respondent committed, or is otherwise responsible for, the violations described in the Show Cause Order, the number of violations that occurred, the amount of unjust profits derived from the violations, if any, and in what manner, and from whom, those profits should be disgorged.

12. In their reply briefs, the Respondents generally object to the Commission's exercise of jurisdiction in this proceeding and the potential application of the Anti-Manipulation Rule to them individually or to the trading activity at issue, arguing that summary disposition would be appropriate at least as to issues involving particular Respondents. If the Commission does not grant requests for summary disposition or *de novo* adjudication in federal district court, the Amaranth Parties ask the Commission to set for hearing disputed issues regarding whether the Anti-Manipulation Rule was violated, whether particular Respondents can be held vicariously liable for manipulation committed by other Respondents, the nature of any violations that occurred, and what disgorgement amount, if any, would be appropriate in the event unjust profits were realized.

II. Discussion

13. Based upon its review of the extensive pleadings filed by Enforcement Staff and the Respondents, the Commission finds that there are genuine issues of fact material to

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[19] One reply brief was filed on behalf of Amaranth Advisors L.L.C., Amaranth Advisors (Calgary) ULC, Amaranth Management Limited Partnership, Amaranth Partners LLC, Amaranth Capital Partners LLC, and Amaranth Group Inc. (collectively, Amaranth Parties). AIL, Amaranth LLC, and Respondents Hunter and Donohoe each filed separate reply briefs.

the decision in this proceeding that require a hearing before an ALJ, as ordered below.[20] Accordingly, the pending motions for summary disposition are denied.

14. The Commission directs the ALJ to determine, based on the allegations contained in the Show Cause Order and Enforcement Litigation Staff's March 18, 2008 brief, whether any of the Respondents violated the Anti-Manipulation Rule. The ALJ should also determine whether any of the Respondents unjustly profited from their activities and, if so, the level of unjust profits. The Commission reserves to itself the issues of whether civil penalties should be imposed for the Respondents' alleged violations and the method by which the Respondents should disgorge any unjust profits. The Commission will make these determinations based on the record developed at the hearing established by this order.

15. As also discussed below, the Commission will rule on certain preliminary legal issues raised in the briefs filed by Enforcement Litigation Staff and Respondents.

A. Jurisdiction

1. Subject Matter Jurisdiction

a. Enforcement Litigation Staff's Position

16. Enforcement Litigation Staff supports the Commission's determination in the Rehearing Order that it has jurisdiction under NGA section 4A to impose penalties for manipulative trading of NYMEX NG Futures Contracts that has a clear and direct effect on physical jurisdictional natural gas sales prices. Enforcement Litigation Staff states that the Commission accounted for the exclusive jurisdiction of the CFTC over futures markets and neither asserted jurisdiction over, nor sought to interfere with, day-to-day regulation of futures markets.

b. Respondents' Position

17. Amaranth Parties acknowledge that the Commission determined in the Rehearing Order that it has subject matter jurisdiction and that the issue currently is pending before the D.C. Circuit. Amaranth Parties nonetheless repeat arguments that the CFTC has exclusive jurisdiction to regulate the "normal functioning" of the NYMEX. Amaranth

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[20] The Commission directs the Chief ALJ to make a settlement judge available to the parties should they request assistance with any settlement negotiations that may occur. If an agreement is reached among any of the parties, the resulting certification of settlement should address the financial health of the Amaranth business entities that are parties to the agreement.

Parties request that the Commission terminate this proceeding for lack of subject matter jurisdiction or, at a minimum, stay the proceeding pending the court's determination.

18. Respondent Hunter similarly claims that the Commission lacks statutory authority to bring an enforcement action against one who has traded solely in natural gas futures, for which the CFTC has exclusive jurisdiction, and has not traded in physical natural gas. Hunter maintains that the actual relationship between the natural gas futures trading and the price of physical natural gas presents a factual question that should be resolved by an ALJ before the Commission can determine that it has subject matter jurisdiction. If the natural gas futures trading at issue did not have a direct effect on jurisdictional physical natural gas prices, Hunter argues that the Commission's assertion of subject matter jurisdiction must fail. Hunter requests that the Commission resolve through a separate evidentiary hearing the factual dispute related to jurisdiction before subjecting Respondents to a full-blown proceeding on the merits.[21]

c. Commission Determination

19. The Rehearing Order addressed at length and resolved the question of the Commission's authority regarding manipulative trading in the NG Futures Contract market that has a direct effect on the price of physical natural gas prices subject to the Commission's jurisdiction. For the reasons set forth there, the Commission denies Amaranth Parties' request to dismiss this proceeding for lack of subject matter jurisdiction. Similarly, the Commission denies the requests for rehearing of Amaranth LLC and AIL to the extent they purport to adopt arguments regarding the Commission's subject matter jurisdiction that were rejected in the Rehearing Order.

2. Personal Jurisdiction

a. Enforcement Litigation Staff's Position

20. Enforcement Litigation Staff asks the Commission to confirm that it has personal jurisdiction over each of the Respondents, including AIL (which asserts that it is a Bermudan corporation) and Hunter (who asserts that he is a Canadian resident). Enforcement Litigation Staff argues that Hunter and AIL meet the legal standards of sufficient "minimum contacts" with the United States such that participation in this proceeding does not "offend traditional notions of fair play and substantial justice."[22]

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[21] *Citing Stauffacher v. Bennett*, 969 F.2d 455 (7th Cir. 1992); *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000); *Prakash v. American Univ*., 727 F.2d 1174, 1179-80 (D.C. Cir. 1984); *Miller v. Holzman*n, 2006 WL 3422421 at *1 (D.D.C., Nov. 28, 2006); *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 713 (7th Cir. 2002).

[22] *Citing Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Because there has been no evidentiary hearing at this point, Enforcement Litigation Staff contends that the Commission should only require a *prima facie* showing that personal jurisdiction over Hunter and AIL exists and that, in reaching that determination, all factual disputes or inferences are to be resolved in favor of the Commission.[23] Enforcement Litigation Staff states that it has established the requisite minimum contacts and, therefore, the burden shifts to the Respondents to demonstrate that the Commission's exercise of personal jurisdiction would be unreasonable.

21. Enforcement Litigation Staff notes that the Commission can establish the minimum contacts necessary to exercise personal jurisdiction over AIL and Hunter by demonstrating either specific jurisdiction, through contacts arising out of or relating to their conduct alleged in the Show Cause Order, or general jurisdiction, through "continuous and systematic" general contacts with the United States that are not related to the events described in the Show Cause Order.[24] Enforcement Litigation Staff argues that such contacts may include actions such as telephone calls or acts taken through an investment broker.[25] Enforcement Litigation Staff emphasizes that no physical presence is necessary to establish contacts because the focus is on the effects or results occurring inside the United States.[26]

22. With regard to Respondent Hunter, Enforcement Litigation Staff contends that the Commission can establish specific jurisdiction because Hunter developed and implemented the natural gas trading strategy that gave rise to the allegations in the Show Cause Order.[27] Enforcement Litigation Staff asserts that Hunter placed or had others place orders with a floor broker at the NYMEX for the majority of the futures transactions at issue and that he directed others to place trades that occurred in the United States (on NYMEX, on the Intercontinental Exchange (ICE), and bilaterally).

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[23] *Citing Data Disc Inc. v. Sys. Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977); *In re Baan Sec. Lit.*, 245 F. Supp. 2d 117, 125 (D.D.C. 2003); *SEC v. Euro Sec. Fund*, Fed. Sec. L. Rep. (CCH) ¶ 90,433 (S.D.N.Y. Feb. 17, 1999).

[24] *Citing Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 411-16 & n.8-9 (1984).

[25] *Citing U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 152-53 (2d Cir. 2001); *D.H. Blair & Co. v. Gottdiener,* 462 F.3d 95 (2d Cir. 2006).

[26] *Citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

[27] *Citing Lewis v. Fresne*, 252 F.3d 352, 358-59 (5th Cir. 2001) (a single act, such as a telephone call, could establish minimum contacts "if that act gives rise to the claim being asserted.").

