

**ORAL ARGUMENT HAS BEEN SCHEDULED FOR JANUARY 12, 2009**

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

No. 08-5380

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BRIAN HUNTER,  
*Plaintiff-Appellant,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**BRIEF OF DEFENDANT-APPELLEE FEDERAL  
ENERGY REGULATORY COMMISSION**

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Cynthia A. Marlette  
General Counsel

Robert H. Solomon  
Solicitor

Lona T. Perry  
Senior Attorney

For Defendant-Appellee  
Federal Energy  
Regulatory Commission  
Washington, D.C. 20426

NOVEMBER 26, 2008

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## CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and *Amici*

The parties before the District Court and this Court are identified in the brief of Plaintiff-Appellant, except that the Futures Industry Association, the Managed Funds Association, CME Group, Inc., and the National Futures Association collectively have filed an *amicus* brief in support of Plaintiff-Appellant, and the American Public Gas Association, American Public Power Association and the National Rural Electric Cooperative Association collectively have filed a motion out of time for leave to participate as *amicus curiae* in support of FERC.

B. Rulings Under Review

*Hunter v. FERC*, 569 F. Supp. 2d 12 (D.D.C. 2008) (Memorandum Opinion at JA 881).

C. Related Cases and Settlement Discussions

This case has not been before this Court or any other court. *Amaranth Advisors, LLC v. FERC*, No. 07-1491 (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, the Court directed that oral argument for this appeal (Docket No. 08-5380) and for Docket No. 07-1491 be held on the same day before the same panel.

On November 7, 2008, FERC enforcement staff and all respondents to the FERC Show Cause Order that is at issue in this proceeding and in No. 07-1491 jointly filed a Motion with the Administrative Law Judge, seeking a two-week suspension of proceedings before FERC in order to conclude what the parties believe is an agreement in principle to resolve all matters in dispute before FERC as to all respondents. On November 10, 2008, the Chief Administrative Law Judge granted the motion. Counsel for Plaintiff-Appellant Hunter refused, however, to consent to a motion by FERC to hold this case in abeyance and suspend the briefing schedule pending completion of the parties' settlement.

On November 24, 2008, FERC enforcement staff and all respondents to the FERC Show Cause Order filed with the Administrative Law Judge a Joint Offer of Settlement which, if approved by the Commission, will resolve all claims asserted against all respondents in the FERC Show Cause proceedings as well as this appeal and No. 07-1491. The parties simultaneously filed a joint motion to suspend the FERC proceedings, pending settlement consideration by the Commission.

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Lona T. Perry  
Senior Attorney

November 26, 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
Hunter	Plaintiff-Appellant Brian Hunter
Mem. Op.	Memorandum Opinion
NGA	Natural Gas Act
NG Futures Contracts	natural gas futures contracts
NYMEX	New York Mercantile Exchange



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

No. 08-5380

---

BRIAN HUNTER,  
*Plaintiff-Appellant,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Defendant-Appellee.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

**BRIEF OF DEFENDANT-APPELLEE FEDERAL  
ENERGY REGULATORY COMMISSION**

**STATEMENT OF THE ISSUES**

1. Whether the District Court correctly dismissed Brian Hunter's complaint for lack of jurisdiction, where the complaint challenged a Federal Energy Regulatory Commission (FERC) order subject to exclusive review in the court of appeals, and the challenged order was not final as it only required Hunter to show cause why he had not violated FERC's 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 the District Court's dismissal of Hunter's complaint should be affirmed on other jurisdictional grounds, because Hunter has a request for rehearing pending before the agency, and therefore is simultaneously seeking agency and court review, and Hunter cannot show jurisdictional aggrievement where no finding has been made of any statutory violations and Hunter is only subject to further agency proceedings.
3. Whether, assuming jurisdiction, the District Court's dismissal of Hunter's complaint should be affirmed on the merits because Hunter's complaint and his arguments on appeal fail to demonstrate any error in FERC's determination that: (1) Hunter's alleged manipulative conduct, directly affecting FERC-jurisdictional markets, if proven, was within FERC's jurisdiction under § 4A of the Natural Gas Act (NGA), 15 U.S.C. § 717c-1, which empowers FERC to prosecute manipulation by "any entity" occurring "in connection with" FERC-jurisdictional transactions; and (2) FERC's exercise of that jurisdiction in no way interferes with or impedes the exclusive jurisdiction of the Commodity Futures Trading Commission's (CFTC) exclusive jurisdiction over the operation of futures markets.

## **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 (EPAAct 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 . . . .

Hunter and his 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*, FERC demonstrates that the District Court properly determined that it lacked jurisdiction over Hunter's complaint because:

(1) Hunter's complaint effectively is challenging a FERC order subject to exclusive review in the court of appeals under NGA § 19(b), 15 U.S.C. § 717r(b); and (2) the challenged order is not final and reviewable because it merely required

that Hunter show cause why he should not be found in violation of NGA § 4A and the Anti-Manipulation Rule (18 C.F.R. § 1c.1) promulgated thereunder. No final determination regarding any alleged violation has been made, and the matter has been set for hearing before FERC and remains pending.

Additionally, as demonstrated in Argument Section III, *infra*, dismissal of Hunter's complaint on jurisdictional grounds may also be affirmed because: (1) Hunter has a request for rehearing pending before FERC, and is therefore simultaneously seeking agency and court review, which under this Court's settled caselaw renders agency action non-final, and the appeal incurably premature; and (2) Hunter cannot show jurisdictional aggrievement where no adverse findings have been made against him and he is only subject to further agency proceedings.

## **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 of NGA § 4A (along with a comparable provision with regard to wholesale electric markets). NGA § 4A 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. 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 the Anti-Manipulation Rule, 18 C.F.R. § 1c.1.

Under this newly-granted enforcement authority, FERC issued *Amaranth Advisors, LLC*, 120 FERC ¶ 61,085 (2007), JA 375 (Show Cause Order), *reh'g denied*, 121 FERC ¶ 61,224 (2007), JA 456 (Rehearing Order), requiring Amaranth,<sup>1</sup> 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 respondents had engaged in 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.

Instead of challenging FERC’s Show Cause Order under the procedures set forth in NGA § 19(b) -- filing a request for rehearing followed by a petition for review to the court of appeals -- as did the other Show Cause respondents,<sup>2</sup> Hunter

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<sup>1</sup> 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.

<sup>2</sup> Amaranth’s petition for review of the Show Cause and Rehearing Orders is pending before the Court in Docket No. 07-1491. By order of September 25, 2008,

filed an action for injunctive relief and declaratory judgment in the District Court. The District Court determined that it lacked jurisdiction over Hunter's complaint challenging the Show Cause Order under NGA § 19(b), which vests exclusive review in the court of appeals. *Hunter v. FERC*, 569 F. Supp. 2d 12, 15 (D.D.C. 2008) (Memorandum Opinion (Mem. Op.), JA 885).

The District Court further determined that FERC's Show Cause Order was not ripe for review as the agency proceedings are ongoing. *Hunter*, 569 F. Supp. 2d at 17 (Mem. Op. JA 888). FERC has not finally determined whether Hunter's conduct falls within the scope of NGA § 4A. *See Amaranth Advisors, LLC*, 124 FERC ¶ 61,050 (2008) (Hearing Order) (setting case for evidentiary hearing before an administrative law judge). 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 by "any entity," directly or indirectly, "in connection with" FERC-jurisdictional transactions.

This exercise of jurisdiction over conduct affecting FERC-jurisdictional markets does not, moreover, infringe upon the jurisdiction of the CFTC over

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this Court directed that oral argument for Docket No. 07-1491 and this appeal (Docket No. 08-5380) be held on the same day before the same panel. Matthew Donohoe's appeal of FERC's orders, Docket No. 07-1504, was dismissed by the Court because Donohoe was simultaneously seeking agency rehearing and judicial review. *Amaranth Advisors, LLC v. FERC*, 2008 U.S. App. LEXIS 9095 (D.C. Cir. Apr. 23, 2008).

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, 15 U.S.C. § 717c-1, 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 376 (citing EPCRA 2005 § 314(b), codified at 15 U.S.C. § 717t-1).

In Order No. 670, JA 285, 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 because 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 293-94. *See* JA 351 (text of rule).

## **II. THE ALLEGED CONDUCT**

In the Show Cause Order, JA 375, FERC preliminarily concluded that respondents manipulated the price of FERC-jurisdictional transactions<sup>3</sup> by trading in NG Futures Contracts on February 24, March 29, and April 26, 2006, which trading was designed to and did produce artificial settlement prices for these contracts. Show Cause Order P 5, JA 377. *See* Show Cause Order PP 28-33, JA 389-90 (describing role of various Amaranth entities); *id.* PP 35-36, JA 390-91

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<sup>3</sup> 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) (2000).



(describing Hunter’s and Donohoe’s role as Amaranth traders). The NG Futures Contract is a contract for the future delivery of natural gas under standardized terms.<sup>4</sup> *Id.* P 10, JA 379. 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 381.

FERC preliminarily found that Amaranth manipulated the price of NG Futures Contracts by holding open extraordinarily large positions in the contracts and then liquidating the contracts on the days in question at the end of the settlement period. *Id.* P 57, JA 405. This behavior had the effect of artificially driving down the NG Futures Contract settlement price, to the benefit of Amaranth’s much larger portfolio of opposing positions in derivatives whose value increased as the NG Futures Contract price declined. *Id.* PP 57-58, JA 405, P 62, JA 407. *See id.* PP 59-106, JA 406-35 (describing challenged Amaranth trading in detail).

