ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 10-1017

BRIAN HUNTER,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

THOMAS R. SHEETS
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

LONA T. PERRY
SENIOR ATTORNEY

ROBERT M. KENNEDY
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426
(202) 502-8904

September 16, 2010

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and *Amici*

The parties before this Court are identified in Petitioner's brief.

B. Rulings Under Review

Brian Hunter, 130 F.E.R.C. ¶ 61,030 (Jan. 15, 2010), JA 769.

C. Related Cases

This case has not been before this Court or any other court. There are, however, a number of related actions. In *Hunter v. FERC*, D.C. Cir. No. 08-5380, Petitioner appealed a district court decision that dismissed for lack of jurisdiction his request for an injunction and a declaratory judgment that FERC lacked the authority to initiate an enforcement proceeding against him. *See Hunter v. FERC*, 527 F. Supp. 2d 9 (D.D.C. 2007) (denying preliminary injunction) and *Hunter v. FERC*, 569 F. Supp. 2d 12 (D.D.C. 2008) (granting motion to dismiss and denying declaratory relief). This Court affirmed the district court's ruling. *See Hunter v. FERC*, 348 Fed. Appx. 592, 2009 U.S. App. LEXIS 23417, at *5 (D.C. Cir. Oct. 13, 2009) (agreeing that judicial review of FERC decisions lies exclusively in the courts of appeals; there is no exception for a "collateral" objection to the agency's exercise of jurisdiction).

Two other cases – *Amaranth Advisors, LLC v. FERC*, No. 07-1491 (D.C. Cir.), and *CFTC v. Amaranth Advisors, LLC*, No. 1:07-cv-06682 (S.D.N.Y.) – are related to this case as they arise from the same acts at issue here. The former

action was terminated on September 9, 2009, when the Court granted the petitioners' motion to dismiss in light of a settlement with the Federal Energy Regulatory Commission's enforcement staff. The Commission understands that the latter case, in which Petitioner is a defendant, is ongoing in the Southern District of New York. *See CFTC v. Amaranth Advisors, LLC*, 523 F. Supp. 2d 328 (S.D.N.Y. 2007) (denying injunctive relief).

/s/ Robert M. Kennedy
Attorney

September 16, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

*** Cases chiefly relied upon are marked with an asterisk.**

ADMINISTRATIVE CASES:

STATUTES:

REGULATIONS:

LEGISLATIVE HISTORY:

GLOSSARY

2007 Rehearing Order	*Amaranth Advisors, L.C.C., et al.,* 121 F.E.R.C. ¶ 61,244 (2007), JA 285
2010 Rehearing Order	*Brian Hunter*, 130 F.E.R.C. ¶ 61,030 (2010), JA 769
ALJ	Administrative Law Judge
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
Br.	Brief of Petitioner, filed July 1, 2010
CEA	Commodity Exchange Act
CFTC	Commodity Futures Trading Commission
CFTC Br.	Brief of Intervenor Commodity Futures Trading Commission, filed July 16, 2010
Commission or FERC	Federal Energy Regulatory Commission
EPAct of 2005	Energy Policy Act of 2005
Exchange Act	Securities Exchange Act of 1934
Futures Br.	Corrected Amicus Brief of Futures Industry Association, *et al*., filed July 9, 2010.
Futures Industry Group	collectively the Futures Industry Association, Managed Funds Association, CME Group, Inc. and National Futures Association

Hearing Order	*Amaranth Advisors, LLC, et al*., 124 F.E.R.C. ¶ 61,050 (2008), JA 693
Hunter	Petitioner Brian Hunter
JA	Joint Appendix
NGA	Natural Gas Act
NG Futures Contracts	natural gas futures contracts
NYMEX	New York Mercantile Exchange
Show Cause Order	*Amaranth Advisors, L.C.C., et al.,* 120 F.E.R.C. ¶ 61,085 (2007), JA 122

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

No. 10-1017

BRIAN HUNTER,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the challenged order is unfit for immediate review where it did not mark the end of the agency's ongoing decisionmaking process, but simply reaffirmed prior jurisdictional rulings and allowed for evidentiary hearings to consider the Petitioner's alleged violations of the Natural Gas Act ("NGA").

2. Whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably determined that its jurisdiction under NGA § 4A, 15 U.S.C. § 717c-1, which empowers FERC to prosecute market manipulation by "any entity" occurring "in connection with" FERC-jurisdictional transactions,

encompasses manipulative conduct in the natural gas futures market that has a direct effect on the price of FERC-jurisdictional natural gas transactions.

3. Whether FERC reasonably determined that the exclusive jurisdiction of the Commodity Futures Trading Commission ("CFTC") over the operation of futures markets does not preclude FERC from prosecuting, pursuant to NGA § 4A, manipulative conduct occurring in the futures market that directly affects FERC-jurisdictional natural gas transactions.

4. Whether FERC reasonably interpreted NGA § 4A as prohibiting conduct, undertaken with manipulative intent, by a party that intends to affect, or recklessly affects, FERC-jurisdictional transactions.

5. Whether FERC reasonably construed its NGA civil penalty authority as permitting it to adjudicate, in the first instance, a party's alleged violation of the Act's anti-manipulation provisions.

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in Addendum A to this brief. In particular, FERC exercised its authority under NGA § 4A, 15 U.S.C. § 717c-1, added by the Energy Policy Act of 2005, which prohibits market manipulation:

> 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 ….

COUNTERSTATEMENT OF JURISDICTION

In October 2009, this Court rejected Hunter's attempt – via a request to the district court for a declaratory judgment and injunction – to secure interlocutory review of FERC's jurisdiction to prosecute an enforcement proceeding against him. *Hunter v. FERC*, 348 Fed. Appx. 592, 2009 U.S. App. LEXIS 23417 (D.C. Cir. Oct. 13, 2009). The Court explained that challenges to FERC's jurisdictional rulings must await "review of any final [] order the [agency] might issue." *Id*. at *4.

No such order has issued. The order underlying Hunter's current appeal denied summary disposition, confirmed earlier jurisdictional rulings, and set the matter for hearing. The initial phase of that hearing process concluded in January 2010 with the issuance of an initial decision from an Administrative Law Judge ("ALJ") finding that Hunter had violated the NGA's anti-manipulation provisions. The matter is now before the Commission, which will decide whether to adopt, reject, or modify the ALJ's initial decision, and determine any civil penalties. The ongoing agency proceedings thus remain insufficiently final.

INTRODUCTION

In July 2007, the Commission commenced an enforcement action against Amaranth,[1] a hedge fund, and Amaranth traders Brian Hunter and Matthew Donohoe, pursuant to NGA § 4A, 15 U.S.C. § 717c-1, which empowers FERC to prosecute "any entity" that, "directly or indirectly," commits manipulation "in connection with" FERC-jurisdictional transactions. FERC alleged that Amaranth, Hunter and Donohoe had engaged in a manipulative scheme in the natural gas ("NG") Futures Contract market, which directly affected the price of FERC-jurisdictional natural gas transactions, including the price for NG Futures Contracts that went "to delivery" – *i.e*., resulted in an actual sale of natural gas during the time period in question. *Amaranth Advisors, LLC*, 120 F.E.R.C. ¶ 61,085, P 5 ("Show Cause Order"), JA 127, *reh'g denied*, 121 F.E.R.C. ¶ 61,224 (2007) ("2007 Rehearing Order"), JA 285. *See also Amaranth Advisors, LLC*, 124 F.E.R.C. ¶ 61,050 (2008) (setting matter for hearing), JA 693.

In the order under review, the Commission reaffirmed its jurisdiction to prosecute the alleged conduct and set the matter for hearing before an ALJ. *Brian Hunter*, 130 F.E.R.C. ¶ 61,030, P 29 (2010) ("2010 Rehearing Order"), JA 780.

---

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

FERC will finally determine Hunter's liability under NGA § 4A after its review of the ALJ's initial decision, and the resolution of any rehearing requests regarding that order.

The exercise of FERC jurisdiction over manipulative conduct affecting FERC-jurisdictional markets does not, moreover, infringe upon or impede the CFTC's jurisdiction over futures markets under § 2(a)(1)(A) of the Commodities Exchange Act ("CEA"), 7 U.S.C. § 2(a)(1)(A). FERC interpreted its 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

Following the manipulation of prices in western energy markets during 2000-01, Congress expanded FERC's anti-manipulation authority with the enactment of § 315 of the Energy Policy Act of 2005 ("EPAct of 2005"), Pub. L. No. 109-58 (codified in NGA § 4A, 15 U.S.C. § 717c-1). As Senator Cantwell explained:

> 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 9344 (July 29, 2005).

Section 4A empowers FERC to prohibit manipulation, not only by direct participants in the physical natural gas markets, but also where "any entity" commits manipulation, directly or indirectly, "in connection with" jurisdictional transactions. 15 U.S.C. § 717c-1. In Order No. 670 (JA 56), FERC adopted the Anti-Manipulation Rule, which implemented § 4A. *See* 18 C.F.R. § 1c.1 (proscribing manipulation affecting natural gas transactions). The implementing regulation was modeled on the SEC's Rule 10b-5, 17 C.F.R. § 240.10b-5, since § 4A itself was based on § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and directed that certain aspects of FERC's new authority be exercised in a manner consistent with that statute. Order No. 670 P 7, JA 60-61. *See also* JA 118 (text of rule).

II. THE ALLEGED CONDUCT

In the Show Cause Order, FERC alleged that respondents manipulated the price of FERC-jurisdictional transactions by trading in NG Futures Contracts – contracts for the future delivery of natural gas under standardized terms – on February 24, March 29, and April 26, 2006, in a manner that was designed to, and did, produce artificial settlement prices for these contracts. Show Cause Order PP 5, 10, JA 127, 129. The "settlement price" for NG Futures Contracts 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 131.

FERC preliminarily found that Amaranth engaged in manipulative conduct by amassing large numbers of NG Futures Contracts and then, on the expiration days in question, liquidating its positions minutes before the close of the settlement period. *Id*. P 57, JA 155. This artificially drove down the settlement price. Amaranth profited because it held a much larger position in derivatives whose value increased as the settlement price of the NG Futures Contracts declined. *Id*. PP 57-58, JA 155. Amaranth thus orchestrated these trades knowing that it would lose money on the NG Futures Contracts but would profit on its derivative financial positions. *Id*. P 5, JA 127.

A. Hunter's Role

Hunter, the head natural gas trader at Amaranth, is alleged to have masterminded the trading strategies at issue. *Id*. PP 35-36, 135-36, JA 140-41, 197-98. The Show Cause Order alleged that Hunter "traded with the intent to manipulate the settlement price" of the NG Futures Contracts, *id*. P 111, JA 187, and knew that the "settlement price affected or determined prices for physical gas and that manipulation of this price would harm all market participants," *id*. P 112, JA 188. *See also id*. PP 63-106, JA 158-85 (detailing Hunter's conduct). Amaranth profited by at least $59 million from the alleged manipulation. *Id*. PP 80, 88, 98,

JA 170, 175, 181. Hunter, in turn, stood to benefit by receiving a substantial percentage of Amaranth's profits from the trading. *Id*. PP 37, 127, JA 141, 194.