Alternatively, Enforcement Litigation Staff argues that the Commission has general jurisdiction over Hunter because he maintained systematic and continuous contacts with the U.S. in the form of litigation to protect his own interests and through business activities conducted between 2001 until at least July 2007.[28]

23. With respect to specific jurisdiction over AIL, Enforcement Litigation Staff argues that several of the Amaranth Parties acted as AIL's agents in the United States and that AIL operated as part of a single entity with the other Amaranth entities that was functionally based in the United States.[29] Alternatively, Enforcement Litigation Staff maintains that the Commission has general jurisdiction over AIL because AIL's entire business was largely dependent on contacts with the United States.[30]

24. Contending that it has established that Hunter and AIL had sufficient minimum contacts with the United States, Enforcement Litigation Staff emphasizes that the burden shifts to those Respondents, who bear a very high burden if they are to persuade the Commission that the exercise of personal jurisdiction is unreasonable.[31] Enforcement Litigation Staff explains that the determination of reasonableness is based on balancing the burden to Respondents, the interest of the Commission in obtaining relief, the efficient resolution of the claims, and the interest of the United States in furthering social policy.[32] Enforcement Litigation Staff maintains that Hunter and AIL will not be significantly burdened by travel from Calgary and Bermuda to Washington, D.C. to litigate this matter[33] and that most of the potential witnesses are already located in the United States.

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[28] *Citing Metro. Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 569-70 (2d Cir. 1996); *Helicopteros Nacionales*, 466 U.S. at 411-16 & n.8-9; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Burger King*, 471 U.S. at 475.

[29] *Citing Minerva Marine, Inc. v. Spilcotes*, No. 02-2517, 2006 U.S. Dist. LEXIS 13939, at *11 (D.N.J. Mar. 13, 2006).

[30] *Citing Helicopteros Nacionales*, 466 U.S. at 414; *Metro. Life*, 84 F.3d at 569-70; *Volkswagen*, 444 U.S. at 297; *Burger King*, 471 U.S. at 475.

[31] *Citing Burger King*, 471 U.S. at 477.

[32] *Citing Asahi Metal Indus. Co. v. Sup. Ct. of Cal*, 480 U.S. 102, 113 (1987).

[33] *Citing Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129-30 (2d Cir. 2002).

b. Respondents' Position

25. Respondent Hunter argues on brief that Enforcement Litigation Staff has failed to demonstrate that the Commission has specific jurisdiction over him. Hunter argues that a showing of minimum contacts is insufficient and, instead, it must be demonstrated that the activity he allegedly engaged in had a direct and foreseeable effect on jurisdictional natural gas prices at issue in this proceeding.[34] Given that Enforcement Litigation Staff concedes that the relationship between the financial and physical natural gas markets must be explored at hearing, Hunter concludes that the Commission cannot rule on the issue of personal jurisdiction based on the record as it stands.[35] Hunter further argues that there is no support for general jurisdiction because general jurisdiction may not apply to individuals, as opposed to corporations.[36] Even if general jurisdiction were to apply to individuals, Hunter argues that the "continuous and systematic" standard for finding such jurisdiction is considerably more stringent than the specific jurisdiction tests.[37] Hunter contends that his prior residence in the United States, frequent trips to the United States, and frequent communications with people located in the United States are insufficient to give rise to general jurisdiction.[38]

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[34] *Citing Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972) (*quoting Restatement (Second) of Conflict of Laws §37b)*; *Bersch v. Drexel Firestone Inc.*, 519 F.2d 974, 1000 (2d Cir. 1975).

[35] *Citing Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000); *Miller v. Holzmann*, 2006 WL 3422421, at *1 (D.D.C. Nov. 28, 2006).

[36] *Citing Burnham v. Sup. Ct. of Cal.*, 495 U.S. 604, 609, n.1 (1990) (plurality opinion); *Archibald v. Archibald*, 826 F. Supp. 26, 29 n.3 (D. Me. 1993); *Span Const. & Engineering, Inc. v. Stephens*, No. CIV-F-06-0286 (AWI) (DLB) 2006 WL 1883391, at *5-6 (E.D. Cal. July 7, 2006).

[37] *Citing Negron-Torres v. Verizon Comms. Inc.*, 478 F.3d 19, 27 (1st Cir. 2007); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996); *Purdue Research Foundation v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F. 3d 797, 801 (9th Cir. 2004); *Corry v. CFM Majestic Inc.*, 16 F. Supp. 2d 660, 663 (E.D. Va. 1998).

[38] *Citing Johnson v. Woodcock*, 444 F.3d 953 (8th Cir. 2006); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984); *Porter v. Berall,* 293 F.3d 1073, 1075 (8th Cir. 2002); *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195 (4th Cir. 1993); *Corry*, 16 F. Supp. 2d at 663.

26. AIL argues on brief and in its request for rehearing of the Show Cause Order that it cannot be held vicariously liable for the alleged wrongful conduct of other Respondents and, therefore, the Commission can have no specific jurisdiction over AIL.[39] AIL states that it passively invested assets in Amaranth LLC, a Cayman Islands investment company, and had no agency relationship with the other Respondents in this proceeding. AIL contends that there is no evidence that the other Respondents served as its agent(s) with respect to the conduct in question in this proceeding. AIL asserts that due process requires an actual principal-agent relationship with respect to the wrongful conduct at issue, not the "agency paths" or "single entity" theories pursued by Enforcement Litigation Staff.[40]

27. AIL also argues that it does not have the systematic, continuous, extensive, or pervasive contacts with the United States necessary to justify the exercise of general jurisdiction by the Commission.[41] AIL states that it is not licensed or qualified to do business in the United States, has not maintained a registered agent or telephone listing in the United States, has not owned or leased property in the United States, or otherwise had investments or assets in the United States at any relevant time. AIL contends that its relationship with domestic service providers and its investments in Amaranth LLC, which

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[39] *Citing Gilson v. Republic of Ireland*, 682 F.2d 1022, 1029-30 (D.C. Cir. 1981); *Bigelow-Sanford, Inc. v. Gunny Corp.*, 649 F.2d 1060, 1063-64 (5th Cir. 1981); *E. Eur. Domestic Int'l Sales Corp. v. Terra,* 467 F. Supp. 383, 390 (S.D.N.Y. 1979).

[40] *Citing Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 413 (5th Cir. 2004); *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 648-650 (8th Cir. 2003); *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 217-219 (5th Cir. 2000); *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1273-74 (6th Cir. 1998); *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 944 (7th Cir. 2000); *Negron-Torres*, 478 F.3d at 27.

[41] *Citing Int'l Shoe v. Washington*, 326 U.S. 310, 320 (1945); *Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am.*, 651 F.2d 877, 890 (3d Cir. 1981); *In re Baan Co. Sec. Litig.,* 2002 U.S. Dist. LEXIS 10474 at *11 (D.D.C. June 10, 2002); *Provident Nat'l Bank v. Cal. Fed. Sv. & Loan Ass'n,* 819 F.2d 434, 437 (3d Cir. 1987).

in turn invested in domestic markets, are an insufficient basis for jurisdiction.[42] AIL states that the courts have failed to find general jurisdiction in various cases involving claims of significantly greater contacts with the United States than AIL had.[43]

c. Commission Determination

28. The Commission concludes that it is reasonable to exercise jurisdiction over Respondents Hunter and AIL for purposes of setting this matter for hearing. The facts alleged by Enforcement Trial Staff, if proven at trial, are adequate to demonstrate that Hunter and AIL had sufficient contacts with the United States to justify the exercise of jurisdiction in this proceeding. The Commission acknowledges, however, that the facts on which such jurisdiction is based are in dispute. The Commission therefore includes within the issues set for hearing whether Hunter and AIL in fact have had sufficient contacts with the United States to justify the exercise of specific or general jurisdiction in this proceeding. To assist the ALJ in reaching this determination, the Commission addresses certain threshold legal issues regarding the standards to be applied.

29. The minimum contacts standard for specific jurisdiction requires that a party's conduct and connection with the forum are such that he "should reasonably anticipate being haled into court there."[44] This fair warning requirement is met if the defendant has purposefully availed himself of the privilege of conducting activities within the forum.[45] The Supreme Court has explained its policy reasons for this standard:

> [w]hen a corporation purposefully avails itself of the privilege of conducting activities within the forum State, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome

[42] *Citing Toy v. Plumbers & Pipefitters Local Union No. 74 Pension Plan*, 2005 U.S. Dist. LEXIS 21568, at *19 (D.Del. Sept. 27, 2005); *Far W. Capital, Inc. v. Towne*, 46 F.3d 1071, 1076 (10th Cir. 1995); *Constr. Aggregates, Inc. v. Senior Commodity Co., S.A.M.,* 860 F. Supp. 1176, 1180 (E.D. Tex. 1994); *Daventree Ltd. v. Republic of Azer.*, 349 F. Supp. 2d 736. 764 (S.D.N.Y. 2004).

[43] *Citing El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 675 (D.C. Cir. 1996); *Noonan v. Winston Co.*, 135 F.3d 85, 93-94 (1st Cir. 1998); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1330-31 (9th Cir. 1984).