Hunter was the head natural gas trader at Amaranth, who masterminded the trading strategies that were then implemented by Donohoe, Hunter’s “execution trader.” Show Cause Order PP 35-36, JA 390-91, P 136, JA 447-48; *In re*

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<sup>4</sup> 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.

*Amaranth Natural Gas Commodities Litigation*, 2008 U.S. Dist. LEXIS 79235 at \*5 (S.D.N.Y. Oct. 6, 2008). The Show Cause Order preliminarily concluded that the manipulation was the result of Hunter’s intentional and deceitful conduct. *Id.* P 124, JA 442. *See* Show Cause Order PP 63-106, JA 408-35 (detailing at length Hunter’s behavior concerning the days in question, including references to multiple instant messages evidencing the scheme and the knowledge that the conduct was suspect). Amaranth profited by at least \$59 million from the alleged manipulation. *Id.* P 80, JA 420, P 88, JA 425, P 98, JA 431. Hunter, in turn, stood to benefit by receiving a substantial percentage of Amaranth’s profits from the trading. Show Cause Order P 136, JA 447-48.

This manipulation of the price of NG Futures Contracts affected the price of FERC-jurisdictional natural gas 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 388. 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 385. 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.<sup>5</sup> *Id.*

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 385. 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 in turn are determined by reference to the NG Futures Contract settlement price. *Id.* P 22, JA 385. 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 386.

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

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<sup>5</sup> 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. Show Cause Order P 20 n.26, JA 385.

futures swaps and basis swaps. *Id.* P 17, JA 382 (describing derivatives). Certain “options” can also settle on the final NG Futures Contract settlement price. *Id.*

### **III. HUNTER’S COMPLAINT**

Based on the above-referenced investigation and findings, FERC on July 20, 2007 notified Hunter that it intended to issue a Show Cause Order and Notice of Proposed Penalties. *See* Complaint, JA 15. On July 23, 2007, Hunter filed a complaint in the United States District Court for the District of Columbia, seeking a declaratory judgment that FERC had exceeded its statutory authority, and seeking injunctive relief prohibiting FERC from bringing its enforcement action against Hunter. *Id.* In the Complaint, Hunter contended that FERC’s assertion of jurisdiction exceeded its authority under the NGA, and unlawfully intruded upon the exclusive jurisdiction of the CFTC over the trading of natural gas futures on the New York Mercantile Exchange (NYMEX). *Id.* JA 24-25.

### **IV. FERC’S ORDERS**

In the Show Cause Order, issued July 26, 2007, JA 375, FERC ordered respondents Amaranth, and traders Hunter and Donohoe, to show cause why they had not violated FERC’s Anti-Manipulation Rule, and why they should not be assessed civil penalties and required to disgorge unjust profits plus interest from these violations. The Amaranth entities filed timely requests for rehearing of the

Show Cause Order, Donohoe filed an untimely request, and Hunter filed no request at all.

On November 30, 2007, FERC issued the Rehearing Order, responding to the request of four Amaranth entities for expedited rehearing. The Amaranth entities asserted that FERC lacked jurisdiction because the alleged manipulative conduct was within the exclusive jurisdiction of the CFTC, and was not “in connection with” FERC-jurisdictional natural gas transactions as required under NGA § 4A. Rehearing Order PP 8-10, JA 459-61.

FERC rejected these contentions. While the NG Futures Contracts are not directly FERC-regulated, the settlement price of these contracts has a direct effect on the price of FERC-jurisdictional natural gas sales. *Id.* P 11, JA 462. 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 469. This finding, moreover, did not intrude on or interfere with the CFTC’s exclusive jurisdiction to oversee the operation of the futures markets, but rather was complementary to the CFTC’s jurisdiction. *Id.* P 11, JA 462.

On December 14, 2007 -- one day after this Court denied emergency motions for stay of the agency proceedings -- respondents filed responses to the Show Cause Order, generally challenging all aspects of the Order. On February 1, 2008, FERC issued an order directing the parties to file briefs addressing which

issues should be set for hearing. *Amaranth Advisors, LLC*, 122 FERC ¶ 61,087 (2008). On March 18, 2008, FERC enforcement staff filed its brief, and respondents filed responsive briefs on May 19, 2008.

On July 17, 2008, FERC issued the Hearing Order, denying the remaining requests for rehearing of the Show Cause Order, addressing certain preliminary legal issues raised in the briefs and setting for hearing the issue of whether any of the respondents violated the Anti-Manipulation Rule. The Hearing Order reaffirmed FERC's conclusions in the Rehearing Order regarding its jurisdiction to issue the Show Cause Order. Hearing Order, 124 FERC at 61,256 P 19. The Hearing Order also rejected arguments that FERC's jurisdiction under NGA § 4A over "any entity" does not extend to natural persons, finding "any entity" to be a deliberately inclusive term left by Congress to FERC's interpretation. *Id.* at 61,262 P 49. As Congress directed that FERC implement NGA § 4A through rules "as necessary in the public interest or for the protection of natural gas ratepayers," 15 U.S.C. § 717c-1, FERC concluded that a narrow interpretation of "any entity" would unreasonably frustrate FERC's ability to punish acts of manipulation and deception prohibited in EPCA 2005. Hearing Order, 124 FERC at 61,263 P 55.

Hunter requested rehearing of the Hearing Order before FERC; that request remains pending.

## V. THE DISTRICT COURT'S DECISIONS ON HUNTER'S COMPLAINT

On December 10, 2007, the District Court denied Hunter's request for injunctive relief. *Hunter v. FERC*, 527 F. Supp. 2d 9 (D.D.C. 2007) (Mem. Op. JA 200-14). The court concluded, *inter alia*, that Hunter had not shown a likelihood of success on the merits, and, indeed, had not shown that the court had the necessary jurisdiction even to rule on the matter. *Hunter*, 527 F. Supp. 2d at 16, Mem. Op. JA 210. The court found that the Show Cause Order was not a final agency action warranting review at this time, but rather simply "the first step of a formal process designed to determine whether Hunter actually violated any FERC regulations." *Hunter*, 527 F. Supp. 2d at 19, Mem. Op. JA 211. Even assuming ripeness, Hunter failed to demonstrate that FERC's assertion of jurisdiction was sufficiently outside of its statutory authority (*i.e. ultra vires*) that Hunter was likely to succeed on the merits. *Hunter*, 527 F. Supp. 2d at 17 n.6, Mem. Op. JA 212. Further, the court found that any challenge to the Show Cause Order is properly made in the courts of appeal pursuant to NGA § 19(b). *Hunter*, 527 F. Supp. 2d at 17, Mem. Op. JA 212 n.6.

On July 31, 2008, the District Court dismissed Hunter's complaint. *Hunter*, 569 F. Supp. 2d 12 (Mem. Op. JA 881). The court agreed with FERC that Hunter's Complaint was essentially a challenge to FERC's assertion of jurisdiction in the Show Cause Order and, as such, must be brought in the court of appeals in

the normal course of review under NGA § 19(b). *Hunter*, 569 F. Supp. 2d at 15, Mem. Op. JA 885. Although Hunter attempted to recast his declaratory judgment claim as a general challenge to FERC’s jurisdiction rather than a challenge to the Show Cause Order itself, the court found that “Hunter’s declaratory judgment claim is so intertwined with the [Show Cause Order] and accompanying enforcement proceedings that it must be construed as an attack on the [Show Cause Order] itself.” *Hunter*, 569 F. Supp. 2d at 15, Mem. Op. JA 886. Other respondents to the Show Cause Order proceeded under NGA § 19(b) to seek rehearing before FERC and then review in the court of appeals. *Hunter*, 569 F. Supp. 2d at 16, Mem. Op. JA 886-87.

The court further rejected the contention that circumstances warranted the invocation of its inherent power to review alleged *ultra vires* agency actions. *Hunter*, 569 F. Supp. 2d at 16, Mem. Op. JA 887. FERC’s initiation of enforcement proceedings against Hunter “is not the sort of ‘brazen defiance’ that calls for *ultra vires* review.” *Hunter*, 569 F. Supp. 2d at 16, Mem. Op. JA 888. Even if the court had jurisdiction, it would find that FERC’s actions were neither sufficiently final nor ripe to warrant review at this juncture. *Hunter*, 569 F. Supp. 2d at 17, Mem. Op. JA 888.



## SUMMARY OF ARGUMENT

Hunter's complaint in the District Court challenged FERC's assertion of jurisdiction in its Show Cause Order, requiring 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. That scheme 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.

The District Court correctly dismissed Hunter's complaint. Because Hunter effectively is challenging FERC's Show Cause Order, jurisdiction in the District Court is barred under NGA § 19(b), which provides for exclusive review in the court of appeals. Moreover, the District Court correctly concluded that FERC's Show Cause Order was in any event unripe for review. These agency proceedings are in the early stages. There has been no final determination by FERC that Hunter's conduct does in fact fall within the scope of NGA § 4A and the FERC Anti-Manipulation Rule; rather, FERC has only found an adequate basis to proceed further with the enforcement action.

