ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 07-1491

AMARANTH ADVISORS L.L.C., *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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November 10, 2008

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the briefs of Petitioners.

B. Rulings Under Review

1. *Amaranth Advisors L.L.C.*, 120 FERC ¶ 61,085, JA 5 (2007) (Show Cause Order); and

2. *Amaranth Advisors L.L.C.*, 121 FERC ¶ 61,224, JA 80 (2007) (Rehearing Order).

C. Related Cases

This case has not been before this Court or any other court. *Hunter v. FERC*, No. 08-5380 (D.C. Cir.) and *CFTC v. Amaranth Advisors, LLC*, No. 1:07-cv-06682-DC (S.D.N.Y.) are related to this case as they arise from the same acts at issue in this proceeding. By order of September, 25, 2008 in this appeal (No. 07-1491), the Court directed that oral argument for this appeal and for Docket No. 08-5380 be held on the same day before the same panel.

Lona T. Perry
Senior Attorney

November 10, 2008

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GLOSSARY

Amaranth	Collectively Amaranth Advisors, LLC, Amaranth LLC, Amaranth Management Limited Partnership, Amaranth International Limited, Amaranth Partners LLC, Amaranth Capital Partners, LLC, Amaranth Group, Inc., and Amaranth Advisors (Calgary) ULC
Anti-Manipulation Rule	18 C.F.R. § 1c.1
CEA	Commodity Exchange Act
CFTC	Commodity Futures Trading Commission
EPAct 2005	Energy Policy Act of 2005
Exchange Act	Securities Exchange Act of 1934
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Futures Industry Group	Collectively the Futures Industry Association, Managed Funds Association, CME Group, Inc. and National Futures Association
NGA	Natural Gas Act
NG Futures Contracts	natural gas futures contracts
NLRB	National Labor Relations Board
TRAC	*Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984)

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the challenged orders are unfit for immediate review where they only required that petitioners show cause why they had not violated the Federal Energy Regulatory Commission's (FERC) Anti-Manipulation Rule, and no final determination regarding alleged violations or the imposition of penalties will be made until the completion of ongoing agency proceedings.

2. Whether FERC reasonably determined that its anti-manipulation jurisdiction under § 4A of the Natural Gas Act (NGA), which empowers FERC to prosecute manipulation occurring "in connection with" FERC-jurisdictional transactions, encompassed manipulative conduct in the natural gas futures market that had a direct effect on the price of FERC-jurisdictional physical natural gas transactions.

3. Whether FERC reasonably determined that the Commodity Futures Trading Commission's (CFTC) exclusive jurisdiction over the operation of futures markets does not preclude the exercise of FERC's prosecutorial authority under NGA § 4A over manipulative conduct occurring in the futures market that directly affects FERC-jurisdictional natural gas transactions.

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in the Addendum to this brief. In particular, FERC bases its action on its new authority under the Energy Policy Act of 2005 (EPAct 2005), Pub. L. No. 109-58, § 315 (2005) (codified at NGA § 4A, 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 the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15

> U.S.C. 78j(b)) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. . . .

Petitioners and supporters, in challenging FERC's authority to act, rely on the CFTC's authority under Commodity Exchange Act (CEA) § 2(a)(1)(A), 7 U.S.C. § 2(a)(1)(A), which provides in pertinent part that:

> The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements [of various types] and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated or derivatives transaction execution facility registered pursuant to section 7 or 7a of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title. . .

COUNTERSTATEMENT OF JURISDICTION

In Argument Section II, *infra,* pursuant to this Court's direction in its July 11, 2008 Order, FERC demonstrates that the challenged orders are not final, reviewable orders because the orders merely required a response to a Show Cause Order. No final determination regarding any alleged violation has been made, and the matter has been set for hearing before FERC and remains pending.

INTRODUCTION

In the wake of the manipulation of prices in western energy markets during 2000-01, Congress expanded FERC's anti-manipulation authority in

the natural gas markets with the enactment in EPAct 2005 of NGA § 4A (a comparable anti-manipulation provision was enacted for wholesale electric markets). NGA § 4A empowers FERC to prohibit manipulation, not only by direct participants in the physical natural gas markets, but also where "any entity" commits manipulation, directly or indirectly, "in connection with" jurisdictional transactions. FERC implemented this authority in *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047, *reh'g denied*, 114 FERC ¶ 61,300 (2006), by adopting regulations forbidding the proscribed conduct. *See* 18 C.F.R. § 1c.1 (the Anti-Manipulation Rule) (proscribing manipulation affecting natural gas transactions).

Under this newly-granted enforcement authority, the challenged orders, *Amaranth Advisors L.L.C.*, 120 FERC ¶ 61,085 P 3, JA 5 (Show Cause Order), *reh'g denied*, 121 FERC ¶ 61,224 (2007) (Rehearing Order), required petitioner Amaranth,[1] a hedge fund, and Amaranth traders Brian Hunter and Matthew Donohoe, to show cause why they should not be found in violation of the Anti-Manipulation Rule. Based upon its investigation, FERC preliminarily concluded that Amaranth and its traders had engaged in

[1] Collectively Amaranth Advisors, LLC, Amaranth LLC, Amaranth Management Limited Partnership, Amaranth International Limited, Amaranth Partners LLC, Amaranth Capital Partners, LLC, Amaranth Group, Inc., and Amaranth Advisors (Calgary) ULC.

a manipulative scheme in the natural gas (NG) Futures Contracts market, which directly affected the price for FERC-jurisdictional natural gas transactions, including the price for NG Futures contracts that went "to delivery," *i.e*. resulted in an actual sale of physical natural gas, during the time period in question.

These agency proceedings are ongoing. *See Amaranth Advisors, LLC*, 124 FERC ¶ 61,050 (2008) (Hearing Order) (setting matters for evidentiary hearing before an administrative law judge). FERC has not finally determined that Amaranth's conduct does in fact fall within the scope of NGA § 4A. Rather, all FERC has determined at this juncture is that the conduct alleged -- if proven -- falls within the scope of FERC's NGA § 4A authority, which prohibits manipulative conduct, directly or indirectly, "in connection with" FERC-jurisdictional transactions.

This exercise of jurisdiction over conduct affecting FERC-jurisdictional markets does not, moreover, infringe upon or impede the jurisdiction of the CFTC over futures markets under CEA § 2(a)(1)(A). Instead, FERC interpreted its NGA § 4A jurisdiction harmoniously with that of the CFTC, so that both agencies have full authority to prosecute manipulation affecting their jurisdictional markets.

STATEMENT OF FACTS

I. THE EXPANSION OF FERC's ANTI-MANIPULATION AUTHORITY IN THE ENERGY POLICY ACT OF 2005.

Following the manipulation of prices in western energy markets during 2000-01, Congress expanded FERC's anti-manipulation authority with the enactment of NGA § 4A (and a companion statute in the Federal Power Act (FPA)):

> This bill also takes steps to respond to the disastrous western energy crisis . . . As I have recounted many times on this floor, the illegal and unethical practices of Enron and others sent Washington power rates through the roof. This Energy bill puts in place the first ever broad prohibition on manipulation of electricity and natural gas markets.

151 Cong. Rec. S 9335 at 17 (daily ed. July 29, 2005) (statement of Sen. Cantwell).

The new statutory authority empowered FERC to prohibit manipulation, not only by direct participants in the physical natural gas (or wholesale electric) markets, but also where "any entity" commits manipulation, directly or indirectly, in connection with jurisdictional transactions. Congress also substantially increased the remedies available to FERC to punish and deter violations of FERC regulations, orders, rules or policies, including increased civil penalties of up to $1,000,000 per

violation, per day. Show Cause Order P 3, JA 5 (citing EPAct 2005 § 314(b), codified at 15 U.S.C. § 717t-1).

II. ORDER NO. 670 AND THE ANTI-MANIPULATION RULE

In Order No. 670, P 5, JA 522-23, FERC adopted the Anti-Manipulation Rule implementing the new NGA § 4A. *See* 18 C.F.R. § 1c.1. Because NGA § 4A dictated that certain aspects of FERC's new authority be exercised in a manner consistent with § 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78j(b), and NGA § 4A was modeled on Exchange Act § 10(b), FERC modeled its implementing regulation on the SEC's Rule 10b-5, 17 C.F.R. § 240.10b-5. Order No. 670 P 7, JA 523-24. *See* JA 581 (text of rule).

III. THE SHOW CAUSE ORDER

In the Show Cause Order, JA 1-79, FERC ordered respondents Amaranth, and traders Hunter and Donohoe, to show cause why they had not violated FERC's Anti-Manipulation Rule, and why civil penalties and disgorgement should not be imposed based upon these violations. *See* Show Cause Order PP 28-33, JA 18-19 (describing role of various Amaranth entities); *id*. PP 35-36, JA 19-20 (describing Hunter and Donohoe's role).

FERC preliminarily concluded that respondents manipulated the price of FERC-jurisdictional transactions[2] by trading in NG Futures Contracts on February 24, March 29, and April 26, 2006, with the intent and result of producing artificial settlement prices for these contracts. Show Cause Order P 5, JA 6. The NG Futures Contract is a contract for the future delivery of natural gas under standardized terms.[3] *Id*. P 10, JA 8. The NG Futures Contract "settlement price" is the average price of trades made during the 30-minute "settlement period," which is the last 30 minutes of trading on the termination day for the "prompt-month" (the next calendar month) contract. *Id*. P 14, JA 10.

FERC preliminarily found that Amaranth manipulated the price of NG Futures Contracts by holding open extraordinarily large positions in NG Futures Contracts and then liquidating the contracts on the days in question at the end of the settlement period. *Id*. P 57, JA 34. This behavior had the effect of artificially driving down the NG Futures Contract settlement price,

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[2] FERC-jurisdictional natural gas sales are wholesale natural gas sales for resale in interstate commerce, NGA § 1(b), 15 U.S.C. § 717(b), that are not "first sales" within the meaning of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3431(a).

[3] The terms are delivery of 10,000 MMBtu (one million british thermal units) of natural gas over the course of the contract month to the buyer's interconnection on the Sabine Pipe Line Co.'s Henry Hub in Louisiana.

to the benefit of Amaranth's much larger portfolio of opposing financial derivatives whose value increased as the NG Futures Contract price declined. *Id*. PP 57-58, JA 34, P 62, JA 36. *See id*. PP 59-106, JA 34-64 (describing challenged Amaranth trading in detail).