[44] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 288, 297 (1980) (internal quotations omitted).

[45] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

> litigation by procuring insurance, passing the expected costs on to customers, or if the risks are too great, severing its connection with the State.[46]

Physical presence within the forum is unnecessary, as long as the "commercial actor's efforts are purposefully directed toward" the forum asserting jurisdiction.[47]

30. In comparison, general jurisdiction exists if the party's general business contacts with the United States have been "continuous and systematic" even though they are unrelated to the lawsuit.[48] Physical presence in the forum may not be necessary for general jurisdiction over a party,[49] and the revenue derived from the forum can be a persuasive factor in establishing the minimum contacts required for the exercise of general jurisdiction.[50]

31. With regard to Respondent Hunter, the Commission notes that the United States District Court for the Southern District of New York recently found in a related proceeding that Hunter had purposefully availed himself of the privilege of conducting business in the United States and therefore had sufficient contacts to justify the exercise of personal jurisdiction over him.[51] The court found that Hunter personally placed orders through a NYMEX broker and directed Amaranth traders under his supervision to trade

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[46] *Volkswagen*, 444 U.S. at 297.

[47] *Burger King*, 471 U.S. at 476.

[48] *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984); *Metro. Life Ins. Co. v. Robertson-Ceco Corp*., 84 F.3d 560, 568 (2d Cir. 1996).

[49] *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 2006 U.S. Dist. LEXIS 11617, at *21 (S.D.N.Y. Mar. 20, 2006) (stating no physical presence necessary for general jurisdiction over a Cayman Islands corporation); *citing Burger King*, 471 U.S. at 476 ("So long as a commercial actor's efforts are purposefully directed towards residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.").

[50] *Id* *22-23, *citing Metro. Life*, 84 F.3d at 573 (explaining that defendant's four million dollars in sales in the forum over six years was one factor making the exercise of general jurisdiction permissible).

[51] *CFTC v. Amaranth Advisors LLC*, 2008 U.S. Dist. LEXIS 40655, at *5 (S.D.N.Y. May 21, 2008).

natural gas futures on NYMEX on February 24 and March 26.[52] Consistent with the court's determinations, the Commission finds that such activities, if proven in this proceeding, may justify the exercise of jurisdiction over Hunter.

32. The Commission disagrees with Hunter that jurisdiction may be found in this proceeding only if his actions resulted in a direct and foreseeable effect on jurisdictional natural gas prices.[53] Even if that standard applied, it could be satisfied by proof of intentional manipulation of the NG Futures Contract prices, as alleged by Enforcement Litigation Staff.[54]

33. With regard to AIL, it is clear that the activities of an agent may be attributed to a principal for purposes of determining jurisdiction over the principal.[55] The nature of the relationship between AIL and the other Respondents is related to the determination of whether any of the Respondents violated the Anti-Manipulation Rule or unjustly profited from activities that adversely affected the physical natural gas markets subject to the Commission's jurisdiction, matters that are set for hearing above. The Commission notes, however, that the courts have considered similar issues involving the overlap of agency and personal jurisdiction arguments.[56] There the appellate court explained that:

> [i]f plaintiff can show that his allegations have substance and that defendants in fact acted in concert, so that the contacts of one may be attributed to the others, then this is more than enough to establish that "maintenance of the suit does not offend traditional notions of fair play and substantial justice."[57]

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[52] Commission Enforcement Staff's Brief Addressing Issues For Trial or a Ruling and in Opposition to Motion for Summary Disposition (March 18, 2008) at 14; *CFTC v. Amaranth Advisors LLC*, 2008 U.S. Dist. LEXIS 40655, at *5 (S.D.N.Y. May 21, 2008).

[53] The Commission does not decide today whether an "effects" test applies to the case at hand given that some courts indicate that analysis is only intended to cover tort and product liability cases. *See Calder v. Jones,* 465 U.S. 783, 787-89 (1984); *Kulko v. Sup. Ct. of Cal.*, 436 U.S. 84, 96 (1978).

[54] *See SEC v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990); *Derensis v. Coopers & Lybrand Chtd. Accountants,* 930 F. Supp. 1003, 1014 (D.N.J. 1996).

[55] *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026n.16 (D.C. Cir. 1981); *E. Eur. Domestic Int'l Sales Corp. v. Terra,* 467 F. Supp. 383, 390 (S.D.N.Y. 1979).

[56] *See Gilson*, 682 F.2d at 1029-30.

[57] *Id*. at 1029 (internal citations omitted).

The Commission agrees with the court that an agency relationship, if proven in this proceeding, may justify the exercise of jurisdiction over AIL.

34. Finally, the Commission notes that, even if minimum contacts exist to exercise personal jurisdiction over Hunter and AIL, the Commission also must conclude that it is reasonable and within "traditional notions of fair play and substantial justice" to exercise such jurisdiction.[58] Reasonableness is determined by balancing various factors: the defendant's burden from appearing, the forum's interests in adjudicating the dispute, the plaintiff's interest in obtaining effective and convenient relief, the judicial system's interest in the most efficient resolution of the controversy, and the common interest of the states in promoting social policies.[59] Assuming that sufficient minimum contacts are proven at trial, the Commission concludes that the exercise of personal jurisdiction over Hunter and AIL in this proceeding is appropriate. The Commission's interest in enforcing the NGA in this proceeding is significant,[60] as is its interest in effectively and conveniently prosecuting violations of the Anti-Manipulation Rule to deter unlawful behavior by others and maintaining the integrity of the natural gas markets subject to its jurisdiction. While the Commission does not discount the burden on Hunter and AIL from appearing in this forum, courts have consistently found that modern travel and communication facilitate participating in litigation where one engages in economic activity.[61] Respondents have failed to demonstrate a compelling burden that would outweigh the Commission's interest in exercising jurisdiction, assuming minimum contacts are shown, and thus the Commission finds that the exercise of jurisdiction over Hunter and AIL is reasonable.

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[58] *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

[59] *Burger King,* 471 U.S. at 477; *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102, 113 (1987).

[60] *Cf. SEC v. Euro. Sec. Fund,* Fed. Sec. L. Rep. (CCH) ¶ 90,433 (S.D.N.Y. Feb. 17, 1999) (SEC's significant interest in enforcing United States securities laws).

[61] *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *U.S. Titan Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 152-53 (2d Cir. 2001) (not an undue hardship for a Chinese company to litigate in New York); *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129-130 (2d Cir. 2002) (court found burden of traveling from Puerto Rico to New York was a weak factor in favor of defendant).

B. Scope of Anti-Manipulation Rule

1. Application to Natural Persons

a. Enforcement Litigation Staff's Position

35. Enforcement Litigation Staff maintains that NGA section 4A can be enforced against natural persons as well as corporate and other business entities. Enforcement Litigation Staff argues that the plain language and broad remedial purpose of the anti-manipulation provisions of the NGA, as it was amended by section 315 of EPAct 2005[62] and implemented in Order No. 670, support the interpretation that natural persons, i.e., individuals, who employ manipulative or deceptive devices adversely affecting the natural gas markets are subject to enforcement action by the Commission. Enforcement Litigation Staff notes that the Commission specifically addressed this question in Order No. 670 and that no one appealed or sought rehearing of that aspect of the order.

36. Because the NGA contains a general definition of "person" that includes an individual or corporation,[63] Enforcement Litigation Staff argues that the amendment of the NGA in EPAct 2005 to prohibit "any entity" from manipulating the markets expanded the law's application by using the "broadest of all definitions which relates to bodies or units."[64] Given that Congress did not define "entity" in EPAct 2005 or the NGA, Enforcement Litigation Staff suggests that the term be construed in accordance with its ordinary meaning, which includes a natural person.[65]

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[62] *Citing* the following NGA/EPAct 2005 provision:

> It shall be unlawful for *any entity*, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or the sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary. . . .

15 U.S.C. § 717c-1 (2006) (emphasis added).

[63] *Citing id.* § 717a(1) ("'Person' includes an individual or a corporation.").

[64] *Citing Alarm Indus. Commc'n Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997) (*quoting Collier on Bankruptcy*, P 101.15 (15th ed. 1997).

[65] *Citing Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 186 (1995); *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999).