Additional jurisdictional infirmities not relied upon by the District Court support dismissal. First, Hunter has a request for rehearing of the Hearing Order pending before FERC. Under this Court's settled caselaw, a petitioner cannot simultaneously seek review before the court of appeals and before the agency. Second, Hunter cannot show jurisdictional aggrievement where no finding has been made of any statutory or regulatory violations, and Hunter is only subject to further agency proceedings.

Even assuming jurisdiction, dismissal of Hunter's complaint may be affirmed because Hunter's complaint lacks merit. Hunter's complaint and the arguments of Hunter and his supporters (the CFTC and the Futures Industry Group<sup>6</sup>) provide no basis to find that FERC exceeded its jurisdiction in issuing the Show Cause Order. FERC's NGA § 4A authority applies to "any entity" engaging in prohibited conduct – a term which reasonably is interpreted broadly to encompass all types of actors, both natural and non-natural, and by no means excludes natural persons such as Hunter from the prohibitions of NGA § 4A. Further, although Hunter's alleged conduct did not occur in a FERC-jurisdictional physical natural gas transaction, NGA § 4A (which was modeled on Exchange Act § 10(b)) prohibits manipulative conduct "in connection with" FERC-jurisdictional

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<sup>6</sup> Collectively the Futures Industry Association, Managed Funds Association, CME Group, Inc. and National Futures Association.

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 futures markets did not give the CFTC exclusive jurisdiction over manipulative conduct in futures markets affecting FERC-jurisdictional markets. Therefore, 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

The court reviews the dismissal of a complaint *de novo*. *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1485 (D.C. Cir. 1992). The court may “affirm the dismissal of a complaint on different grounds than those relied upon by the district court.” *Broudy v. Mather*, 460 F.3d 106 (D.C. Cir. 2006).

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 (footnote omitted).

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 as necessary in the public interest or for the protection of natural gas ratepayers.” 15 U.S.C. § 717c-1. This case concerns Hunter’s alleged violation of FERC’s Anti-Manipulation Rule, promulgated under authority of NGA § 4A. 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* CFTC Br. 13, does not change this result. As demonstrated in Argument Section IV(B)(3) *infra*, FERC’s interpretation of NGA § 4A in no way intrudes upon the CFTC’s exclusive jurisdiction. Rehearing Order P 66, JA 495. Even if there were a conflict, the CFTC’s cases simply demonstrate that agencies are not entitled to deference in interpreting statutes they do not administer; none undercuts the deference due FERC in interpreting NGA § 4A, unambiguously entrusted to FERC’s administration. *See 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), nor can the CFTC – which did not participate in the FERC proceeding below – claim such an entitlement in the absence of its own authoritative interpretation of CEA § 2(a)(1)(A). *See* Hunter Br. 33 (asserting CFTC interpretation in its intervenor brief is entitled to deference). *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 DISTRICT COURT CORRECTLY FOUND THAT IT LACKED JURISDICTION OVER HUNTER’S COMPLAINT.**

In *Hunter*, 569 F. Supp. 2d 12, Mem. Op. JA 881, the District Court dismissed Hunter’s complaint on two independent grounds. First, because Hunter’s complaint essentially challenged FERC’s Show Cause Order, jurisdiction in the District Court was barred under NGA § 19(b), 15 U.S.C. § 717r(b), which provides for exclusive review in the court of appeals. *Hunter*, 569 F. Supp. 2d at 15, Mem. Op. JA 885. Second, the District Court found that FERC’s actions were not sufficiently final to warrant review at this juncture, as the Show Cause Order merely initiated enforcement proceedings, without reaching any final determination or imposing any liability on Hunter. *Hunter*, 569 F. Supp. 2d at 17, Mem. Op. JA 888. These determinations are correct, as discussed below, and the District Court’s dismissal of Hunter’s complaint should be affirmed.

**A. The District Court Correctly Determined That Exclusive Jurisdiction Over Any Challenge To FERC’s Show Cause Order Rests In The Court Of Appeals.**

In the decision on appeal, the District Court correctly determined that Hunter’s complaint essentially challenged FERC’s Show Cause Order. *Hunter*, 569 F. Supp. 2d at 15, Mem. Op. JA 885. As a result, jurisdiction in the District Court is barred by NGA § 19(b), which vests exclusive jurisdiction over review of FERC NGA orders in the court of appeals.<sup>7</sup> *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-36 (1958) (recognition of the Supreme Court, in construing the identical language of the companion provision in the FPA, that the statute prescribes the “complete and exclusive mode for judicial review of the Commission’s orders”).

As the District Court found, Hunter’s Complaint “is so intertwined with the [Show Cause Order] and accompanying enforcement proceedings that it must be construed as an attack on the [Show Cause Order] itself.” *Hunter*, 569 F. Supp. 2d at 15, Mem. Op. JA 886.

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<sup>7</sup> NGA § 19(b) provides that:

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such a proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia . . . .

For example, the subheading for Count I, Declaratory Judgment, is premised on the [Show Cause Order]: “FERC’s Imminent Enforcement Action by [Show Cause Order] is Beyond the Scope of Its Authority.” *See also* Compl. P 1 (“This action arises from FERC’s assertion of jurisdiction to bring an investigation and enforcement action against Plaintiff for Plaintiff’s trading of natural gas futures contracts.”); Compl. P 59 (“By threatening and proceeding to an imminent enforcement action by against [sic] Plaintiff by [the Show Cause Order] for alleged manipulation of natural gas futures on NYMEX, the FERC has grossly exceeded its statutory authority.”) (emphasis added by court).

*Hunter*, 569 F. Supp. 2d at 15-16, Mem. Op. JA 886. Other respondents to the Show Cause Order viewed it as an order governed by NGA § 19, seeking rehearing before FERC and petitioning for review in the D.C. Circuit, raising some of the same jurisdictional challenges as *Hunter*. *Hunter*, 569 F. Supp. 2d at 16, Mem. Op. JA 886-87.

*Hunter* asserts that he is not challenging the Show Cause Order, but rather only FERC’s general jurisdictional determination, that allegedly preceded the Show Cause Order. *Hunter* Br. 55. The District Court reasonably found this argument unconvincing. *Hunter*, 569 F. Supp. 2d at 16, Mem. Op. JA 887. *Hunter* made no reference to any prior jurisdictional determinations in his complaint and sought no relief from these alleged jurisdictional determinations until the Show Cause Order was issued. *Id.* “Thus it is clear that the principal target of *Hunter*’s declaratory judgment claim is the [Show Cause Order] itself, not FERC’s jurisdictional authority.” *Id.*



Further, Hunter need not specifically challenge the Show Cause Order for district court review of Hunter's claims to be precluded, because consideration of Hunter's jurisdictional claims in the district court now necessarily would interfere with the court of appeals' *future* jurisdiction over final FERC orders exercising that jurisdiction. *See Hunter*, 569 F. Supp. 2d at 15, Mem. Op. JA 885; *CFTC v. Amaranth Advisors, LLC*, 523 F. Supp. 2d 328, 338 (S.D.N.Y. 2007) (because NGA § 19(b) vests exclusive jurisdiction in the courts of appeal, "district courts are not the proper *fora* for defendants to challenge FERC's jurisdiction"). "[W]here a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's *future* jurisdiction" is subject to the exclusive review provisions. *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) (emphasis added). *See also Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187 (2d Cir. 2001) (statutes that "vest judicial review of administrative orders exclusively in the courts of appeals also preclude district courts from hearing claims that are 'inescapably intertwined' with review of such orders.").

The fact that Hunter purports to raise a jurisdictional challenge does not change matters. Exclusive review provisions apply to challenges to agency jurisdiction. *Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 550 (D.C. Cir. 1992). There is no exception to the NGA § 19(b) scheme of exclusive review based upon

the substance of the challenge; indeed, “such a procedure would negate most of the benefits attending the ‘exclusive’ scheme of review.” *Williams Natural Gas Co. v. The City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989).

*Great Plains Coop v. CFTC*, 205 F.3d 353, 355 (8th Cir. 2000), affirmed dismissal of a complaint for declaratory and injunctive relief alleging that the CFTC lacked jurisdiction to file an administrative complaint against petitioner. “Allowing the target of an administrative complaint simply to file for an injunction in a federal district court would defeat the purpose of [the CEA’s exclusive review provision]: It would create two avenues of judicial review and would allow the plaintiff to short-circuit the administrative review process and the development of a detailed factual record by the agency.” *Id.* at 355. Rather, “the relevant statute allows judicial review, even of jurisdictional questions, only after a final order has been issued by the CFTC, and then only by direct review in the appropriate court of appeals.” *Id.* at 356. *See also Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 957 (4th Cir. 1979) (district court lacked jurisdiction to enjoin FERC show cause proceedings under NGA § 19(b); “there is no area of review, whether relating to final or preliminary orders, available in the district court.”)

Hunter relies on *Nat’l Mining Ass’n v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002), to support his argument that he is not challenging a FERC “order.”

Hunter Br. 56-57.<sup>8</sup> *Nat'l Mining* construed the Black Lung Benefits Act, 33 U.S.C. § 921(c), which provides that a person aggrieved by a final “order” of the Black Lung Benefits Review Board may obtain review in the courts of appeals. *Nat'l Mining*, 292 F.3d at 856. Noting that the Administrative Procedure Act draws a distinction between “orders,” which typically follow adjudications, and regulations, the court concluded that this exclusive review procedure applied only to Board compensation orders issued in benefits adjudications, and did not govern review of Secretary of Labor regulations. *Id.* at 856.