B. Impact Upon FERC-Jurisdictional Transactions

Manipulating the price of NG Futures Contracts affected the price of FERC-jurisdictional natural gas transactions directly and indirectly. Most obviously, the 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 138. 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 135. 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 specified location versus the Henry Hub in Louisiana) at the time of the transaction. *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 135. 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. The indices at these locations thus 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 135-36. The price indices are widely used in bilateral natural gas markets as a price term. *Id*. P 23, JA 136-37.

III. FERC'S ORDERS

A. The Show Cause Orders

In the Show Cause Order, FERC ordered Amaranth, 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 for these violations. On rehearing, FERC rejected the contention that it lacked jurisdiction because the alleged manipulative conduct was within the exclusive jurisdiction of the CFTC. FERC explained that, while it does not directly regulate NG Futures Contracts, their settlement price directly affects the price of FERC-jurisdictional natural gas sales. 2007 Rehearing Order P 11, JA 291. As a result, the alleged conduct fell within NGA § 4A's broad prohibition of manipulation "in connection with" FERC-jurisdictional sales. *Id*. P 23, JA 298. This finding did not interfere with the CFTC's exclusive jurisdiction to oversee the operation of futures markets, but rather complemented the CFTC's overlapping jurisdiction. *Id*. P 11, JA 291.

B. The Hearing Orders

In a July 17, 2008 order, FERC denied the respondents' motions for summary disposition, finding that there were "genuine issues of fact material to the

decision in this proceeding that require a hearing before an ALJ." *Amaranth Advisors, LLC*, 124 F.E.R.C. ¶ 61,050, P 13 ("Hearing Order"), JA 698-99, *reh'g denied sub nom. Brian Hunter*, 130 F.E.R.C. ¶ 61,030 (2010), JA 769. FERC directed the ALJ to determine, *inter alia*, "whether any of the Respondents violated the Anti-Manipulation Rule," and reserved to itself the issue of whether civil penalties should be imposed. Hearing Order P 14, JA 699. After issuance of the Hearing Order, FERC Enforcement Litigation Staff and all respondents with the exception of Hunter reached a settlement which was approved by FERC in August 2009. *Amaranth Advisors L.L.C.*, 128 F.E.R.C. ¶ 61,154 (2009).

On January 15, 2010, FERC denied Hunter's request for rehearing of the Hearing Order. FERC again explained that it possesses jurisdiction to "sanction manipulative conduct that has a nexus to and a significant effect on the prices of Commission-jurisdictional wholesale sales of physical natural gas." 2010 Rehearing Order P 11, JA 773. FERC also reiterated that the term "any entity" in NGA § 4A "is a deliberately inclusive term" that "include[s] any person or form of organization, regardless of its legal status, function or activities." *Id*. P 16 (internal quotations omitted), JA 775. Further, FERC rejected Hunter's contention that a trial *de novo* in the federal district court is required before penalties may be assessed for alleged market manipulation. Relying upon its detailed analysis of that issue in a similar enforcement action, FERC reaffirmed its conclusion that

"Congress intended that the Commission's assessment of NGA section 22 civil penalties should be reviewed by a court of appeals rather than a federal district court." *Id*. P 27 (internal quotations omitted), JA 779.

C. The Initial Decision

On January 22, 2010, the ALJ issued an initial decision. *Brian Hunter*, 130 F.E.R.C. ¶ 63,004 (2010). The ALJ determined that, based upon the evidence adduced at the hearing, "Hunter intended to manipulate the price of natural gas futures contracts, which in turn affected the price of jurisdictional transactions." *Id*. P 212. The ALJ's initial decision "is subject to review by the Commission," *id*. P 216, which may adopt, reverse, or modify the ALJ's initial determination of Hunter's culpability. In addition, the Commission has reserved for itself, and has yet to rule upon, "the issue[] of whether civil penalties should be imposed for [Hunter's] alleged violations." Hearing Order P 14, JA 699.

The parties filed briefs on, and opposing, exceptions to the ALJ's initial decision in March 2010. The matter remains pending before the Commission.

IV. HUNTER'S PRIOR APPEAL

On July 23, 2007, after being advised of the Commission's intent to issue the Show Cause Order, 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 an injunction prohibiting FERC from pursuing

its enforcement action. The District Court denied Hunter's request for injunctive relief, finding that the Show Cause Order was not final agency action, but rather "the first step of a formal process designed to determine whether Hunter actually violated any FERC regulations." *Hunter v. FERC*, 527 F. Supp. 2d 9, 17 (D.D.C. 2007). Even if the matter were ripe for review, Hunter failed to demonstrate that FERC's assertion of jurisdiction was "sufficiently outside its statutory authority (*i.e.*, *ultra vires*) to be likely to succeed on the merits." *Id*. at 17 n.6.

The District Court subsequently dismissed Hunter's complaint, finding that it effectively challenged FERC's assertion of jurisdiction in the Show Cause Order and that any such challenge must be brought in the court of appeals in the normal course of review under NGA § 19(b), 15 U.S.C. § 717r(b). *Hunter v. FERC*, 569 F. Supp. 2d 12, 19 (D.D.C. 2008).

On appeal, this Court affirmed, noting that "Hunter will be free to mount a challenge to the FERC's jurisdiction on review of any final order the agency might issue." *Hunter*, 2009 U.S. App. LEXIS 23417, at *4 (alterations omitted). The Court further observed that FERC's jurisdictional determination is not a collateral order worthy of interlocutory review, but rather a "'a step toward' the decision on the merits." *Id*. at *5 (quoting *FTC v. Standard Oil of Cal*., 449 U.S. 232, 246 (1980)).

SUMMARY OF ARGUMENT

1. Appellate review is premature at this time. The 2010 Rehearing Order simply reaffirmed previous jurisdictional rulings and allowed for evidentiary hearings to consider Hunter's alleged violations of the NGA. The Court has previously determined that such rulings are merely "'a step toward' the decision on the merits," *Hunter*, 2009 U.S. App. LEXIS 23417, at *5, and that judicial review must await "any final order the agency might issue." *Id*. at *4 (alterations omitted). Such an order will issue only after FERC concludes its review of the ALJ's initial decision and any related rehearing requests. Hunter's appeal is thus premature and should be dismissed.

2. The arguments of Hunter and his supporters (intervenor CFTC and *amicus* the Futures Industry Group[2]) provide no basis to find that FERC exceeded its jurisdiction in issuing the challenged order. Hunter's alleged conduct had a direct (as well as indirect) effect on the price of physical natural gas sales. NGA § 4A (which was modeled after Exchange Act § 10(b)) prohibits manipulative conduct "in connection with" FERC-jurisdictional natural gas transactions. As interpreted by § 10(b) precedent, the phrase "in connection with" expands FERC's authority beyond conduct occurring in jurisdictional transactions to conduct

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

affecting such transactions. Further, NGA § 4A prohibits "any entity" from engaging in manipulative conduct – a term which reasonably is interpreted broadly to encompass all types of actors, including natural persons like Hunter.

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 harmonized, if possible. While the CFTC regulates the operation of futures markets, it does not regulate the underlying physical markets. FERC does not seek to police the futures exchanges, but rather only seeks to protect the integrity of FERC-jurisdictional energy markets. Under the relevant statutes, the CFTC has jurisdiction over trading on its regulated exchanges, FERC has jurisdiction over the natural gas markets and, in certain areas where these markets interact, both agencies have jurisdiction to prohibit market manipulation. FERC thus reasonably determined that where, as here, the conduct at issue produces profound effects with FERC-jurisdictional markets, FERC can exercise its authority for the protection of customers in those markets.

3. FERC reasonably interpreted the term "manipulative device" in NGA § 4A as encompassing purportedly lawful conduct undertaken with manipulative intent. This Court has already upheld this construction of the identical phrase in § 10(b) of the Exchange Act. FERC also reasonably interpreted NGA § 4A as

proscribing manipulative action undertaken by an actor who recklessly affects FERC-jurisdictional transactions. This construction limits § 4A's reach to those manipulative schemes that have an appropriate nexus with jurisdictional transactions. It is also consistent with NGA § 4A's "in connection with" language, which does not require a specific intent to affect FERC-jurisdictional transactions, but only that the manipulation somehow affect such transactions.

4. FERC reasonably interpreted the NGA's civil penalty provisions as permitting the Commission to adjudicate alleged violations in the first instance, rather than pursuing such actions *de novo* in federal district court. FERC appropriately observed that in other energy statutes it administers, Congress used express language when it intended to provide for *de novo* civil penalty proceedings in federal district court. No such language is contained in the NGA. Further, FERC's interpretation appropriately harmonizes the NGA's civil penalty collection and judicial review provisions.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO REVIEW THE CHALLENGED ORDER.

The 2010 Rehearing Order did not mark the end of the Commission's decisionmaking process. It reaffirmed previous jurisdictional rulings and allowed for evidentiary hearings to consider Hunter's alleged violations of the NGA. Such rulings are intermediate steps toward a final decision on the merits, and may only

be challenged on appeal from such a final ruling.[3]

A. The Challenged Order Is Not Final.

"A party may only petition for judicial review of a final agency action. If the agency's action is not final, [the court] cannot reach the merits of the petition." *Fourth Branch Assocs. v. FERC*, 253 F.3d 741, 746 (D.C. Cir. 2001) (citations omitted). The Supreme Court has established a two-part test for identifying final agency action: "[f]irst, [an] action must mark the 'consummation' of the agency's decisionmaking process" and "second, [an] action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The 2010 Rehearing Order satisfies neither condition.

The challenged order is not the consummation of FERC's decisionmaking process, but only one step along the path to a final resolution of whether Hunter's actions were lawful. Nor does the order determine any "rights or obligations," and no "legal consequences will flow" from it. *Id*. at 178. *See Aluminum Co. of America v. ICC*, 790 F.2d 938, 941-42 (D.C. Cir. 1986) (assertion of jurisdiction is not "the sort of 'deprivation of a right' or 'imposition of an obligation' that constitutes final action"). Orders setting matters for hearing despite a party's

[3] By Order dated February 17, 2010, this Court referred FERC's motion to dismiss for lack of finality to the merits panel and directed the parties to address finality issues in their briefs.

objections to the agency's jurisdiction "have long been considered nonfinal …. [They are] like a district court's denial of a motion to dismiss, which – unlike a final order ending the case – assures its continuation." *DRG Funding Corp. v. Sec'y of Housing & Urban Dev.*, 76 F.3d 1212, 1215 (D.C. Cir. 1996). *See also Reliable Automatic Sprinkler Co. v. Consumer Product Safety Comm'n*, 324 F.3d 726, 733 (D.C. Cir. 2003) (noting that there is no "special rule" of finality where, as here, "a litigant challenges the agency's authority to regulate rather than the merits of an agency's act of regulation").