37. Enforcement Litigation Staff maintains that the meaning of "any entity" also is evident when placed in context and considered in light of EPAct 2005's overall statutory scheme.[66] For example, Enforcement Litigation Staff cites section 318 of EPAct 2005, which prohibits trading and participating in other activities by "individuals" who have violated NGA section 4A.[67] Enforcement Litigation Staff argues that section 318 of EPAct 2005 would be rendered meaningless if natural persons were not prohibited from engaging in anti-manipulative activities covered by NGA section 4A.[68] Similarly, Enforcement Litigation Staff notes that section 314 of EPAct 2005 provides that any person violating the NGA shall be subject to a civil penalty and that, had Congress intended to exclude natural persons from the meaning of "any entity," the Commission would have virtually no authority to impose civil penalties for fraud and manipulation affecting jurisdictional markets. Enforcement Litigation Staff goes on to argue that the language of additional provisions of EPAct 3005, such as sections 1282, 1283, and 1288, further support an interpretation of the term "any entity" in NGA section 4A as including natural persons.

38. Enforcement Litigation Staff acknowledges that, in *American Dental Ass'n v. Shalala* (*American Dental*),[69] the D.C. Circuit interpreted the use of the term "entity" in the Health Care Quality Improvements Act of 1986 as not including individuals. Enforcement Litigation Staff contends that the court's analysis in that case is nonetheless consistent with Enforcement Litigation Staff's own analysis in this proceeding, given that the court looked to the context in which the term appeared in the statute. Further, Enforcement Litigation Staff asserts that application of NGA section 4A to individuals is consistent with precedent under section 10(b) of the Securities Exchange Act (SEA) holding individual investment advisors liable for manipulative conduct.[70] Enforcement

[66] *Citing Bailey v. United States*, 516 U.S. 137, 145 (1995) (the meaning of statutory language depends on the context in which it is used); *United States v. Morton*, 467 U.S. 822, 828 (1984) (statutory phrases are not construed in isolation; instead the statute is read as a whole) (citations omitted).

[67] *Citing* 15 U.S.C. § 717s (2006).

[68] *Citing Dodd v. United States*, 545 U.S. 353, 371 (2005).

[69] 3 F.3d 445, 446 (D.C. Cir. 1993).

[70] *Citing Clark v. John Lamula Investors, Inc.*, 583 F.2d 594, 600 (2d Cir. 1978) (upholding verdict that investment advisor was liable under section 10(b). Enforcement Litigation Staff contends that, because NGA section 4A was modeled after section 10(b) of the SEA, cases construing section 10(b) are relevant to the construction of section 4A. *See* 15 U.S.C. § 717c (2006).

Litigation Staff also argues that anti-fraud statutes are to be broadly and flexibly construed to ensure that markets are maintained. Enforcement Litigation Staff notes that the Supreme Court, in commenting on SEA section 10(b), has stated that "the magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated."[71] As a result, continues Enforcement Litigation Staff, the SEC imposes liability on any *person* who participates in a manipulative or deceptive scheme, even if a material misstatement by another person created the connection between the scheme and the securities market.[72] Because NGA section 4A is modeled on SEA section 10(b), Enforcement Litigation Staff concludes that there is no reason to believe that the Commission was given less authority to prevent abuses in energy markets.

b. Respondents' Position

39. Donohoe responds that the use of the terms "person" and "entity" in the NGA reflects Congress' desire to draw a distinction between those terms.[73] Donohoe argues that the NGA repeatedly uses "person" or "individual" instead of "entity" when referring to natural persons.[74] Donohoe contends that, where the relevant act makes "ample use of the word 'person' to refer to individuals," the court in *American Dental* found it significant that Congress chose to use only the term "entity" in a different instance.[75]

40. Donohoe argues that other uses of the term "entity" in the NGA, such as section 23, demonstrate that the term applies to companies and organizations but not to individuals. Donohoe notes that section 23 provides that the Commission may rely on other "entities" to disseminate information about the availability and prices of natural gas. Donohoe contends that section 23 could not be intended to apply to natural persons, as no natural person could obtain, aggregate, and publish the data referred to in the statute. Citing the rule of statutory construction that a word is presumed to have the same

[71] *Quoting Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 78 (2006).

[72] *Citing In re Lermont & Haupsie Sec. Lit.*, 236 F. Supp. 2d 161, 173 (D. Mass. 2003).

[73] *Citing Wolverine Power Co. v. FERC*, 963 F.2d 446, 451 (D.C. Cir. 1992).

[74] *Citing* 15 U.S.C. §§ 717g(a), 717m(d), 717s(b), 717s(d), 717n(e) (2006).

[75] *Quoting American Dental Ass'n v. Shalala*, 3 F.3d 446, 446-47 (D.C. Cir. 1993).

meaning in all subsections of the same statute,[76] Donohoe concludes that an "entity" as used in NGA section 4A does not apply to natural persons. Donohoe argues that, where Congress intended a particular section of the NGA to apply to a broader group than "persons," it made its intent clear by listing "person" as one of several groups to which the section applies.[77]

41. Donohoe asserts that the courts have relied on the language and use of a term throughout a statute to reject an agency's conflicting interpretation based on the plain meaning of the term as defined in dictionaries.[78] With regard to the definition of "entity" in particular, Donohoe contends that the court in *American Dental* rejected the definition from *The American Heritage Dictionary of the English Language* on which Enforcement Litigation Staff relies in this proceeding.[79]

42. Donohoe disagrees with Enforcement Litigation Staff that the injunctive relief and civil penalty provisions of NGA sections 21 and 22 support the conclusion that NGA section 4A applies to natural persons. Donohoe states that, in *Wolverine*, the court rejected the Commission's expansive reading of "licensee" because the relevant statute gave the Commission authority to seek an injunction against any "person," but, in contrast, used a term other than "person" in the provision at issue in that case.[80] Donohoe argues that the use of "person" and "individual" in other provisions of the NGA similarly indicate that the term "entity" in NGA section 4A should not be construed as including a "person" or "individual."

43. With particular regard to section 318 of EPAct 2005, Donohoe notes that the section applies to any individual who is engaged or has engaged in practices constituting a violation of NGA section 4A.[81] According to Donohoe, if Congress had intended for

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[76] *Citing Allen v. CSX Transp., Inc*., 22 F.3d 1180, 1182 (D.C. Cir. 1994); *Morrison-Knudsen Constr. Co. v. U.S. Dept. of Labor*, 461 U.S. 624, 633 (1983); *Wolverine*, 963 F.2d at 450-51; *American Dental*, 3 F.3d at 447.

[77] *Citing* 15 U.S.C. § § 717n(e), 717r(a) (2006).

[78] *Citing American Dental*, 3 F.3d at 448; *Blackman v. District of Columbia*, 456 F.3d 167, 176 (D.C. Cir. (2006); *Ardestani v. INS*, 502 U.S. 129, 135 (1991); *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d, 395, 398-400 (D.C. Cir. 2004).

[79] *Citing American Dental*, 3 F.3d at 448; *City of Abilene v. FCC*, 164 F.3d 49, 52-53 (D.C. Cir. 1999).

[80] *Wolverine*, 963 F.2d at 450-51.

[81] 15 U.S.C. § 717s(d) (2006).

NGA section 4A to apply to individuals, it could have allowed for injunctive relief under EPAct 2005 section 318 simply by referring to any individual "who is violating or has violated" section 4A. Donohoe argues that Congress instead drafted EPAct 2005 section 318 to apply to any individual who engages or has engaged in "*practices constituting a violation*" of NGA section 4A, indicating that section 4A cannot be violated by individuals.[82]

44. With regard to section 314 of EPAct 2005, Donohoe contends that provision applies to violations of the chapter generally and mentions nothing about NGA section 4A in particular.[83] Donohoe states that Congress has made clear that natural persons are capable of violating other provisions of the NGA.[84] Donohoe argues that the court in *Wolverine* rejected a similar attempt by the Commission to cite the use of "person" in a penalty provision, finding instead that, as here, "[t]he best evidence of the scope of [the agency's] authority is found not in the statutory language spelling out the process for executing that authority but instead in the language establishing the authority."[85]

45. Donohoe also disputes Enforcement Litigation Staff's reliance on other provisions of EPAct 2005 in support of its position that NGA section 4A applies to natural persons. Donohoe contends that EPAct 2005 is a collection of amendments to many diverse statutes, most of which are outside the Commission's jurisdiction and, like the NGA, have unique sets of defined terms. Donohoe argues that the court refused to consider a similar argument in *American Dental* because, as here, "the language and structure of the [relevant act is] sufficient to establish clear congressional intent on the precise question at issue."[86]

46. Donohoe contends that the language of SEA section 10(b) actually compels the conclusion that NGA section 4A does not apply to natural persons. Donohoe agrees that section 4A is modeled on and closely tracks SEA section 10(b), but he notes that SEA

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[82] *Id.* (emphasis added).