*Nat'l Mining* patently is inapplicable here, as NGA § 19(b) “does not support the distinction between orders derived from adjudications and those growing out of rulemaking.” *Public Sys. v. FERC*, 606 F.2d 973, 979 (D.C. Cir. 1979) (the Natural Gas Act “‘refers more or less indiscriminately to ‘rules,’ ‘regulations,’ and ‘orders’”) (quoting *Union Oil Co. v. FPC*, 542 F.2d 1036, 1040 (9th Cir. 1976)). *See also, e.g., Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1018 (D.C. Cir. 1987) (applying NGA § 19(b) to rulemaking).

Moreover, no rulemaking is involved here; the Show Cause Order marks the beginning of an adjudicatory process. This is like the situation in *Sturm, Ruger &*

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<sup>8</sup> *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008) (cited Hunter Br. 56-57), is likewise inapposite as it found that exclusive review provisions did not preclude jurisdiction over a complaint challenging the constitutionality of the statute that created the agency. No such constitutional claim is raised here.

*Co., Inc. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002), where the court found *Nat'l Mining* inapplicable. There the petitioner -- who was anticipating enforcement proceedings -- filed a suit for declaratory judgment and injunctive relief against the agency in district court, seeking to “short-circuit” the administrative process including exclusive review in the court of appeals. *Id.* The court concluded that “[o]ur obligation to respect the review process established by Congress bars us from permitting Sturm Ruger to make this end run, and requires dismissal of its district court complaint.” *Id.*

**B. The District Court Correctly Determined That The Show Cause Order Is Not Final, Reviewable Agency Action.**

**1. The Show Cause Order Does Not Satisfy Finality Requirements.**

The District Court correctly determined that, even if jurisdiction were not barred under NGA § 19(b), FERC’s actions nevertheless were not sufficiently final to warrant review at this juncture. *Hunter*, 569 F. Supp. 2d at 17, Mem. Op. JA 888. For an agency action to be final, *Bennett v. Spear*, 520 U.S. 154 (1997), 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).

FERC's Show Cause Order satisfies neither condition. There is no consummation of FERC's decision-making process, *Bennett*, 520 U.S. at 178; the order was only the first step of formal administrative litigation in which FERC ultimately will make a final determination whether the actions taken by Hunter were lawful. Such an administrative complaint, which simply avers the agency's "reason to believe" that a statutory violation had occurred, is not final agency action. *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 239 (1980). 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 Show Cause Order also did not determine any "rights or obligations," and no "legal consequences will flow" from it. *Bennett*, 520 U.S. at 178. As a result of the Show Cause Order, Hunter faces no choice between "unnecessary compliance and substantial sanctions," nor is imposition of sanctions on Hunter "inevitable." Hunter Br. 51. Hunter will only face the adverse consequences of civil penalties or disgorgement if FERC ultimately rules against him. Hunter's exposure to an enforcement action is insufficient, Hunter Br. 54; 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. Hunter’s Jurisdictional Claims Are Not “Purely Legal Issues” Susceptible To Interlocutory Review.

Hunter asserts that “[c]ourts routinely find an agency’s determination as to its jurisdiction to be a purely legal issue that is ripe for review.” Hunter Br. 46. There is, however, 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.

Hunter cites to inapposite cases where the issue involved expressly was found to be “strictly a legal issue” and “no factual development or application of agency expertise will aid the court’s decision.” *Atlantic Richfield Co. v. DOE*, 769 F.2d 771, 782 (D.C. Cir. 1984) (cited Hunter Br. 46) (quoting *Athlone Indus., Inc. v. Consumer Products Safety Comm’n*, 707 F.2d 1485, 1489-90 n.30 (D.C. Cir. 1983) (cited Hunter Br. 46)). *See also Ciba-Geigy Corp. v. EPA*, 801 F.2d 430,

435, 437 (D.C. Cir. 1986) (Hunter Br. 48) (issue found sufficiently final for review where both sides agreed that the issue was “a purely legal issue,” and the agency action had an immediate legal effect on the petitioner who was required immediately to comply with changed labeling requirements).

In contrast, the question here is whether Hunter has committed acts falling within the scope of NGA § 4A and the Anti-Manipulation Rule, as preliminarily found (but not finally determined) in the Show Cause Order. Such an inquiry is not a “purely legal issue,” Hunter Br. 46, properly subject to interlocutory review. The issuance of an administrative complaint “is a step toward, and will merge in, the Commission’s decision on the merits.” *Standard Oil*, 449 U.S. at 246. Rather than reaching a final determination, *see* Hunter Br. 47, 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*, 569 F. Supp. 2d at 17, Mem. Op. JA 889. FERC has not yet determined what acts Hunter committed and consequently has not determined whether those acts 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).

**3. There Is No *Ultra Vires* Assertion of Statutory Authority to Provide a Basis for Interlocutory Review.**

Hunter contends that interlocutory review is available because FERC's assertion of jurisdiction in the Show Cause Order is *ultra vires*, citing *Aid Ass'n for Lutherans v. United States Postal Service*, 321 F.3d 1166, 1173 (D.C. Cir. 2003), and *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988). Hunter Br. 22-23, 53. However, *Lutherans* and *Griffith* confronted agency action ordinarily *exempt* from judicial review. *See Lutherans*, 321 F.3d at 227 (postal service exempt from review under the Administrative Procedure Act); *Griffith*, 842 F.2d at 490 (Congress precluded review of FLRA decisions concerning arbitral awards). *See also Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988) (cited Hunter Br. 23, 53) (considering extent to which action by Secretary of Commerce was immune from judicial review under two "finality" clauses in the Export Administration Act). These cases are inapposite here where statutory review in the court of appeals following a final agency decision provides a perfectly adequate means of review. *See Telecomms. Research*, 750 F.2d at 78.

Further, the *ultra vires* 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*, 842 F.2d at 493 (citing cases). As the District Court correctly found, however, no patent violation



of law exists here. “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.” *Hunter*, 527 F. Supp. 2d at 17 n.6 (citing *Griffith*, 842 F.2d at 493), Mem. Op. JA 212. 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.” *Id.*

**4. Hunter Will Suffer No Hardship From Delay That Warrants Interlocutory Review.**

Notwithstanding Hunter’s assertions of hardship from delay, Hunter Br. 49-52, the District Court reasonably found 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. *Hunter*, 569 F. Supp. 2d at 17, Mem. Op. JA 889. The fact that Hunter is required to participate in agency proceedings, *see* Hunter Br. 51-52, is insufficient grounds for finding agency orders setting a complaint for hearing final. *Standard Oil*, 449 U.S. at 242. *See also 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).

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 another FERC Show Cause Order, *Energy Transfer Partners, L.P., et al.*, 120 FERC ¶ 61,086 (July 26, 2007), *on reh'g*, 121 FERC ¶ 61,282 (December 20, 2007). The Fifth Circuit agreed with FERC, *see* FERC Motion to Dismiss, 5th Cir. No. 07-61021 (filed Jan. 25, 2008),<sup>9</sup> that the Show Cause Order was not a final order, and 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.

FERC's enforcement proceedings may never impose legal consequences on Hunter, depending upon factual determinations yet to be made by the FERC. *Hunter*, 569 F. Supp. 2d at 17, Mem. Op. JA 889. The Hearing Order expressly directed the administrative law judge to determine "whether any of the Respondents violated the Anti-Manipulation Rule." Hearing Order, 124 FERC at 61,255 P 14. There is no assurance at this stage that FERC ultimately will even

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<sup>9</sup> 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 (5<sup>th</sup> Cir. Nos. 08-60730 and 08-60810) following administrative hearing orders, in light of the ongoing agency enforcement proceeding. On October 30, 2008, the Fifth Circuit issued an order carrying FERC's Motion to Dismiss with the case.

find a violation of the Anti-Manipulation Rule. “[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*, 569 F. Supp. 2d at 17 (emphasis in original), Mem. Op. JA 889. 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.* See, e.g., *Standard Oil*, 449 U.S. at 242 (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.”).

Hunter asserts that FERC desires interlocutory review, referencing FERC’s January 28, 2008 Motion to Dismiss in *Amaranth Advisors, LLC*, No. 07-1491 (D.C. Cir.). Hunter Br. 50. However, in that motion FERC recognized the “obvious finality concerns” raised by the ongoing agency proceedings, see Motion at 7, and events subsequent to the January 28, 2008 Motion have reinforced those

concerns. The District Court below found that the Show Cause Order was not final agency action. *Hunter*, 569 F. Supp. 2d at 17, Mem. Op. JA 889. 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, and as the Commission has argued at pp. 17-27 in its answering brief in the companion Amaranth appeal in No. 07-1491, the Show Cause Order is not final, reviewable agency action.

### **III. ADDITIONAL JURISDICTIONAL INFIRMITIES SUPPORT DISMISSAL OF HUNTER'S COMPLAINT.**

In addition to the jurisdictional infirmities relied upon by the District Court, other jurisdictional issues provide additional bases upon which dismissal of Hunter's complaint can be affirmed. First, Hunter currently has pending before FERC a request for rehearing of FERC's Hearing Order. Under this Court's settled caselaw, a pending request for administrative reconsideration renders agency action non-final, thereby providing an independent basis for affirming dismissal of Hunter's complaint. *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002); *Tennessee Gas Pipeline Co. v. FERC*, 9 F.3d 980 (D.C. Cir. 1993). The Court previously granted FERC's motion to dismiss the petition for review filed by Hunter's execution trader, Donohoe, who also was simultaneously

seeking agency and court review. *Amaranth Advisors, LLC v. FERC*, 2008 U.S. App. LEXIS 9095 (D.C. Cir. Apr. 23, 2008).

