137 FERC ¶ 61,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Brian Hunter Docket No. IN07-26-007

ORDER DENYING REHEARING

(Issued November 18, 2011)

1. On May 23, 2011, Respondent Brian Hunter (Hunter) requested rehearing of the Commission's Order Affirming Initial Decision and Ordering Payment of Civil Penalty issued on April 21, 2011.[1] In the Affirming Order, we found that the record supported the administrative law judge's (ALJ) determination that Hunter engaged in trading practices that violated section 4A of the Natural Gas Act (NGA), 15 U.S.C. section 717c-1, and the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.1, which prohibit "any entity" from engaging in manipulation "in connection with" transactions subject to the jurisdiction of the Federal Energy Regulatory Commission (Commission). For the reasons set forth below, we deny Hunter's request for rehearing of the Affirming Order.

2. The conduct at issue in this case concerns trading in natural gas futures contracts (NG Futures Contracts) on the New York Mercantile Exchange (NYMEX) in a manner that was designed to manipulate the prices of those contracts in order to reap a profit on related financial instruments, such as swaps and call options.[2] The record demonstrated that Hunter accumulated large amounts of NG Futures Contracts that were subsequently sold off during the final 30 minutes of trading (i.e., the settlement period) on the final day of trading for those contracts (i.e., the expiration days) in February, March, and April 2006, with the aim of driving down their settlement price. Hunter's trading pattern was intended to benefit the significantly larger short swap and option positions maintained by

[1] *Brian Hunter*, 135 FERC ¶ 61,054 (2011) (Affirming Order).

[2] For an overview of the futures and swap markets, *see* Affirming Order at P 7-10.

Amaranth[3] on other trading platforms, whose value increased as the NG Futures Contract settlement price declined.[4]

3. After an extensive hearing, the ALJ determined that Hunter's trading practices during the at-issue expiration days were fraudulent or deceptive, undertaken with the requisite scienter, and carried out in connection with Commission-jurisdictional natural gas transactions.[5] The Commission affirmed that decision and assessed a $30,000,000 civil penalty against Hunter.[6]

I. Procedural History

4. This proceeding began with an order issued July 26, 2007, directing Amaranth and two of its traders, Hunter and Matthew Donohoe (Donohoe) (collectively, Respondents), to show cause why they had not violated the Anti-Manipulation Rule, and why they should not be required to pay civil penalties and disgorge unjust profits.[7]

5. In an order issued November 30, 2007, the Commission denied rehearing of the Show Cause Order. In doing so, the Commission explained that, while it does not regulate NG Futures Contracts, the settlement price of such contracts directly affects the price of Commission-jurisdictional natural gas sales. Accordingly, manipulation of NG Futures Contracts falls within section 4A's broad prohibition of manipulation "in connection with" Commission-jurisdictional sales.[8]

6. On December 14, 2007, Respondents filed their answers to the Show Cause Order, as well as motions for summary disposition. Respondents denied all allegations and again argued that the Commission lacked jurisdiction to pursue an enforcement action against them.

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[3] "Amaranth" refers collectively to Amaranth Advisors, L.L.C., Amaranth LLC, Amaranth Management Limited Partnership, Amaranth International Limited, Amaranth Partners LLC, Amaranth Capital Partners, LLC, Amaranth Group, Inc., and Amaranth Advisors (Calgary) ULC.

[4] *See, e.g.*, Affirming Order at P 11-15 (describing manipulative scheme).

[5] *Brian Hunter*, 130 FERC ¶ 63,004 (2010) (Initial Decision).

[6] Affirming Order at P 148.

[7] *Amaranth Advisors, L.L.C.*, 120 FERC ¶ 61,085 (2007) (Show Cause Order).

[8] *Amaranth Advisors, L.L.C.*, 121 FERC ¶ 61,224, at P 11, 23 (2007) (2007 Rehearing Order).

7. In a second rehearing order issued July 17, 2008, the Commission reaffirmed that it possessed subject matter jurisdiction to address the alleged manipulation of NG Futures Contracts. The Commission also set the proceeding for hearing before an ALJ to address the allegations in the Show Cause Order, and reserved for itself the issue of whether civil penalties should be imposed.[9] In an order issued January 15, 2010, the Commission denied Hunter's request for rehearing of the Hearing Order.[10]

8. Respondents and the Commission's Enforcement Litigation Staff engaged in settlement negotiations during this proceeding. On November 24, 2008, the parties filed an offer of settlement, which the Commission rejected by order dated February 12, 2009.[11] On July 23, 2009, Amaranth and Donohoe, on the one hand, and Enforcement Litigation Staff, on the other, filed another offer of settlement. The Commission approved the settlement in an order issued August 12, 2009.[12]

9. The hearing as to the claims against Hunter commenced on August 18, 2009 and concluded on September 2, 2009. The ALJ issued the Initial Decision on January 22, 2010, which the Commission affirmed on April 21, 2011. On May 23, 2011, Hunter sought rehearing of the Affirming Order.

II. Discussion

A. The Commission's Subject Matter Jurisdiction

10. In his request for rehearing, Hunter reiterates his arguments regarding the Commission's purported lack of statutory authority to pursue an enforcement action against him, which have been addressed in numerous prior orders.[13] In short, Hunter contends that section 4A of the NGA (1) does not authorize the Commission to police manipulation occurring in the futures market, (2) does not permit enforcement actions against natural persons, and (3) vests the federal district courts with exclusive jurisdiction to adjudicate alleged violations.[14] Hunter states these issues are being raised again now

[9] *Amaranth Advisors, L.L.C.*, 124 FERC ¶ 61,050, at P 14 (2008) (Hearing Order).

[10] *Brian Hunter*, 130 FERC ¶ 61,030 (2010) (2010 Rehearing Order).

[11] *Amaranth Advisors, L.L.C.*, 126 FERC ¶ 61,112 (2009).

[12] *Amaranth Advisors, L.L.C.*, 128 FERC ¶ 61,154 (2009).

[13] Hunter does not take issue with the Commission's determination that the evidence adducted at the hearing supports the exercise of personal jurisdiction over him. *See* Affirming Order at P 25-27.