FERC preliminarily concluded that this manipulation affected the price of FERC-jurisdictional transactions directly and indirectly. Most obviously, the NG Futures Contract settlement price directly determines the sales price for NG Futures Contracts that "go to delivery," which are FERC-jurisdictional natural gas transactions. *Id*. P 26, JA 17. During the months at issue here, BP, Louis Dreyfus, UBS, Merrill Lynch, and ConocoPhillips sold natural gas under NG Futures Contracts. *Id*.

The NG Futures Contract settlement price also directly determines the price of "physical-basis" transactions, which are contracts for delivery of natural gas. *Id*. P 20, JA 14. The price of a physical basis transaction is the NG Futures Contract settlement price for the month, plus or minus a fixed amount representing the expected "basis" (or differential for delivery at the delivery location versus Henry Hub) at the time of the transaction.[4] *Id*.

[4] For example, if gas for delivery to Transco Zone 6 (*i.e.*, New York) during August 2007 is expected to be $1 greater than gas delivered to Henry Hub for that month, a physical basis trade for the prompt month would be the settlement price of the August 2007 NG Futures Contract settlement price, plus one dollar.

Several monthly price indices published by the trade press are calculated based on the average price of fixed-price and/or physical basis transactions executed at certain locations during "bid week," the last five business days of the month. *Id*. P 21, JA 14. High percentages of bid week transactions at index points in the East, Mid-Continent, and producing regions along the Gulf Coast are physical basis transactions, and thus the indices at these locations are set primarily by physical basis transactions, which are, in turn, determined by reference to the NG Futures Contract settlement price. *Id*. P 22, JA 14. The price indices -- calculated by reference to physical basis transactions that are calculated by reference to the NG Futures Contract settlement price -- are widely used in bilateral natural gas markets as a price term. *Id*. P 23, JA 15.

The NG Futures Contract settlement price also sets, in whole or in part, the settlement price for a wide range of natural gas derivatives, including natural gas futures swaps and basis swaps. *Id*. P 17, JA 11 (describing derivatives). Certain "options" can also settle on the final NG Futures Contract settlement price. *Id*.

IV. THE REHEARING ORDER

On rehearing, Amaranth asserted that FERC lacked jurisdiction over Amaranth's alleged manipulation because: (1) the disputed conduct was

within the CFTC's exclusive jurisdiction; (2) the disputed conduct was not "in connection with" FERC-jurisdictional transactions as required under NGA § 4A; and (3) Order No. 670 stated that FERC does not regulate manipulation in "non-jurisdictional" transactions. Rehearing Order PP 8-10, JA 83-86.

FERC rejected these contentions. While NG Futures Contracts are not directly FERC-regulated, the settlement price of these contracts has a direct effect on the price of natural gas sales which are within FERC's jurisdiction. Rehearing Order P 11, JA 86. Because of this direct effect on jurisdictional sales, the behavior fell within the NGA § 4A prohibition of manipulation "in connection with" FERC-jurisdictional sales. *Id*. P 23, JA 93. This finding, moreover, did not intrude on, but rather was complementary to, the CFTC's exclusive jurisdiction to oversee the operation of the futures markets. *Id*. P 11, JA 86.

Nor was FERC's determination contrary to Order No. 670. *Id*. P 64, JA 118. Order No. 670 affirmed that NGA § 4A did not expand the transactions that would satisfy the NGA § 4A requirement that affected markets be "subject to the Commission's jurisdiction." *Id*. NGA § 4A did, however, broaden FERC's overall jurisdiction to prohibit any entity, directly

or indirectly, from using a manipulative or deceptive device in connection with the purchase or sale of natural gas subject to FERC's jurisdiction. *Id.*

Following the Rehearing Order, FERC found there were "genuine issues of fact material to the decision in this proceeding that require a hearing before an [administrative law judge]." Hearing Order P 13, JA 125-26. FERC directed the administrative law judge to determine *inter alia* "whether any of the Respondents violated the Anti-Manipulation Rule." *Id.* P 14, JA 126. That proceeding remains pending.

SUMMARY OF ARGUMENT

The challenged orders required Amaranth and traders Hunter and Donohoe to show cause why they should not be found in violation of the Anti-Manipulation Rule. Based upon its investigation, FERC preliminarily concluded that respondents had engaged in a manipulative scheme in the NG Futures Contracts market, which directly affected the price for FERC-jurisdictional natural gas transactions, including the price for NG Futures Contracts that went "to delivery," *i.e.* resulted in an actual sale of physical natural gas, during the time period in question.

These agency proceedings are in the early stages. There has been no final determination by FERC that Amaranth's conduct does in fact fall within the scope of NGA § 4A; rather, FERC has only found an adequate

basis to proceed further with the enforcement action. Accordingly, appellate review is premature at this time.

Assuming jurisdiction, the arguments of Amaranth and its supporters (intervenor CFTC and *amicus* the Futures Industry Group[5]) provide no basis to find that FERC exceeded its jurisdiction in issuing the challenged orders. Although the alleged conduct did not itself occur in a FERC-jurisdictional physical natural gas transaction, NGA § 4A (which was modeled after Exchange Act § 10(b)) prohibits manipulative conduct "in connection with" FERC-jurisdictional natural gas transactions. The phrase "in connection with," under the broad language of the phrase itself and the Exchange Act § 10(b) precedent interpreting it, expands FERC's NGA § 4A authority beyond conduct occurring only in jurisdictional transactions to conduct affecting such transactions.

Nor is FERC's NGA § 4A authority preempted by the CFTC's exclusive jurisdiction over futures markets under CEA § 2(a)(1)(A). Settled principles of statutory construction require the two statutes to be read together, if possible. FERC reasonably determined that the CFTC's exclusive jurisdiction over "accounts, agreements and transactions" in the

[5] Collectively the Futures Industry Association, Managed Funds Association, CME Group, Inc. and National Futures Association.

futures markets did not give the CFTC exclusive jurisdiction over manipulative conduct in futures markets affecting FERC-jurisdictional markets. Where the conduct at issue produced profound cross-market effects, as here, *both* agencies could exercise their authority in their own spheres for the protection of customers in the markets they each regulate.

ARGUMENT

I. STANDARD OF REVIEW

Where a court is called upon to review an agency's construction of the statute it administers, well-settled principles apply. If Congress has directly spoken to the precise question at issue, the court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the statute is silent or ambiguous as to the question at issue, the court must determine whether the agency's interpretation is a "permissible construction" of the statute. *Id.* at 843.

Under *Chevron*, administrative agencies receive deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Here, NGA § 4A expressly

proscribes manipulative conduct "in contravention of such rules and regulations as the Commission may prescribe." This case concerns Amaranth's alleged violation of FERC's Anti-Manipulation Rule, promulgated under FERC's NGA § 4A authority. Therefore, to the extent the Court finds NGA § 4A to be ambiguous, FERC's permissible interpretation should be entitled to deference.

The alleged conflict between FERC's NGA § 4A jurisdiction and the CFTC's CEA § 2(a)(1)(A) jurisdiction, *see* Pet. Br. 51-52; CFTC Br. 10, does not change this result. As demonstrated in Argument Section IV *infra*, FERC's interpretation of NGA § 4A in no way intrudes upon or interferes with the CFTC's exclusive jurisdiction. Rehearing Order P 66, JA 119. Even if there were a conflict, none of the cases relied on by Amaranth or the CFTC undercuts the deference due FERC in interpreting NGA § 4A, unambiguously entrusted to FERC's administration.

Amaranth's cases concern situations where more than one agency is granted authority to interpret the *same* statute, which is not the case here. *See Sallah v. Christopher*, 85 F.3d 689, 691-92 (D.C. Cir. 1996) (Pet. Br. 51-52) (Secretary of State and Foreign Service Grievance Board have "delegated authority under two sequential provisions of § 610(a)."); *Bullcreek v. NRC*, 359 F.3d 536, 541 (D.C. Cir. 2004) (Pet. Br. 52) (both

NRC and DOE implement program under Nuclear Waste Policy Act); *Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000) (Pet. Br. 52) (no deference to FDIC interpretation of general statute of limitations in 28 U.S.C. § 2462).

The CFTC's cases demonstrate that agencies are not entitled to deference in interpreting statutes they do not administer. *New Jersey Air Nat'l Guard v. FLRA*, 677 F.2d 276, 281-82 n. 6 (3d Cir. 1982) (CFTC Br. 10) (deferring to FLRA's interpretation of Labor-Management Act it implements but not to interpretation of allegedly conflicting statute FLRA does not administer); *Ohio Power Co. v. FERC*, 880 F.2d 1400, 1405 (D.C. Cir. 1989), *rev'd on other grounds sub. nom., Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1990) (CFTC Br. 10) (no deference to FERC interpretation of SEC regulation under the Public Utility Holding Company Act).

While FERC claims no entitlement to deference in interpreting CEA § 2(a)(1)(A), neither can the CFTC -- which did not participate in the FERC proceedings below -- claim such an entitlement in the absence of its own authoritative interpretation of CEA § 2(a)(1)(A). *Chevron* deference is not applicable to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

II. THE COURT LACKS JURISDICTION TO REVIEW THE CHALLENGED ORDERS.

In its July 11, 2008 Order, the Court directed the parties to address whether the orders under review lack finality under *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), and *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 242 (1980), and whether jurisdiction exists under the collateral order doctrine, *Meredith v. Fed. Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1046-52 (D.C. Cir. 1999). As demonstrated below, none of the challenged FERC orders is final for purposes of judicial review, nor does jurisdiction exist over the challenged orders under the collateral order doctrine. Rather, FERC's orders did no more than set forth its preliminary view (based on evidence uncovered during its investigation) that Amaranth's actions violated its rules and regulations, provide notice of proposed civil penalties, and establish further procedures to permit Amaranth to respond to the allegations, and to reach a final determination on the merits.

A. The Challenged Orders Are Not Final.

1. The Challenged Orders Do Not Satisfy The *Bennett* Finality Requirements.

For an agency action to be final, *Bennett* requires that the action must "mark the consummation of the agency's decisionmaking process," and must "be one by which rights or obligations have been determined, or from

which legal consequences will flow." *Bennett*, 520 U.S. at 177-78 (internal quotation marks and additional citations omitted).