Second, Hunter fails to meet the requirement under NGA § 19(b) that a party 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. § 825l(b)).

As the District Court found, Hunter has suffered no irreparable injury from FERC’s establishment of a hearing to determine whether Hunter committed the alleged violations of the Anti-Manipulation Rule. *Hunter*, 527 F. Supp. 2d at 14-15, Mem. Op. JA 228. The fact that Hunter must defend himself 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. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974)).

#### **IV. DISMISSAL OF HUNTER’S COMPLAINT CAN BE AFFIRMED ON THE MERITS OF THE COMPLAINT.**

Dismissal of Hunter’s complaint can be affirmed on the merits of the complaint; Hunter’s contentions in his complaint, and the arguments of Hunter and his supporters before this Court, provide no basis to find that FERC exceeded its jurisdiction in issuing the Show Cause Order. *See, e.g., Flynt v. Rumsfeld*, 355

F.3d 697, 698 (D.C. Cir. 2004) (rejecting jurisdictional grounds relied on by district court in dismissing complaint, but affirming dismissal based on the court of appeals' consideration and rejection of the complaint's merits). FERC reasonably concluded that Hunter's alleged manipulative conduct, if proven, falls within FERC's NGA § 4A jurisdiction because that jurisdiction encompasses manipulation by "any entity" in the futures market that directly affects FERC-jurisdictional natural gas transactions.

As demonstrated in the FERC's 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 495.

These arguments are, moreover, addressed at greater length in FERC's Respondent's Brief in the companion proceeding to this docket, *Amaranth Advisors, LLC v. FERC*, Docket No. 07-1491 (D.C. Cir.), filed on November 10, 2008, and ordered by the Court to be argued on the same day as this appeal.

**A. Because Of Its Direct Effect On FERC-Jurisdictional Sales, Hunter's Manipulative Conduct, If Proven, Would Violate NGA § 4A.**

In the Show Cause Order, FERC preliminarily concluded that Amaranth, Hunter and Donohoe manipulated (by driving down) the settlement price of NG Futures Contracts by selling an extraordinary amount of the contracts during the

last 30 minutes of trading before the contracts expired. Show Cause Order P 84, JA 423, P 91, JA 426, P 106, JA 435, P 111, JA 437; Rehearing Order P 3, JA 457. Amaranth benefitted from driving down the price because Amaranth had taken 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.* Hunter, in turn, stood to benefit by receiving a substantial percentage of Amaranth's profits from the trading. Show Cause Order P 136, JA 447-48.

This manipulative trading behavior “had a direct and substantial effect on the price of Commission-jurisdictional transactions.” Rehearing Order P 2, JA 457. *See also* Show Cause Order PP 108-110, JA 435-36; Rehearing Order P 23, JA 469. The conduct *directly* affected the price of NG Futures Contracts that went to delivery during the relevant time period. Rehearing Order P 4, JA 458. *See also* Show Cause Order P 26, JA 388; Rehearing Order P 14(b), JA 464. The NG Futures Contract settlement price also is incorporated into the price for physical basis transactions. Show Cause Order P 47, JA 399, P 108, JA 435; Rehearing Order P 4, JA 458; P 23, JA 469. The price of a substantial proportion of physical basis transactions, in turn, is used in indices which price a substantial volume of physical natural gas. Show Cause Order P 47, JA 399, P 109, JA 436; Rehearing Order P 23, JA 469.

Because Hunter’s trading conduct directly (and indirectly) affected FERC-jurisdictional sales, FERC reasonably concluded that, if proven, Hunter’s conduct constituted direct or indirect manipulation by “any entity” “in connection with” jurisdictional sales within the scope of NGA § 4A. Rehearing Order P 11, JA 462. NGA § 4A properly is interpreted consistently with Exchange Act § 10(b); a comparison of identical phrases used throughout NGA § 4A and Exchange Act § 10(b) shows that Congress modeled NGA § 4A after § 10(b).<sup>10</sup> Rehearing Order P 36, JA 477. “[W]hen ‘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

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<sup>10</sup> Compare NGA § 4A, p.2 *supra*, with the near-identical text of 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 of the mails, or of any facility of any national securities exchange—

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(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.



(2006) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)) (cited Rehearing Order P 39, JA 479).

The phrase “in connection with” in Exchange Act § 10(b) has been construed expansively to accomplish its broad remedial purposes. Rehearing Order PP 36-37, JA 477-78 (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)). However, mindful of the admonition, *see* Hunter Br. 40, that § 10(b) “must not be construed so broadly as to convert every common law fraud that happens to involve securities into a violation,” Order No. 670 at P 22, JA 304 (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 436; Rehearing Order P 22, JA 468. Based on the direct effects of Hunter’s manipulation of the 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 Hunter’s conduct and FERC-jurisdictional transactions. Rehearing Order P 23, JA 469.

**B. Hunter’s Arguments That FERC Lacks Jurisdiction Over The Alleged Manipulative Conduct Are Without Merit.**

Hunter asserts that FERC’s jurisdictional conclusion is flawed because: (1) the use of the term “entity” in NGA § 4A precludes application of that statute to individuals like Hunter, Hunter Br. 24-32; (2) FERC’s NGA § 4A authority is limited to conduct in the market for physical natural gas, Hunter Br. 38-42; and (3) FERC’s NGA § 4A jurisdiction intrudes on the exclusive jurisdiction afforded the CFTC in CEA § 2(a)(1)(A), Hunter Br. 32-42. *See also* CFTC Br. 12-37; Futures Br. 13-26. None of these arguments has merit.

**1. Natural Persons Are Within FERC’s NGA § 4A Jurisdiction.**

EPAct 2005 amended the NGA to give FERC authority to prevent “any entity” from engaging in market manipulation that affects FERC-jurisdictional markets. *See* NGA § 4A; Hearing Order, 124 FERC at 61,262 P 50. Hunter contends that use of the term “any entity” precludes application of NGA § 4A to natural persons, particularly given the use elsewhere in the NGA of terms such as “person” or “individual,” which clearly apply to natural persons. Hunter Br. 24-25. However, as FERC explained:

“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.

Hearing Order, 124 FERC at 61,262 P 49 (quoting Order No. 670, FERC Stats. & Regs. ¶ 31,202 P 18, JA 301) (footnotes omitted). Because the term “entity” includes “the largest possible universe of beings, natural and non-natural,” *State of Florida Dept. of Ins. v. Blackburn*, 209 B.R. 4, 8 (M.D. Fla. 1997), courts have found that the term “entity” is reasonably interpreted to include natural persons. *See City of Abilene, TX v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) (the term “entity,” where undefined in the statute, “may include a natural person, a corporation, a partnership, a limited liability company, a limited liability partnership, a trust, an estate, an association.”) (emphasis added); *Blackburn*, 209 B.R. at 8 (“Entity” means both *natural persons* as well as artificial, non-natural persons, such as corporations, partnerships, estates, and trusts.”) (emphasis added).

*American Dental Ass’n v. Shalala*, 3 F.3d 445 (D.C. Cir. 1993) (cited Hunter Br. 26), is not to the contrary. Hearing Order, 124 FERC at 61,263 P 53. In that statute, Congress employed the “unvarying practice” of using the term “entity” to refer to groups and organizations, and using terms other than “entity” when referring to individuals. *American Dental*, 3 F.3d at 447. Congress also repeatedly used the term “entity” *in combination with* terms signifying individuals. *Id.* Based on this “textual evidence,” the court concluded that Congress intended that the term “entity” not include individual practitioners. *Id.*

Here, in contrast, the NGA, as amended by EPAct 2005, does not use the term “entity” in ways that indicate the exclusion of natural persons. Hearing Order, 124 FERC at 61,263 P 53. To the contrary, such an interpretation is unreasonable. *Id.* at 61,263 P 51. If, as Hunter suggests, use of the term “entity” in NGA § 4A means NGA § 4A does not apply to “persons,” that requires the unreasonable conclusion that NGA § 4A cannot apply to corporations, because NGA § 2(1) defines “person” to include a corporation as well as an individual. *Id.* at 61,262 P 50 (citing NGA § 2(1), 15 U.S.C. § 717a(1)). FERC rejected such a strained reading of NGA section 4A. *Id.*

*Wolverine Power Co. v. FERC*, 963 F.2d 446 (D.C. Cir. 1992) (cited Hunter Br. 27-28), is likewise inapposite. *Wolverine* rejected FERC’s determination that it had authority to assess penalties against an unlicensed project operator under a civil penalty provision limited to “licensees.” Hearing Order, 124 FERC at 61,263 P 54 (citing *Wolverine*, 963 F.2d at 4). Among other things, the Court noted that “licensee” was defined in the FPA to include only those licensed. *Wolverine*, 963 F.2d at 450. Here, in contrast, Congress used the broad, undefined term “any entity,” and left the interpretation of that term to FERC to address in its regulations “as necessary in the public interest or for the protection of natural gas ratepayers.” Hearing Order, 124 FERC at 61,262 P 50 (quoting NGA § 4A); at 61,263 P 55.