[14] Rehearing Request at 10-19.

in order to ensure his ability to pursue them on appeal.[15] His rehearing request presents no new arguments with respect to these matters. Accordingly, the Commission sees no reason to revisit its prior rulings rejecting Hunter's contentions.[16]

B. The Elements of Market Manipulation

11. Hunter also reiterates his contentions that (1) so-called "open market" manipulation requires some showing of deceptive conduct, apart from trading with manipulative intent, (2) artificial price is an element of a manipulation claim under NGA section 4A, and (3) the Commission must establish that Hunter intentionally manipulated a jurisdictional transaction.[17]

1. Manipulative Intent

12. The Commission has previously rejected Hunter's assertion that, in the absence of some other deceptive conduct, so-called "open market" trading cannot constitute market manipulation. As explained in the Affirming Order, "Section 4A of the Natural Gas Act proscribes otherwise legal conduct undertaken with manipulative intent, where a party intends to affect, or recklessly affects Commission-jurisdictional transactions. This is the identical construction of the identical language found in section 10(b) of the Securities Exchange Act of 1934 that was upheld by the DC Circuit in *Markowski v. SEC*, 274 F.3d 525 (D.C. Cir. 2001)."[18]

13. Hunter argues that the Commission has "mischaracterize[d]" *Markowski* "as holding that otherwise lawful open-market transactions can in themselves constitute unlawful market manipulation where the subjective intent behind them was to affect prices."[19] We disagree. In *Markowski*, the DC Circuit addressed the question of whether "[l]iability for manipulation" could be imposed "wholly independent of fictitious

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[15] Rehearing Request at 14 n.2 ("Although Hunter believes that he has adequately preserved [his arguments regarding the meaning of the term "any entity"] for appeal, he raises it again out of an abundance of caution"). *See id*. at 17 n.4 (same).

[16] *See*, *e.g.*, Show Cause Order at P 44-49; 2007 Rehearing Order at P 15-65; Hearing Order at P 16-19, 35-55, 74-77; 2010 Rehearing Order at P 9-19, 27-28; Affirming Order at P 150.

[17] Rehearing Request at 19-27.

[18] Affirming Order at P 48. *See also* Hearing Order at P 65 (rejecting "contention that false statements are required in order violate NGA section 4A").

[19] Rehearing Request at 20.

transactions."[20] While the Court acknowledged the defendants' contention that imposing liability in such circumstances may give rise to practical concerns, it found that such "arguments [were] of little use."[21] "Whatever the practical concerns, we cannot find the Commission's interpretation to be unreasonable in light of what appears to be Congress's determination that 'manipulation' can be illegal solely because of the actor's purpose."[22]

14. Hunter also asserts that the Commission "misapprehended" the Second Circuit's decision in *ATSI Communications Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007) which, according to Hunter, established an "other deceptive conduct" requirement in so-called "open market" manipulation cases.[23] But as explained in the Affirming Order, the *ATSI* court "did not create a safe harbor for manipulative schemes premised upon otherwise legal trading activities."[24] Further, we do not accept Hunter's premise that the conduct at issue here involved nothing more than open market trading activities that were incapable of deceiving market participants. In this case, Hunter manipulated "the interplay of trading activities in two separate markets" by "trading against his interest in the futures market in order to reap larger profits in the separate swap market."[25]

2. Artificial Price

a. As an element of the offense

15. Hunter contends that the Commission erred in the Affirming Order by "stating for the very first time" that the existence of an artificial price is not an element of a claim under section 4A of the NGA or the Anti-Manipulation Rule.[26] But the requirements for a manipulation claim were established in Order No. 670, which did not include artificial

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[20] *Markowski*, 274 F.3d at 528.

[21] *Markowski*, 274 F.3d at 529.

[22] *Markowski*, 274 F.3d at 529.

[23] Rehearing Request at 20.

[24] Affirming Order at P 52. *See also In re Amaranth*, 587 F. Supp. 2d 513, 534 (S.D.N.Y. 2008) (the "additional factor [referenced in *ATSI*] need not be a misstatement or omission. The 'something more' is anything that distinguishes a transaction made for legitimate economic purposes from an attempted manipulation.").

[25] Affirming Order at P 53.

[26] Rehearing Request at 22.

price as an element.[27] Nor is artificial price an element under section 10(b) of the Exchange Act, upon which section 4A was modeled.[28]

16. Hunter's argument to the contrary is largely based upon cases arising under the Commodities Exchange Act (CEA), certain sections of which have been interpreted as requiring proof of an artificial price. The legal standard created by those sections of the CEA differs from that created by NGA section 4A. But as the CFTC recently explained when adopting regulations implementing its anti-manipulation authority under newly-enacted CEA section 6(c)(1) – which, like NGA section 4A, is modeled on section 10(b) of the Exchange Act – a finding of market manipulation does not require proof of price artificiality: "A market or price effect may well be indicia of the use or employment of a manipulative or deceptive device or contrivance; nonetheless, a violation of [the CFTC's anti-manipulation rule] may exist in the absence of any market or price effect."[29] We similarly held in the Affirming Order that findings regarding artificial price "would be a sufficient, but not a necessary, basis for finding manipulation."[30]

17. In addition, it is important to note that the ALJ found, and the Commission affirmed, "that Amaranth's extraordinary selling during the at-issue settlement periods exerted downward pressure on the market and created prices that were not the result of normal supply and demand" – i.e., prices that were artificial.[31] Thus, even if the

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[27] *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047, P 48-54, *order denying reh'g*, 114 FERC ¶ 61,300 (2006) (Order No. 670).

[28] *See* Affirming Order at P 54. *See also Chemetron Corp. v. Business Funds, Inc.*, 718 F.2d 725, 728 (5th Cir. 1983) (a section 10(b) claim "is not defeated by the fact that the jury found the activities did not have an 'affect' on Chemetron's purchase price of the stock"); *GLF Advantage Funds, Ltd. v. Colkitt*, 272 F.3d 189, 206 n.6 (3d Cir. 2001) (observing that, in "a government prosecution under Section 10(b) … the government need not demonstrate that the defendant's conduct induced reliance by investors or affected the price of the security"); *In re Blech Sec. Litig.*, 928 F. Supp. 1279, 1298 (S.D.N.Y. 1996) ("The absence of allegations of market dominance and price movement are not fatal to the Complaint. While these may be classic attributes of market manipulation, they are not requisites.").

[29] *Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation*, 76 Fed. Reg. 41398, 41401 (CFTC July 14, 2011).

[30] Affirming Order at P 55.

[31] Affirming Order at P 56 (internal quotations omitted).

existence of an artificial price were an element of the NGA section 4A and the Anti-Manipulation Rule, such element was established here.

b. Evidence of artificial price

18. Hunter disputes that there was sufficient evidence to support a finding that his conduct resulted in an artificial price.[32] He first attempts to draw a distinction between conduct which affects prices and conduct which results in artificial prices. According to Hunter, "a mere effect on price is insufficient to come to a finding of manipulation because such evidence would at most establish a causal relationship between the resulting price and a would-be manipulator's trades, but not indicate whether that price failed to reflect market conditions of supply and demand because of illegitimate trading practices or factors extraneous to the economic pricing system."[33] To the extent Hunter is arguing that an artificial price can only arise from conduct that is itself fraudulent or otherwise illegal, we reject that assertion.[34] As explained in the Affirming Order, "[a]n artificial price is simply one that is not produced by the normal forces of supply and demand."[35] Here, the record supports the ALJ's determination that the settlement price on the expiration days in question was affected by factors extraneous to the economic pricing

[32] Rehearing Request at 29-37.