The challenged orders satisfy neither condition. There is no consummation of FERC's decision-making process, *Bennett*, 520 U.S. at 178; these are only the first steps of formal administrative litigation in which FERC ultimately will make a final determination whether the actions taken by Amaranth were lawful. Such administrative complaints, which simply aver the agency's "reason to believe" that a statutory violation had occurred, are not final agency actions. *Standard Oil*, 449 U.S. at 239. There is no "definitive statement of position" but rather a "threshold determination that further inquiry is warranted and that a complaint should initiate proceedings." *Id*. at 241.

The challenged orders also do not determine any "rights or obligations," and no "legal consequences will flow" from them. *Bennett*, 520 U.S. at 178. Amaranth will only face the adverse consequences of civil penalties or disgorgement if FERC ultimately rules against it. Although Amaranth complains of being subjected to a "costly enforcement proceeding," Pet. Br. 9, the burden of responding to charges is "different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action." *Standard Oil*, 449 U.S. at 242.

2. Amaranth's Jurisdictional Claims Do Not Alter The Finality Analysis.

Amaranth's challenges to FERC's jurisdiction, *see* Pet. Br. 12-13, do not alter the finality analysis. There is no "special rule" of finality that applies "when a litigant challenges the agency's authority to regulate rather than the merits of an agency's act of regulation." *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Comm'n*, 324 F.3d 726 (D.C. Cir. 2003). The policy underlying the finality requirement "'is no less applicable to piecemeal appeals on issues of statutory authority than to piecemeal appeals on other points.'" *Id*. at 733 (quoting *Aluminum Co. of America v. United States*, 790 F.2d 938, 942 (D.C. Cir. 1986)). Thus, while parties may defend against an enforcement action on the ground that the agency lacks jurisdiction, parties "may not preemptively challenge the Government's jurisdiction before the Government has taken any action to enforce the law against them." *Id*. at 732.

Leedom v. Kyne, 358 U.S. 184 (1958) (cited Pet. Br. 12-13), is inapplicable. *Kyne* involved the very limited circumstance where the National Labor Relations Board (NLRB) had clearly violated an express mandate of the statute *and* the plaintiff had no alternate means of review. *Telecomms. Research & Action Ctr. v. FCC* (*TRAC*), 750 F.2d 70, 78 (D.C. Cir. 1984); *Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 550 (D.C. Cir.

1992). Statutory review in the Court of Appeals provides an adequate means of review. *TRAC*, 750 F.2d at 78. Further, the *Kyne* exception to finality applies only where an agency *patently* misconstrues a statute, disregards a *specific and unambiguous* statutory directive, or violates some *specific* statutory command. *Griffith v. Fed. Labor Relations Auth*., 842 F.2d 487, 493 (D.C. Cir. 1988) (citing cases). *See Kyne*, 358 U.S. at 188-89 (cited Pet. Br. 12) (NLRB acted contrary to a specific statutory prohibition); *Gulf Oil Corp. v. United States Dept. of Energy*, 663 F.2d 296, 313 n.88 (D.C. Cir. 1981) (cited Pet. Br. 12) (*Kyne* exception requires a "clear and unambiguous" statutory mandate).

No patent violation of law exists here. *Hunter v. FERC*, 527 F. Supp. 2d 9 (D.D.C. 2007), rejected Hunter's attempt to assert this exception to finality in review of FERC's Show Cause Order. "Simply stated, Hunter cannot demonstrate that FERC's [Show Cause Order] is the 'brazen defiance' of its statutory authority required to constitute an '*ultra vires*' act that warrants judicial review at this time." *Id*. at 17 n.6 (citing *Griffith*, 842 F.2d at 493; *Kyne*, 358 U.S. 184). This is particularly true "when Congress, in adopting EPAct 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." *Id*. (emphasis in original).

3. Other Courts Addressing The Same Or Similar Show Cause Orders Have Found Such Orders Unripe.

Other courts addressing the same or similar Show Cause Orders have found such orders unripe for review.

Hunter v. FERC, 2008 U.S. Dist. LEXIS 58099 at *13 (D.D.C. July 31, 2008), *appeal pending*, *Hunter v. CFTC*, No. 08-5380 (D.C. Cir.), held that the Show Cause Order did not "have the day-to-day effect or hardship needed for final or ripe agency action," notwithstanding the "practical consequences" of participating in the enforcement proceedings. *See also Hunter*, 527 F. Supp. 2d at 17 (no interlocutory review where Show Cause Order was simply "the first step of a formal process designed to determine whether Hunter actually violated any FERC regulations").

Further, whether or not the enforcement proceeding *ever* imposes legal consequences on petitioners depends upon factual determinations yet to be made by the FERC, which may moot petitioners' claims, or lessen the effect of their aggrievement. The Hearing Order expressly directed the administrative law judge to determine "whether any of the Respondents violated the Anti-Manipulation Rule." Hearing Order P 14, JA 126. There is no assurance at this stage that FERC ultimately will even find a violation.

"[A]lthough it is clear that FERC interprets the EPAct to permit it to bring anti-manipulation proceedings against those entities, including individuals, that *affect* its jurisdictional markets, it is far from certain that Hunter's activities will ultimately fall within those confines." *Hunter*, 2008 U.S. Dist. LEXIS 58099 at **13-14 (emphasis in original). In the proceedings before FERC, "Hunter will have ample opportunity to contest whether his conduct violates FERC's anti-manipulation rule, or whether FERC's anti-manipulation rule infringes on the province of the CFTC. Permitting the agency to go forward may not only moot Hunter's claim, but will also provide a context within which our Circuit Court can evaluate FERC's interpretation of its enforcement authority." *Id*.

These considerations are equally applicable to Amaranth. Accordingly, here, the effect of interlocutory judicial review likely would be "interference with the proper functioning of the agency and a burden for the courts," which would lead to "piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary." *Standard Oil*, 449 U.S. at 242.

By order dated March 17, 2008, the Fifth Circuit granted FERC's motion to dismiss a petition for review, *Energy Transfer Partners, L.P. v. FERC*, 5th Cir. No. 07-61021, that challenged a FERC Show Cause Order

issued under FERC's market behavior rules (specifically 18 C.F.R. § 284.403(a)), that predated FERC's NGA § 4A authority. *Energy Transfer Partners, L.P., et al.*, 120 FERC ¶ 61,086 (July 26, 2007), *on reh'g*, 121 FERC ¶ 61,282 (December 20, 2007). FERC moved to dismiss the petition because the Show Cause Order was not a final order; all FERC had done, at that early stage in the proceedings, was to establish formal investigation procedures and direct Energy Transfer Partners to file a formal response to its Show Cause Order. *See* FERC Motion to Dismiss, 5th Cir. No. 07-61021 (filed Jan. 25, 2008).[6] The Fifth Circuit agreed with FERC that the presence of a threshold statutory issue raised by petitioners (in that case, whether the district court has jurisdiction to hear the case *de novo*) did not provide a reason to depart from conventional finality principles.

In contrast, *Public Utils. Comm'n v. FERC*, 894 F.2d 1372 (1990), Pet. Br. 7-10, is inapposite. First, *Public Utils.* found little risk of multiple reviews; the administrative law judge had already completed the factual proceedings by the time of the appeal, and "the task before the ALJ appears to have been somewhat mechanical and thus unlikely to generate issues for

[6] On September 12, 2008, FERC filed a second motion to dismiss, for lack of finality, a second set of Energy Transfer Partners petitions for review (5th Cir. Nos. 08-60730 and 08-60810) of Energy Transfer Partners show cause and hearing orders, in light of ongoing agency enforcement proceedings. On October 30, 2008, the Fifth Circuit issued an order carrying FERC's Motion to Dismiss with the case.

judicial review at all." 894 F.2d at 1377. Here, the hearing before the administrative law judge has not yet occurred, and thus is neither completed nor, once completed, is it unlikely to generate issues for judicial review.

Second, in *Public Utils*., even if reviewable issues did arise from the factual proceedings, "it does not appear that any such issues would be analytically entangled with the present one." *Id*. Here, the jurisdictional question is necessarily entangled with the factual determinations regarding Amaranth's actions. *See Hunter*, 2008 U.S. Dist. LEXIS 58099 at **13-14 (recognizing FERC may not ultimately find conduct violating the Anti-Manipulation Rule). Third, *Public Utils*. found that "[t]here is no possibility that the remaining proceedings might moot the case by giving victory to the loser on other grounds." 894 F.2d at 1377. Here, Amaranth has the opportunity at hearing to disprove the elements of the action against it, thereby potentially obtaining victory in the remaining proceedings. *Hunter*, 2008 U.S. Dist. LEXIS 58099 at **13-14.

Fourth, *Public Utils*. relied on FERC's desire that the issue be reviewed. 894 F.2d at 1377. Amaranth points to a prior FERC motion at JA 494, 501 as evidence that FERC similarly seeks immediate review here. Pet. Br. 9. However, FERC has consistently recognized the "obvious finality concerns" associated with Amaranth's petition for review, *see* JA 499, and

events subsequent to the January 28, 2008 Motion on which Amaranth relies have reinforced those concerns. The District Court has found that the Show Cause Order was not final. *Hunter*, 2008 U.S. Dist. LEXIS 58099 at *13. The Fifth Circuit dismissed a petition for review of a comparable Show Cause order on prematurity grounds. *See* March 17, 2008 Order in *Energy Transfer Partners, L.P. v. FERC*, 5th Cir. No. 07-61021. FERC has set this matter for hearing in the Hearing Order, of which order Messrs. Donohoe and Hunter have sought rehearing. In light of these subsequent developments, Amaranth's petition for review should be dismissed as premature.