Hunter will only face the adverse consequence of civil penalties if, following review of the ALJ's initial decision, FERC ultimately rules against him. FERC may ultimately determine that Hunter's conduct did not violate the NGA, or that civil penalties are not warranted. In such circumstances, Hunter would not be aggrieved and would have no reason to seek judicial review. And "[w]hen completion of an agency's processes may obviate the need for judicial review, it is a good sign that an intermediate agency decision is not final." *DRG Funding Corp.*, 76 F.3d at 1215.

B. The Essential Predicates For Dismissal Have Been Decided.

Prior rulings regarding Hunter's initial challenge to FERC's jurisdiction establish the basis for dismissing his current appeal. In rejecting Hunter's request for a declaratory judgment, the district court found that "FERC's actions are

neither sufficiently final nor ripe to warrant review at this juncture." *Hunter,* 569 F. Supp. 2d at 17. FERC's assertion of jurisdiction does not "have the day-to-day effect or hardship needed for final or ripe agency action." *Id*.

This Court likewise found that the assertion of jurisdiction over Hunter did not constitute final agency action: "The jurisdictional determination in the administrative proceeding is not collateral but is a step toward the decision on the merits." *Hunter,* 2009 U.S. App. LEXIS 23417, at *5. Nor is that determination effectively unreviewable, since "Hunter will be free to mount a challenge to the FERC's jurisdiction on review of any final order the agency might issue." *Id*. at *4 (alterations omitted).

Although Hunter makes no mention of these decisions, they cannot be ignored. The primary jurisdictional issues raised in Hunter's prior action are identical to those raised here. *Compare Hunter*, 2009 U.S. App. LEXIS 23417, at *3 (noting argument that CFTC has "exclusive jurisdiction over the allegedly manipulative trades" and that NGA § 4A does not reach natural persons) with Br. 28-45 (raising same issues). And as this Court recognized, decisions regarding those objections are intermediate steps along the path to a final resolution of Hunter's liability under the NGA.

This Court recently reached this same conclusion in *Brookfield Energy Marketing, Inc. v. FERC*, No. 09-1320 (D.C. Cir. June 21, 2010) (a copy of which

is included in Addendum B). In that case, the petitioner challenged orders setting an enforcement proceeding for hearing on the ground that FERC lacked jurisdiction to entertain the complaints that prompted the enforcement action. This Court dismissed the appeal for lack of finality, finding that "[t]he orders of the Federal Energy Regulatory Commission setting for public hearing the issue of petitioner's alleged [market manipulation] violations and denying the request for rehearing are not final orders for the purpose of judicial review." *Brookfield,* No. 09-1320 at 1 (citing various decisions of this Court). The same is true here.

C. The Collateral Order Doctrine Does Not Support Jurisdiction.

In an effort to invoke the collateral order doctrine, Hunter argues that the 2010 Rehearing Order should be considered final for purposes of judicial review because there is no suggestion "that the issues would be decided differently were the Commission to revisit them yet again." Br. 21. But the collateral order doctrine only applies in exceptional circumstances where a non-final order conclusively determines an important issue completely separate from the merits that effectively cannot be reviewed on appeal from a final judgment. *See Meredith v. Fed. Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1048-49 (D.C. Cir. 1999). No such circumstances exist here.

First, the jurisdictional issue presented is intertwined with the merits of the charges against Hunter, which have yet to be finally determined. The jurisdictional

determination here depends upon the scope of FERC's enforcement authority to reach "*any* entity that, directly or indirectly, engages in manipulative practices, *in connection with* natural gas transportation and sales." *Hunter*, 527 F. Supp. 2d at 17 n.6 (emphasis in original). All that FERC has determined at this juncture is that NGA § 4A permits it to pursue actions against those entities engaging in manipulative practices that affect its jurisdictional markets. It has yet to finally determine whether (as the ALJ has found) Hunter's alleged actions fall within that prohibition. *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).

Nor is the question of FERC's jurisdiction effectively unreviewable on appeal from a final judgment. While Hunter claims that he "is likely to lose his opportunity for review of these issues altogether if immediate review is denied now," Br. 25, this Court has already found that "the fact that Hunter argues his jurisdictional points before the agency … demonstrates that the 'jurisdictional determination' is related and could be raised on appeal of the final order." *Hunter*, 2009 U.S. App. LEXIS 23417, at *4. *See* 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."). *See also Standard Oil*, 449 U.S. at 246 ("[T]he issuance of the complaint averring reason to believe is

a step toward, and will merge in, the [agency's] decision on the merits. Therefore, review of this preliminary step should abide review of the final order").

Hunter's reliance on this Court's decision in *Pub. Utils. Comm'n of Cal. v. FERC*, 894 F.2d 1372 (D.C. Cir. 1990), is misplaced. In that case, "[t]here [was] no possibility that the remaining proceedings might moot the case by giving victory to the loser on other grounds." *Id*. at 1377. Here, Hunter does not dispute that he could ultimately prevail before the Commission. In addition, the agency proceeding at issue in *PUC* was a "somewhat mechanical" review of a pipeline's contracts that was "unlikely to generate issues for judicial review at all." *PUC*, 894 F.2d at 1377. Here, the ongoing agency proceedings go to the very heart of the matter – *i.e.*, whether Hunter's conduct violated the NGA's anti-manipulation provisions. And as the district court found here, "[p]ermitting the agency to go forward … will also provide a context within which our Circuit Court can evaluate FERC's interpretation of its enforcement authority." *Hunter*, 569 F. Supp. 2d at 17.

The Fifth Circuit recently reached this same conclusion when faced with objections to FERC's statutory authority to adjudicate an enforcement proceeding in the first instance (as opposed to pursuing such an action in a *de novo* proceeding in federal district court), a claim which Hunter raises here. *See* Br. 52-55. In *Energy Transfer Partners, L.P. v. FERC*, 567 F.3d 134 (5th Cir. 2009), the Fifth

Circuit held that interlocutory FERC orders initiating an enforcement proceeding and setting the matter for hearing could not be reviewed while the agency's enforcement proceedings were ongoing. *Id*. at 139 (a reviewable agency order must "have some substantial effect on the parties which cannot be altered by subsequent administrative action"); *see also id*. at 146 ("The proper construction of the NGA must await resolution when and if the Commission determines that the NGA has been violated and assesses a penalty.").

D. FERC Has Not Waived Jurisdictional Objections.

Hunter contends that in addressing his rehearing request on the merits, rather than dismissing it as premature, FERC "tacitly conceded" that the 2010 Rehearing Order is final, and should be "precluded from now contesting the [order's] finality" for purposes of judicial review. Br. 23. It suffices to say that finality is a prerequisite to this Court's jurisdiction, *Clifton Power Corp. v. FERC*, 294 F.3d 108, 112 (D.C. Cir. 2002), which cannot be waived. *See Laffey v. Northwest Airlines, Inc*., 567 F.2d 429, 474 (D.C. Cir. 1976) ("Parties cannot waive subject matter jurisdiction by their conduct or confer it on the court by consent and the absence of such jurisdiction can be raised at any time."). Thus, in further addressing Hunter's jurisdictional objections, FERC did not – and could not – confer this Court with jurisdiction over Hunter's premature appeal.

II. STANDARD OF REVIEW

An agency's construction of the statute it administers is reviewed under well-settled principles. 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 Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). If the statute is silent or ambiguous, then the Court "must defer to a 'reasonable interpretation made by the [agency].'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 481 (2001) (quoting *Chevron*, 467 U.S. at 844).

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." 15 U.S.C. § 717c-1. This case concerns an administrative adjudication of Hunter's alleged violation of FERC's Anti-Manipulation Rule, 18 C.F.R. § 1c.1, promulgated under authority of NGA § 4A. Therefore, to the extent the Court finds § 4A or the Act's civil penalty provisions to be ambiguous, FERC's permissible interpretation is entitled to deference.

The purported conflict between FERC's NGA jurisdiction and the CFTC's jurisdiction under the CEA, *see* Br. 28-40, CFTC Br. 11-36, does not change this result. As explained in Part IV below, FERC's interpretation of NGA § 4A does not intrude upon or interfere with the CFTC's exclusive jurisdiction. Even if there were a conflict, none of the cases relied on by the CFTC undercuts the deference due the Commission's interpretation of NGA § 4A. *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 but not to interpretation of allegedly conflicting statute FLRA does not administer); *Ohio Power Co. v. FERC*, 880 F.2d 1400, 1405 (D.C. Cir. 1989), *rev'd on other grounds sub. nom. Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1990) (CFTC Br. 10) (no deference to FERC interpretation of SEC regulation under the Public Utility Holding Company Act).

While FERC claims no entitlement to deference in interpreting CEA § 2(a)(1)(A), neither can the CFTC in light of the absence of its own authoritative interpretation of that statute. *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).

III. HUNTER'S ALLEGED MANIPULATIVE CONDUCT IS WITHIN FERC'S NGA § 4A JURISDICTION.

FERC reasonably concluded that it had jurisdiction to prosecute Hunter's alleged conduct because NGA § 4A encompasses manipulation in the futures markets that directly affects FERC-jurisdictional natural gas transactions. Hunter's alleged conduct constitutes a "manipulative device" used, "directly or indirectly," by "any entity" "in connection with" FERC-jurisdictional natural gas sales, and is thus prohibited by NGA § 4A.

A. Hunter Manipulated The Price Of FERC-Jurisdictional Transactions.

In the Show Cause Order, FERC alleged that Amaranth and Hunter drove down the settlement price of NG Futures Contracts by selling an extraordinary amount during the last 30 minutes of trading before the contracts expired, for the sole purpose of enriching themselves through various financial derivatives whose value increased as the settlement price declined. Show Cause Order PP 5, 84, 91, 106, 111, JA 127, 173, 176, 185, 187. This trading behavior "had a direct and substantial effect on the price of Commission-jurisdictional transactions." 2007 Rehearing Order P 2, JA 286. *See also* Show Cause Order PP 108-110, JA 185-86.

First, Hunter's trading directly affected the settlement price of NG Futures Contracts that went to delivery during the relevant time period. 2007 Rehearing Order P 4, JA 287. During that time, BP, Louis Dreyfus, UBS, Merrill Lynch, and

ConocoPhillips each sold natural gas under approximately 2000 NG Futures Contracts, for approximately 20 billion cubic feet of physical natural gas that went to delivery. *Id*. P 14(b), JA 293. Second, the settlement price is incorporated into the price for physical basis transactions. Show Cause Order PP 20, 47, 108, JA 135, 149, 185-86. The price of physical basis transactions is used in indices. Those indices, in turn, price a substantial volume of physical natural gas. *Id*. PP 21, 47, 109, JA 135, 149-50, 186. Based on this direct (and indirect) effect on the price of FERC-jurisdictional transactions, FERC reasonably concluded that Hunter's alleged conduct constituted a "manipulative device" prohibited by NGA § 4A. *Id*. PP 45, 57, JA 148, 155.

Market manipulation is conduct "controlling or artificially affecting" prices or any practice that "artificially affect[s] market activity." *Id*. P 45, JA 148-49 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976); *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462, 476 (1977)). "Just as in the securities markets, energy market participants may be deceived or defrauded where one market participant trades with the intent to artificially affect the price of a physical or financial energy product and has the ability to do so." *Id*., JA 149. In such circumstances "the price is no longer set solely by the legitimate forces of supply and demand." *Id*.