[33] Rehearing Request at 31.

[34] *See, e.g., Anderson v. Dairy Farmers of Am. Inc.*, No. 08-4726, 2010 U.S. Dist. LEXIS 104191, *14 (D. Minn. Sept. 30, 2010) ("to establish that an artificial price existed for the purposes of a CEA manipulation claim, a plaintiff need not establish fraud, misrepresentation, or a violation of exchange rules on the part of the defendant"); *Prohibition of Market Manipulation*, 75 Fed. Reg. 67,657, 67661 (CFTC Nov. 3, 2010) ("The Commission also emphasizes, consistent with the weight of existing precedent, that the conduct giving rise to a manipulation charge need not itself be fraudulent or otherwise illegal") (citing *In re Zenith-Godley Co., Inc and John McClay, Jr.*, 6 Agric. Dec. 900 (1947); *In re Henner*, 30 Agric Dec. 1155 (1971); *In re DiPlacido*, No. 01-23, 2008 CFTC LEXIS 101 (Nov. 5, 2008), *aff'd in pertinent part*, *DiPlacido v. CFTC*, 2009 U.S. App. LEXIS 22692 (2d Cir. Oct. 16, 2009)).

[35] Affirming Order at P 56 n. 86 (citing cases). *See also CFTC v. Enron Corp.*, No. H-03-909, 2004 U.S. Dist. LEXIS 28794, *16 (S.D. Tex. Mar. 9, 2004) ("whenever a buyer on the Exchange intentionally pays more than he has to for the purpose of causing the quoted price to be higher than it would otherwise have been …, the resultant price is an artificial price not determined by the free forces of supply and demand on the exchange") (internal quotation omitted).

system of the NG Futures Contracts – i.e., a desire to benefit opposing positions held by Hunter on other trading platforms.[36]

19. Hunter disputes this finding, asserting that "the testimony of the [the parties' economic] experts was given no weight."[37] The CFTC has recognized, however, that "extensive economic analysis may not be necessary to demonstrate" the existence of an artificial price.[38] Here, the ALJ found, among other things, that Amaranth traded at prices generally below those of other traders, and below the volume-weighted average price for the at issue-settlement periods.[39] Because the settlement price is an average of all sales during the settlement period, the challenged trades – as a matter of mathematics – impacted the price. And when such trades are executed with an intent to lower the settlement price in order to benefit positions on other trading platforms, the resulting price is no longer the product of *bona fide* forces of supply and demand.

20. Hunter further argues that the Commission's affirmance of the ALJ's findings regarding price artificiality improperly rested upon descriptive statistics that "merely show" the challenged trading, and "do nothing to analyze … whether the resulting price was artificial in any way."[40] To the extent Hunter is arguing that either the Commission's, or the ALJ's, findings rested entirely upon descriptive statistics, he is wrong. As explained in the Affirming Order, it was "[o]n the basis of these statistics, and a consideration of Hunter's trading practices, the impact of that trading upon others, and Hunter's position on other trading platforms, [that] the ALJ reasonably concluded that Hunter engaged in fraudulent or deceptive conduct."[41] The Affirming Order further discusses the various findings made by the ALJ establishing that Hunter's trading exerted downward pressure on the market and created prices that were not the result of normal supply and demand.[42]

21. Hunter also asserts that the Commission erred in upholding the ALJ's refusal to credit the correlation and price recovery analyses performed by Hunter's economic

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[36] *See*, *e.g.*, Affirming Order at P 56.

[37] Rehearing Request at 33.

[38] *Prohibition of Market Manipulation*, 75 Fed. Reg. 67,657, 67660 (CFTC Nov. 3, 2010).

[39] Initial Decision at P 73, 74.

[40] Rehearing Request at 31.

[41] Affirming Order at P 59 (citing Initial Decision at P 84).

[42] *See*, *e.g.*, Affirming Order at P 56.

expert, Dr. Michael Quinn.[43] He argues that in affirming the ALJ's determination that Dr. Quinn's analysis "omitted key variables,"[44] the Commission "evidence[d] a fundamental misunderstanding of statistical analysis."[45]

22. Dr. Quinn's correlation analysis considered the linear relationship between Hunter's trading volume and the settlement price. Such a straight line analysis often fails to capture nonlinear relationships that may become apparent if other variables are considered.[46] And, as the ALJ explained, "other factors can offset an effect of interest, as Dr. Quinn himself notes, so that no correlation is observed."[47] Here, for example, Dr. Quinn did not consider the relationship between the settlement price and Amaranth's percentage of trading volume, thereby ignoring the extent to which those trades influenced the volume weighted average price.[48] Nor did he consider those minutes during the settlement period when Amaranth did not trade. Such data could serve as a control when considering the relationship between the settlement price and Hunter's trading during the at-issue expiration days.[49] The record thus supports the ALJ's finding that "Dr. Quinn's correlation testimony is not … persuasive."[50]

23. Hunter also challenges the Commission's approval of the ALJ's determination not to give significant weight to Dr. Quinn's price recovery analysis. The ALJ explained that "evidence concerning price recovery is not given significant weight" because "[p]rice recovery in this type of case is not conclusive."[51] The record also supports this

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[43] Rehearing Request at 33-37.

[44] Affirming Order at P 61.

[45] Rehearing Request at 34.

[46] Initial Decision at P 79 (citing Ex. S10 at 43-45 (Kaminski)).

[47] Affirming Order at P 79.

[48] Tr. 1953-61, 1986, 1991-92 (Quinn).

[49] Ex. RES2-18, Tr. 1982 (Quinn).

[50] Initial Decision at P 79.

[51] Initial Decision at P 70 n.47.

conclusion, as both parties' experts agreed that price recovery, or the lack thereof, could be attributable to normal market factors.[52]

24. Hunter nonetheless claims that the ALJ "agreed that one can observe price recovery" and that "one would expect a recovery subsequent to a manipulation in the market."[53] This contention, however, is largely fashioned from the ALJ's discussion of the effect of manipulation on prices for prompt-next month contracts, which are traded for another thirty days (roughly) after any manipulation in the prompt-month settlement period.[54] By contrast, "trading of prompt-month futures finishes at 2:30 pm. on the settlement day. Arguably, then there are no new prices, no new trading, no way to recover."[55]

25. Moreover, the ALJ's decision not to give significant weight to the price recovery analysis was also based upon flaws in Dr. Quinn's methodology.[56] Hunter does not challenge our affirmation of the ALJ's findings in this regard. Rather, he asserts that the Commission "ignored the additional price recovery analysis conducted by Dr. Quinn and presented during the Hearing," that purportedly corrects the flaws identified in the Initial Decision.[57] Dr. Quinn's revised analysis, presented for the first time during the hearing, looked for evidence of price recovery over the entire settlement period, rather than just the last two minutes of the period.[58] While this adjustment addresses one of the identified methodological flaws, others remain. For instance, the revised analysis employs a long time frame for the pre- and post-settlement period, which has the effect of ignoring price trends during the day and after the settlement period. The failure to control for such

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[52] *See* Ex. S11 at 68 (King) ("because of the many factors that affect prices, neither a reversal nor a lack of reversal by itself is conclusive evidence of price manipulation"); Tr. 1912-13 (Quinn) (acknowledging that price reversal or the lack thereof could be due to normal price volatility). *See also In re BellSouth Corp. Sec. Litig*., 355 F. Supp. 2d 1350, 1371 n.21 (N.D. Ga. 2005) (declining to place great weight upon evidence of a price recovery since it "could have been the result of some market or other influence").