Under Hunter’s strained statutory view, NGA § 20(d), 15 U.S.C. § 717s(d), provides FERC the only means to enforce its anti-manipulation authority over individuals. *See* Hunter Br. 30-32. NGA § 20(d) “gives federal regulators new authority to ban unscrupulous energy traders and executives from employment in the utility industry.” Hunter Br. 32 (quoting 151 Cong. Rec. S7451-04 (2005) (Statement of Senator Cantwell)). Nothing in NGA § 20(d) remotely suggests that Congress intended to insulate individuals from other enforcement of FERC’s anti-manipulation authority. To the contrary, injunctive relief, NGA § 20(a), 15 U.S.C. § 717s(a), general penalties, NGA § 21, 15 U.S.C. § 717t, and civil penalty authority, NGA § 22, 15 U.S.C. § 717t-1, all are applicable to “persons,” which under NGA § 2(1), 15 U.S.C. § 717a(1), includes an “individual.”<sup>11</sup>

In light of the specific directive of Congress to implement the prohibition stated in NGA § 4A through rules “as necessary in the public interest or for the protection of natural gas ratepayers,” a narrow interpretation of the term “entity” would unreasonably frustrate FERC’s ability to punish acts of manipulation

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<sup>11</sup> Although Hunter reads much Congressional intent into the NGA § 20(d) phrase “is engaged or has engaged *in practices constituting* a violation of 717c-1,” *see* Hunter Br. 31 (emphasis by Hunter), that language does nothing more than mirror the pre-existing language in NGA § 20(a) providing FERC authority to obtain injunctions where “any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation” of the NGA. That language certainly provides no basis to conclude that individuals are, except as provided in NGA § 20(d), immune from enforcement of FERC’s NGA § 4A anti-manipulation authority, as Hunter claims.

prohibited in EAct 2005. Hearing Order, 124 FERC at 61,263 P 55 (citing NGA § 4A). 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. *Id.* The Anti-Manipulation Rule and FERC'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. *Id.* The behavior prohibited in NGA § 4A can have a direct and serious impact on the prices of natural gas and transportation subject to FERC's jurisdiction, affecting the nation's economy and the consumers for whose protection the NGA was enacted. *Id.*

Use of the term "entities" in NGA § 23(a)(3), 15 U.S.C. § 717t-2(a)(3), also enacted by EAct 2005, *see* Hunter Br. 28, likewise does not compel a different outcome. Hearing Order, 124 FERC at 61,263 P 51. This section directs FERC to facilitate price transparency in jurisdictional markets, permitting FERC to rely on "entities other than the Commission to receive and make public the information." Hearing Order, 124 FERC at 61,263 P 51 n.99. Hunter asserts that "[h]ere, the NGA is *obviously* referring to organizations that obtain and aggregate information, rather than individuals," *i.e.*, organizations like Platts or the National Gas Institute that synthesize and disperse information on prices. Hunter Br. 28-29 (emphasis added). Hunter's *assumption* of Congressional intent is unsupported, however, as

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. Hearing Order, 124 FERC at 61,263 P 51.

**2. FERC’s NGA § 4A Jurisdiction Is Not Limited To Conduct In The Physical Natural Gas Markets.**

Hunter contends that FERC cannot reach Hunter’s conduct in the NG Futures Contract market because FERC’s NGA § 4A jurisdiction extends only to conduct in physical natural gas markets. Hunter Br. 38-39. NGA § 4A did not expand the transactions that would satisfy the NGA § 4A requirement that affected markets be “subject to the Commission’s jurisdiction.” Order No. 670 P 20, JA 303, P 22, JA 305 (cited Hunter Br. 38). However, Congress did broaden in NGA § 4A 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 470; PP 30-45, JA 473-82; P 59, JA 491. Congress could have, but did not, prohibit manipulative or deceptive conduct that occurred *in* FERC-jurisdictional markets. *Id.* P 34, JA 476. 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 FERC’s jurisdiction. *Id.*

Indeed, prior to 2005, FERC had statutory authority to punish manipulation by sellers *in* physical natural gas markets, and had promulgated market behavior rules prohibiting such manipulation. *Id.* P 29, JA 473 (citing 18 C.F.R. § 284.403(a)). As Congress is presumed not to enact surplusage, the better interpretation is that Congress meant to expand FERC authority beyond what existed prior to 2005, to proscribe the conduct alleged in the Show Cause Order. *Id.*

Hunter contends that his alleged manipulative conduct cannot be “in connection with” a jurisdictional sale because the “scheme to defraud must be part of the sale,” Hunter Br. 40, and Hunter never engaged in FERC-jurisdictional physical natural gas sales. *Id.* at 41. This argument ignores that the alleged manipulative conduct artificially distorted the price for NG Futures Contracts, on which participants in the NG Futures Contract Market (some of whom engaged in FERC-jurisdictional physical natural gas sales), and participants in FERC-jurisdictional natural gas markets, relied. *See supra* Statement of Facts Section II. Market manipulation under Exchange Act § 10(b) is defined as conduct “*controlling or artificially affecting* the price of securities.” Rehearing Order P 42, JA 480 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) (emphasis added in Rehearing Order)). “Failure to disclose that market prices are being artificially depressed operates as a deceit on the market place and is an omission of



a material fact.” Rehearing Order P 42, JA 480 (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 (2<sup>nd</sup> 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.”). This satisfies the standard set forth in *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 847 (2d Cir. 1986) (cited Hunter Br. 41), that the acts in question have the “incidental involvement of securities.” Rehearing Order P 43, JA 481 (citing *Rand*, 794 F.2d at 847).

*Conoco, Inc. v. FERC*, 90 F.3d 536, 552 (D.C Cir. 1996) (cited Hunter Br. 40), is not to the contrary. *Conoco* was applying NGA § 4(a), 15 U.S.C. § 717c(a), which 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), 15 U.S.C. § 717(b). Rehearing Order P 25, JA 470. Congress expressly patterned § 4A on Exchange Act § 10(b), *not* on NGA § 4(a); thus, it is reasonable

to rely on Exchange Act § 10(b) precedent, and not on NGA § 4(a) precedent, to interpret the phrase “in connection with.” Rehearing Order P 25, JA 470.

Further, *Conoco* held that the NGA § 4(a) phrase “in connection with” did not allow FERC to regulate gathering facilities that are expressly exempt from FERC jurisdiction under NGA § 1(b). Rehearing Order P 27, JA 471. In this case, NGA § 1(b) does not exempt financial market participants, such as Hunter, or trading in natural gas futures markets, so FERC’s interpretation of its jurisdiction under NGA § 4A does not conflict with NGA § 1(b). Rehearing Order P 28, JA 472. *Conoco* in fact *supports* the view that, when non-jurisdictional transactions, such as transactions in natural gas futures contracts, affect jurisdictional markets, the “in connection with” requirement of § 4(a) is met. *Id.* P 28 n.64 (quoting *Conoco*, 90 F.3d at 549) (when exempt gathering facilities become “intertwined with jurisdictional activities, the Commission’s regulation of the latter may impinge on the former”).

**3. FERC’s Interpretation Of NGA § 4A Does Not Intrude On The CFTC’s Exclusive Jurisdiction Under CEA § 2(a)(1)(A).**

Hunter and his supporters contend that FERC’s assertion of jurisdiction will impliedly repeal or “eviscerate” the CFTC’s jurisdiction under CEA § 2(a)(1)(A). *See* Hunter Br. 39; CFTC Br. 29; 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 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 sales of NG Futures contracts, the operating rules of the NYMEX exchange, or traders’ commodity accounts. Rehearing Order P 58, JA 490. *See* CFTC Br. 13-19; Futures Br. 14-18 (describing CFTC exclusive jurisdiction). FERC neither asserted jurisdiction over these matters nor sought to interfere with that jurisdiction. Rehearing Order P 11, JA 462 (citing Show Cause Order P 48, JA 400; P 55, JA 404). However, FERC reasonably concluded that the 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 483. 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.*

**a. FERC Reasonably Distinguished Between The CFTC’s Exclusive Jurisdiction Over Futures Markets And Non-Exclusive Jurisdiction Over Manipulation.**

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 489-90 (citing *Tug Allie-B. v. U.S.*, 273 F.3d 936, 941 (11<sup>th</sup> 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 Hunter Br. 35; CFTC Br. 20-21; Futures Br. 21-22). Accordingly, where “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.” *Roberts*, 276 F.3d at 593 (quoting *Mancari*, 417 U.S. at 551) (emphasis in *Roberts*). See Show Cause Order P 48, JA 400 (citing *United States v. Reliant Energy*, 420 F. Supp. 2d 1043, 1064-65 (N.D. Cal. 2006)).

Under this standard, FERC reasonably determined that its jurisdiction over activities that affect 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 462; Show Cause Order P 48, JA 400. Indeed, *Roberts* supports 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 485-86. “[W]hile 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 487. “[O]ther agencies . . . retain their jurisdiction beyond the confines of ‘accounts, agreements, and transactions’” for futures contracts. Rehearing Order P 50, JA 485-86 (quoting *Roberts*, 276 F.3d at 591).

In particular, there is an “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. §6o, that jurisdiction is *not* exclusive. Rehearing Order P 50, JA 485-86 (quoting *Roberts*, 276 F.3d at 591). Here, the CFTC is pursuing a complaint against Hunter under its anti-manipulation authority in 7 U.S.C. § 13(a)(2). CFTC Br. 4. Like its fraud jurisdiction under 7 U.S.C. §6o, there is no provision for *exclusive* jurisdiction over manipulative acts in 7 U.S.C. § 13(a)(2).<sup>12</sup> *See, e.g.*, CEA § 22(a)(1)(D), 7 U.S.C.