[83] *Id.* § 717t-1(a) ("any person that violates *this chapter*. . . ") (emphasis added).

[84] *Citing id.* § 717g(a) ("The burden of proof to justify every accounting entry . . . shall be on the person making, authorizing, or requiring such entry. . . .").

[85] *Wolverine*, 963 F.2d at 451.

[86] *American Dental Ass'n v. Shalala*, 3 F.3d 446, 448 (D.C. Cir. 1993) (declining to address argument that "entity" and "person" were used in a different manner "elsewhere in [the agency's] regulations").

section 10(b) uses the term "person" instead of the term "entity."[87] Because Congress chose different language, Donohoe argues that the Commission must presume that Congress intended the terms to have different meanings.[88] Had Congress intended for "entity" in NGA section 4A to be defined as broadly as "person" is defined in the SEA section 10(b), it could simply have kept "person" in NGA section 4A because "person" is defined in SEA section 10(b) to include "a natural person, company, government, or political subdivision, agency, or instrumentality of a government."[89]

47. Donohoe further objects to Enforcement Litigation Staff's contention that interpreting NGA section 4A to apply to natural persons is consistent with the broad remedial purpose of the statute. Donohoe argues that the court in *Wolverine* has declined to "look [] beyond the precise words of [the section] to the design of the statute as a whole. . . ." which, the Commission argued, gave it a "broad grant of authority. . . ."[90] Even assuming *arguendo* that Congress had granted the Commission broad remedial powers in prosecuting alleged manipulation of FERC jurisdictional markets, Donohoe contends that it would be entirely rational to conclude that Congress did not give the Commission civil penalty authority with respect to natural persons who engage in manipulative practices. Donohoe states that this is especially true given the Commission's ability to seek injunctive relief against natural persons for such practices.[91]

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[87] *Citing* 15 U.S.C. § 78j(b) (2006) ("It shall be unlawful for any person, directly or indirectly . . . [t]o use or employ, in connection with the purchase or sale of [securities], any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe. . . ."). *Compare with* 15 U.S.C. § 717c-1 ("it shall be unlawful for any *entity*, directly or indirectly, to use or employ, in connection with the purchase or sale of [natural gas or jurisdictional transportation services], any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe. . . .") (emphasis added).

[88] *Citing Washington Hosp. Ctr. v. Bowen*, 795 F.2d 139, 146 (D.C. Cir. 1986) (citations omitted).

[89] *See* 15 U.S.C. § 78(c)(a)(9) (2006).

[90] *Wolverine*, 963 F.2d at 451-53 (internal citations and quotations omitted). *See also American Dental*, 3 F.3d at 448 (reversing district court finding that plaintiff's interpretation of relevant statute would undermine statute's purpose as "the specific statutory language at issue is clear on its face" and such a clear reading "does not . . . eviscerate the Act.").

[91] *Citing Wolverine*, 963 F.2d at 452-53.

48. Respondent Hunter also argues that the Commission lacks authority under NGA section 4A to bring an enforcement action against natural persons. Hunter states that he briefed this issue extensively in his response to the Show Cause Order and that he incorporates by reference the arguments made by Respondent Donohoe discussed above.

c. <u>Commission Determination</u>

49. The Commission made clear in Order No. 670 that the term "any entity" in NGA section 4A includes natural persons:

> "Any entity" is a deliberately inclusive term. Congress could have used the existing defined terms in the NGA and FPA of "person," "natural gas company," or "electric utility," but instead chose to use a broader term without providing a specific definition. Thus, the Commission interprets "any entity" to include any person or form of organization, regardless of its legal status, function or activities.[92]

The Commission continues to believe that this is the correct interpretation of NGA section 4A and rejects Respondent Donohoe's argument that the Anti-Manipulation Rule cannot be applied to natural persons.[93]

50. The EPAct 2005 amended the NGA to give the Commission authority to prevent "any entity" from engaging in market manipulation that affects jurisdictional sales and the transportation of natural gas.[94] As Respondent Donohoe acknowledges, Congress chose not to refer to "persons" or "individuals" in NGA section 4A or to otherwise define the term "any entity." The interpretation of that term was, therefore, left to the Commission to address in its regulations "as necessary in the public interest or for the protection of natural gas ratepayers."[95] The Commission disagrees that the choice by

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[92] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 18 (footnotes omitted).

[93] As noted above, Donohoe also submitted a late-filed request for rehearing of the Show Cause Order on the grounds that NGA section 4A could not be applied to him as an individual. The Commission has no jurisdiction to consider late-filed requests for rehearing and, therefore, must deny Donohoe's request for rehearing of the Show Cause Order. *See* 15 U.S.C. § 717r(a) (2006); e.g., *Moreau v. FERC*, 982 F.2d 556, 563 (D.C. Cir. 1993). Nonetheless, the Commission addresses the merits of Donohoe's position above.

[94] 15 U.S.C. § 717c-1 (2006). EPAct 2005 added a parallel provision to the FPA. 16 U.S.C. § 222(a) (2006).

[95] *See* 15 U.S.C. § 717c-1 (2006).

Congress not to refer specifically to "individuals" or "persons" in NGA section 4A means that it cannot apply to natural persons. Indeed, were the Commission to conclude that use of the term "person" in the same statute as "entity" implied the exclusion of the former, it would follow that NGA section 4A could not be applied to corporations as well, because NGA section 2 defines "person" to include a corporation.[96] The Commission rejects such a strained reading of NGA section 4A.

51. The Commission also disagrees that application of NGA section 4A to natural persons conflicts with other provisions of the NGA or EPAct 2005. With the enactment of NGA section 4A, Congress declared it unlawful for a broad range of entities to engage in manipulative or deceptive practices in connection with the jurisdictional purchase or sale of natural gas or jurisdictional transportation services. At the same time, Congress restricted the application of penalties under NGA sections 21 and 22 only to "persons,"[97] defined to include individuals and corporations,[98] that engage in prohibited activities. Use of a more limited term in NGA sections 21 and 22 does not, however, require a restrictive interpretation of the term "entity" in NGA section 4A. Again, the failure of Congress to define the term "entity" leaves the Commission with discretion to do so, and the Commission concludes that it would be unreasonable to adopt the more narrow interpretation advocated by Respondent Donohoe. Use of the term "entity" in NGA section 23(a)(3), also enacted by EPAct 2005, does not compel a different outcome.[99] The price transparency required in that section could conceivably be performed by a group of individuals and, therefore, use of the term "entities" does not require an interpretation of the term to exclude natural persons.

52. The Commission notes that Respondent Hunter unsuccessfully raised in the district court the question of the Commission's jurisdiction over him as an individual. The court did not rule directly on this issue because it determined that Hunter had not satisfied the requirements for a preliminary injunction. The court did, however, suggest that Hunter's argument lacked merit:

> Hunter cannot demonstrate that FERC's [Show Cause Order] is the "brazen defiance" of its statutory authority required to constitute an "*ultra vires*" act

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[96] *See id.* § 717a(1).

[97] *See id.* §§ 717t(a), 717t-1(a).

[98] *See id*. § 717a(1).

[99] *See id.* § 717t-2(a)(3). This section directs the Commission to facilitate price transparency in jurisdictional markets, permitting the Commission to rely on "entities other than the Commission to receive and make public the information." *Id.*

> that warrants judicial review at this time. This is particularly true when Congress, in adopting the EPAct in 2005, expanded FERC's enforcement authority to reach *any* entity, that directly or indirectly, engages in manipulative practices, *in connection with*, natural gas transportation and sales.[100]

53. Enforcement Litigation Staff and Donohoe debate whether *American Dental* supports their positions. In that case, the Department of Health and Human Services (HHS) adopted regulations implementing the Health Care Quality Improvement Act of 1986, which the court concluded did not employ the term "entity" to refer to individuals and, in some cases, used the term in conjunction with phrases that specifically referred to individuals. The court further found that the statutory language was clear on its face.[101] Neither is the case here. The NGA, as amended by EPAct 2005, does not use the term "entity" in ways that clearly indicate the exclusion of natural persons, nor in ways that contradict other provisions of the NGA. Indeed, interpretation of the term to exclude "persons" would contradict the structure of the NGA, which defines "persons" to include corporations, as noted above.