[53] Rehearing Request at 36.

[54] *See* Initial Decision at P 81.

[55] Initial Decision at P 70 n.47.

[56] Affirming Order at P 61 (discussing ALJ's findings regarding Dr. Quinn's price recovery analysis). *See also* Initial Decision at P 79 (same).

[57] Rehearing Request at 36.

[58] Ex. RES Demonstrative-25; Tr. 2503-2507 (Quinn).

trends could obscure price recoveries (or the lack thereof).[59] Accordingly, the record supports the ALJ's decision not to place significant weight upon Dr. Quinn's price recovery analyses.

3. Recklessness

26. We have previously addressed Hunter's call for a rule requiring proof that a party intentionally manipulated a Commission-jurisdictional transaction before liability may be imposed.[60] In Order No. 670, the Commission explained that acting with reckless disregard as to the impact of manipulative conduct upon Commission-jurisdictional transactions is sufficient.[61] This reasonable construction of section 4A's broad "in connection with" requirement ensures that "only fraudulent and manipulative activity that has a nexus to a jurisdictional transaction is actionable."[62]

27. The Commission's interpretation of NGA section 4A's "in connection with" requirement is consistent with judicial interpretations of the identical phrase in section 10(b) of the Exchange Act. The Supreme Court "has espoused a broad interpretation" of section 10(b)'s "in connection with" requirement, and has stated that "it is enough that the fraud alleged 'coincide' with a securities transaction."[63] As the Third Circuit has explained, so long as the alleged fraud touches the sale of securities, it is irrelevant that the challenged conduct was not undertaken "for the purpose or object of influencing the investment decisions of market participants."[64]

28. We therefore reaffirm that liability under NGA section 4A may be triggered where a party acts recklessly with regard the manipulation's effect on participants in the physical natural gas markets subject to the Commission's jurisdiction.

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[59] *See*, *e.g.*, Ex. S11 at 72-115 (King) (critiquing Dr. Quinn's analysis); Tr. 2184-2200 (King) (same).

[60] Rehearing Request at 25-27.

[61] Order No. 670 at P 22.

[62] Hearing Order at P 73. *See also* 2010 Rehearing Order at P 24 (same).

[63] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006). *See also SEC v. Zandford*, 535 U.S. 813, 822 (2002) ("It is enough that the scheme to defraud and the sale of the securities coincide.").

[64] *Semerenko v. Cendant Corp.*, 223 F.3d 165, 176 (3d Cir. 2000). *See also In re Ames Dep't Stores Inc. Stock Litig.*, 991 F.2d 953, 965 (2d Cir. 1993) (holding that an investor's reliance need not be envisioned to give rise to liability under section 10(b) and Rule 10b-5).

C. Review of Initial Decisions; Burden of Proof

29. In the Initial Decision, the ALJ generally found that Hunter's testimony lacked candor and was not credible.[65] Hunter contends that the Commission should not have deferred to the ALJ's findings in this regard. He argues that the "sole rationale for deferring to the trier of fact" on credibility determinations "is that such findings involve a first-hand observation of the demeanor of the witnesses."[66] And here, according to Hunter, the ALJ did not rest her findings on Hunter's demeanor, but rather conflicts between his testimony and other evidence in the record.[67]

30. We do not agree with Hunter's characterization of the ALJ's credibility findings. In some instances, the ALJ did explain that her credibility determination arose from conflicts between Hunter's testimony and other record evidence.[68] In others, however, the ALJ's findings appear to reflect her observations regarding Hunter's demeanor on the witness stand. For instance, the ALJ found that Hunter had "not been forthright with [the] tribunal,"[69] "exhibited significant selective memory,"[70] and "would not admit" certain facts while "[o]n the witness stand."[71] In any event, even if Hunter had correctly characterized the basis of the ALJ's credibility findings, "[t]he rationale for deference to the original finder of fact is not limited to the superiority of the [trier of fact's] position to make determinations of credibility. The [trier of fact's] major role is the determination of fact, and with experience in fulfilling that role comes expertise."[72] Thus, "deference to the trier of fact [] is the rule, not the exception."[73]

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[65] *See, e.g.*, Initial Decision at P 165, 167, 212.

[66] Rehearing Request at 27 (internal quotations omitted).

[67] Rehearing Request at 28.

[68] *See, e.g.*, Initial Decision at P 172, 183.

[69] Initial Decision at P 212.

[70] Initial Decision at P 165.

[71] Initial Decision at P 176.

[72] *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

[73] *Bessemer City*, 470 U.S. at 575. *See also Inwood Labs. Inc. v. Ives Labs., Inc*., 456 U.S. 844, 856 (1982) ("Determining the weight and credibility of the evidence is the special province of the trier of fact").

31. Hunter also claims that the Commission erred in rejecting his objections to the ALJ's characterization of certain facts.[74] The objections at issue were raised in list form in Hunter's brief on exceptions, and simply asserted that, in various paragraphs, "the ID erred in its characterization of facts," without any supporting explanation or citation to relevant contrary evidence.[75] While our regulations require a summary list of numbered exceptions to initial decisions, they also mandate that any objection be accompanied by "[a] presentation of the participant's position and argument in support of that position, including reference to the pages of the record or exhibits containing evidence and arguments in support of that position."[76] "A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim."[77] The Commission, like any reviewing tribunal, is "not like [a] pig[], hunting for truffles buried in briefs."[78] Accordingly, the Commission reaffirms its denial of those objections that lacked any supporting argumentation.[79]

32. In the Affirming Order, we found that the ALJ properly placed the burden of proof upon Enforcement Litigation Staff, and properly measured that proof with a preponderance of the evidence standard.[80] Hunter contends that, in certain instances, the ALJ based her findings on Hunter's lack of candor or the unconvincing nature of his explanation, rather than any proof offered by Enforcement Litigation Staff. This is incorrect. As explained throughout the Affirming Order and herein, the record supports the ALJ's conclusion that Enforcement Litigation Staff established the elements of a NGA section 4A violation by a preponderance of the evidence. Hunter was presented with the opportunity to refute that evidence. The ALJ gave close attention to those attempted refutations, and found that Hunter's explanations for his trading activities

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[74] Rehearing Request at 28-29.