B. The Collateral Order Doctrine Does Not Provide Jurisdiction Over The Challenged Orders.

Under *Meredith*, 177 F.3d at 1048-49, in exceptional circumstances a non-final order nevertheless can be immediately reviewed if it conclusively determines an important issue completely separate from the merits of the action, that effectively cannot be reviewed on appeal from a final judgment. *Meredith* allowed interlocutory review because the issue involved -- whether a certain class of employees was effectively immune from suit under the relevant statute -- was "completely independent from the merits of whether petitioners committed the acts charged in the complaint." *Id*. at 1051. Further, as any right to such immunity from suit would be irrevocably lost if

the case were permitted to proceed, the unreviewability and conclusiveness prongs were satisfied. *Id.*

These considerations do not exist here. The jurisdictional issue presented is not a pure question of law, *see* Pet. Br. 10-11, but rather is intertwined with the merits of the charges against Amaranth, which have yet to be determined. The jurisdictional determination here depends upon the scope of FERC's enforcement authority to reach "*any* entity, that directly or indirectly, engages in manipulative practices, *in connection with*, natural gas transportation and sales." *Hunter*, 527 F. Supp. 2d at 17 n.6 (emphasis in original). *See also* Rehearing Order PP 16-17, JA 89. All that FERC has determined at this juncture is that NGA § 4A permits it to pursue actions against those entities engaging in practices that "affect its jurisdictional markets." *Hunter*, 2008 U.S. Dist. LEXIS 58099 at *13. It has not yet determined what actions Amaranth committed and consequently has not determined whether those actions fall within the scope of its NGA § 4A authority. *Id. See, e.g., Reliable*, 324 F.3d at 734 (jurisdictional question is not purely legal where application of statute to the situation presented involves resolving factual issues and creating a record, and may involve agency expertise); *Standard Oil*, 449 U.S. at 246 (claim of illegality did not render administrative complaint a reviewable collateral order because "the

issuance of the complaint averring reason to believe is a step toward, and will merge in, the Commission's decision on the merits.").

Nor is the question of FERC's jurisdiction effectively unreviewable on appeal from FERC's final judgment in this matter. Clearly the issue of FERC jurisdiction can be addressed at that time, on a full record. *Hunter*, 2008 U.S. Dist. LEXIS 58099 at *14. Although Amaranth complains of being subjected to FERC's enforcement proceedings in the meantime, *see* Pet. Br. 11-12, as this Court has found, the burden of litigation before the agency is insufficient grounds for interlocutory review, even where a jurisdictional challenge is raised. *Reliable*, 324 F.3d at 732 (subjection to agency proceedings insufficient grounds for interlocutory review, even where jurisdictional issue is raised); *Aluminum Co.*, 790 F.2d at 941 (same).

C. Amaranth Cannot Show Aggrievement.

Amaranth also fails to meet the requirement under NGA § 19(b), 15 U.S.C. § 717r(b), that a petitioner must be "aggrieved" by a FERC order to seek judicial review. Judicial review is limited to "orders of definitive impact, where judicial abstention would result in irreparable injury to a party." *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 238 (D.C. Cir. 1980) (interpreting companion FPA provision § 313(b), 16 U.S.C. § 825*l*).

Amaranth has suffered no irreparable injury from FERC's establishment of a hearing to determine whether Amaranth committed the alleged violations. *See Hunter*, 527 F. Supp. 2d at 14-15 (finding that Hunter failed to show irreparable harm from FERC's Show Cause Order). The fact that Amaranth must defend itself in the hearing is insufficient. *Standard Oil*, 449 U.S. at 244. "'Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.'" *Id*. (quoting *Renegotiation Board v. Bannercraft Clothing Co*., 415 U.S. 1, 24 (1974)).

III. AMARANTH'S ALLEGED MANIPULATIVE CONDUCT, IF PROVEN, IS WITHIN FERC'S NGA § 4A JURISDICTION.

FERC reasonably concluded that Amaranth's alleged manipulative conduct, if proven, falls within FERC's NGA § 4A jurisdiction because that jurisdiction encompasses manipulation in the futures market that directly affects FERC-jurisdictional natural gas transactions. As demonstrated in the challenged orders and below, FERC's determination is supported by the language of the NGA; it is consistent with, and does not infringe upon, the jurisdiction of the CFTC; and it furthers the NGA objective to ensure that energy markets remain fair and competitive. Rehearing Order P 66, JA 119.

A. Amaranth's Alleged Manipulative Conduct Directly Affected The Price Of FERC-Jurisdictional Natural Gas Transactions.

In the Show Cause Order, *see* Statement of Facts Section III *supra*, FERC preliminarily concluded that Amaranth manipulated (by driving down) the settlement price of NG Futures Contracts by selling an extraordinary amount of NG Futures Contracts during the last 30 minutes of trading before the contracts expired. Show Cause Order P 84, JA 52, P 91, JA 55, P 106, JA 64, P 111, JA 66. *See also* Rehearing Order P 3, JA 82. Amaranth benefitted from driving down the price because it held positions several times larger in various financial derivatives whose value increased as a direct result of the decrease in the NG Futures Contracts settlement price. *Id*.

This manipulative trading behavior "had a direct and substantial effect on the price of Commission-jurisdictional transactions." Rehearing Order P 2, JA 81. *See also* Show Cause Order PP 108-110, JA 64-66; Rehearing Order P 23, JA 93. Contrary to the assertion that FERC "has not identified a single physical natural gas transaction" affected by Amaranth's trading, Pet. Br. 30, FERC showed that Amaranth's trading *directly* affected the settlement price of NG Futures Contracts that went to delivery during the relevant time period. Rehearing Order P 4, JA 82. *See* Show Cause Order P

26, JA 17 ("During the months of interest, blanket certificate holders such as BP, Louis Dreyfus, UBS, Merrill Lynch, and ConocoPhillips each sold natural gas by taking NG Futures Contracts short through expiration in one or more of the months for a total of over 2,000 contracts for approximately 20 Bcf of physical gas that went to delivery."). *See also* Rehearing Order P 14(b), JA 88.

The NG Futures Contract settlement price also is incorporated into the price for physical basis transactions. Show Cause Order P 47, JA 28, P 108, JA 64-65; Rehearing Order P 4, JA 82, P 23, JA 93. The price of a substantial proportion of physical basis transactions are used in indices, and those indices, in turn, price a substantial volume of physical natural gas. Show Cause Order P 47, JA 28-29, P 109, JA 65; Rehearing Order P 23, JA 93.

B. Because Of This Direct Effect On FERC-Jurisdictional Sales, Amaranth's Manipulative Trading Meets The "In Connection With" Requirement Under NGA § 4A.

Because Amaranth's trading conduct directly (and indirectly) affected FERC-jurisdictional sales, Amaranth's conduct satisfies the "in connection with" requirement under NGA § 4A. Rehearing Order P 42, JA 104. In ordinary usage, the phrase "in connection with" is noted for its "pliability." Rehearing Order P 35, JA 100 (quoting Fowler's Modern English Usage 172

(R.W. Burchfield ed., 3d ed. 1996)). In a variety of contexts, courts have broadly and flexibly interpreted the phrase to encompass a wide variety of relationships, always with an eye to accomplishing statutes' broad remedial purposes. *Id*. (citing cases). The phrase "in connection with" in Exchange Act § 10(b), on which NGA § 4A was modeled, has been construed expansively to accomplish its broad remedial purposes. Rehearing Order PP 36-37, JA 101 (citing *SEC v. Zandford*, 535 U.S. 813, 819 (2002); *United States v. O'Hagan*, 521 U.S. 642, 651 (1997); *Superintendent of Ins. of New York v. Bankers Life & Cas. Co.*, 404 U.S. 6, 10 (1971)).

Amaranth contends that, because NGA § 4A specifies that the phrase "any manipulative or deceptive device or contrivance" be interpreted "as those terms are used in [section 10(b)]," Congress did *not* intend that the rest of the statute -- including the "in connection with" requirement -- be so interpreted. Pet. Br. 44-45. However, a comparison of identical phrases used throughout NGA § 4A and Exchange Act § 10(b) shows that Congress modeled NGA § 4A after § 10(b).[7] Rehearing Order P 36, JA 101. "[W]hen

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[7] Compare NGA§ 4A, Statutes and Regulations *supra* at 2, with Exchange Act § 10(b):

§ 10(b). Manipulative and deceptive devices

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or

'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretation as well.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shadi*, 547 U.S. 71, 85 (2006) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)) (cited Rehearing Order P 39, JA 103). Specifically, "Congress can hardly have been unaware of the broad construction adopted by both [the Supreme Court] and the SEC when it imported the key phrase -- 'in connection with the purchase or sale' into" other statutes. Rehearing Order P 39, JA 103 (quoting *Merrill Lynch* , 547 U.S. at 85 (broadly construing the "in connection with" requirement in the Securities Litigation Uniform Standards Act of 1998)).

However, mindful of the admonition that Exchange Act § 10(b) "must not be construed so broadly as to convert every common law fraud that

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> of the mails, or of any facility of any national securities exchange —
>
> * * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

happens to involve securities into a violation," Order No. 670 at P 22, JA 534-35 (quoting *Zandford*, 535 U.S. at 820), FERC reasonably interpreted the "in connection with" element in the energy context as encompassing situations in which there is a "nexus" between the fraudulent conduct and a jurisdictional transaction. Show Cause Order P 110, JA 65; Rehearing Order P 22, JA 92. Based on the direct effects of Amaranth's manipulation on the settlement price of FERC-jurisdictional transactions, including NG Futures Contracts that went to physical delivery during the relevant time period, FERC reasonably found a "nexus" between Amaranth's trading and FERC-jurisdictional transactions. Rehearing Order P 23, JA 93.

Amaranth reads the securities cases, particularly *Zandford*, Pet. Br. 45, as permitting the "in connection with" test to be satisfied only where the manipulation "coincided with the sales themselves." FERC did not read *Zanford* as holding that this "coincidence" is the *only* way to meet the "in connection with" requirement, which is better susceptible to a case-by-case determination. Rehearing Order P 44 & n. 111, JA 106.

In any event, the "coincidence" test is satisfied. Rehearing Order P 44, JA 105-06. As alleged in the Show Cause Order, Amaranth traded between 2:00 and 2:30 PM on each of the three settlement days with the specific intent and actual effect of artificially setting the price of the NG

Futures Contracts. *Id*. Within an instant of that trading, effectively at 2:31 PM, and as a direct result of that trading, the settlement price became the price for physical sales at Henry Hub under NG Futures Contracts that went to delivery. *Id*. It is difficult to imagine much more "coincidence" between Amaranth's trading and FERC-jurisdictional sales. *Id*.

C. Amaranth's Trading Behavior Was "In Connection With" FERC-Jurisdictional Sales Because It Artificially Distorted The Market Price On Which Market Participants Rely.