Thus, "[t]he gravamen of manipulation is deception of investors into believing that prices at which they purchase and sell securities are determined by

the natural interplay of supply and demand, not rigged by manipulators." *Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999). It is precisely the effect on prices, which does not represent the true "interplay of supply and demand," that constitutes the fraud on purchasers and sellers. *See* Show Cause Order P 45, JA 148. Hunter's "[f]ailure 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." *Id*. P 51, JA 152 (quoting *United States v. Charnay*, 537 F.2d 341, 351 (9th Cir. 1976)). *See also United States v. Royer*, 549 F.3d 886, 900 (2d Cir. 2008) (scheme to artificially affect securities prices is a "constructive fraud" on the market; "[i]t would be hard to imagine conduct that more squarely meets the ordinary meaning of 'manipulation'").

B. Hunter's Conduct Is "In Connection With" The Purchase Or Sale Of FERC-Jurisdictional Natural Gas.

NGA § 4A prohibits the use of any manipulative device "in connection with" the purchase or sale of natural gas subject to FERC's jurisdiction. Because of the direct (and indirect) effects on the price of FERC-jurisdictional transactions, FERC reasonably concluded that Hunter's trading was "in connection with" FERC-jurisdictional natural gas transactions. Show Cause Order P 108, JA 185-86; 2007 Rehearing Order PP 23, 31, JA 298, 303. While § 4A did not expand the natural gas transactions "subject to the Commission's jurisdiction," Order No. 670 P 20, JA 69-70, it broadened the conduct *affecting* such transactions that FERC

may police, namely manipulative conduct in connection with the purchase or sale of FERC-jurisdictional natural gas or transportation services. 2007 Rehearing Order PP 25, 30-45, 59, JA 299, 302-11, 320.

Hunter contends that FERC may only regulate alleged manipulation that occurs *in* the physical natural gas markets. Br. 40. *See also* CFTC Br. 35 (sole focus of EPAct of 2005 is "on preventing manipulative conduct in the physical markets that were already within FERC's jurisdiction"). But such an interpretation would render NGA § 4A meaningless. *See Dunn v. CFTC*, 519 U.S. 465, 472 (1997) ("legislative enactments should not be construed to render their provisions mere surplusage"); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988) (same). Prior to the enactment of § 4A, FERC already had statutory authority to punish manipulation by sellers in physical natural gas markets, and had promulgated market behavior rules prohibiting such manipulation. 2007 Rehearing Order P 29, JA 302 (citing earlier version of 18 C.F.R. § 284.403(a)). *See Colorado Office of Consumer Counsel v. FERC*, 490 F.3d 954 (D.C. Cir. 2007) (denying petition for review of orders imposing market behavior rules). FERC's pre-existing authority to police manipulation occurring *in* its jurisdictional markets strongly suggests that Congress in 2005 meant to *expand* FERC authority through EPAct's addition of NGA § 4A. 2007 Rehearing Order P 29, JA 302.

Further, Congress could have, but did not, prohibit manipulative conduct that occurs *in* FERC-jurisdictional markets. *Id*. P 34, JA 305. Instead, Congress used the phrase "in connection with," which, in Exchange Act § 10(b), has been construed expansively to accomplish its broad remedial purposes. *Id*. PP 36-37, JA 306 (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)).

While NGA § 4A only specifically references Exchange Act § 10(b) with regard to the phrase "any manipulative or deceptive device or contrivance," Br. 38 n.7, the identical phrases used throughout the two statutes demonstrate that Congress modeled NGA § 4A after Exchange Act § 10(b). 2007 Rehearing Order P 36, JA 306. The broad interpretation of § 10(b)'s "in connection with" requirement is thus imported into NGA § 4A. *Id*. P 39, JA 308 (citing *Merrill, Lynch, Pierce Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006)).

Given the connection between Hunter's trading and the physical natural gas market, the "in connection with" requirement is met. *Id*. P 42, JA 309. "[F]rauds which mislead the general public as to the market value of securities, and affect the integrity of securities markets … fall well within [Rule 10b-5's "in connection with" requirement]." *United States v. Russo*, 74 F.3d 1383, 1391 (2d Cir. 1996) (internal quotations omitted). *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.").

Hunter asserts (Br. 39) that, in § 10(b) cases, the manipulator must be "a direct participant in the securities market he was accused of manipulating." But ample precedent rejects that position. *See* Show Cause Order P 110 n.171, JA 186-87 (citing *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (permitting a Rule 10b-5 shareholder suit based on a company's allegedly misleading statements, where the company did not trade); 2007 Rehearing Order P 38, JA 308 (citing *SEC v. Rocklage*, 470 F.3d 1, 8-10 (1st Cir. 2006) (sister who provided insider information to brother acted "in connection with" the brother's securities trades)). Secondary actors, such as lawyers, accountants, or banks, can be liable for securities violations even though they do not themselves purchase or sell securities. *See O'Hagan*, 521 U.S. at 664; *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 191 (1994)). Thus, the "in connection with" requirement is satisfied where reasonable investors are influenced "regardless of the motive or existence of contemporaneous transactions by or on behalf of the violator." *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1171 (D.C. Cir. 1978).

Hunter's reliance on *Conoco, Inc. v. FERC*, 90 F.3d 536, 552 (D.C. Cir. 1996) (Br. 37-38), is misplaced. *Conoco* held that the phrase "in connection with"

in NGA § 4(a) did not allow FERC to regulate gathering facilities that are expressly exempted from FERC jurisdiction under NGA § 1(b), 15 U.S.C. § 717(b). 2007 Rehearing Order PP 27-28, JA 300-01. *Conoco* did not address the broader scope of NGA § 4A which expressly applies to "any entity" – not just jurisdictional natural gas companies – that directly or indirectly takes actions in connection with the "purchase or sale" of jurisdictional services. *Id*. P 28, JA 301.

Conoco in fact *supports* the view that, when non-jurisdictional transactions affect jurisdictional markets, the "in connection with" requirement is met. *Id*. *Conoco* held that, when exempt gathering facilities become "'intertwined with jurisdictional activities, the Commission's regulation of the latter may impinge on the former.'" *Id*. P 28 n.64, JA 301 (quoting *Conoco*, 90 F.3d at 549). Thus, "'a nonjurisdictional entity could act in a manner that would change its status by enabling an affiliated interstate pipeline to manipulate access and costs of gathering.'" *Id.* (quoting *Conoco*, 90 F.3d at 549). *See also Northern Natural Gas Co. v. FERC*, 929 F.2d 1261, 1273 (8th Cir. 1991) (non-jurisdictional gathering rates are "in connection with" jurisdictional interstate transportation); *Nat'l Ass'n of Regulatory Util. Commn'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (in exercising its jurisdiction, FERC may "impinge" on non-jurisdictional matters).

C. The Term "Any Entity" In NGA § 4A Encompasses Natural Persons.

NGA § 4A prohibits "any entity" from engaging in manipulation that affects FERC-jurisdictional markets. 15 U.S.C. § 717c-1. While Hunter contends (Br. 41-45) that the statute cannot be read to apply to natural persons such as himself, "'[a]ny entity' is a deliberately inclusive term." Hearing Order P 49, JA 715. It "is the broadest of all definitions which relate to bodies or units." *Alarm Indus. Commc'n Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997) (internal quotations omitted). Because "entity" includes "the largest possible universe of beings, natural and non-natural," *Florida Dept. of Ins. v. Blackburn*, 209 B.R. 4, 8 (M.D. Fla. 1997), courts routinely find that "entity" is reasonably interpreted to include natural persons. *See City of Abilene, TX v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) ("entity," where undefined in the statute, "may include a natural person"), *cited in* Hearing Order P 36 n.65, JA 709; *Blackburn*, 209 B.R. at 8 ("entity" means "both natural persons as well as artificial, non-natural persons"). FERC thus reasonably concluded that use of the term reflected Congress' intent to capture not only companies historically subject to the NGA, but also any individual, corporation, or governmental or non-governmental entity that engages in prohibited behavior. 2007 Rehearing Order P 17, JA 294-96.

Notably, Congress chose not to employ "the existing defined terms in the NGA and Federal Power Act of 'person,' 'natural gas company,' or 'electric

utility,' but instead chose to use a broader term." Hearing Order P 49, JA 715 (quoting Order No. 670 P 18, JA 68). Other provisions in the Energy Policy Act of 2005 demonstrate that Congress intended this broader term to include natural persons. For instance, EPAct of 2005 § 1282 (codified at 16 U.S.C. § 824u) provides:

> ***No entity*** (including an entity described in [16 U.S.C. § 824(f)]) shall willfully and knowingly report any information relating to the price of electricity sold at wholesale or the availability of transmission capacity, which information ***the person or any other entity*** knew to be false at the time of the reporting, to a Federal agency with intent to fraudulently affect the data being compiled by the Federal agency.

(emphasis added).

This section immediately precedes the Federal Power Act's anti-manipulation provision (EPAct of 2005 § 1283, codified as 16 U.S.C. § 824v) – which is "virtually identical" to NGA § 4A (EPAct of 2005 § 315), Order No. 670 P 6, JA 60 – thereby reinforcing the conclusion that "entity," as used in both the Federal Power Act and NGA anti-manipulation provisions, is intended to encompass natural "persons." *See, e.g., Brown v. Garner*, 513 U.S. 115, 118 (1994) (recognizing "presumption that a given term is used to mean the same thing throughout a statute").

American Dental Ass'n v. Shalala, 3 F.3d 445 (D.C. Cir. 1993) (cited Br. 41), is not to the contrary. In the statute at issue there, Congress employed the "unvarying practice" of using "entity" to refer to groups and organizations, and

using other terms when referring to individuals. *Id*. at 447. *See* Hearing Order P 53, JA 717. Based on this "textual evidence," the court concluded that Congress intended that "entity" would not include individual practitioners. *American Dental*, 3 F.3d at 447. No such textual evidence exists here.

Hunter contends that FERC's anti-manipulation enforcement authority with respect to individuals is limited to the injunctive relief provided for in NGA § 20(d), 15 U.S.C. § 717s(d). *See* Br. 42, 45. But such injunctive authority, standing alone, would be insufficient to remedy violations of the Anti-Manipulation Rule, as the manipulation could occur long before it is discovered. Hearing Order P 55, JA 718. And nothing in NGA § 20(d) suggests that Congress intended to insulate individuals from other enforcement mechanisms. 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" who violate the Act, which as defined in NGA § 2(1), 15 U.S.C. § 717a(1), includes "individuals." Hearing Order P 51, JA 716. The Anti-Manipulation Rule and FERC's civil penalty authority therefore work together to provide a strong disincentive for manipulation of the natural gas market by individuals. *Id*. P 55, JA 718.