[75] *See* Brief on Exceptions of Brian Hunter at pp. 1-8. *See also* Affirming Order P 47 n.72.

[76] 18 C.F.R. § 385.711 (b)(1)(ii).

[77] *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

[78] *Dunkel*, 927 F.2d at 956.

[79] Hunter's rehearing request (at 29) seemingly acknowledges that the Affirming Order addressed those issues that were elucidated in detail in his brief on exceptions. The only specific objection identified is his challenge to the ALJ's use of descriptive statistics. Rehearing Request at 29 n.8. That objection was addressed in the Affirming Order (at P 58-59) and is addressed further *supra* at P 18-20.

[80] Affirming Order at P 29.

during the at-issues periods conflicted with other record evidence and were otherwise not credible.[81] That is not burden shifting.

33. Nonetheless, Hunter contends that the ALJ required him to prove that price changes during the at-issue settlement periods were the result of market fundamentals, rather than requiring Enforcement Staff to establish that something other than market fundamentals caused the price movements.[82] The record – which contains evidence that Hunter's manipulative trading impacted the price on the at-issue expiration days, and that market fundamentals did not explain the price movements observed on those days – belies this assertion.[83] For instance, Enforcement Litigation Staff's experts testified that the market quickly reacts to new information and that no new information about market fundamentals was released during the at-issue settlement periods.[84]

34. Hunter next asserts that the ALJ engaged in "improper burden shifting" when she ruled that Hunter could not enter rebuttal evidence regarding the timing of weather updates to the market.[85] This too is not burden shifting. The ALJ explained that the proffered rebuttal testimony was unnecessary because Hunter had already testified as to the manner in which weather information is transmitted to the market.[86] Hunter argues that documentary evidence underlying the proposed rebuttal testimony "would have torpedoed the opinion" of the Enforcement Staff's expert.[87] But the exhibit in question (RES Dem. 18) concerns weather patterns in August 2009 and is thus irrelevant to the question how prices in 2006 were impacted by weather information. And as the ALJ

[81] *See*, *e.g.*, Initial Decision at P 163, 165, 167, 169-70, 172, 176, 183-84, 186-88, 191, 212.

[82] Rehearing Request at 73.

[83] *See*, *e.g.*, Initial Decision at P 64-74.

[84] *See*, *e.g.*, Exs. S1 at 143 (Kaminksi); S10 at 14-19 (Kaminski), S11 at 182-89 (King). Hunter's own expert acknowledged that he was "not able to say for certain that market fundamentals explain prices during the at-issue periods." Tr. 1899 (Quinn).

[85] Rehearing Request at 73.

[86] Tr. 1718-19.

[87] Rehearing Request at 74.

found, "[t]here is no evidence of any weather patterns that were not taken into account during price formation before the settlement period."[88]

D. Hunter Acted With the Requisite Scienter

35. In order to constitute a violation of the Anti-Manipulation Rule, a party's fraudulent conduct must be undertaken with the requisite scienter.[89] In the Affirming Order, the Commission agreed with the ALJ's conclusion that the preponderance of the evidence demonstrated that Hunter intentionally manipulated the NG Futures Contract settlement price during the three at-issue expiration days. Such evidence established that Hunter believed that the NYMEX settlement price was susceptible to manipulation; had a financial motive for the manipulation; employed a trading strategy during the at-issue months that differed considerably from all prior periods; and understood that lowering the settlement price of the NG Futures Contracts would benefit his related positions on other trading platforms.[90] On rehearing, Hunter takes issue with the Commission's evaluation of the record evidence supporting these conclusions. Those objections are addressed in turn below.

1. Hunter's knowledge regarding the susceptibility of the NYMEX futures market to manipulation

36. In the Affirming Order, the Commission agreed that the ALJ's conclusion regarding Hunter's awareness of the susceptibility of the natural gas futures market to manipulation was supported by the record.[91] That conclusion was based, in part, on an August 30, 2006 letter to NYMEX in which Amaranth complained about market manipulation during the thirty-minute settlement period on August 29, 2006 for the September 2006 NG Futures Contract (the prompt month futures contract).[92] Hunter contends that the Commission improperly disregarded a report from the Senate Subcommittee on Investigations regarding the August 2006 settlement period, which purportedly found that it "is impossible to manipulate the prompt month settlement prices

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[88] Initial Decision at P 64, n.41. *See also* Affirming Order at P 60, n.101. Hunter's final example of burden shifting relates to a purported lack of proof regarding his participation in the manipulation of the April 2006 NG Futures Contract. That contention is addressed *infra* at P 49.

[89] Order No. 670 at P 52-53.

[90] Affirming Order at P 76.

[91] Affirming Order at P 79-82.

[92] *See* Affirming Order at P 80.

on NYMEX … using only prompt month futures in the close," without also engaging in significant trading on the ICE platform during the settlement period.[93]

37. While the Staff Report described the trading that took place on the NYMEX and ICE trading platforms on August 29, 2006, and concluded that the final settlement price was likely artificial, it did not find that it is impossible to manipulate the settlement price through the sale of a significant number of NG Futures Contracts during the settlement period.[94] And the fact that the trading pattern examined in the Staff Report may have differed from the strategy employed by Hunter does not contradict or call into question the record evidence relied upon by the ALJ to determine that Hunter believed the natural gas futures market could be manipulated.[95]

38. Hunter also contends that the Commission improperly ignored testimony from floor brokers DeLucia and Rufa in which they acknowledged that market participants selling large volumes could affect prices, but asserted that it would be impossible to guarantee that such sales would move the price downward. It is unnecessary, however, to prove that Hunter's trading strategy was guaranteed to lower the NG Futures Contract settlement price in order to find that his strategy was employed in an effort to manipulate the market. Moreover, the brokers' observations, however, are consistent with Hunter's acknowledgment that the trading strategy at issue in this case began in February 2006 as a "bit of an exp[e]riment mainly"[96] – an experiment that replicated itself on the expiration days in March and April 2006.

39. In support of the conclusion that Hunter believed the thirty-minute settlement period for NG Futures Contracts could be manipulated, the Affirming Order also cites two instant messages in which Hunter referred to a fellow trader as the "master of moving the close" due to his ability to "jack the settle."[97] Hunter asserts that the Commission ignored his testimony that these instant messages were discussing the two-minute settlement period for prompt-next month contracts, rather than the thirty-minute settlement period for prompt month contracts.[98] The messages themselves, however,

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[93] Rehearing Request at 39 (citing Permanent Subcommittee on Investigations of the United States Senate Staff Report with Additional Minority Staff Views, Excessive Speculation in the Natural Gas Market (2007) at 107 (Staff Report)).

[94] Staff Report at 105-10.

[95] *See* Affirming Order at P 80-82, Initial Decision at P 144-45.