Amaranth contends that a "mere effect on prices" fails to satisfy the "in connection with" requirement, Pet. Br. 47, and that FERC was required to "allege that [] purchasers of physical natural gas considered (or even were aware of) Amaranth's futures trading when deciding whether to purchase physical natural gas." *Id*. 48. Amaranth attempts to distinguish its situation from cases where "the alleged fraud was 'integral to the purchase and sale.'" Pet. Br. 47-48 (quoting *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 395 F.3d 25 (2d Cir. 2005), *rev'd on other grounds*, 547 U.S. 71 (2006)).

This argument ignores that Amaranth's manipulative conduct artificially distorted the settlement price for NG Futures Contracts, on which participants in the NG Futures Market (some of whom engaged in FERC-jurisdictional physical natural gas sales), and participants in FERC-

jurisdictional natural gas markets, relied. The NGA § 4A phrase "manipulative or deceptive device or contrivance" is to be interpreted "as those terms are used" in Exchange Act § 10(b). Order No. 670 P 6, JA 523. Market manipulation under Exchange Act § 10(b) is defined as conduct "*controlling or artificially affecting* the price of securities." Rehearing Order P 42, JA 104 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) (emphasis added in Rehearing Order)).[8] Thus, "[t]he gravamen of manipulation is deception of investors into believing that prices at which they purchase and sell securities are determined by the interplay of supply and demand, not rigged by manipulators." *Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999). It is precisely the effect on prices, which does not represent the true "interplay of supply and demand," that constitutes the fraud on purchasers and sellers. *See* Rehearing Order P 42, JA 104; Show Cause Order P 45, JA 27. Defendants' "[f]ailure to disclose that market prices are being artificially depressed operates as a deceit on the market

[8] The direction in which the manipulative conduct moves the price is immaterial to its legality. Show Cause Order P 51, JA 31. Courts routinely find that a downward manipulation violates Exchange Act § 10(b) and Rule 10b-5. *Id*. (citing cases). Such conduct is manipulative because it "creat[es] a false impression of supply and demand. . . . " *Id*. (quoting *Nanopierce Tech. v. Southridge Capital Mgmt, LLC*, 2002 U.S. Dist. LEXIS 24049 at *30 (S.D.N.Y. Oct. 10, 2002)).

place and is an omission of a material fact." Rehearing Order P 42, JA 104 (quoting *United States v. Charnay*, 537 F.2d 341, 351 (9th Cir. 1976)).

Accordingly, "[f]rauds which 'mislead[] the general public as to the market value of securities,' and 'affect the integrity of securities markets'… fall well within [Rule 10b-5's "in connection with" requirement]." *United States v. Russo*, 74 F.3d 1383, 1391 (2d Cir. 1996) (quoting *In re Ames Dep't Stores, Inc. Stock Litigation*, 991 F.2d 953, 966 (2d Cir. 1993)). *See also Merrill Lynch*, 547 U.S. at 89 ("The misconduct of which respondent complains here – fraudulent manipulation of stock prices – unquestionably qualifies as fraud 'in connection with the purchase or sale' of securities.").

D. FERC's NGA § 4A Jurisdiction Is Not Limited To Physical Sellers Of Gas.

Amaranth contends that its manipulative behavior was not "in connection with the purchase or sale of natural gas" because Amaranth itself did not trade in physical natural gas. Pet. Br. 46. However, the contention that FERC only has authority under NGA § 4A over physical sellers of natural gas is inconsistent with the language of the statute. Rehearing Order P 31, JA 98.

Section 4A and the Anti-Manipulation Rule prohibit "any entity" from engaging in manipulation "in connection with" a jurisdictional transaction. Rehearing Order P 31, JA 98; Show Cause Order P 110 & n.171, JA 66.

"Any entity" is a deliberately inclusive term. Order No. 670 P 18, JA 531. Congress could have used the existing defined terms in the NGA of "person" or "natural gas company," but instead chose to use a broader term without providing a specific definition. *Id*. This language demonstrates Congress' intent to capture not only companies subject to FERC's NGA jurisdiction but rather any individual, corporation, or governmental or non-governmental entity that engages in the prohibited behavior. Rehearing Order P 17, JA 90. Neither NGA § 4A nor the Anti-Manipulation Rule speaks in terms of conduct by an entity "engaged in" or "a party to" such transactions. Rehearing Order P 31, JA 98; Show Cause Order P 110 & n.171, JA 66.

Likewise, Congress could have, but did not, prohibit manipulative or deceptive conduct that occurred *in* Commission-jurisdictional markets. Rehearing Order P 34, JA 100. Instead, Congress used expansive language that prohibits manipulative or deceptive practices by any entity, directly or indirectly, "in connection with" the purchase, sale or transportation of natural gas historically within the Commission's jurisdiction. *Id*.

Under Rule 10b-5 precedent interpreting the "in connection with" requirement, the alleged manipulator need not be a party to the jurisdictional transaction. Show Cause Order P 110 & n. 171, JA 65-66; Rehearing Order P 22, JA 92, P 32, JA 99 (quoting *O'Hagan*, 521 U.S. at 658) ("as written,

[§ 10(b)] does not confine its coverage to deception of a purchaser or seller of securities; rather the statute reaches *any* deceptive device used 'in connection with' the purchase or sale of a security.") (emphasis added in Rehearing Order). While the malefactor in *O'Hagan* actually traded in securities, Pet. Br. 47, the Court nonetheless expressly held that "'[a]ny person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) *on which a purchaser or seller of securities relies*, may be liable as a primary violator under 10b-5, assuming . . . the requirements for primary liability under 10b-5 are met.'" *O'Hagan*, 521 U.S. at 664 (emphasis in *O'Hagan*) (quoting *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 191 (1994)).[9] Other cases decided under the Exchange Act generally demonstrate that one can violate Rule 10b-5 without being a purchaser or seller of a security. Rehearing Order P 32, JA 99; Show Cause Order P 110 n.171, JA 66 (citing *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (permitting shareholder suit for damages under 10b-5 where company made misleading statements that affected its own stock)). *Rand v. Anaconda-Ericsson, Inc.*,

[9] *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (cited Pet. Br. 47), is inapposite as the defendant was a customer who engaged in deals with a company that subsequently were misreported and used to falsify the company's audit report. The defendant, unlike Amaranth here, itself did nothing to mislead the market.

794 F.2d 843, 847 (2d Cir. 1986) (cited Pet. Br. 46-47), did not require that fraudulent conduct be *in* a securities transaction, Rehearing Order P 43, JA 105, but rather only that it "have some direct pertinence to a securities transaction." *Rand*, 794 F.2d at 847.

Interpreting FERC's NGA § 4A authority as limited to physical sellers of natural gas also effectively reads the term "indirectly" out of NGA § 4A. Rehearing Order P 33, JA 100. The phrase "directly or indirectly" has been interpreted broadly to reach not only entities engaging in the subject transaction but others participating indirectly. Rehearing Order P 17, JA 90 (citing *In re Lernout & Haupsie Sec. Lit.*, 236 F. Supp. 2d 161, 173 (D. Mass. 2003)). Amaranth's argument that the phrase "directly or indirectly" does not expand *transactions* that are "subject to the jurisdiction of the Commission" under NGA § 4A, Pet. Br. 40-42, misses the point; the term "indirectly" supports the conclusion that Congress intended the NGA's anti-manipulation prohibition to apply to more than just the direct wholesale seller of the physical commodity, *i.e.* the physical sellers of natural gas. Rehearing Order P 33, JA 99.

E. NGA § 4A's "In Connection With" Language Is Not Properly Interpreted The Same Way As NGA § 4(a)'s "In Connection With" Language.

Rather than interpreting NGA § 4A consistently with Exchange Act § 10(b), Amaranth contends that NGA § 4A should be interpreted consistently with preexisting NGA § 4(a), 15 U.S.C. § 717c(a). Pet Br. 43-44. NGA § 4(a) provides FERC with ratemaking authority over natural gas companies with respect to rates and charges "in connection with" the transportation or wholesale sale of natural gas within FERC's jurisdiction as defined (and limited) in NGA § 1(b). Rehearing Order P 25, JA 94.

Amaranth's argument ignores that NGA § 4A was a "new and broad jurisdictional grant by Congress to the Commission that goes beyond prior Commission jurisdiction to prohibit manipulation involving entities and transactions traditionally not regulated by the Commission." Rehearing Order P 30, JA 97.[10] While NGA § 4A does not increase the transactions within FERC's jurisdiction under pre-existing NGA § 4(a), Congress did

[10] Amaranth points to this statement as evidence that FERC has "changed course" since Order No. 670, and now interprets the EPAct as expanding the scope of its NGA jurisdiction. Pet. Br. 40. To the contrary, "in neither Order No. 670 nor in the [Show Cause Order] did the Commission assert that EPAct 2005 expanded the types of jurisdictional transactions that would satisfy section 4A's requirement that the affected markets must be 'subject to the Commission's jurisdiction.'" Rehearing Order, P 64, JA 118.

broaden (with language in NGA § 4A that is not present in NGA § 4(a)), the conduct *affecting* such transactions that FERC may police, namely manipulative or deceptive conduct by any entity that, either directly or indirectly, is in connection with the purchase or sale of natural gas or transportation services within FERC jurisdiction. Rehearing Order P 25, JA 94; PP 30-45, JA 97-106; P 59, JA 115.

Thus, use of the term "in connection with" is where the similarity between NGA §§ 4A and 4(a) begins and ends. *Id*. P 25, JA 94. Congress expressly patterned § 4A, including the "in connection with" language therein, on Exchange Act § 10(b), *not* on NGA § 4(a). *Id*. Thus, it is reasonable to rely on Exchange Act § 10(b) precedent, and not NGA § 4(a) precedent, to interpret the phrase "in connection with." *Id*. While generally identical words in different parts of the same act may be construed to have the same meaning, Pet. Br. 44, the general rule does not apply in a situation where, as here, Congress amended a statute with a new provision expressly modeled on a provision in another act. Rehearing Order P 26, JA 94. As discussed, repetition of statutory language that is already subject to existing judicial interpretations -- such as the Exchange Act § 10(b) language used in NGA § 4A -- evidences a Congressional intent to incorporate that judicial interpretation. *Merrill Lynch*, 547 U.S. at 85.