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<sup>12</sup> The Futures Industry Group makes an argument based on § 412 of the CFTC Act of 1974, Pub. L. No. 93-463, 88 Stat. 1414 (Oct. 23, 1974). Futures Br. 19-21. 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 provides 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. The Futures Industry Group also argues that the savings clause in CEA §

§ 25(a)(1)(D) (statutory private right of action for manipulation); *In re Amaranth*, 2008 U.S. Dist. LEXIS 79235 at \*58 (allegations that the Amaranth defendants manipulated the NG Futures Contracts settlement price “fall squarely within the scope of [the CEA] section 22(a)(1)(D) [private right of action]”).

Accordingly, courts addressing the preemptive effect of the CFTC’s § 2(a)(1)(A) jurisdiction on federal anti-fraud statutes have found that the statutes are complementary and can co-exist. *See United States v. Brien*, 617 F.2d 299, 310 (1st Cir. 1980) (the CFTC’s CEA § 2(a)(1)(A) jurisdiction does not preempt federal mail and wire fraud statutes with regard to sales of commodities options; “[a]lthough the statutes prohibit similar conduct, they operate independently and harmoniously.”); *United States v. Shareef*, 634 F.2d 679, 680-81 (2d Cir. 1980) (no repugnancy between the CFTC’s exclusive jurisdiction and the federal mail fraud statute); *United States v. Dial*, 757 F.2d 163 (7<sup>th</sup> 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). *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 28 (2d Cir. 1985), found that the CFTC anti-manipulation provisions were not repugnant to antitrust laws applicable to the same conduct because “price manipulation is an

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2(a)(1)(A) does not provide FERC with *additional* jurisdiction *vis-à-vis* the CFTC, Futures Br. 24-26, but FERC does not contend otherwise. *See* Rehearing Order PP 54-55, JA 488-89.

evil that is always forbidden under every circumstance by both the Commodity Exchange Act and the antitrust laws.” Likewise, here, as both the CEA and the NGA forbid manipulative conduct, the statutes are not repugnant but rather complementary.

The cases relied upon by Hunter and his supporters do not support a different result. *Chicago Merc. Exch. v. SEC*, 883 F.2d 537, 539 (7th Cir. 1989) and *Chicago Bd. of Trade v. SEC*, 677 F.2d 1137 (7th Cir. 1982), *vacated*, *Chicago Bd. Options Exch. v. Board of Trade*, 459 U.S. 1026 (1982) (cited Hunter Br. 36-37, CFTC Br. 23, Futures Br. 22), address only the narrow question of whether the CFTC or the SEC has jurisdiction *in the first instance* over new products brought to market possessing features of both securities and commodities or futures contracts. Rehearing Order P 51 & n.130, JA 486. 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).

*SEC v. Am. Commodity Exchange*, 546 F.2d 1361 (10<sup>th</sup> Cir. 1976) (cited Hunter Br. 36-37; CFTC Br. 22; Futures Br. 20), and *SEC v. Univest, Inc.*, 405 F. Supp. 1057 (N.D. Ill. 1975) (cited CFTC Br. 22; Futures Br. 21), concern 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 that were based on acts predating

the CEA were within the SEC’s jurisdiction. None of these cases addresses the issue here of 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 473-74; P 51 & n.130, JA 486.

**b. NGA § 23 Supports FERC’s Jurisdictional Determination.**

NGA § 23, 15 U.S.C. § 717t-2, enacted simultaneously with NGA § 4A (the former is § 316 of EAct 2005; the latter is § 315 of EAct 2005), reflects Congress’ recognition that FERC’s newly-enacted NGA § 4A authority would overlap with CFTC jurisdiction. Rehearing Order P 12, JA 463; *CFTC v. Amaranth Advisors, LLC*, 523 F. Supp. 2d at 332. 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, and the recognition that the information required would lead to potential enforcement. “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.” Rehearing Order P 62, JA 493.

Hunter and the CFTC assert that the “savings clause” in NGA § 23(c)(2), 15 U.S.C. § 717t-2(c)(2) – providing that nothing 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. Hunter Br. 38; CFTC Br. 27-28. However, the presence of a savings clause applicable only to 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 492.

Hunter argues that the Memorandum of Understanding<sup>13</sup> contemplated in NGA § 23 demonstrates that there is no overlapping jurisdiction. *See* Hunter Br. 38. The cited language, however, only refers to the CFTC’s jurisdiction under

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<sup>13</sup> *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 279.

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 493 (quoting Memorandum of Understanding at 3, JA 281) (emphasis in Rehearing Order)). Thus, FERC has acted entirely in accord with the CFTC’s and FERC’s understanding -- at least as that understanding existed prior to the initiation of litigation activities -- of the latter’s new authority.

## CONCLUSION

For the foregoing reasons, FERC respectfully requests that the District Court's dismissal of this appeal be affirmed.

Respectfully submitted,

Cynthia A. Marlette  
General Counsel

Robert H. Solomon  
Solicitor

Lona T. Perry  
Senior Attorney

Federal Energy Regulatory  
Commission  
Washington, D.C. 20426  
TEL: (202) 502-6600  
FAX: (202) 273-0901

November 26, 2008

*Hunter v. FERC,*  
No. 08-5380

**CERTIFICATE OF COMPLIANCE**

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 13,546 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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Lona T. Perry  
Senior Attorney

Federal Energy Regulatory  
Commission  
Washington, DC 20426  
TEL: (202) 502-6600  
FAX: (202) 273-0901

November 26, 2008

# **ADDENDUM**

## **STATUTES AND REGULATIONS**

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Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) provides as follows:

**(b) Transactions to which provisions of chapter applicable:**

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 4A, 15 U.S.C. § 717c-1 provides as follows:

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 78j (b) of this title) 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. Nothing in this section shall be construed to create a private right of action.



Section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c(a) provides as follows:

**(a) Just and reasonable rates and charges:**

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) provides as follows:

**(b) Review of Commission order:**

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

Section 20 of the Natural Gas Act, 15 U.S.C. § 717s provides as follows:

**(a) Action in district court for injunction**

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

**(b) Mandamus**

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

**(c) Employment of attorneys by Commission**

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

**(d) Violation of market manipulation provisions**

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 717c-1 of this title (including related rules and regulations) from—

(1) acting as an officer or director of a natural gas company; or

(2) engaging in the business of—

(A) the purchasing or selling of natural gas; or

(B) the purchasing or selling of transmission services subject to the jurisdiction of the Commission.

Section 21 of the Natural Gas Act, 15 U.S.C. § 717t provides as follows:

**(a)** Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than \$1,000,000 or by imprisonment for not more than 5 years, or both.

**(b)** Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding \$50,000 for each and every day during which such offense occurs.

Section 22 of the Natural Gas Act, 15 U.S.C. § 717t-1 provides as follows:

**(a) In general**

Any person that violates this chapter, or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall be subject to a civil penalty of not more than \$1,000,000 per day per violation for as long as the violation continues.

**(b) Notice**

The penalty shall be assessed by the Commission after notice and opportunity for public hearing.

**(c) Amount**

In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation.

Section 23 of the Natural Gas Act, 15 U.S.C. § 717t-2 provides as follows:

**(a) In general**

(1) The Commission is directed to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

(2) The Commission may prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section. The rules shall provide for the dissemination, on a timely basis, of information about the availability and prices of natural gas sold at wholesale and in interstate commerce to the Commission, State commissions, buyers and sellers of wholesale natural gas, and the public.

(3) The Commission may—

(A) obtain the information described in paragraph (2) from any market participant; and

(B) rely on entities other than the Commission to receive and make public the information, subject to the disclosure rules in subsection (b) of this section.

(4) In carrying out this section, the Commission shall consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible. The Commission may establish an electronic information system if it determines that existing price publications are not adequately providing price discovery or market transparency.

**(b) Information exempted from disclosure**

(1) Rules described in subsection (a)(2) of this section, if adopted, shall exempt from disclosure information the Commission determines would, if disclosed, be detrimental to the operation of an effective market or jeopardize system security.

(2) In determining the information to be made available under this section and the time to make the information available, the Commission shall seek to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information.

**(c) Information sharing**

(1) Within 180 days of August 8, 2005, the Commission shall conclude a memorandum of understanding with the Commodity Futures Trading Commission relating to information sharing, which shall include, among other things, provisions ensuring that information requests to markets within the respective jurisdiction of each agency are properly coordinated to minimize duplicative information requests, and provisions regarding the treatment of proprietary trading information.

**(2)** Nothing in this section may be construed to limit or affect the exclusive jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.).

**(d) Compliance with requirements**

**(1)** The Commission shall not condition access to interstate pipeline transportation on the reporting requirements of this section.

**(2)** The Commission shall not require natural gas producers, processors, or users who have a de minimis market presence to comply with the reporting requirements of this section.

**(e) Retroactive effect**

**(1)** Except as provided in paragraph (2), no person shall be subject to any civil penalty under this section with respect to any violation occurring more than 3 years before the date on which the person is provided notice of the proposed penalty under section 717t-1 (b) of this title.

**(2)** Paragraph (1) shall not apply in any case in which the Commission finds that a seller that has entered into a contract for the transportation or sale of natural gas subject to the jurisdiction of the Commission has engaged in fraudulent market manipulation activities materially affecting the contract in violation of section 717c-1 of this title.