[96] Ex. S47; Tr. 425 (Hunter).

[97] Affirming Order at P 81 (citing Exs. S18, S19).

[98] Rehearing Request at 40. *See also* Tr. 555-69 (Hunter).

refer to the last trading day for the May 2006 NG Futures Contract.[99] The "settle" for that contract was the price established during the thirty-minute settlement period on the last trading day in April 2006. The record therefore supports the ALJ's reliance upon these instant messages as evidence supporting the conclusion that Hunter believed the thirty-minute settlement period could be manipulated.

40. In any event, we have already rejected Hunter's contention that while the two-minute settlement period for prompt-next month contracts may be manipulated, the thirty-minute settlement period cannot be manipulated "'because everyone has to get flat' …. [N]ot everyone has to get flat. As the ALJ found, every month thousands of contracts go to delivery. And Hunter knew that physical natural gas traders, who did not need to be flat, traded in the settlement period and that their activities could create imbalances and price movements in the market."[100]

2. Hunter's financial motive for manipulation

41. Hunter acknowledges that he was compensated based on the profitability of his book and cites evidence submitted by Enforcement Litigation Staff indicating that the at-issue trades resulted in a profit to Amaranth of $18,224,777.[101] Hunter nonetheless argues that there is no support for the Commission's conclusion that he possessed "a financial motive to pursue the manipulative trading strategy" at issue in this case.[102] Hunter asserts that, even if evidence showing a $18 million profit were accepted, such a figure is *de minimus* in relation to the size of his entire portfolio and thus could not have motivated the manipulative conduct.[103] We disagree and find it entirely reasonable for the ALJ to conclude that these profits – of which Hunter stood to take home at least seven percent (that is, potentially more than $1,275,000)[104] – could provide a sufficient motive for manipulation.[105]

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[99] *See* Ex. S18.

[100] Affirming Order at P 82 (quoting Brief on Exceptions of Brian Hunter at 44).

[101] Rehearing Request at 41-42 (citing Ex. S1 at 148, 152, 156 (Kaminski)).

[102] Affirming Order at P 83.

[103] Rehearing Request at 42.

[104] *See* Affirming Order at P 83 (discussing Hunter's compensation package).

[105] *See* Initial Decision at P 80, 152 (discussing Hunter's profit motive).

42. Hunter also reiterates his contention that, because the value of his book was based on seasonal spreads, he lacked a profit motive to manipulate the NG Futures Contract settlement. We again find that there is sufficient evidence in the record to support the ALJ's finding that a spread trading strategy does not preclude profitable manipulation of the prompt month contract.[106] This is demonstrated, for example, by Hunter's expressed desire to have the settlement price of the March 2006 NG Futures Contract "get smashed" and Amaranth's profit and loss statement for February 24, 2006, which shows a significant gain due in part to a decrease in that settlement price.[107] In a related vein, Hunter argues that there is no evidentiary support for the notion that prices do not necessarily decline symmetrically on elements of a spread position (*e.g.*, price declines in near months (where Hunter is short) would not necessarily result in the same level of declines in forward months (where Hunter is net long)).[108] But the profit and loss statement for February 24 illustrates an instance where declines in the prompt month contract did not result in the same level of declines in the forward months.[109] And during his testimony, Hunter provided examples of how downward price movements could result in profits to a spread trader,[110] and acknowledged instances when downward price movements in near months resulted in substantial benefits to his portfolio.[111]

43. Finally, Hunter argues that the Affirming Order erred in agreeing with the ALJ's observation that gains for the prompt month are realized on settlement day, while losses for prompt next month contracts are temporary since there is a possibility of price recovery.[112] Hunter contends that, because the NYMEX margin system valued Amaranth's entire portfolio each day, it was impossible for him to benefit from a manipulation of the prompt month contract without harming his overall portfolio.[113] The point, however, is that if the settlement price of the prompt month contract was manipulated downward, the benefit to the short position would be locked in, since trading

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[106] *See* Initial Decision at P 80-81; Affirming Order at P 85-86.

[107] *See* Affirming Order at P 85; Exs. S45, S48.

[108] Rehearing Request at 43 (criticizing Affirming Order at P 86).

[109] Ex S48. *See also* Tr. 525-26 (Hunter) (discussing scenarios where declines in front month may not be result in equivalent declines in forward months).

[110] Tr. 524-26 (Hunter).

[111] Tr. 437-39, 878-80 (Hunter).

[112] Affirming Order at P 86.

[113] Rehearing Request at 43-44.

in that contract would cease on the expiration day. While that manipulation may harm a long position by also driving down the price of the prompt-next month contract, those losses would be temporary since trading would continue, thereby allowing the price to recover.[114]

3. Hunter's February trading

44. In the Affirming Order, the Commission affirmed the ALJ's conclusion that Hunter intentionally manipulated the settlement price of the March 2006 NG Futures Contract.[115] That determination was based, in part, upon contemporaneous instant messages sent by Hunter which shed light on his intent with respect to the February trading.[116] Hunter argues that the ALJ and Commission took these messages out of context and ignored Hunter's testimony regarding their meaning.[117] We disagree and reaffirm our determination that the ALJ reasonably analyzed these instant messages.

45. In the Initial Decision, the ALJ discussed a number of instant messages relating to Hunter's February 2011 trading.[118] She considered the construction of those messages proffered by Hunter and Enforcement Litigation Staff, determined which messages, or which portions of messages, should be given weight, and whether the parties' interpretations were consistent with other record evidence.[119] The ALJ did not consider these messages in isolation, but rather with other contextual evidence, such as (a) Hunter's knowledge that his swap positions would benefit from a lower NG Futures Contract settlement price,[120] (b) the existence of a trading pattern seen on the three at-issue trading days that differed markedly from Amaranth's previous trading,[121] (c) Hunter's significant trading during at-issue settlement periods, despite Amaranth's instructions that its traders eliminate their prompt month positions as soon as possible,[122]

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[114] *See, e.g.*, Initial Decision at P 81, 164.

[115] Affirming Order at P 90.

[116] *See, e.g.*, Affirming Order at P 91.

[117] Rehearing Request at 45-48.

[118] *See, e.g.*, Initial Decision at P 146, 148-49, 160, 166.

[119] *See, e.g.*, Initial Decision at P 86, 90, 115-16, 122-25.

[120] Initial Decision at P 147.

[121] Initial Decision at P 150.

[122] Initial Decision at P 150.