Hunter asserts that a statement by Senator Cantwell supports his view that the EPAct of 2005 authorizes FERC to do "two separate things:" ban individuals

from employment and impose civil penalties on companies. Br. 44-45. Hunter omits the Senator's preceding statement, in which she observed that "[t]his Energy bill puts in place the first ever broad prohibition on manipulation of electricity and natural gas markets." 151 Cong. Rec. S9344 (July 29, 2005). Senator Cantwell then notes that the legislation *also* gives federal regulators authority to ban traders and increases fines for energy companies. *Id*. The Senator's statement therefore does not support Hunter's view that *only* injunctive relief is available for individual manipulators. Rather, the Commission's injunctive authority is in addition to the Commission's authority to police market manipulation. *See* 151 Cong. Rec. S7474 (June 28, 2005) (Statement of Senator Cantwell) (the EPAct of 2005 "puts in place a broad statutory ban *on all forms of market manipulation* in our Nation's electricity and natural gas markets. Second, it gives Federal authorities the ability to ban traders and executives *implicated in energy market manipulation schemes* from participating in the utility industry.") (emphasis added).

Here, in the aftermath of the manipulative practices uncovered in the Western energy crisis of 2000-2001, Congress gave FERC the necessary tools to sanction future manipulation affecting FERC-jurisdictional transactions and relied on FERC's expertise to craft rules that would most fully effectuate the prevention, detection, and punishment of such conduct by any "entity." 2007 Rehearing Order P 19, JA 296. Congress did not define the term "entity," but rather left it to FERC

to formulate an interpretation "as necessary in the public interest or for the protection of natural gas ratepayers." Hearing Order PP 50, 55, JA 715, 718. FERC determined that a broad interpretation was necessary to adequately address manipulative acts which could have direct and serious impacts on FERC-jurisdictional transactions, affecting the nation's economy and the consumers for whose protection the NGA was enacted. *Id*. P 55, JA 718. That assessment, which is neither arbitrary nor capricious, must be afforded "controlling weight." *O'Hagan*, 521 U.S. at 673. *See also United States v. Conlon*, 628 F.2d 150, 154 (D.C. Cir. 1980) (statutes – even penal statutes – "must be read so as to effectuate the legislative purpose," which will "often mean giving the words a broad, rather than a narrow, meaning").

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

Hunter and his supporters contend that FERC's interpretation of the scope of NGA § 4A intrudes upon the CFTC's jurisdiction under CEA § 2(a)(1)(A), 7 U.S.C. § 2(a)(1)(A), which provides the CFTC with exclusive jurisdiction "with respect to accounts, agreements [of various types] and transactions involving contracts of sale of a commodity for future delivery." But FERC's interpretation involves no "partial repeal or amendment by implication" of the CFTC's jurisdiction. CFTC Br. 29. It simply applies NGA § 4A's prohibitions to activities that affect FERC-jurisdictional markets in a manner that is complementary to, and

can co-exist with, the CFTC's jurisdiction over futures markets. 2007 Rehearing Order P 11, JA 291.

A. The CFTC's CEA § 2(a)(1)(A) Jurisdiction Can And Should Be Harmonized With FERC's NGA § 4A Jurisdiction.

"[W]e live in 'an age of overlapping and concurring regulatory jurisdiction.'" *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2002) (quoting *Thompson Med. Co., Inc. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986)). Accordingly, "a court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may." *Id*. Where the "statutes are 'capable of co-existence,' it becomes the *duty* of this court 'to regard each as effective' – at least absent clear congressional intent to the contrary." *Id*. (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

Under the CEA, the CFTC has unquestioned "jurisdiction over trading on its regulated exchanges." Show Cause Order P 48, JA 151. But while the CFTC regulates the operation of the futures markets, it does not regulate the underlying or downstream physical commodity markets. 2007 Rehearing Order P 57, JA 318-19. It is these underlying jurisdictional markets – and not the trading of futures contracts itself – which FERC regulates, exclusively, under the NGA. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988) ("The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale."); *Pub. Utils. Comm'n of Cal. v.*

FERC, 900 F.2d 269, 274 (D.C. Cir. 1990) (same). As FERC recognized, where the futures market and the underlying commodity market intersect, as in NGA § 4A's broad prohibition on market manipulation, "both agencies have an enforcement role to protect their respective markets and interests." 2007 Rehearing Order P 58, JA 319.

The CFTC's own "exclusive jurisdiction" over futures "accounts, agreements … and transactions," 7 U.S.C. § 2(a)(1)(A), does not preclude this overlapping regulatory scheme. Such exclusivity does not extend to "fraudulent or deceptive practices associated with those transactions." 2007 Rehearing Order P 47, JA 312. FERC thus remains free to "examin[e] fraudulent or deceptive conduct in exercising [its] regulatory responsibilities, particularly where [FERC] has been provided with express authority with respect to such conduct if it has a nexus to jurisdictional physical sales." *Id*. In short, while the CFTC has jurisdiction to prosecute (and is prosecuting) Hunter for his manipulative conduct, that jurisdiction is not *exclusive*. *Id*. P 50, JA 314-15 (citing *Roberts*, 276 F.3d at 591). *See* CFTC Br. 3 (describing CFTC complaint proceeding against Amaranth and Hunter).

The CFTC argues (at 30) that CEA § 2(a)(1)(A) is more "precisely drawn" than NGA § 4A and therefore the EPAct of 2005 cannot preempt the CFTC's exclusive jurisdiction. But preemption is not at issue since the two statutes can be

harmonized. Moreover, it is "inaccurate" to refer to one grant of statutory authority as "general" and another as "specific;" "[w]hen … two statutes apply to intersecting sets … neither is more specific." *Core Communications, Inc. v. FCC*, 592 F.3d 139, 143 (D.C. Cir. 2010) (quoting *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 264 (7th Cir. 1998)). As both statutes here involve intersecting realms of regulatory responsibility, neither is more detailed than, nor controlling of, the other.

The fact that FERC and the CFTC are addressing the same conduct under the varying legal standards of their enabling statutes, *see* CFTC Br. 23 & n.8; Futures Br. 25-28, provides no basis for finding the statutes repugnant. Mere "differing results when applied to the same factual situation" is not enough. *Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 155 (1976). Rather, there must be an "irreconcilable conflict" in the "sense that there is a positive repugnancy between them or that they cannot mutually coexist." *Id*. No such conflict exists here. Indeed, as this Court has recognized, overlapping and concurring regulatory jurisdiction is commonplace. *Roberts,* 276 F.3d at 593. And judicial precedent permits multiple agencies to pursue claims for the same conduct to protect their respective constituents. 2007 Rehearing Order P 57 & n.142, JA 318-19.[4]

[4] *See FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948) (the FTC and the Attorney General could both act upon the same anticompetitive conduct; "the Sherman

(footnote continued on next page)

When Congress expanded FERC's jurisdiction through NGA § 4A, it was well aware of the scope of the CFTC's jurisdiction and, indeed, considered concerns regarding "unnecessary duplication" of efforts by enforcement agencies. 2007 Rehearing Order P 59, JA 320 (citing 149 Cong. Rec. S 13997 at 9 (daily ed. Nov. 5, 2005) (statement of Sen. Bennett)). Congress nevertheless "'put in place the first ever broad prohibition on manipulation in electricity and natural gas markets.'" *Id*. (quoting 151 Cong. Rec. S 9335 at 17 (daily ed. July 29, 2005) (statement of Sen. Cantwell)). The CFTC contends (at 36) that this legislative history evidences no Congressional intent "to effectively read the exclusive jurisdiction provision out of the Commodity Exchange Act with respect to natural gas futures contracts." But no evidence of such intent is required as FERC's jurisdiction does not intrude into, but rather complements, that of the CFTC.

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

The *Roberts* court distinguished between the CFTC's *exclusive* jurisdiction over "accounts, agreements, and transactions" and the CFTC's *non-exclusive*

Act and the Trade Commission Act provide the Government with cumulative remedies against activity detrimental to competition"); *Bristol-Meyers Co. v. FTC*, 738 F.2d 554, 559-60 (2d Cir. 1984) (concurrent FTC/FDA jurisdiction approved); *Warner-Lambert Co. v. FTC*, 361 F. Supp. 948, 953 (D.D.C. 1973) ("concurrent FDA-FTC proceedings involving the same or similar matters are proper, and … the statutory remedies of the two agencies are cumulative and not mutually exclusive").

jurisdiction over fraudulent practices. 2007 Rehearing Order P 50, JA 314-15. "[Section] 2(a)(1)(A) confers exclusive jurisdiction to the CFTC over a limited, discrete set of items related to the making of futures contracts," which "comports with Congress' goal of conferring the CFTC with sole regulatory authority over 'futures contracts *markets* and other *exchanges.*'" *Roberts*, 276 F.3d at 589-90 (citing text and legislative history of the CEA). The statutory goal was "to bring the futures markets 'under a uniform set of regulations;'" consequently, "'only in the context of market regulation does the need for uniform legal rules apply.'" *Id.* at 591 (quoting *Am. Agric. Movement, Inc. v. Bd. of Trade of Chicago*, 977 F.2d 1147, 1155-57 (7th Cir. 1992)), *cited in* CFTC Br. 22.

The court rejected as "specious" the contention that "whatever [the CFTC] may regulate, it regulates exclusively." *Id.* Thus, "while the CFTC was created to regulate all commodities and commodities *trading*," "it does not follow from this, however, that Congress intended to preempt the activities of all other federal agencies in their regulatory realms." *Id.* Accordingly, "other agencies … retain their jurisdiction beyond the confines of 'accounts, agreements, and transactions' for futures contracts." *Id.* *See also* 2007 Rehearing Order PP 50, 52, JA 314-16.

This result stems from the "imperfect overlap" between CEA § 2(a)(1)(A) and the rest of the CEA. *Roberts*, 276 F.3d at 591. For example, while the CFTC has jurisdiction over a trader's deceitful "practices" under 7 U.S.C. §6*o*, that

jurisdiction is *not* exclusive. 2007 Rehearing Order P 50, JA 315. Here, the CFTC is prosecuting Hunter under the anti-manipulation authority granted by 7 U.S.C. § 13(a)(2). CFTC Br. 4. But just like its jurisdiction over fraudulent acts (7 U.S.C. §6*o*), that jurisdiction is non-exclusive. Indeed, there is a private right of action for such manipulation, *see* 7 U.S.C. § 25(a), a right currently being exercised by a class of investors against Amaranth, Hunter, and others. *See In re Amaranth Natural Gas Commodities Litig.*, 612 F. Supp. 2d 376 (S.D.N.Y. 2009).

C. Precedent Demonstrates That There Is No Conflict Between The CFTC's Jurisdiction And FERC's Anti-Manipulation Authority.

Case law supports the finding that there is no conflict between the CFTC's CEA § 2(a)(1)(A) jurisdiction and FERC's NGA § 4A anti-manipulation authority, and therefore both statutes should be given effect. For instance, in *Strobl v. New York Mercantile Exch.*, 768 F.2d 22 (2d Cir. 1985), the court found that the antitrust laws did not conflict with, and thus were not preempted by, the CEA. Since "price manipulation is an evil that is always forbidden under every circumstance" by both statutes, "application of the [antitrust laws] cannot be said to be repugnant to the purposes of the [CEA]." *Id*. at 28. As "[s]tatutes are to be construed together to effectuate, to the greatest extent possible, the legislative policies of both," *id*. at 30, claims arising from manipulation of futures contracts could be asserted under both the CEA and the antitrust laws. *Id*. at 24.