54. Donohoe also relies repeatedly on *Wolverine*, where the court rejected the Commission's determination that it had the authority to assess civil penalties against a company that had failed to obtain required licenses. While the statute authorizing such penalties allowed the Commission to impose the civil penalties on "any licensee, permittee, or exemptee who violates or fails or refuses to comply with [the Commission's regulations],"[102] the Commission implemented a regulation making "persons" subject to potential penalties.[103] The court pointed out that the statutory text expressly restricted the Commission's civil penalty authority to violations committed by licensees, permittees, or exemptees, concluding that Congress did not intend to allow the applicability of civil penalty authority to be extended beyond the specified entities.[104] Again, the statutory provisions in that case are not analogous to those at issue in this proceeding.

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[100] *Hunter v. FERC*, 527 F. Supp. 2d 9, 19 n.6 (D.D.C. 2007) (citations omitted).

[101] *American Dental Ass'n v. Shalala*, 3 F.3d 446, 447-48 (D.C. Cir. 1993). The particular requirement at issue in *American Dental* involved the reporting of malpractice payments to a data bank.

[102] *Wolverine Power Co. v. FERC*, 963 F.2d 446, 447 (D.C. Cir. 1992).

[103] *See id. at* 450.

[104] *Id. at* 453.

55. In *Wolverine*, the applicable statute specifically listed those against which penalties could be assessed, while here Congress specifically chose to use a broad term that is subject to interpretation. The most that can be said is that the term “entity” could be interpreted either narrowly or broadly. In light of the specific directive of Congress to implement the prohibition stated in NGA section 4A through rules “as necessary in the public interest or for the protection of natural gas ratepayers,”[105] a narrow interpretation of the term would unreasonably frustrate the ability of the Commission to punish acts of manipulation and deception prohibited in EPAct 2005. The behavior prohibited in NGA section 4A can have a direct and serious impact on the prices of natural gas and transportation subject to the Commission’s jurisdiction, affecting the nation’s economy and the consumers for whose protection the NGA was enacted. While Donohoe suggests that the Commission’s authority to seek an injunction under NGA section 20[106] is sufficient to remedy violations of the Anti-Manipulation Rule, the Commission disagrees. The type of trading activity alleged in the Show Cause Order and the type of manipulation the rule prohibits could occur long before they are discovered. The Anti-Manipulation Rule and the Commission’s civil penalty authority therefore work together to provide a strong incentive for individuals not to engage in manipulation of the natural gas market to the detriment of the public interest and natural gas ratepayers.

2. False Statement Requirement

a. Enforcement Litigation Staff’s Position

56. Enforcement Litigation Staff maintains that the Respondents can be found to have violated the Anti-Manipulation Rule even if the acts of alleged manipulation do not involve false statements. Enforcement Litigation Staff argues that the trading at issue in this proceeding is actionable because it created prices that did not reflect supply and demand and thus the trading was inherently deceptive to the marketplace. Enforcement Litigation Staff contends that this interpretation is consistent with recent securities law precedent effectuating the judgment of Congress that otherwise legitimate trades with real customers can constitute illegal manipulation solely due to the actor’s fraudulent purpose.[107]

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[105] *See* 15 U.S.C. § 717c-1 (2006).

[106] *See id.* § 717(a).

[107] *Citing SEC v. Masri*, 523 F. Supp. 2d 361, 368 (S.D.N.Y. 2007) (*quoting* H.R. Rep. No. 73-3183 (1934)). The court stated that, under the SEA:

> [I]f a person is merely trying to acquire a large block of stock for investment, or desires to dispose of his holdings, his knowledge that in

(continued…)

57. Enforcement Litigation Staff also cites *Markowski v. SEC* (*Markowski*),[108] stating that so-called "open market manipulation" is fraudulent even though it is wholly independent of fictitious transactions such as wash sales or matched sales that the Supreme Court recognized as classic manipulation 30 years ago in *Santa Fe Industries, Inc. v. Green*.[109] Enforcement Litigation Staff emphasizes that the same key allegations that described the actors' manipulative intent in *Markowski* are present in this case (e.g., profit motive plus direct evidence of intent from actors' own words that they intended to affect the market price) and that the claimed distinctions between this case and *Markowski* are actually common features (e.g., very high-volume trading, actual attempts to control the market price rather than to trade in response to legitimate supply and demand, and an "external purpose" to benefit instruments in their portfolio other than the one they manipulated).

58. Enforcement Litigation Staff argues that the Respondents' alleged conduct is closely analogous to the long-recognized and prohibited open market manipulation practice of "marking the close," a fraudulent practice by which a manipulator seeks to alter normal market operations through transactions targeted at the close of exchange trading. Enforcement Litigation Staff maintains that Amaranth traded furiously only at the "snapshot" last 30 minutes of the close -- the time on which the markets focus to set the final settlement price for look-alike swaps (which was Amaranth's target), expiring futures contracts, and other much larger-volume transactions of physical gas. Enforcement Litigation Staff contends that all of the relevant cases recognize a common sense notion that it is harmful and illegal when traders go into the market to control and change prices for their own benefit instead of simply offering to buy or sell at prices set by the fundamentals of supply and demand, and particularly when they succeed, regardless of the legal terminology employed (such as deception, fraud, or manipulation).

b. Respondent's Position

59. Amaranth Parties contend that the high volume, open-market trading alleged in the Show Cause Order cannot constitute manipulation as a matter of law. Amaranth Parties

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> doing so he will affect the market price does not make his action unlawful. His transactions become unlawful only when they are made for the purpose of raising or depressing the market price.

[108] 274 F.3d 528, 528-29 (D.C. Cir. 2001).

[109] 430 U.S. 462, 476 (1977). *See also Markowski v. SEC*, 274 F.3d 528, 528-29 (D.C. Cir. 2001); *ATSI Commc'n, Inc. v. Shaar Fund, Inc.*, 493 F.3d 87, 100-01 (2d Cir. 2007) (*quoting SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1466 (2d Cir. 1996) (*quoting* H.R. Rep. No. 73-1383, at 11 (1934)).

argue that, under securities case law, manipulative conduct involves the injection of inaccurate information in the marketplace to crease a false impression of how market participants value a security.[110] Amaranth Parties state that this precedent is consistent with manipulation cases under the CEA, relied upon by Enforcement Litigation Staff in other contexts,[111] which typically allege something more than mere open-market trading.[112]

60. Amaranth Parties dispute the applicability of *Markowski* to the facts of this proceeding. Amaranth Parties contend that the SEC in that case found that inaccurate information in the form of bids for securities was published with the sole manipulative purpose of keeping the price of those securities at an artificially high level.[113] Amaranth Parties state that the D.C. Circuit affirmed that determination, rejecting arguments that the bids at issue were real as opposed to fictitious.[114] Amaranth Parties argue that no allegations have been made in this proceeding that they similarly injected inaccurate information into the marketplace. Amaranth Parties also distinguish *Markowski* as involving the intentional restriction of access to securities in an effort to increase prices, while the futures at issue in this proceeding are not limited in number, and it is less plausible for one investor to dominate the market. Amaranth Parties further argue that there was no real dispute in *Markowski* as to the existence of an artificial price, while there was ample demand for the NG Futures Contracts at issue in this proceeding aside from the Amaranth Parties' legitimate trading.

61. Amaranth Parties also reject any reliance on *Masri*, arguing that the case failed to recognize binding precedent addressing the issue of whether manipulative conduct alone can support liability for otherwise legal open-market transactions.[115] Amaranth Parties

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[110] *Citing ATSI*, 493 F.3d 87; *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 207 (3d Cir. 2001); *Nanopierce Tech., Inc. v. Southridge Capital Mgmt.*, 02 Civ. 0767, 2008 WL 250553 (S.D.N.Y. Jan. 28, 2008), *reconsideration denied*, 2008 U.S. Dist. LEXIS 34560 (S.D.N.Y. Apr. 24, 2008).

[111] *Citing* Staff's Br. at 61-62.

[112] *Citing In re Natural Gas Commodity Litig.*, 337 F. Supp. 498, 503 (S.D.N.Y. 2004); *Transnor (Bermuda) Ltd v. BP N. Am. Petroleum*, 738 F. Supp. 1472, 1493-96 (S.D.N.Y. 1990).

[113] *Citing In the Matter of Markowski*, Exchange Act Release No. 43,259 SEC Decision Sept. 7, 2000).

[114] *Citing Markowski*, 274 F.3d at 528-30.

[115] *Citing ATSI*, 493 F.3d at 100-01.

further distinguish the facts of *Masri*, which they state involved trading constituting 75 percent of the buying activity in question through sales that had been broken into small increments. Amaranth Parties contend that the trading at issue in this proceeding constituted only 13 to 17 percent of total settlement period trading volume and that there is no evidence that the trading was broken into smaller increments.