(d) Hunter's profit motive,[123] and (e) Hunter's lack of candor and credibility on the witness stand.[124] Based on this analysis, the ALJ determined that Hunter's construction of these messages – proffered in support of his explanation for his February trading – was not credible.[125] These weight and credibility determinations are entitled to deference where, as here, they are supported by the record.[126]

46. Hunter next argues that the Commission "demonstrates [a] fundamental misunderstanding"[127] of his trading strategy when noting that it seemed "illogical that Hunter would devise a strategy intended to take advantage of a higher settlement price … when a higher settlement price would significantly reduce the value of his short swap position."[128] Hunter contends that he was not looking to "take advantage of a higher settlement price," but rather attempting to beat the close by selling his futures at an average price above the final settlement price.[129] The Affirming Order accurately recounts Hunter's strategy and its inherent incongruity.[130] While Hunter was purportedly expecting buying pressure for NG Futures Contracts (which would result in a higher settlement price), he was substantially increasing his short swap position on the ICE and Clearport platforms. Hunter claims that this swap position "would not be affected at all by the buying pressure he expected in the close."[131] But the swaps settle financially at the

[123] Initial Decision at P 152.

[124] *See, e.g.*, Initial Decision at P 169.

[125] Initial Decision at P 153-69.

[126] Hunter argues that the ALJ and Commission were required to accept his "undisputed testimony on the record as to what the email and IMs actually mean." Rehearing Request at 45. But in post-hearing briefing, Hunter advised that the instant messages contained "content … that does not require explanation by an experienced trader," and some were "plain" and "did not even require that you have ever traded futures" to interpret. Initial Summation Brief, filed Oct. 13, 2009, at 40, 50.

[127] Rehearing Request at 48.

[128] Affirming Order at P 95.

[129] Rehearing Request at 48-49.

[130] *See* Affirming Order at P 93 (describing Hunter's strategy to beat the close).

[131] Rehearing Request at 49.

final settlement price of the relevant NG Futures Contract.[132] Thus, because Hunter's February 2006 short swap position "would be significantly harmed if the buying pressure … did in fact emerge," the Commission found Hunter's explanation "illogical."[133]

47. Hunter also asserts that the Commission "misunderstands Hunter's strategy as one intended to make a large profit and thus discredits Hunter's strategy because it was 'unlikely to succeed' because the [Exchange of Futures for Swaps (EFS)][134] were purchased at a 2 cent premium."[135] But the Affirming Order repeatedly recognized Hunter's assertion that his February 24 trading strategy was designed to "just 'make a little bit of money.'"[136] We affirmed the ALJ's conclusion that several anomalies associated with this trading strategy made it unlikely to reach even this modest goal.[137] For instance, while Hunter testified that he hoped to obtain an average sales price that exceeded the settlement price, he instructed his broker to sell futures positions ratably over the close. In doing so, Hunter eliminated any statistical expectation of obtaining prices in excess of the settlement price.[138] And even if Hunter were able to execute sales at prices that met his expectations, he would still not garner enough to recoup the premium paid in connection with the EFS transactions used to carry out his February trading strategy.[139]

48. Hunter further argues that the second aspect of his February trading – the purchase of approximately 1,800 March futures, while selling the same number of April futures – had nothing to do with his experiment to beat the close. The ALJ found, however, that these futures were a component of the long position that Hunter amassed in order to carry

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[132] *See* Show Cause Order at P 18 (citing NYMEX Exchange Rulebook § 508.02, ICE, Product Detail for Natural Gas Swap Fixed for NYMEX LD1). *See also* Hunter's Memorandum in Response to Order to Show Cause, filed Dec. 14, 2007, at 9.

[133] Affirming Order at P 95.

[134] For a description of EFS transactions, *see* Affirming Order at P 96 n.173.

[135] Rehearing Request at 49.

[136] Affirming Order at P 95 (quoting Hunter's Brief on Exceptions at 57). *See also id*. at P 94, 97 (same).

[137] Affirming Order at P 94.

[138] *See* Affirming Order at P 93-94, 96.

[139] Affirming Order at P 97.

out his "experiment."[140] That conclusion is supported by the record and is not contradicted by the testimony cited by Hunter is in his request for rehearing.[141] Moreover, even if Hunter were correct, such a fact would not undermine the ALJ's conclusion that Hunter's trading with respect to the 3,000 EFS positions was undertaken with scienter, and that Hunter's explanation of that trading lacked credibility and thus failed to rebut Enforcement Staff's prima facie case of manipulation.

4. Hunter's March trading

49. Hunter argues that because there is no direct evidence that he directed Amaranth's trading on March 29, 2006 – the expiration day for the April 2006 NG Futures Contracts – he cannot be found to have manipulated the settlement price for those contracts.[142] In the Affirming Order, however, the Commission identified a number of pieces of evidence supporting the ALJ's determination that Hunter intentionally manipulated the settlement price of the April 2006 NG Futures Contracts.[143] Among other things, the record established that Hunter was responsible for Amaranth's natural gas trading book, that Donohoe (who carried out the actual trading on March 29) had no authority to determine Amaranth's trading strategy, and that Amaranth employed a strategy mirroring that which took place in February and April (which Hunter admittedly directed).[144] While this evidence is circumstantial, "circumstantial evidence can be more than sufficient" when establishing scienter.[145]

5. Hunter's April Trading

50. In the Affirming Order, the Commission affirmed the ALJ's conclusion that Hunter intentionally manipulated the settlement price of the May 2006 NG Futures Contracts in order to benefit positions held on other trading platforms.[146] Hunter contends that his April trading was driven by a directive from Amaranth management to reduce the funds' natural gas portfolio, and asserts that the Commission ignored evidence

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[140] *See* Initial Decision at P 155 (citing Tr. 414-16 (Hunter), Ex. S46).

[141] *See* Rehearing Request at 50 (citing Tr. 683:1-17, 686:10-11 (Hunter)).

[142] Rehearing Request at 51.

[143] Affirming Order at P 103.

[144] Affirming Order at P 103.

[145] *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983).

[146] Affirming Order at P 105.

establishing this directive.[147] But both the Initial Decision and the Affirming Order acknowledged the portfolio reduction directive.[148] Those orders found, however, that a preponderance of the evidence established that the trading underlying the manipulation claim – the sale of May 2006 NG Futures Contracts during the settlement period in order to benefit swap positions on other trading platforms – was not part of any portfolio reduction effort.

51. Hunter testified that he chose to reduce Amaranth's natural gas holdings by "legging out" of its spread position, which involved the sale of Amaranth's long winter contracts while allowing its short May swaps to expire on April 26, 2006. The ALJ found that Hunter's attempt to explain why the execution of this plan required the sale of NG Futures Contracts during the settlement period resulted in a trading strategy that was "needlessly complex."[149] Hunter argues that the ALJ "is without the power" to opine on his strategy and that there is "no legal basis for the Commission to require Hunter to show that he chose the most straightforward way to reduce the risk in the book."[150] The ALJ's comment regarding the complexity of Hunter's explanation for his April trading emanated from her role as fact-finder.[151] As such, the ALJ was charged with determining whether Hunter's explanation for his conduct (i.e., his defense to the Enforcement Staff's prima facie case) was credible, or whether it amounted to an after-the-fact concoction. Here, the needless complexity resulting from Hunter's efforts to incorporate his sale of NG Futures Contracts during the settlement period contributed to the ALJ's conclusion that Hunter's explanation was an *ex post facto* creation.[152]

52. In determining that Hunter's explanation lacked credibility, the ALJ also noted Hunter's refusal to acknowledge at the hearing that the sale of NG Futures Contracts during the settlement period on April 26 was related to a portfolio reduction strategy.[153]

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[147] Rehearing Request at 56-58.