Commodity Exchange Act, 7 U.S.C. § 2(a)(1)(A) provides as follows:

**(a) Jurisdiction of Commission; Commodity Futures Trading Commission**

**(1) Jurisdiction of Commission**

**(A) In general**

The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in subparagraphs (C) and (D) of this paragraph and subsections (c) through (i) of this section, with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), 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. Except as hereinabove provided, nothing contained in this section shall

**(I)** supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or

**(II)** restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.



Commodity Exchange Act, 7 U.S.C. § 13(a) provides as follows:

**(a) Felonies generally:**

It shall be a felony punishable by a fine of not more than \$1,000,000 (or \$500,000 in the case of a person who is an individual) or imprisonment for not more than five years, or both, together with the costs of prosecution, for:

**(1)** Any person registered or required to be registered under this chapter, or any employee or agent thereof, to embezzle, steal, purloin, or with criminal intent convert to such person's use or to the use of another, any money, securities, or property having a value in excess of \$100, which was received by such person or any employee or agent thereof to margin, guarantee, or secure the trades or contracts of any customer or accruing to such customer as a result of such trades or contracts or which otherwise was received from any customer, client, or pool participant in connection with the business of such person. The word "value" as used in this paragraph means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

**(2)** Any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to corner or attempt to corner any such commodity or knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 6, section 6b, subsections (a) through (e) of subsection <sup>[1]</sup> 6c, section 6h, section 6o(1), or section 23 of this title.

**(3)** Any person knowingly to make, or cause to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement required under this chapter, or by any registered entity or registered futures association in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, or knowingly to omit any material fact required to be stated therein or necessary to make the statements therein not misleading.

**(4)** Any person willfully to falsify, conceal, or cover up by any trick, scheme, or artifice a material fact, make any false, fictitious, or fraudulent statements or representations, or make or use any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry to a registered entity, board of trade, or futures association designated or registered under this chapter acting in furtherance of its official duties under this chapter.

**(5)** Any person willfully to violate any other provision of this chapter, or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this chapter, but no person shall be subject to imprisonment

under this paragraph for the violation of any rule or regulation if such person proves that he had no knowledge of such rule or regulation.

Commodity Exchange Act, 7 U.S.C. § 25(a) provides as follows:

**(a) Actual damages; actionable transactions; exclusive remedy:**

**(1)** Any person (other than a registered entity or registered futures association) who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D) of this paragraph and caused by such violation to any other person—

**(A)** who received trading advice from such person for a fee;

**(B)** who made through such person any contract of sale of any commodity for future delivery (or option on such contract or any commodity); or who deposited with or paid to such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract;

**(C)** who purchased from or sold to such person or placed through such person an order for the purchase or sale of—

**(i)** an option subject to section 6c of this title (other than an option purchased or sold on a registered entity or other board of trade);

**(ii)** a contract subject to section 23 of this title; or

**(iii)** an interest or participation in a commodity pool; or

**(D)** who purchased or sold a contract referred to in subparagraph (B) hereof if the violation constitutes a manipulation of the price of any such contract or the price of the commodity underlying such contract.

**(2)** Except as provided in subsection (b) of this section, the rights of action authorized by this subsection and by sections 7 (d)(13), 7a-1 (b)(1)(E), and 21 (b)(10) of this title shall be the exclusive remedies under this chapter available to any person who sustains loss as a result of any alleged violation of this chapter. Nothing in this subsection shall limit or abridge the rights of the parties to agree in advance of a dispute upon any forum for resolving claims under this section, including arbitration.

**(3)** In any action arising from a violation in the execution of an order on the floor of a registered entity, the person referred to in paragraph (1) shall be liable for—

**(A)** actual damages proximately caused by such violation. If an award of actual damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2 (a)(1) of this title for the floor broker's violation, such futures commission merchant may be required to satisfy such award; and

**(B)** where the violation is willful and intentional, punitive or exemplary damages equal to no more than two times the amount of such actual damages. If an award of punitive or exemplary damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2 (a)(1) of this title for the floor broker's violation, such futures commission merchant may be required to satisfy such award if the floor broker fails to do so, except that such requirement shall apply to the futures commission merchant only if it willfully and intentionally selected the floor broker with the intent to assist or facilitate the floor broker's violation.

**(4) Contract enforcement between eligible counterparties.—** No agreement, contract, or transaction between eligible contract participants or persons reasonably believed to be eligible contract participants, and no hybrid instrument sold to any investor, shall be void, voidable, or unenforceable, and no such party shall be entitled to rescind, or recover any payment made with respect to, such an agreement, contract, transaction, or instrument under this section or any other provision of Federal or State law, based solely on the failure of the agreement, contract, transaction, or instrument to comply with the terms or conditions of an exemption or exclusion from any provision of this chapter or regulations of the Commission.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) provides as follows:

**(b)** To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), 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.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q (a) of this title and sections 78i, 78o, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

## 17 C.F.R. § 240.10b-5 provides as follows:

other fraudulent device or contrivance”, as used in section 15(c)(1) of the act, see §§ 240.15c1-2 to 240.15c1-9.

[13 FR 8183, Dec. 22, 1948, as amended at 19 FR 8017, Dec. 4, 1954; 41 FR 22824, June 7, 1976]

### § 240.10b-4 [Reserved]

### § 240.10b-5 Employment of 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 of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

(Sec. 10; 48 Stat. 891; 15 U.S.C. 78j) [13 FR 8183, Dec. 22, 1948, as amended at 16

FR 7928, Aug. 11, 1951]

### § 240.10b5-1 Trading “on the basis of” material nonpublic information insider trading cases.

*Preliminary Note to § 240.10b5-1:* This provision defines when a purchase or sale constitutes trading “on the basis of” material nonpublic information in insider trading cases brought under Section 10(b) of the Act and Rule 10b-5 thereunder. The law of insider trading is otherwise defined by judicial opinions construing Rule 10b-5, and Rule 10b5-1 does not modify the scope of insider trading law in any other respect.

(a) *General.* The “manipulative and deceptive devices” prohibited by Section 10(b) of the Act (15 U.S.C. 78j) and § 240.10b-5 thereunder include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other

person who is the source of the material nonpublic information. (b) *Definition of “on the basis of.”* Subject to the affirmative defenses in paragraph (c) of this section, a purchase or sale of a security of an issuer is “on the basis of” material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale. (c) *Affirmative defenses.* (1)(i) Subject to paragraph (c)(1)(ii) of this section, a person’s purchase or sale is not “on the basis of” material nonpublic information if the person making the purchase or sale demonstrates that:

(A) Before becoming aware of the information, the person had: (1) Entered into a binding contract to purchase or sell the security, (2) Instructed another person to purchase or sell the security for the in-

structing person’s account, or (3) Adopted a written plan for trading securities;

(B) The contract, instruction, or plan described in paragraph (c)(1)(i)(A) of this Section:

(1) Specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold;

(2) Included a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold; or (3) Did not permit the person to exercise any subsequent influence over

how, when, or whether to effect purchases or sales; provided, in addition, that any other person who, pursuant to the contract, instruction, or plan, did exercise such influence must not have

been aware of the material nonpublic information when doing so; and

(C) The purchase or sale that occurred was pursuant to the contract, instruction, or plan. A purchase or sale is not “pursuant to a contract, instruction, or plan” if, among other things, the person who entered into the contract, instruction, or plan altered or deviated from the contract, instruction, or plan to purchase or sell securities (whether by changing the amount,

## 18 C.F.R. § 1c.1 provides as follows:

(d) Calls to the Hotline may be made anonymously.  
(e) Any person who contacts the Hotline is not precluded from filing a formal action with the Commission if discussions assisted by Hotline Staff are unsuccessful at resolving the matter. A caller may terminate use of the Hotline procedure at any time.  
(f) The Hotline may be reached by calling (202) 502-8390 or 1-888-889-8030 (toll free), by e-mail at [hotline@ferc.gov](mailto:hotline@ferc.gov), or writing to: Enforcement Hotline, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. [Order 602, 64 FR 17097, Apr. 8, 1999, as amended by Order 647, 69 FR 32438, June 10, 2004]

### PART 1c—PROHIBITION OF ENERGY MARKET MANIPULATION

Sec.

1c.1 Prohibition of natural gas market manipulation.

1c.2 Prohibition of electric energy market manipulation.

AUTHORITY: 15 U.S.C. 717-717z; 16 U.S.C. 791-825f, 2601-2645; 42 U.S.C. 7101-7352.

SOURCE: 71 FR 4258, Jan. 26, 2006, unless otherwise noted.

**§ 1c.1 Prohibition of natural gas market manipulation.** (a) It shall be unlawful for any entity, directly or indirectly, 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,

(1) To use or employ any device, scheme, or artifice to defraud, (2) To make any untrue statement of a material fact or to omit to state a

material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) To engage in any act, practice, or course of business that operates or

would operate as a fraud or deceit upon any entity. (b) Nothing in this section shall be construed to create a private right of action.

### **§ 1c.2 Prohibition of electric energy market manipulation.**

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of trans-

mission services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or  
(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon

any entity. (b) Nothing in this section shall be construed to create a private right of

action.

### PART 2—GENERAL POLICY AND INTERPRETATIONS

STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS OF THE COMMISSION

Sec.

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