62. Amaranth Parties further dispute Enforcement Litigation Staff's analogy to "marking the close" in the securities context. Amaranth Parties argue that, unlike in a securities market, market participants do not have to trade in the derivatives market with participants that are distorting prices with their trading activity. Amaranth Parties argue that "marking the close" simply does not work in a derivatives market because there can never be a mismatch between demand and supply near the expiration of the market.[116] Amaranth Parties contend this is particularly true in the NYMEX NG Futures Contract market because price is a function of the volume-weighted average price over the last half-hour of trading, not the last transaction of the day. By having a volume-weighted average price over 30 minutes, argue Amaranth Parties, all trades are taken into consideration in determining the settlement price, thus substantially diminishing, if not eliminating, the possibility that an investor could mark the close. Amaranth Parties further note that the NG Futures Contract settlement prices are reviewed by a NYMEX Settlement Committee, which scrutinizes trading during the settlement period to ensure that the settlement price accurately reflects the normal function of supply and demand.

63. Respondent Hunter similarly argues that large volume selling alone does not constitute actionable manipulation, regardless of the trader's subjective intent, because such large volume alone does not deceive the market about whether the price reflects the natural interplay of market forces.[117] Hunter contends that actionable manipulation requires some form of deceptive or manipulative conduct that has the effect of injecting inaccurate information into the marketplace. Hunter argues that the cases finding manipulation through non-fictitious trading or open-market manipulation all involved some other form of deceptive conduct that injected false information into the marketplace, such as secretly executing transactions through nominee accounts, secretly absorbing securities into inventory, or deliberately trading at something other than prevailing market prices.

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[116] *Citing Bd. of Trade v. SEC*, 187 F.3d 713, 724-25 (7th Cir. 1999).

[117] *Citing Gruntal & Co., Inc. v. San Diego Bancorp*, 901 F. Supp. 607 (S.D.N.Y. 1995).

c. Commission Determination

64. The Commission agrees with Enforcement Litigation Staff that specific false statements need not be made in order to trigger potential liability under NGA section 4A. Open market transactions send false signals to market participants if such transactions are undertaken with the intention of creating a false price. A central issue in this proceeding is whether the Respondents' activity in the NG Futures Contract market on the days in question was intended to create a price that was not reflective of supply and demand and, if so, whether the activity in fact resulted in artificial prices in that market. If these questions are answered in the affirmative, then it would be reasonable for the Commission to find that the Respondents engaged in manipulation within the meaning of NGA section 4A.

65. The Commission disagrees with Amaranth Parties that Enforcement Litigation Staff has failed to allege that inaccurate information was injected into the marketplace by the Respondents' trading activity. Enforcement Litigation Staff specifically alleges that the Respondents intentionally manipulated the settlement price of the NG Futures Contract[118] and that the creation of a price that does not reflect supply and demand is inherently deceptive to the marketplace.[119] The Commission also disagrees with Respondent Hunter that some other form of deceptive conduct is required in order to prove liability under NGA section 4A. In *Markowski*, the court concluded that trading undertaken for the purpose of keeping prices at an artificial level serves to inject inaccurate information into the marketplace.[120] In attempting to distinguish *Markowski* from the facts of this proceeding, Amaranth Parties obscure the core holding of that case: that intentional manipulation of market prices for the purpose of benefitting other instruments in the actor's portfolio is actionable, even in the absence of evidence that specific false statements were made. The Commission therefore rejects the contention that false statements are required in order to violate NGA section 4A.

3. Reckless Conduct

a. Enforcement Litigation Staff's Position

66. Enforcement Litigation Staff contends that the Respondents' intentional manipulation of settlement prices in the NG Futures Contract is actionable under NGA section 4A if the Respondents' actions were reckless with regard to their effect on

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[118] *See* Staff's Br. at 34.

[119] *See id.* at 30.

[120] *See Markowski v. SEC*, 274 F.3d 528, 529 (D.C. Cir. 2001).

physical natural gas markets subject to the Commission's jurisdiction. Enforcement Litigation Staff acknowledges that actions that are merely negligent, a mistake, or unintended would not be actionable, but notes that intentional manipulation of the NG Futures Contract market has been alleged. Enforcement Litigation Staff contends that it is irrelevant whether the intentional manipulation's effect on jurisdictional transactions is, in turn, intentional or reckless.

67. Enforcement Litigation Staff cites the express wording of Order No. 670 in support of its claim that recklessness generally satisfies the *scienter* element of the Anti-Manipulation Rule.[121] Enforcement Litigation Staff notes that the Commission explicitly acknowledged in Order No. 670 that not every common-law fraud that happens to touch a jurisdictional transaction would be actionable under the Anti-Manipulation Rule. Enforcement Litigation Staff states that the Commission instead limited the Anti-Manipulation Rule only to instances where the entity intended to affect, or has acted recklessly to affect, a jurisdictional transaction.[122] Enforcement Litigation Staff acknowledges that the Commission's stated goal is to ensure that there is a "nexus between the fraudulent conduct of an entity and a jurisdictional transaction."[123]

68. Enforcement Litigation Staff states that courts have settled on the definition of recklessness in securities cases, which it applies here as well:

> [R]eckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.[124]

Enforcement Litigation Staff contends that the conduct at issue in this proceeding clearly meets this standard as well as common law principles of proximate cause.[125]

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[121] *Citing* Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 53.

[122] *Citing id.* P 22.

[123] *Quoting id.*

[124] *Quoting Sundstrand Corp. v. Sun Chem. Corp*., 553 F.2d 1033, 1045 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977) (citation and internal quotes omitted).

[125] *Citing Palsgraf v. Long Island R.R. Co*., 248 N.Y. 339 (N.Y. 1928).

b. Respondents' Position

69. Amaranth Parties argue that no allegations have been made that they intentionally manipulated a jurisdictional transaction. Amaranth Parties argue that the Show Cause Order must allege that Respondents acted with the requisite *scienter* to manipulate a market in connection with the purchase or sale of natural gas subject to the Commission's jurisdiction.[126] Amaranth Parties assert that the Commission acknowledged in Order No. 670 that EPAct 2005 was not intended to expand the types of transactions subject to the Commission's jurisdiction within the NGA.[127] Amaranth Parties argue that the Commission therefore cannot construe the "in connection with" element of the Anti-Manipulation Rule as a grant of authority to regulate conduct it could not regulate prior to EPAct 2005. Amaranth Parties contend that the Commission recognized this limitation in Order No. 670 by stating that the Anti-Manipulation Rule was designed "to prohibit manipulation and fraud in the markets the Commission is charged with regulating" and "to deter or punish fraud in wholesale energy markets."[128] Amaranth Parties characterize the Commission's reference to recklessly affecting jurisdictional markets as a reference to the level of *scienter* required, not whether an action was "in connection with" a jurisdictional transaction.

70. Amaranth Parties contend that their interpretation of the "in connection with" element is consistent with SEA section 10(b) precedent on which the Anti-Manipulation Rule is based. Amaranth Parties contend Order No. 670 therefore requires a showing of knowing or intentional misconduct designed to affect a transaction subject to the Commission's jurisdiction. Amaranth Parties object to Enforcement Litigation Staff's reliance on common law principles of proximate cause as unsupported by caselaw under section 10(b)[129] and an attempt to expand the Commission's jurisdiction to any market where manipulation may occur that has an impact on physical natural gas prices.

71. Respondents Donohoe and Hunter similarly argue that Enforcement Litigation Staff must plead and prove that they intended to affect a jurisdictional transaction. Donohoe argues that his trading took place solely in the NG Futures Contract market and, therefore, Enforcement Litigation Staff cannot establish the required jurisdictional nexus.

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[126] *Citing* Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

[127] *Citing id.* P 22.

[128] *Quoting id.* at P 5.

[129] *Citing Chemical Bank v. Arthur Anderson & Co.*, 726 F.2d 930, 943 (2d Cir. 1984).