Similarly, in *United States v. Brien*, 617 F.2d 299, 301, 309 (1st Cir. 1980), the court upheld mail and wire fraud convictions arising from the sale of futures contracts, rejecting the argument that such claims were preempted by the CFTC's exclusive jurisdiction. Although the First Circuit "agree[d] that Congress intended the CFTC to occupy the entire field of commodities futures regulation," that did not support the conclusion that the mail and wire fraud statutes were preempted. "[S]trong judicial policy disfavor[s] the implied repeal of statutes." *Id*. at 310 (citing *United States v. Borden*, 308 U.S. 188, 198 (1939)). "Where two statutes cover the same subject, effect will be given to both, if possible." *Id*. (citing *Posadas v. National City Bank*, 296 U.S. 497, 504 (1936)). Therefore, "[a]lthough the statutes prohibit similar conduct, they operate independently and harmoniously." *Id*.

The Second Circuit likewise concluded that the "reach of [the mail fraud statute] is unimpaired by the Commodity Futures Trading Commission Act of 1974." *United States v. Shareef*, 634 F.2d 679, 681 (2d Cir. 1980). The latter "has as its primary purpose the regulation of certain financial market transactions. This purpose is quite consistent with the simultaneous retention of the jurisdiction of [the mail fraud statute] over the criminal prosecution of mail frauds involving, among other things, commodity futures." *Id*. at 680-81. *See also United States v. Dial*, 757 F.2d 163 (7th Cir. 1985) (finding defendants "wise" not to argue that the

CFTC's exclusive jurisdiction supersedes the federal mail and wire fraud statutes in light of *Brien*); *United States v. Sawyer*, 799 F.2d 1494 (11th Cir. 1986) (affirming convictions for both mail and wire fraud and commodity fraud and manipulation). Similarly, here, both the CEA and the NGA seek to prohibit market manipulation. There is no conflict in purpose between the two statutes, and therefore no basis upon which the statutes should be found repugnant; rather, they both should be given full effect.

In contrast, the cases relied on by Hunter and his supporters are inapposite. *See* Br. 33-34; CFTC Br. 19-21; Futures Br. 19-22. Some addressed which agency, the SEC or CFTC, had jurisdiction over certain financial instruments in the first instance. *See Chicago Merc. Exch. v. SEC,* 883 F.2d 537 (7th Cir. 1989) (overturning SEC orders permitting trading of index participations on stock exchanges); *Chicago Bd. of Trade v. SEC,* 677 F.2d 1137 (7th Cir. 1982) (overturning SEC orders permitting trading of options in Government National Mortgage Association mortgage-backed certificates on the Chicago Board Options Exchange). *See* 2007 Rehearing Order P 51, JA 315-16 (discussing cases). The others – *SEC v. Am. Commodity Exch., Inc*., 546 F.2d 1361 (10th Cir. 1976), and *SEC v. Univest, Inc*., 405 F. Supp. 1057 (N.D. Ill. 1975), *remanded without op*., 556 F.2d 584 (7th Cir. 1977) (table decision) – addressed whether the SEC maintained jurisdiction to file complaints where it had instituted an investigation

prior to the CFTC's assumption of jurisdiction pursuant to the Commodities Futures Trading Commission Act of 1974, but failed to file a complaint until after the CFTC assumed jurisdiction.

None of the relied-upon cases addressed 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. 2007 Rehearing Order PP 31, 51 & n.130, JA 303, 315-16.

D. NGA § 23 Supports FERC's Interpretation.

Section 23 of the NGA, 15 U.S.C. § 717t-2(c), also enacted in EPAct of 2005, reflects Congress' recognition that FERC's newly-granted authority under § 4A authority would overlap with CFTC jurisdiction. 2007 Rehearing Order P 12, JA 292. Newly-enacted NGA § 23 directs FERC to facilitate price transparency in natural gas markets, and instructs FERC to negotiate a memorandum of understanding with the CFTC that includes "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).

Congress thus recognized the potential for FERC to require information

from the CFTC's jurisdictional markets. 2007 Rehearing Order P 62, JA 322. This necessarily presumes that the jurisdictional overlap will extend beyond information gathering. "It is an odd notion indeed that Congress intended [FERC] to gather information pertaining to exchanges under the CFTC's jurisdiction, but if [FERC] thereby detected manipulation affecting [its] jurisdictional markets to have no enforcement role to punish and deter such manipulation." *Id.* The Memorandum of Understanding itself provides (at 3) that: "the CFTC and FERC may from time to time engage in oversight or *investigations of activity affecting both CFTC-jurisdictional and FERC-jurisdictional markets*." JA 48 (emphasis added). *See also id*. at 48-49 (recognizing that the CFTC and FERC might have a "mutual interest" in acting on the market information they share); 2007 Rehearing Order P 62 (noting that the two agencies, at the time of their memorandum of understanding, contemplated joint investigative activities that go beyond the mere collection of information), JA 322.

Hunter and the CFTC assert that the NGA § 23(c)(2) "savings clause" – providing that "[n]othing in this section may be construed to limit or affect the exclusive jurisdiction" of the CFTC, 15 U.S.C. § 717t-2(c)(2) – evidences Congressional intent to preserve the CFTC's "exclusive" jurisdiction generally. Br. 17, 36; CFTC Br. 27-28. But the limited scope of this clause – applicable only to "this section" (NGA § 23) – only highlights the absence of such a savings clause

elsewhere in the statute. Had Congress intended to give the CFTC exclusive jurisdiction over all manipulation occurring in natural gas futures markets, it could have done so explicitly in NGA § 4A or in a generally-applicable savings clause. 2007 Rehearing Order P 60, JA 321. *See Russello v. United States*, 464 U.S. 16, 23 (1984) ("it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of language in one section, but not another). *See also Am. Forest & Paper Ass'n v. FERC*, 550 F.3d 1179, 1181 (D.C. Cir. 2008) (affirming FERC's reasonable construction of another provision of EPAct of 2005, based on FERC's consideration of precise language appearing in one statutory section but not another).

V. FERC REASONABLY DETERMINED THE ELEMENTS OF A MANIPULATION CLAIM.

FERC interpreted NGA § 4A as proscribing otherwise legal conduct undertaken with manipulative intent, where a party intends to affect, or recklessly affects, FERC-jurisdictional transactions. *See* 2010 Rehearing Order PP 20-26, JA 777-79 (reaffirming elements of market manipulation as earlier establish in Order No. 670, adopting its Anti-Manipulation Rule, 18 C.F.R. § 1c.1, implementing NGA § 4A); Hearing Order PP 56-73, JA 718-725 (same). That construction is consistent with numerous decisions interpreting identical language found in the Exchange Act and is thus worthy of this Court's deference.

A. FERC Reasonably Found That "Open-Market Transactions," Undertaken With Manipulative Intent, Are Proscribed By NGA § 4A.

Hunter asserts that FERC unreasonably found that the sale of enormous quantities of futures contracts during the 30-minute settlement period on three dates, in order to artificially depress the settlement price of such contracts so as to increase the value of related financial derivatives, could constitute market manipulation within the meaning of NGA § 4A. He contends that in the absence of some other deceptive conduct, these so-called "open-market transactions" do not "send false signals to the market participants and thus do not create an actionable case for manipulation." Br. 46-47. Hunter is wrong.

1. This Court's *Markowski* decision forecloses Hunter's challenge.

In *Markowski v. SEC*, 274 F.3d 525 (D.C. Cir. 2001), this Court held that it is reasonable to construe the term "manipulative device," as used in § 10(b) of the Exchange Act, as encompassing open-market transactions undertaken with manipulative intent. Since NGA § 4A specifically dictates that the terms "manipulative or deceptive device or contrivance" are to be used "as those terms are used in [§ 10(b) of the Exchange Act]," 15 U.S.C. § 717c-1, *Markowski* forecloses any claim that FERC's interpretation is unreasonable.

The *Markowski* petitioners argued, like Hunter here, that because "the trades … were 'real' – they involved real customers, real transactions, and real

money – the trades cannot be classified as unlawful manipulation." 274 F.3d at 528. The Court rejected this argument and upheld as reasonable the SEC's determination that such conduct, if accompanied by manipulative intent, is prohibited by § 10(b):

> [W]e cannot find the Commission's interpretation to be unreasonable in light of what appears to be Congress' determination that 'manipulation' can be illegal solely because of the actor's purpose.

Id. at 529.

While Hunter attempts (Br. 49-50) to distinguish *Markowski* on the facts, the conduct at issue there shares common features with the allegations here: high-volume trading (*Markowski*, 274 F.3d at 527), actual attempts to control the market price, rather than trade in response to legitimate supply and demand (*id*.), and an "external purpose" to benefit other financial instruments held by the manipulator (*id*. at 529). Moreover, Hunter's factual arguments cannot obscure *Markowski's* core holding that purportedly legitimate transactions can be deemed manipulative "solely because of the actor's purpose." *Id*. at 529. *See also* Hearing Order P 65 (discussing *Markowski*), JA 722.

2. FERC's construction of NGA § 4A is consistent with precedent.

FERC's construction of NGA § 4A is consistent with a number of cases that have considered whether open-market transactions, accompanied by manipulative intent, can give rise to liability under the Exchange Act and the CEA. These cases

recognize that transactions undertaken with manipulative intent, rather than a legitimate economic motive, send inaccurate price signals to the market: "Because every transaction signals that the buyer and seller have legitimate economic motives for the transaction, if either party lacks that motivation, the signal is inaccurate." *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 534 (S.D.N.Y. 2008). *See also SEC v. Marsi*, 523 F. Supp. 2d. 361, 372 n.17 (S.D.N.Y. 2007) ("a transaction entered with manipulative intent distorts the functioning of the market and sends a false message to its participants").

For instance, in *SEC v. Marsi* the court rejected the assertion that open-market transactions "cannot be considered manipulative based solely on manipulative intent, that is, without additional deceptive or fraudulent conduct." 523 F. Supp. 2d at 371. Instead, the court held that "if an investor conducts an open-market transaction with the intent of artificially affecting the price of the security, and not for any legitimate economic reason, it can constitute market manipulation." *Id*. at 372. This same conclusion was reached by two federal district courts in Amaranth-related litigation under the CEA involving virtually the same conduct at issue here. *See In re Amaranth*, 587 F. Supp. 2d at 534 ("a legitimate transaction combined with an improper motive is commodities manipulation"); *CFTC v. Amaranth Advisors, LLC*, 554 F. Supp. 2d 523, 534 (S.D.N.Y. 2008) ("there is no doubt that marking the close or any other trading

practice, without an allegation of fraudulent conduct, can also constitute manipulation in contravention of the CEA, so long as they are pursued with manipulative intent"). *See also Initial Public Offering Sec. Litig*., 241 F. Supp. 2d 281, 391 (S.D.N.Y. 2003) (finding no case or academic literature supporting any additional requirements in "so-called open market" cases).