Reading § 4A consistently with § 4(a) also essentially eliminates much of the intended effect of the new § 4A. Rehearing Order P 29, JA 97. Prior to 2005, FERC had authority under § 4(a) to pursue manipulation *by sellers* in physical natural gas markets and had promulgated "Market Behavior Rules" prohibiting such manipulation. Rehearing Order P 29, JA 97 (citing 18 C.F.R. § 284.403(a)). *See Colorado Office of Consumer Counsel v. FERC*, 490 F.3d 954 (D.C. Cir. 2007) (denying petition for review of orders imposing Market Behavior Rules). Congress is not presumed to enact surplusage. *Id*. (citing cases). The better interpretation is that Congress meant to expand FERC authority beyond what existed in 2005 to proscribe the conduct alleged in the Show Cause Order. *Id*.

Conoco, Inc. v. FERC, 90 F.3d 536, 552 (D.C Cir. 1996) (cited Pet. Br. 43-44), is inapposite. *Conoco* held that the NGA § 4(a) phrase "in connection with" did not allow FERC to regulate gathering facilities that are exempt from FERC jurisdiction under NGA § 1(b). Rehearing Order P 27, JA 95. NGA § 1(b) does not exempt financial market participants, such as Amaranth, or trading in natural gas futures markets, so FERC's interpretation of its jurisdiction under NGA § 4A does not conflict with NGA § 1(b) (or, for that matter, any other NGA provision). Rehearing Order P 28, JA 96.

Conoco in fact *supports* the view that, when non-jurisdictional transactions, such as transactions in natural gas futures contracts, affect jurisdictional markets, the § 4(a) "in connection with" requirement is met. Rehearing Order P 28, JA 96. *Conoco* held that, when exempt gathering facilities become "'intertwined with jurisdictional activities, the Commission's regulation of the latter may impinge on the former.'" Rehearing Order P 28 n.64, JA 96 (quoting *Conoco*, 90 F.3d at 549). Thus, "[a]s an abstract matter, [the court had] no reason to doubt the Commission's conclusion that a nonjurisdictional entity could act in a manner that would change its status by enabling an affiliated interstate pipeline to manipulate access and costs of gathering." *Id.* (quoting *Conoco*, 90 F.3d at 549). *See also Northern Natural Gas. Co. v. FERC*, 929 F.2d 1261, 1273 (8th Cir. 1991) (pipeline rates for transportation on non-jurisdictional gathering facilities are "in connection with" jurisdictional interstate transportation); *National Ass'n of Regulatory Util. Commn'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (in exercising its jurisdiction, FERC may "impinge" on non-jurisdictional matters); *Transmission Agency of Northern California v. FERC*, 495 F.3d 663 (D.C. Cir. 2007) (FERC may consider non-jurisdictional rates to the extent those rates affect jurisdictional rates).

IV. FERC'S INTERPRETATION DOES NOT INTRUDE UPON THE CFTC's EXCLUSIVE JURISDICTION.

Amaranth and its supporters contend that FERC's assertion of jurisdiction over Amaranth's behavior will limit, modify, impliedly repeal or even "eviscerate" the CFTC's jurisdiction under CEA § 2(a)(1)(A). *See* Pet. Br. 2; CFTC Br. 24, 26-28; Futures Br. 10. CEA § 2(a)(1)(A) provides that the CFTC has exclusive jurisdiction "with respect to accounts, agreements [of various types] and transactions involving contracts of sale of a commodity for future delivery."

To the contrary, FERC's interpretation involves no repeal or even limitation of CFTC jurisdiction. Rather, under FERC's interpretation, its jurisdiction over activities that affect its physical markets is complementary to and can co-exist with the CFTC's jurisdiction over activities that affect futures markets. Rehearing Order P 11, JA 86; Show Cause Order P 48, JA 29.

A. The CFTC's CEA § 2(a)(1)(A) Jurisdiction Does Not Preclude FERC NGA § 4A Jurisdiction Over Manipulation In Connection With FERC-Jurisdictional Transactions.

1. The Statutes Are Fully Reconcilable.

a. CFTC Exclusive Jurisdiction Does Not Extend To Manipulative Conduct In Futures That Affects FERC-Jurisdictional Markets.

It is a fundamental canon of statutory construction that statutes relating to the same subject matter should be construed harmoniously. Rehearing Order P 57 & n.143, JA 114 (citing *Tug Allie-B. v. U.S.*, 273 F.3d 936, 941 (11th Cir. 2001)). *See also Morton v. Mancari*, 417 U.S. 535, 551 (1974); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2002) (cited Pet. Br. 26-27; CFTC Br. 17-18; Amicus Br. 20-22). "[W]e live in 'an age of overlapping and concurring regulatory jurisdiction.'" *Roberts,* 276 F.3d at 593 (quoting *Thompson Med. Co. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986)). Accordingly, "a court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may." *Id*. Where the "statutes are 'capable of co-existence,' it becomes the *duty* of this court 'to regard each as effective' at least absent clear congressional intent to the contrary." *Id*. (quoting *Morton*, 417 U.S. at 551) (emphasis in *Roberts*). *See* Show Cause Order P 48, JA 29 (citing *United States v. Reliant Energy*, 420 F. Supp. 2d 1043, 1064-65 (N.D. Cal. 2006)).

In the challenged orders, FERC harmonized its NGA § 4A jurisdiction with that of the CFTC under CEA § 2(a)(1)(A). Rehearing Order P 57, JA 113-14. FERC recognized the CFTC's exclusive authority under CEA § 2(a)(1)(A) to regulate the day-to-day aspects of futures trading, such as the terms or conditions of sale of NG Futures contracts, the operating rules of

the NYMEX exchange, or traders' commodity accounts. *Id*. P 58, JA 114. FERC neither asserted jurisdiction over these matters nor sought to interfere with that jurisdiction. *Id*. P 11, JA 86 (citing Show Cause Order P 48, JA 29, P 55, JA 33).

However, FERC reasonably concluded that the CFTC's exclusive CEA § 2(a)(1)(A) jurisdiction over "accounts, agreements . . . and transactions" did *not* provide the CFTC with "exclusive jurisdiction over fraudulent or deceptive practices associated with those transactions." *Id*. P 47, JA 107-08. It did not preclude other agencies such as FERC "from examining fraudulent or deceptive conduct in exercising their regulatory responsibilities, particularly where this Commission has been provided with express authority with respect to such conduct if it has a nexus to jurisdictional physical sales." *Id*. Thus, while certainly the CFTC has jurisdiction to prosecute (and is prosecuting) Amaranth's manipulative conduct in the futures markets, that jurisdiction is not *exclusive*. Rehearing Order P 50, JA 109-10 (citing *Roberts*, 276 F.3d at 591). *See* CFTC Br. 3 (describing CFTC complaint proceeding against Amaranth). [11]

[11] Notably, the Federal Trade Commission, in interpreting its newly-granted anti-manipulation authority in the Energy Independence and Security Act of 2007, similarly concluded, following the orders at issue here, that "CFTC authority over manipulation relating to commodities futures market is not exclusive, and moreover, is separate from CFTC's exclusive

FERC's interpretation of its NGA § 4A jurisdiction thus harmonizes "the various provisions and precedents relating to [FERC] jurisdiction, the jurisdiction of the CFTC, and cases construing section 10(b) of the Securities Exchange Act, which served as the model for new NGA section 4A." Rehearing Order P 57, JA 114. Under FERC's interpretation, "both agencies have an enforcement role to protect their respective markets and interests." *Id*. P 58, JA 115. In contrast, Amaranth's interpretation violates the interpretive canon that the statutes should be read harmoniously, and "undermines the very intent of section 4A to give the Commission ability to sanction manipulation that has a clear nexus to and significant effect on jurisdictional prices." Rehearing Order P 57, JA 114.

b. *Roberts* Supports Distinguishing Between CFTC Exclusive Jurisdiction Over Markets And Non-Exclusive Jurisdiction Over Manipulation.

Roberts made clear the distinction between the CFTC's *exclusive* jurisdiction over "accounts, agreements, and transactions" and the CFTC's *non-exclusive* jurisdiction over fraudulent practices. Rehearing Order P 50, JA 109-10. "[Section] 2(a)(1)(A) confers exclusive jurisdiction to the CFTC

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authority under CEA Section 2(a)(1)(A)." Notice of Proposed Rulemaking, *Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007*, 73 Fed. Reg. 48317 at 48324 (Aug. 19, 2008).

over a limited, discrete set of items related to the making of futures contracts," which "comports with Congress' goal of conferring the CFTC with sole regulatory authority over 'futures contracts *markets* and other *exchanges.*" *Roberts*, 276 F.3d at 589-90 (quoting H.R. Conf. Rep. No. 93-1383, 93rd Cong. (1974), *reprinted in* 1974 U.S.C.C.A.N. at 5897) (emphasis in *Roberts*). The "goal of the CFTCA" was "to bring the futures market 'under a uniform set of regulations;'" consequently, "'only in the context of market regulation does the need for uniform legal rules apply.'" *Id*. at 591 (quoting *Am. Agric. Movement, Inc. v. Bd. of Trade of Chicago*, 977 F.2d 1147, 1155-57 (7th Cir. 1992), *aff'd in part, rev'd in part on other grounds by Sanner v. Chicago Bd. of Trade*, 62 F.3d 918 (7th Cir. 1995)) (cited Pet. Br. 29; CFTC Br. 23; Futures Br. 14) (*Am. Agric*. relied on legislative purpose to find state common law actions against commodity brokers preempted only insofar as they would "directly affect trading on or the operation of a futures market.").

Roberts found "specious" the contention that "whatever [the CFTC] may regulate, it regulates exclusively." Rehearing Order P 50, JA 110 (quoting *Roberts*, 276 F.3d at 591). Thus, "while the CFTC was created to regulate all commodities and commodities *trading*," "it does not follow from this, however, that Congress intended to preempt the activities of all other

federal agencies in their regulatory realms." *Roberts*, 276 F.3d at 591 (emphasis in *Roberts*); Rehearing Order P 52, JA 111. "'Preemption of the regulation of the market does not also mean preemption of all law that might involve participants in the market.'" *Roberts*, 276 F.3d at 591 (quoting *Poplar Grove Planting and Refining Co. v. Bache Halsey Stuart, Inc*., 465 F. Supp. 585, 592 (D. La. 1979)). Accordingly, "'other agencies … retain their jurisdiction beyond the confines of 'accounts, agreements, and transactions'" for futures contracts. Rehearing Order P 50, JA 110 (quoting *Roberts*, 276 F.3d at 591).