Hunter argues that Enforcement Litigation Staff has cited no support for the proposition that, in a manipulation case, the respondent need not actually have intended to manipulate the price of a jurisdictional transaction.

c. Commission Determination

72. In Order No. 670, the Commission explained that the Anti-Manipulation Rule prohibits (1) fraudulent or deceptive behavior, (2) with the requisite *scienter,* (3) in connection with the purchase or sale of jurisdictional natural gas or electric energy.[130] In this proceeding, Enforcement Litigation Staff has alleged that the Respondents acted intentionally with regard to attempts to manipulate settlement prices in the NG Futures Contract market. At issue, then, is whether the Respondents also must have intended for their trading activity to affect physical natural gas prices subject to the Commission's jurisdiction. The Commission made clear in Order No. 670 that acting with reckless disregard to jurisdictional transactions is sufficient to trigger potential liability under the Anti-Manipulation Rule.[131]

73. The Commission disagrees with Respondents that applying the Anti-Manipulation Rule to intentional behavior that recklessly affects jurisdictional markets effectively expands the types of transactions subject to the Commission's jurisdiction under the NGA. The Commission has not exercised jurisdiction over transactions in the futures market. Rather, the Commission has initiated a proceeding in order to determine whether intentional, manipulative behavior in that market negatively affected transactions within the Commission's exclusive jurisdiction in violation of NGA section 4A and the Anti-Manipulation Rule. The Commission reiterates that the Anti-Manipulation Rule is not intended to cover every common law fraud that happens to touch a jurisdictional transaction.[132] The "in connection with" element of the Anti-Manipulation Rule ensures that only fraudulent and manipulative activity that has a nexus to a jurisdictional transaction is actionable. Whether the effect on the jurisdictional transaction is intentional or reckless is not dispositive. The Commission leaves for hearing whether the Respondents in fact acted recklessly with regard to the effect of their trading activity on jurisdictional transactions.

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[130] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

[131] *Id.* P 22.

[132] *See id.*

C. *De Novo* Review

1. Enforcement Litigation Staff's Position

74. Enforcement Litigation Staff supports the Commission's conclusion in *Energy Transfer Partners, L.P.* (*ETP*),[133] that any Commission assessment of penalties under NGA section 22 should be reviewed by a court of appeals, not a federal district court.

2. Respondents' Position

75. Amaranth Parties contend that they are entitled to have any determination of civil penalty liability immediately adjudicated in a *de novo* trial in federal district court. Amaranth Parties argue that NGA section 24 grants federal district courts exclusive jurisdiction over actions to enforce liabilities created by the NGA. Amaranth Parties further argue that due process requires that a party affected by a government action be given the opportunity to be heard at a meaningful time and in a meaningful manner.[134] Amaranth Parties object to a review of a Commission decision in this case by the court of appeals as insufficient in light of the deference that will be given. Amaranth Parties acknowledge that the Commission addressed this issue in the *ETP* proceeding, but ask the Commission to reconsider its determination.

76. Respondent Hunter similarly objects to the Commission's determination in *ETP*, arguing that the federal district courts have exclusive jurisdiction over violations of the NGA and not just over a collective action or an injunction. Hunter disagrees with the Commission's conclusion in *ETP* that interpreting NGA section 24 as requiring *de novo* adjudication in federal district court would render superfluous NGA section 19, which provides for review in the courts of appeal. Hunter notes that the FPA provides for *de novo* adjudication of violations while similarly providing review of Commission decisions in the courts of appeal. Hunter also argues that NGA section 22 cannot be read to authorize agency adjudication of violations given that parallel provisions in the FPA and Natural Gas Policy Act (NGPA) provide for *de novo* adjudication of violations in the federal district courts.[135] Hunter notes that FPA section 31(d) further directs the Commission to give the target of a choice regarding how alleged violations will be adjudicated, again contradicting the Commission's conclusion that the language of NGA section 22, which parallels FPA section 31(c) can be read to exclude *de novo* review in the district court.

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[133] 121 FERC ¶ 61,282, at P 63, 96 (2007).

[134] *Citing Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

[135] *Citing* 15 U.S.C. § 3414; 16 U.S.C. § 825o-1 (2006).

3. Commission Analysis

77. The Commission thoroughly addressed in *ETP* the issue of whether there must be a *de novo* review in a United States district court before any civil penalty may be imposed under NGA section 22.[136] For the reasons stated in that order, the Commission again concludes that Congress intended that "the Commission's assessment of NGA section 22 civil penalties should be reviewed by a court of appeals rather than a federal district court."[137] The Commission notes that the federal district courts in New York and the District of Columbia have agreed, unambiguously holding that review of Commission orders must be by United States courts of appeals rather than district courts.[138]

D. Pending Requests for Rehearing and Procedural Motions

78. On August 27, 2007, Amaranth LLC filed a request for rehearing of the Show Cause Order stating that it joined the request for rehearing of Amaranth Advisors, L.L.C., Amaranth Advisors (Calgary) ULC, Amaranth Management Limited Partnership, and Amaranth Group objecting to the Commission's assertion of subject matter jurisdiction in this proceeding under NGA section 4A.[139] Amaranth LLC also contended that the Commission determined that it has personal jurisdiction over Amaranth LLC without giving that entity an opportunity to contest that determination. Similarly, AIL filed a timely request for rehearing, adopting the arguments presented in the two previously-mentioned requests for rehearing. AIL further contended that, in the Show Cause Order, the Commission erred by determining that it has personal jurisdiction over AIL, that AIL might be held vicariously liable for the alleged manipulative acts, and that the Commission has jurisdiction to impose civil penalties against AIL. As noted above, Donohoe filed a request for rehearing after the statutory deadline.

79. For the reasons discussed above and in the Rehearing Order, the Commission denies rehearing with respect to the issue of subject matter jurisdiction. As also stated

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[136] *ETP,* 121 FERC ¶ 61,282 at P 53-66.

[137] *Id.* P 66.

[138] *CFTC v. Amaranth Advisors, L.L.C.,* 523 F. Supp. 2d 328, 338 (S.D.N.Y. 2007); *Hunter v. FERC*, 527 F. Supp. 2d 9, 20 (D.D.C. 2007).

[139] Also on August 27, 2007, Amaranth Advisors, L.L.C., Amaranth Advisors (Calgary) ULC, Amaranth management Limited Partnership, and Amaranth Group filed a joint request for rehearing of the Show Cause Order. The Commission addressed that request for rehearing in the Rehearing Order. *Amaranth Advisors, L.L.C.,* 121 FERC ¶ 61,224 (2007).

above, the Commission is setting for hearing the questions of whether Respondents AIL and Hunter have had sufficient contacts with the United States to justify the exercise of personal jurisdiction in this proceeding. Accordingly, the Commission will defer ruling on those questions until the hearing process has been completed and the ALJ has issued an initial decision.

80. In the order issued December 6, 2007, in this proceeding, the Commission denied all pending motions for stay except those filed by Hunter and Donohoe.[140] In his emergency motion to stay the proceedings filed December 5, 2007, Donohoe asked for a stay pending judicial review of the Commission's finding of jurisdiction in the Show Cause Order or an extension of time to respond to the Show Cause Order until two weeks after any denial of a related motion to stay filed with the D.C. Circuit. In the alternative, Donohoe requested a stay until two weeks after the Commission issues an order in response to his request for rehearing of the Show Cause Order challenging the finding that the Commission has jurisdiction to enforce its Anti-Manipulation Rule against natural persons, whichever is later. Hunter also filed a motion to stay on December 5, 2007, asserting that the question of whether the Commission has jurisdiction to pursue an administrative enforcement action for civil penalties against him individually in this proceeding was pending before the District Court for the District of Columbia.

81. The Commission denies the motions for stay filed by Donohoe and Hunter. On December 10, 2007, the District Court for the District of Columbia denied Hunter's motion for a temporary restraining order and a preliminary injunction to enjoin the Commission from exercising jurisdiction over him.[141] Additionally, the Commission determined above that the term "entity" in the Anti-Manipulation Rule includes natural persons.

The Commission orders:

(A) Pursuant to the authority of the NGA, particularly sections 4, 4A, 5, 8, and 15 thereof, and pursuant to the Commission's Rules of Practice and Procedure, a public hearing is to be held in Docket No. IN07-26-000 concerning the allegations contained in the Show Cause Order issued July 27, 2006, as discussed above.

(B) A Presiding ALJ, to be designated by the Chief ALJ for that purpose pursuant to 18 C.F.R. § 375.304, must convene a prehearing conference in this proceeding to be held within 20 days after issuance of this order, in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First St., N.E.,

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[140] *Amaranth Advisors, L.L.C.,* 121 FERC ¶ 61,238 (2007).

[141] *Hunter v. FERC*, 527 F. Supp. 2d 9.

Washington, DC 20426. The prehearing conference is for the purpose of clarification of the positions of the participants and establishment by the Presiding ALJ of any procedural dates necessary for the hearing. The Presiding ALJ is authorized to conduct further proceedings in accordance with this order and the Rules of Practice and Procedure. Based on the complexity of the issues to be addressed at the hearing, the Chief ALJ is authorized to determine the track schedule for the hearing.

(C) The pending requests for rehearing of the Show Cause Order, motions for stay of the proceedings, and motions for summary disposition are denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.