The cases cited by Hunter (Br. 47-48) fail to support his position. For instance, while the Second Circuit in *ATSI Comm's v. Shaar Fund Ltd*., 493 F.3d 87 (2d Cir. 2007), found that "short selling must be willfully combined with something more" to be actionable as manipulation, it did not require that "something more" be other deceptive conduct. *Id*. at 101. In fact, the court stated that often scienter – *i.e*., manipulative intent – "is the only factor that distinguishes legitimate trading from improper manipulation." *Id*. at 102. *See also In re Amaranth*, 587 F. Supp. 2d at 534 ("The 'something more' [referenced in *ATSI*] is anything that distinguishes a transaction made for legitimate economic purposes from an attempted manipulation."). Similarly, in *Nanopierce Tech. Inc. v. Southridge Capital Mgmt.*, No. 02 Civ. 0767, 2002 U.S. Dist. LEXIS 24049 (S.D.N.Y. Oct. 10, 2002), the court observed that the "[d]efendants are unable to distinguish *Markowski*," *id*. at *30, and permitted an "open market" manipulation claim to proceed where, *inter alia*, the timing and volume of the trades gave rise to an inference of manipulative intent, *id*. at *31.

In *GFL Advantage Funds, Ltd. v. Colkitt*, 272 F.3d 189, 211 (3d Cir. 2001), the Third Circuit held that manipulation claims under § 10(b) required evidence of "some other type of deceptive behavior" in conjunction with short selling "that either injected inaccurate information into the marketplace or created artificial demand for the securities." However, the *GFL* court had no need to decide whether the trader's manipulative intent could serve as "some other type of deceptive behavior" because it found that the plaintiff had failed to adduce evidence demonstrating "GFL executed the trades for the purpose of depressing the stock's prices." *Id*. at 212.

B. FERC Reasonably Determined That NGA § 4A Encompasses Manipulation That Recklessly Affects FERC-Jurisdictional Transactions.

Hunter argues (Br. 51) that only a "manipulative intent or purpose … to create an artificial price in a FERC jurisdictional market" can trigger liability under NGA § 4A. But § 4A does not contain any language indicating a party must have specifically intended to affect a FERC-jurisdictional transaction with its manipulative conduct. Instead, it bars all manipulative conduct "in connection with" such transactions. 15 U.S.C. § 717c-1. Nonetheless, in order to ensure that NGA § 4A did not "convert every common-law fraud that happens to touch a jurisdictional transaction into a [statutory] violation," the Commission specified that it would construe the "in connection with" element as requiring that "the entity

must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction." Order No. 670, P 22, JA 72. *See also* 2010 Rehearing Order P 24 (same), JA 778.

FERC's construction of NGA § 4A's broad "in connection with" requirement is consistent with judicial interpretations of the identical phrase in § 10(b) of the Exchange Act. As discussed above (at 27-31), the Supreme Court "has espoused a broad interpretation" of this element, and has stated that "it is enough that the fraud alleged 'coincide' with a securities transaction." *Merrill Lynch* , 547 U.S. at 85. *See also Zandford*, 535 U.S. at 822 ("in connection with" element is satisfied where broker converted the sales of clients' securities to his own use, even though sales were lawful, because "[i]t is enough that the scheme to defraud and the sale of the securities coincide"). The "in connection with" requirement is satisfied whenever the alleged fraud "touch[es] the sale of securities," *Bankers Life & Cas. Co*., 404 U.S. at 12-13, whether by the victim of the alleged fraud or anyone else. *O'Hagan*, 521 U.S. at 658.

Indeed, courts have expressly rejected Hunter's contention that liability only attaches when there is specific intent to manipulate a jurisdictional market. As the Third Circuit explained in *Semerenko v. Cendant Corp*., 223 F.3d 165 (3d Cir. 2000), "it is irrelevant that the misrepresentations were not made for the purpose or the object of influencing the investment decisions of market participants." *Id*. at

176. Rather, § 10(b) is triggered where it is reasonably foreseeable that the alleged conduct would influence investors. *Id*.[5] Thus, sham energy and natural gas trades subject to FERC and CFTC jurisdiction, that were designed to boost the company's profile in the industry and attract more business, can "satisfy the 'in connection with' requirement if … investors considered … trading volume and revenues when deciding whether to purchase or sell that company's securities." *SEC v. Hopper*, No. 04-1054, 2006 U.S. Dist. LEXIS 17772, at *41-42 (S.D. Tex. Mar. 24, 2006).

Here, FERC determined that Hunter's intentional manipulation of the settlement prices of NG Futures Contracts would be actionable under NGA § 4A if he acted recklessly with regard to the manipulation's effect on participants in the physical natural gas markets subject to FERC's jurisdiction. *See* 2010 Rehearing Order P 24, JA 778. That construction is reasonable and appropriately defines the scope of § 4A.

[5] *See also In re Carter-Wallace Inc. Sec. Litig*., 150 F.3d 153, 156-57 (2d Cir. 1998) ("false advertisements in technical journals may be 'in connection with' a securities transaction if the proof at trial establishes that the advertisements were used by market professionals in evaluating the stock of the company"). *Savoy Indus.*, 587 F.2d at 1171 (holding that the "in connection with" requirement "is satisfied whenever it may reasonably be expected that a publicly disseminated document will cause reasonable investors to buy or sell securities in reliance thereon").

VI. FERC REASONABLY CONSTRUED ITS CIVIL PENALTY AUTHORITY UNDER THE NGA.

In the 2010 Rehearing Order (at P 27, JA 779), the Commission reaffirmed its prior finding that the NGA vests FERC with authority to adjudicate alleged violations of the Act in the first instance and provides for judicial review of orders assessing civil penalties in the courts of appeals.[6] That conclusion is consistent with the language of the relevant statutory provisions, and ensures that all are given effect. This Court should therefore affirm the Commission's reasonable construction of its civil penalty authority under the NGA.

A. NGA § 22 Vests FERC With Authority To Assess Civil Penalties.

FERC's analysis began with NGA § 22, which grants FERC authority to assess civil penalties against "[a]ny person who violates this chapter," 15 U.S.C. § 717t-1(a), "after notice and opportunity for public hearing," *id*. § 717t-1(b). *See Energy Transfer Partners*, 121 F.E.R.C. at P 53, JA 502. Congress did not specify the process by which such penalties are to be assessed. In such circumstances, "the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress has confided the responsibility of substantive

[6] In doing so, the Commission referred to its extensive analysis of this issue in a similar enforcement action, *Energy Transfer Partners, L.P.*, 121 F.E.R.C. ¶ 61,282, *reh'g denied* 124 F.E.R.C. ¶ 61,149 (2008), dismissed, *Energy Transfer Partners v. FERC*, 567 F.3d 134 (5th Cir. 2009).

judgments." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978). Here, FERC determined that appropriate procedure would include: (1) a notice of proposed penalties and a statement of material facts constituting the violation; (2) an evidentiary hearing before an ALJ; (3) a review of the ALJ's initial decision by the Commission and an assessment of the appropriate penalty; (4) rehearing of any penalty assessment; and (5) an appeal of the rehearing order to the court of appeals, pursuant to 15 U.S.C. § 717r. *Process for Assessing Civil Penalties*, 117 F.E.R.C. ¶ 61,317, ¶ 7 (2006).

In considering these procedures, FERC observed that NGA § 22 contains no language providing for *de novo* proceedings in federal district court. The absence of such language stands in sharp contrast to earlier-enacted statutes administered by FERC in which Congress specifically provided for *de novo* district court adjudication. *Energy Transfer Partners*, 121 F.E.R.C. at PP 53-54, JA 502-04.[7] The Commission concluded that this choice was deliberate, and that *de novo* adjudication in federal district court was not available for NGA civil penalty

[7] The Natural Gas Policy Act grants jurisdiction to federal district courts "to review *de novo* the law and facts" concerning any civil penalty assessment made by FERC, and to "enter a judgment enforcing, modifying … or setting aside in whole or in part, such assessment." 15 U.S.C. § 3414(b)(6)(F). The Federal Power Act similarly grants federal district courts with jurisdiction to "review de novo the law and the facts" underlying a civil penalty assessment, and "enter a judgment enforcing, modifying, … or setting aside in whole or in part, such assessment." 16 U.S.C. §§ 823b(d)(3)(B). *See also id*. § 825*o*-1(b).

assessments. *Id*. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *Brewster v. Gage*, 280 U.S. 327, 337 (1930) ("The deliberate selection of language so differing from that used in the earlier Acts indicates that a change of law was intended.").

B. NGA § 24 Vests District Courts With Jurisdiction To Enforce Liabilities First Determined By The Commission.

Hunter contends (Br. 53-54) that NGA § 24 vests federal district courts with exclusive jurisdiction to adjudicate alleged violations of the Act's anti-manipulation provision. That provision provides district courts with exclusive jurisdiction over "violations" of the NGA and actions "to enforce any liability or duty created by, or to enjoin any violation of" the Act. 15 U.S.C. § 717u.

The Commission explained that in order to trigger district court jurisdiction over "violations" of the Act, the Commission must first find that a violation has occurred. *Energy Transfer Partners*, 121 F.E.R.C. at P 58, JA 506. In the civil penalty context, that finding must stem from the process established by NGA § 22: "notice and the opportunity for a public hearing, followed by the Commission assessing a penalty." *Id*. Once that process is complete, "then a suit can be brought in federal district court to enforce the liabilities that the Commission has determined." *Id*. Section 24 thus provides a vehicle for FERC to bring an action

in district court to enjoin NGA violations, or to enforce liabilities or duties created under the Act – such as civil penalty liability created by a Commission order finding a violation. *Id*.

This conclusion is consistent with precedent construing both NGA § 24 and its identical counterpart, Federal Power Act § 317, 16 U.S.C. § 825p. For instance, in *Panhandle E. Pipe Line Co. v. Trunkline Gas Co*., 928 F. Supp. 466 (D. Del. 1996), the court concluded that it would have jurisdiction to entertain a suit under NGA § 24 only if the suit sought "enforcement of any liability or duty created by the FERC's orders." *Id*. at 471. The Fifth Circuit similarly held that Federal Power Act § 317 gives district courts "exclusive jurisdiction to enforce or enjoin … definitive orders, establishing rights and duties, such as may be reviewed before the Circuit Court of Appeals." *Miss. Power & Light Co. v. FPC*, 131 F.2d 148, 150 (5th Cir. 1942).

C. Hunter's Interpretation Would Render NGA § 19 Superfluous.

FERC's analysis also took into account NGA § 19(b), 15 U.S.C. § 717r(b), which governs judicial review under the NGA. *Energy Transfer Partners*, 121 F.E.R.C. at PP 57, 62, JA 505-06, 508-09. That provision "vest[s] exclusive jurisdiction in the courts of appeals to review FERC's orders." *Hunter*, 2009 U.S. App. LEXIS 23417, at *3. If Hunter were correct that NGA § 24 obligates FERC to seek enforcement of civil penalties in a *de novo* federal district court action,

NGA § 19's exclusive review mandate would be rendered superfluous as to FERC orders finding NGA violations and assessing civil penalties under NGA § 22. *Energy Transfer Partners*, 121 F.E.R.C. at P 62, JA 508-09.