In particular, *Roberts* observed "the imperfect overlap" between CEA § 2(a)(1)(A) and the rest of the CEA. *Roberts*, 276 F.3d at 591. While, for example, the CFTC has jurisdiction over a trader's deceitful "practices" under 7 U.S.C. §6*o*, that jurisdiction is *not* exclusive. Rehearing Order P 50, JA 110 (quoting *Roberts*, 276 F.3d at 591).[12] Here, the CFTC is pursuing a

[12] The CEA legislative history cited by Amaranth and its supporters provides further support for the view that the CFTC's exclusive jurisdiction pertains to the regulation of futures markets and exchanges, and the grant of exclusive jurisdiction was intended to differentiate the CFTC and SEC jurisdiction over markets for particular instruments. *See* Pet. Br. 28 (quoting S. Rep. No. 93-1131, 93rd Cong. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5848 ("'the [CFTC's] jurisdiction *over futures contracts markets or other exchanges* is exclusive'") (emphasis added)); CFTC Br. 14-15 (quoting H.R. Rep. No. 93-975 at 28 (1974) (differentiating CFTC from SEC jurisdiction)); Futures Br. 6-7 (citing legislative history as evidence of

complaint against Amaranth under its anti-manipulation authority in 7 U.S.C. § 13(a)(2) and for false statements under 7 U.S.C. § 13(a)(4). CFTC Br. 3. Like its fraud jurisdiction under 7 U.S.C. §6*o*, there is no provision for *exclusive* jurisdiction over manipulative acts in 7 U.S.C. § 13(a).[13] For instance, there is a private right of action for such manipulation. *See* 7 U.S.C. § 25(a) (statutory private right of action for, *inter alia*, manipulation); *Kohen v. Pacific Investment Management Co., LLC*, 244 F.R.D. 469, 481 (N.D. Ill. 2007) (permitting class action private claims for manipulation of Treasury Notes futures under 7 U.S.C. §§ 13(a)(2) and 25(a)).

c. Caselaw Supports The Finding That There Is No Conflict Between The CFTC's Exclusive Jurisdiction And FERC's Anti-Manipulation Authority.

Caselaw further supports the finding that there is no conflict between the CFTC's CEA § 2(a)(1)(A) exclusive jurisdiction and FERC's § 4A anti-

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Congressional intent to provide CFTC jurisdiction over futures markets to the exclusion of states and the SEC).

[13] The Futures Industry Group makes an *amicus* argument based on § 412 of the CFTC Act of 1974, Pub. L. No. 93-463, 88 Stat. 1414 (Oct. 23, 1974). Futures Br. 18-20. As Amaranth has made no argument based on § 412, this argument is not properly before the Court. *See, e.g., Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1338 (D.C. Cir. 1998) (court would not consider argument raised only by *amicus*). Moreover, § 412 only provided that proceedings pending at the time of enactment of the 1974 CFTC Act would be addressed under the CEA as it existed prior to 1974, and § 412 therefore has no bearing on this case.

manipulation authority. For instance, *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 27-28 (2d Cir. 1985), rejected arguments that the CFTC anti-manipulation provisions were repugnant to antitrust laws applicable to the same conduct. Because "price manipulation is an evil that is always forbidden under every circumstance by both the Commodity Exchange Act and the antitrust laws," "application of the latter cannot be said to be repugnant to the purposes of the former." *Id*. at 28. Likewise, here, as both the CEA and the NGA forbid manipulative conduct, the statutes are not repugnant but rather complementary.

United States v. Brien, 617 F.2d 299, 310 (1st Cir. 1980), rejected arguments that the CFTC's exclusive jurisdiction under CEA § 2(a)(1)(A) preempted the general federal mail and wire fraud statutes with regard to a boiler room sales operation selling commodities options. Although the court "agree[d] that Congress intended the CFTC to occupy the entire field of commodities futures regulation," the court nevertheless found that, if the appellant's acts violated both the CFTC anti-fraud provision (7 U.S.C. §6*o*) and the mail and wire fraud statutes (18 U.S.C. §§ 1341 and 1343), there was no basis for finding the mail and wire fraud statutes preempted. *Id*. at 310. For example, although the CFTC's exclusive jurisdiction preempts state regulation of commodities futures, it did not preempt state general

antifraud statutes. *Id*. (citing cases). Thus, the court found that "[a]lthough the statutes prohibit similar conduct, they operate independently and harmoniously." *Id*. Accordingly, the court followed the settled principle that, "[w]here two statutes cover the same subject, effect will be given to both, if possible." *Id*.

Following *Brien*, *United States v. Shareef*, 634 F.2d 679 (2d Cir. 1980), found no repugnancy between the CFTC's exclusive jurisdiction and the federal mail fraud statute. "The Commodity Futures Trading Commission Act of 1974 has as its primary purpose the regulation of certain financial market transactions. This purpose is quite consistent with the simultaneous retention of the jurisdiction of 18 U.S.C. § 1341 over the criminal prosecution of mail frauds involving, among other things, commodities futures." *Id*. at 680-81. *See also United States v. Dial*, 757 F.2d 163 (7th Cir. 1985) (Posner, J.) (finding defendants accused of fraud in connection with trading silver futures "wise" not to argue that the CFTC's exclusive jurisdiction supersedes the federal mail and wire fraud statutes in light of *Brien*); *United States v. Sawyer*, 799 F.2d 1494 (11th Cir. 1986) (affirming convictions of boiler room operation of commodity pool operator and trading advisor for mail and wire fraud, as well as commodity fraud).

Accordingly, contrary to Amaranth and the Futures Industry Group's assertions, Pet. Br. 54-55; Futures Br. 26-29, the mere fact that FERC and the CFTC are addressing the same conduct, under the varying legal standards of their enabling statutes, provides no basis for finding the statutes repugnant. To show repugnancy, "it is not enough to show that the two statutes produce differing results when applied to the same factual situation." *Radzanower v. Touche, Ross & Co*., 426 U.S. 148, 155 (1976). Rather, there must be an "irreconcilable conflict" in the "sense that there is a positive repugnancy between them or that they cannot mutually coexist." *Id*. No such irreconcilable conflict exists here. As *Roberts* recognized, overlapping and concurring regulatory jurisdiction is commonplace. *Roberts*, 276 F.3d at 593. Judicial precedent permits multiple agencies to pursue claims for the same conduct to protect their respective constituents. Rehearing Order P 57 & n. 142, JA 113-14 (citing *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948) (two or more agencies may proceed simultaneously against the same parties and the same conduct); *Bristol-Meyers Co. v. FTC*, 738 F.2d 554, 559-60 (2d Cir. 1984) (concurrent FTC/FDA jurisdiction approved); *Warner-Lambert Co. v. FTC*, 361 F. Supp. 948, 952-53 (D.D.C. 1973) (same)).

Indeed, when Congress expanded FERC's jurisdiction under EPAct 2005, the CFTC's oversight of futures markets was well known. Rehearing

Order P 59, JA 115 (citing 149 Cong. Rec. S 13997 at 9 (daily ed. Nov. 5, 2005) (statement of Sen. Bennett) (both CFTC and SEC have broad authority to prohibit market manipulation)). In fact, concern was expressed about "unnecessary duplication" of efforts by enforcement agencies. *Id*. (citing 149 Cong. Rec. S 13997 at 9 (daily ed. Nov. 5, 2005) (statement of Sen. Bennett)). Congress nevertheless "put in place the first ever broad prohibition on manipulation in electricity and natural gas markets." *Id*. (quoting 151 Cong. Rec. S 9335 at 17 (daily ed. July 29, 2005) (statement of Sen. Cantwell)).

Amaranth contends that this legislative history evidences no Congressional intent "to intrude into the CFTC's exclusive jurisdiction." Pet. Br. 55. *See also* CFTC Br. 26-27. As demonstrated, however, evidence of such intent is not required as FERC's jurisdiction does not intrude into, but rather complements, that of the CFTC.

2. CFTC "Exempt Commodities" Cases Support FERC's Interpretation.

In the reverse of the current situation, the CFTC has succeeded in pursuing claims for manipulation in markets subject to FERC's exclusive jurisdiction. *See* Show Cause Order P 48, JA 29 (citing *Reliant*, 420 F. Supp. 2d at 1064-65 (FERC's exclusive jurisdiction over wholesale electric market did not preempt CFTC manipulation complaint where CEA could be

given effect without interfering with FERC's regulation of the electric market)). "The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 300 (1988). *See also Northern Natural Gas Co. v. State Corporation Comm'n. of Kansas*, 372 U.S. 84, 91 (1963); *Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 274 (D.C. Cir. 1990). Nevertheless, the CFTC has pursued a number of complaints based on alleged manipulation of natural gas prices in markets subject to FERC's exclusive jurisdiction. *See CFTC v. Reed*, 481 F. Supp. 2d 1190, 1196 (D. Col. 2007); *CFTC v. Atha*, 420 F. Supp. 2d 1373, 1380 (N.D. Ga. 2006); *CFTC v. Enron Corp*., 2004 U.S. Dist. LEXIS 28794 (S.D. Tex. 2004); *CFTC v. Energy Transfer Partners, L.P.*, Civil Action No. 3-07-Cv. 1301 (N.D. Texas).