* * *

The complicated interplay of the NGA's various civil penalty and judicial review provisions were recently presented to the Fifth Circuit in *Energy Transfer Partners, L.P. v. FERC*, 567 F.3d 134 (5th Cir. 2009). Because the petitioner, like Hunter here, sought judicial review prior to any final FERC order fixing liability, the court dismissed the appeal as premature, noting that "[t]he proper construction of the NGA must await resolution when and if the Commission determines that the NGA has been violated and assesses a penalty." *Id*. at 146. The Fifth Circuit noted, however, that the "NGA's statutory scheme is far from clear" and that "Congressional action to chart with clarity the desired course of proceedings … would not be unwelcome." *Id*.

To the extent this Court agrees with the Fifth Circuit's observation regarding the Act's ambiguity, it should affirm the Commission's reasonable construction of the NGA, which attempts to harmonize and give effect to each of the statute's civil penalty and judicial review provisions.

CONCLUSION

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

Respectfully submitted,

Thomas R. Sheets
General Counsel

Robert H. Solomon
Solicitor

Lona T. Perry
Senior Attorney

/s/ Robert M. Kennedy
Robert M. Kennedy
Attorney

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

September 16, 2010

Hunter. v. FERC **D.C. Cir. No. 10-1017**

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 13,652 words, not including the cover page, tables of contents and authorities, the glossary, the certificate of counsel, and this certificate.

/s/ Robert M. Kennedy
Attorney

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

September 16, 2010

ADDENDUM A

STATUTES AND REGULATIONS

TABLE OF CONTENTS

Section 704 of the Administrative Procedure Act, 5 U.S.C. § 704, provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Section 2(a)(1)(A) of the Commodity Exchange Act, 7 U.S.C. § 2(a)(1)(A), provides:

(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.

Section 6*o* of the Commodity Exchange Act, 7 U.S.C. § 6*o*, provides:

(1) It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or

(B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

(2) It shall be unlawful for any commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator registered under this chapter to represent or imply in any manner whatsoever that such person has been sponsored, recommended, or approved, or that such person's abilities or qualifications have in any respect been passed upon, by the United States or any agency or officer thereof. This section shall not be construed to prohibit a statement that a person is registered under this chapter as a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, if such statement is true in fact and if the effect of such registration is not misrepresented.

Section 13(a) of the Commodity Exchange Act, 7 U.S.C. § 13(a), provides:

(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 [1] 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.

Section 25(a) of the Commodity Exchange Act, 7 U.S.C. § 25(a), provides:

(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 31(d) of the Federal Power Act, 16 U.S.C. § 823b(d), provides:

(d) Assessment

(1) Before issuing an order assessing a civil penalty against any person under this section, the Commission shall provide to such person notice of the proposed penalty. Such notice shall, except in the case of a violation of a final order issued under subsection (a) of this section, inform such person of his opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment.

(2)

(A) In the case of the violation of a final order issued under subsection (a) of this section, or unless an election is made within 30 calendar days after receipt of notice under paragraph (1) to have paragraph (3) apply with respect to such penalty, the Commission shall assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of title 5 before an administrative law judge appointed under section 3105 of such title 5. Such assessment order shall include the administrative law judge's findings and the basis for such assessment.

(B) Any person against whom a penalty is assessed under this paragraph may, within 60 calendar days after the date of the order of the Commission assessing such penalty, institute an action in the United States court of appeals for the appropriate judicial circuit for judicial review of such order in accordance with chapter 7 of title 5. The court shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in Part, the order of the Commission, or the court may remand the proceeding to the Commission for such further action as the court may direct.

(3)

(A) In the case of any civil penalty with respect to which the procedures of this paragraph have been elected, the Commission shall promptly assess such penalty, by order, after the date of the receipt of the notice under paragraph (1) of the proposed penalty.

(B) If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (A), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in Part,[1] such assessment.

(C) Any election to have this paragraph apply may not be revoked except with the consent of the Commission.

(4) The Commission may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation in a timely manner at any time prior to a final decision by the court of appeals under paragraph (2) or by the district court under paragraph (3).

(5) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order under paragraph (2), or after the appropriate district court has entered final judgment in favor of the Commission under paragraph (3), the Commission shall institute an action to recover the amount of such penalty in any appropriate district court of the United States. In such action, the validity and appropriateness of such final assessment order or judgment shall not be subject to review.

(6)

(A) Notwithstanding the provisions of title 28 or of this chapter, the Commission may be represented by the general counsel of the Commission (or any attorney or attorneys within the Commission designated by the Chairman) who shall supervise, conduct, and argue any civil litigation to which paragraph (3) of this subsection applies (including any related collection action under paragraph (5)) in a court of the United States or in any other court, except the Supreme Court. However, the Commission or the general counsel shall consult with the Attorney General concerning such litigation, and the Attorney General shall provide, on request, such assistance in the conduct of such litigation as may be appropriate.

(B) The Commission shall be represented by the Attorney General, or the Solicitor General, as appropriate, in actions under this subsection, except to the extent provided in subparagraph (A) of this paragraph.

Section 221 of the Federal Power Act, 16 U.S.C. § 824u, provides:

No entity (including an entity described in section 824 (f) of this title) shall willfully and knowingly report any information relating to the price of electricity sold at wholesale or the availability of transmission capacity, which information the person or any other entity knew to be false at the time of the reporting, to a Federal agency with intent to fraudulently affect the data being compiled by the Federal agency.

Section 222 of the Federal Power Act, 16 U.S.C. § 824v, provides:

(a) In general
It shall be unlawful for any entity (including an entity described in section 824 (f) of this title), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission 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 title 15), 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 electric ratepayers.

(b) No private right of action
Nothing in this section shall be construed to create a private right of action.

Section 316A of the Federal Power Act, 16 U.S.C. § 825*o*-1, provides:

(a) Violations

It shall be unlawful for any person to violate any provision of subchapter II of this chapter or any rule or order issued under any such provision.

(b) Civil penalties

Any person who violates any provision of subchapter II of this chapter or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than $1,000,000 for each day that such violation continues. Such penalty shall be assessed by the Commission, after notice and opportunity for public hearing, in accordance with the same provisions as are applicable under section 823b (d) of this title in the case of civil penalties assessed under section 823b of this title. In determining the amount of a proposed penalty, the Commission shall take into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner.

Section 317 of the Federal Power Act, 16 U.S.C. § 825p, provides:

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 exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

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

(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 2 of the Natural Gas Act, 15 U.S.C. § 717a, provides:

When used in this chapter, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively.

(10) "Vehicular natural gas" means natural gas that is ultimately used as a fuel in a self-propelled vehicle.

(11) "LNG terminal" includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

Section 4A of the Natural Gas Act, 15 U.S.C. § 717c-1, provides:

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

(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:

(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:

(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:

(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:

(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.

Section 24 of the Natural Gas Act, 15 U.S.C. § 717u, provides:

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 exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

Section 504(b)(6) of the Natural Gas Policy Act, 15 U.S.C. § 3414(b), provides:

(b) Civil enforcement

(6) Civil penalties

(A) In general

Any person who knowingly violates any provision of this chapter, or any provision of any rule or order under this chapter, shall be subject to—

(i) except as provided in clause (ii) a civil penalty, which the Commission may assess, of not more than $1,000,000 for any one violation; and

(ii) a civil penalty, which the President may assess, of not more than $1,000,000, in the case of any violation of an order under section 3362 of this title or an order or supplemental order under section 3363 of this title.

(B) "Knowing" defined

For purposes of subparagraph (A) the term "knowing" means the having of—

(i) actual knowledge; or

(ii) the constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.

(C) Each day separate violation

For purposes of this paragraph, in the case of a continuing violation, each day of violation shall constitute a separate violation.

(D) Statute of limitations

No person shall be subject to any civil penalty under this paragraph with respect to any violation occurring more than 3 years before the date on which such person is provided notice of the proposed penalty under subparagraph (E). The preceding sentence shall not apply in any case in which an untrue statement of material fact was made to the Commission or a State or Federal agency by, or acquiesced to by, the violator with respect to the acts or omissions constituting such violation, or if there was omitted a material fact necessary in order to make any statement made by, or acquiesced to by, the violator with respect to such acts or omissions not misleading in light of circumstances under such statement was made.

(E) Assessed by Commission

Before assessing any civil penalty under this paragraph, the Commission shall provide to such person notice of the proposed penalty. Following receipt of notice of the proposed penalty by such person, the Commission shall, by order, asssess such penalty.

(F) Judicial review

If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (E), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.

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

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)

(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, 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.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(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:

§ 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]

18 C.F.R. § 1c.1 provides as follows:

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–
825r, 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.

ADDENDUM B

Brookfield Energy Marketing, Inc. v. FERC,
No. 09-1320 (D.C. Cir. June 21, 2010)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1320 **September Term 2009**

FERC-EL09-48-001

Filed On: June 21, 2010

Brookfield Energy Marketing Inc.,

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

Constellation Energy Commodities Group, Inc., et al.,
Intervenors

BEFORE: Rogers, Garland, and Brown, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the responses thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. The orders of the Federal Energy Regulatory Commission setting for public hearing the issue of petitioner's alleged violations of the Federal Power Act and denying the request for rehearing are not final orders for the purpose of judicial review. See Papago Tribal Authority v. FERC, 628 F.2d 235, 239–40 (D.C. Cir. 1980); see also DRG Funding Corp. v. Secretary of Housing and Urban Development, 76 F.3d 1212, 1215 (D.C. Cir. 1996) ("Orders setting cases for hearings despite objections to the agency's jurisdiction have long been considered nonfinal."); Aluminum Co. of America v. United States, 790 F.2d 938, 941 (D.C. Cir. 1986) ("It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding."); Natural Resources Defense Council, Inc. v. U. S. Nuclear Regulatory Comm'n, 680 F.2d 810, 816 (D.C. Cir. 1982) ("Orders concerning the initiation of adjudicatory proceedings are generally viewed as interlocutory.").

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1320 **September Term 2009**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

Hunter. v. FERC **D.C. Cir. No. 10-1017**

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 16th day of September 2010, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

Andrew Clark Lourie Leanne Abrams Bortner Kobre & Kim LLP 1919 M Street, NW Washington, DC 20036	Email
Bradford Mann Berry Commodity Futures Trading Commission (CFTC) Office of General Counsel 1155 21st Street, NW Three Lafayette Center Washington, DC 20581	Email
Mark D. Young Kirkland & Ellis LLP 655 15th Street, NW Suite 1200 Washington, DC 20005	Email
Mary T. Connelly Commodity Futures Trading Commission (CFTC) Office of General Counsel 1155 21st Street, NW Three Lafayette Center Washington, DC 20581	Email

Michael Sang Yun Kim
Kobre & Kim LLP
800 Third Avenue
6th Floor
New York, NY 10022

Email

/s/ Robert M. Kennedy
Robert M. Kennedy
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-8904
Fax: (202) 273-0901

September 16, 2010