Moreover, the CFTC has pursued such claims notwithstanding that, under 7 U.S.C. §§ 2(g) and (h), the CFTC lacks jurisdiction over a "contract, agreement, or transaction" in an "exempt" commodity, which includes natural gas.[14] The CFTC has asserted successfully that manipulative conduct

[14] An "exempt commodity" is any commodity that is not an "excluded commodity" or an "agricultural commodity." 7 U.S.C. § 1a(14). Natural gas is an exempt commodity as defined under the statute. *CFTC v. Johnson*, 408 F. Supp. 2d 259, 271 n.5 (S.D. Tex. 2005); *Reed*, 481 F. Supp. 2d at 1197.

is not itself a "contract, agreement or transaction," and the exemption from jurisdiction does not extend to conduct *relating to* exempt contracts, agreements or transactions. Rehearing Order P 48 & n.124, JA 108-09 (citing *CFTC v. Bradley*, 408 F. Supp. 2d 1214, 1219 (N.D. Okla. 2005) (exemptions do not "include any conduct related to an exempt contract"); *Johnson*, 408 F. Supp. 2d at 271 (S.D. Tex. 2005) ("Sections 2(g) and 2(h) … do not exempt from the Act *any* conduct or activity related to exempt commodities") (emphasis in original); *Reed*, 481 F. Supp. 2d at 1197 (exemptions do not exclude from jurisdiction manipulative conduct relating to exempt transactions); *Atha*, 420 F. Supp. 2d at 1379 (same)). *See also United States v. Futch*, 278 Fed. Appx. 387, 2008 U.S. App. LEXIS 10563 at * 9 (5th Cir. May 15, 2008) (following above-cited cases in determining false reporting was not an agreement, contract or transaction). These cases support the proposition that manipulation does not fall within the scope of "contract, agreement or transaction" -- and therefore by extension an "account, agreement or transaction" under CEA § 2(a)(1)(A) -- and, accordingly, manipulation is not within the CFTC's *exclusive* jurisdiction. Rehearing Order P 49, JA 109.

Amaranth and its supporters contend the cited cases concerned manipulation accomplished through false reporting, which did not involve a

particular contract, agreement or transaction, unlike the alleged manipulation here, which was effected through NG Futures Contracts. *See* Pet. Br. 32, CFTC Br. 18-19 n.9, Futures Br. 17 n.2. That contention does nothing to alter the basic premise of these decisions that exemption of a "contract, agreement or transaction" does not exempt manipulative conduct *related to* the contract, agreement or transaction.

Indeed, the CFTC filed a complaint alleging manipulation in the natural gas market that involved flooding a natural gas delivery market with massive quantities of gas to place downward pressure on price. Rehearing Order P 49, JA 109 (citing *CFTC v. Energy Transfer Partners, L.P.*, Civil Action No. 3-07-Cv. 1301 (N.D. Texas) (Complaint filed July 26, 2007 P 2) (proceeding terminated by Consent Order on March 17, 2008)). The CFTC asserted that it possessed jurisdiction over the alleged manipulation of the exempt commodity because the exemption "applies only to the contracts themselves, and does not apply to any conduct or activities occurring outside of the contract." *See* CFTC Memorandum in Opposition to Motion to Dismiss at 5, filed November 19, 2007, in Civil Action No. 3-07-Cv. 1301 (N.D. Texas). Thus, according to the CFTC, it possessed jurisdiction because its complaint did not challenge the natural gas contracts themselves, but rather the defendants' "orchestrated efforts to manipulate the *price* of

natural gas." *Id*. (emphasis in original). Similarly, here, FERC's focus is not on the NG Futures Contracts themselves, but rather "on manipulation of Commission-jurisdictional prices result[ing] from manipulation of the NG Futures Contract." Show Cause Order P 2, JA 5.

3. The Cases Relied On By Amaranth And Its Supporters Are Inapposite.

The cases relied on by Amaranth and its supporters to show that FERC jurisdiction is preempted are inapposite. *Chicago Merc. Exch. v. SEC*, 883 F.2d 537 (7th Cir. 1989), and *Chicago Bd. of Trade v. SEC*, 677 F.2d 1137 (7th Cir. 1982) (cited Pet. Br. 34-35; CFTC Br. 21; Futures Br. 22-25), address only the narrow question of whether CFTC or the SEC has jurisdiction *in the first instance* over new products brought to market possessing features of securities *and* of commodities or futures contracts. Rehearing Order P 51 & n.130, JA 110-11. *See Chicago Merc. Exch*., 883 F.2d at 539 (index participation instrument); *Chicago Bd. of Trade*, 677 F.2d at 1138 (options on Government National Mortgage Association certificates).

Similarly, *SEC v. Am. Commodity Exchange*, 546 F.2d 1361 (10th Cir. 1976), and *SEC v. Univest, Inc*., 405 F. Supp. 1057 (N.D. Ill. 1975) (cited CFTC Br. 19-20; Futures Br. 19-20), concerned the transfer of regulatory authority over options to purchase commodities or commodities futures

contracts from the SEC to the CFTC under the CEA, and whether SEC complaints post-dating the CEA based on acts predating the CEA, were within the SEC's jurisdiction. Rehearing Order P 51 & n.130, JA 110-11 (citing *Roberts*, 276 F.3d at 588) ("[t]he aim of [the CFTC exclusive jurisdiction] provision, according to one of its chief sponsors, was to 'avoid unnecessary, overlapping and duplicative regulation,' especially as between the Securities and Exchange Commission and the new CFTC.") (citing 120 Cong. Rec. H34,736 (Oct. 9, 1974)). None of these cases addresses whether the CFTC's jurisdiction over futures markets precludes FERC from exercising its newly-conferred enforcement authority over manipulative conduct affecting its own jurisdictional markets, *i.e.*, whether, because of the "profound cross-market effect" on both futures and natural gas markets, both agencies have non-exclusive jurisdiction over the manipulative conduct. Rehearing Order P 31, JA 98, P 51 & n.130, JA 110-11.

In any event, these cases pre-date the Commodities Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000), which clarified that the CFTC and the SEC share jurisdiction over products having the characteristics of both securities and futures. Rehearing Order P 51 & n.133, JA 111. Because Exchange Act §10(b) and Rule 10b-5 serve as the model for § 4A and the Anti-Manipulation Rule, the legal precedent

upholding the SEC's jurisdiction over fraud and manipulation in futures transactions that involve a security as the underlying commodity further supports FERC's determination that the CEA does not eclipse § 4A. *Id*.

Arguments regarding the "savings clause" in 7 U.S.C. § 2(a)(1)(A), Amaranth Br. 35 n.8; CFTC Br. 13-14; Amicus Br. 23-25, are essentially red herrings as FERC does not contend that the savings clause somehow expands the jurisdiction of other agencies *vis a vis* the CFTC. *See* Rehearing Order P 55, JA 113; Rehearing Order P 54, JA 112. FERC agrees that the savings clause assures that other agencies "retain their jurisdiction beyond the confines of 'accounts, agreements and transactions involving contracts of sale of a commodity for future delivery.'" Rehearing Order P 54, JA 112 (quoting *Roberts*, 276 F.3d at 591). The point is that the manipulation in this case is conduct that goes beyond the confines of "accounts, agreements and transactions." Rehearing Order P 55, JA 113.

B. NGA § 23 Supports FERC's Interpretation.

NGA § 23, 15 U.S.C. § 717t-2(c), enacted simultaneously with NGA § 4A (the former is § 316 of EPAct 2005; the latter is § 315 of EPAct 2005), reflects Congress' recognition that FERC's newly-enacted NGA § 4A authority would overlap with CFTC jurisdiction. Rehearing Order P 12, JA 87. Section 23, which directs FERC to facilitate price transparency in

natural gas markets, required that FERC conclude a memorandum of understanding with the CFTC relating to information sharing, including "provisions ensuring that information requests to markets within the respective jurisdiction of each agency are properly coordinated. . . ." 15 U.S.C. § 717t-2(c)(1). This evidences Congress' recognition of the potential for FERC to require information from the CFTC's jurisdictional markets. Rehearing Order P 62, JA 117. This, moreover, necessarily presumes that the jurisdictional overlap will extend beyond information gathering. "It is an odd notion indeed that Congress intended [FERC] to gather information pertaining to exchanges under the CFTC's jurisdiction, but if [FERC] thereby detected manipulation affecting [its] jurisdictional markets to have no enforcement role to punish and deter such manipulation." *Id.*

Amaranth and the CFTC assert that the NGA § 23(c)(2) "savings clause" – providing that "[n]othing in this section may be construed to limit or affect the exclusive jurisdiction" of the CFTC – supports a finding of Congressional intent to preserve the CFTC's "exclusive" jurisdiction generally. Pet. Br. 36-37; CFTC Br. 24-26. However, the presence of a savings clause applicable only to "this section" (NGA § 23) highlights the absence of such a savings clause elsewhere in the statute, including in NGA § 4A. Had Congress intended to confer upon the CFTC exclusive

jurisdiction over manipulation occurring in natural gas futures markets, it could have done so explicitly in NGA § 4A or in a generally-applicable savings clause. Rehearing Order P 60, JA 116. "[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1984) (citation omitted); *see also Christopher Shays v. FEC*, 528 F.3d 914, 934 (D.C. Cir. 2008) (the "usual canon" is that "when Congress uses different language in different sections of a statute, it does so intentionally") (citation omitted).

Amaranth argues that the Memorandum of Understanding[15] demonstrates that there is no overlapping jurisdiction. *See* Pet. Br. 37. The cited language, however, only refers to the CFTC's jurisdiction under CEA § 2(a)(1)(A). Moreover, the Memorandum expressly provides that: "the CFTC and the FERC may from time to time engage in oversight *or investigations of activity affecting both CFTC-jurisdictional and FERC-jurisdictional markets*." Rehearing Order P 62, JA 117 (quoting

[15] *Memorandum of Understanding Between the Federal Energy Regulatory Commission (FERC) and the Commodity Futures Trading Commission (CFTC) Regarding Information Sharing and Treatment of Proprietary Trading and Other Information*, executed October 12, 2005, JA 509-14.

Memorandum of Understanding at 3, JA 511) (emphasis in Rehearing Order).

Indeed, the year-long joint FERC-CFTC investigation of Amaranth's conduct further illustrates that both agencies (at least until recently) read the statute to contemplate joint investigation activities that go beyond the collection of information. *Id*. FERC Staff's investigation of Amaranth was heavily coordinated with the later-initiated CFTC investigation, including coordination of depositions, sharing of documentary evidence and conferring jointly with experts. Show Cause Order P 55, JA 33. FERC found that coordination of this type is what Congress intended given the increasing interrelationship between the physical and financial energy markets. *Id*.

CONCLUSION

For the foregoing reasons, FERC respectfully requests that the petition for review be dismissed for lack of finality or, if the Court proceeds to the merits, be denied and FERC's orders upheld in all respects.

Respectfully submitted,

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Nos. 07-1491

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 13,716 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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