[148] *See, e.g*, Initial Decision at P 175; Affirming Order at P 106.

[149] Affirming Order at P 106 (citing Initial Decision at P 176, 181). The Initial Decision (at P 175, 177-81) explained in great detail how Hunter could have reduced his portfolio in any number of ways that would not have necessitated the sale of NG Futures Contracts in the settlement period.

[150] Rehearing Request at 53, 55.

[151] *See* Affirming Order at P 106.

[152] *See* Initial Decision at P 167,

[153] Affirming Order at P 107 (citing Initial Decision at P 176).

On rehearing, Hunter points to testimony indicating that he needed to have futures contracts in order to balance out his book – i.e., ensure that he could "roll" his position forward to June.[154] But this testimony fails to coherently explain a connection between the sale of May 2006 NG Futures Contracts during the settlement period and Amaranth's portfolio reduction strategy.[155] And as the ALJ observed, while Hunter claimed that an unbalanced book is undesirable when discussing the sale of futures contracts during the April settlement period, he acknowledged that his portfolio was generally net long as a hedge against potential spread movements.[156] And there were significant variations in the balance of Hunter's portfolio subsequent to the at-issue settlement periods. The ALJ reasonably pointed to these variations as another factor which cut against the credibility of Hunter's explanation of his trading activity.[157]

53. The timing of Hunter's trading on April 26 is another piece of evidence that undercuts the credibility of his proffered explanation. Hunter asserts that he sold the May 2006 NG Futures Contract during the later part of the settlement period only after determining that he would not be able to sell as much winter length as he had hoped, and that only during the settlement period did Amaranth begin "getting decent prices for winter."[158] With respect to the sale of winter length, the ALJ found little evidence of efforts to sell prior to the settlement period or "that the price of these contracts changed during the day."[159] Indeed, the record reflects a sale at 1:30 pm. at $1.98, with subsequent sales during the settlement period at lower prices (although one sale was at

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[154] Rehearing Request at 55-56. *See also* Initial Decision at P 59 n.38 (discussing "roll" transactions).

[155] Amaranth provided a similar explanation to the NYMEX in response to an inquiry about the company's April 26, 2006 trading. Ex. S170. The record indicates that NYMEX officials characterized this explanation as "misleading." Ex. S10 at 78 (Kaminski). The CFTC charged that Amaranth's letter to NYMEX contained material misrepresentations regarding Amaranth's April 26 trading strategy. *See* Complaint in *CFTC v. Amaranth Advisors*, LLC, No. 07-6682 (S.D.N.Y.), filed July 25, 2007, at ¶¶ 62-68.

[156] Initial Decision at P 186 (citing Tr. 320 (Hunter)).

[157] Initial Decision at P 186.

[158] Tr. 496 (Hunter). *See also* Rehearing Request at 57.

[159] Initial Decision at P 183 n.91 (citing Tr. 530 (Hunter), Exs. S1-5 at AMARANTH_REG057018_Trades_2006__Jan_May_WithID.xls; RES20-39, RES20-40, RES20-45, RES20-47, RES20-48).

$2.00), "not at better prices, as Hunter testified."[160] And as explained in the Affirming Order, the record demonstrates that Donohoe was attempting to sell winter length after Amaranth placed its order to sell NG Futures Contracts in the last eight minutes of the settlement period.[161] This fact supports the ALJ's inference that "there was no relationship between selling winter in the close and selling futures within the last eight minutes of the close."[162] On rehearing, Hunter also claims that he waited to sell his winter positions because he expected to find liquidity in the settlement period for such positions.[163] But the testimony purportedly supporting this assertion merely states "you never know when liquidity can happen. You can do a 10,000-lot trade in one trade. You never know."[164] And it does not counter the ALJ's reasonable inference that, because Hunter was selling length after placing orders to sell futures contracts, the sale of the latter was not related to the sale of the former.

54. Hunter next argues that the Commission misunderstands the effect of a trade with Centaurus in which Hunter moved a significant short swap position from June to May. Hunter argues that this trade would have been harmed by trading in the last eight minutes of the settlement period, and thus he lacked any incentive to depress the settlement price for the May or June 2006 NG Futures Contract.[165] But as the ALJ explained, Hunter's portfolio was short for both months and thus would benefit from lower May and June prices. Had prices decreased throughout the settlement period, Hunter would have fared even better. But instead, prices rose during the initial stages of the settlement period, before falling near the close. The end result was profitable to Hunter, although not as profitable as it would have been had there been no early rally in the settlement period.[166] We therefore do not agree that the record supports the notion that Hunter lacked an incentive to lower the settlement price on April 26, 2006.

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[160] Initial Decision at P 183 n.91.

[161] Affirming Order at P 108. *See also* Exs. RES20-27, 20-47, 20-48, 20-49; Tr. 1031-32 (Donohoe).

[162] Initial Decision at P 183.

[163] Rehearing Request at 57 (citing Tr. 901:7-17 (Hunter)).

[164] Tr. 901:15-17 (Hunter).

[165] Rehearing Request at 58-59.

[166] Initial Decision at P 185. *See also* Ex. RES4-9 at AMARANTH_REG075312; Ex. S1-5 at AMARANTH_REG057018_Trades_2006_Jan_May_WithID.xls) (setting forth Amaranth's May and June positions on April 26).

55. Hunter contends that the Commission ignored certain evidence purportedly establishing that he did not want a lower settlement price on April 26, 2006. Hunter first points to an instant message in which he states that he is "a touch worried about a lower close."[167] But Hunter testified that this message expressed his concern that the settlement price for the May 2006 NG Futures Contract would not be low enough, particularly in relation to the settlement price for the June 2006 NG Futures Contract.[168] And as we noted in the Affirming Order, Hunter's testimony regarding this message was premised on the notion that he was "quite long" in June, when in fact he was short in both May and June.[169] Hunter also points to two messages in which he complains about losing money on his trade with Centaurus.[170] But as explained above, a consideration of Hunter's entire portfolio indicates that Hunter would not lack incentive to depress the settlement price on April 26. We do not, therefore, believe that these message contradict the preponderance of record evidence indicating that Hunter intended to depress the settlement price for the May 2006 NG Futures Contracts in order to benefit related positions held on other trading platforms.

56. The record demonstrates that from March 31, 2006 through September 2006, Hunter's natural gas portfolio became "increasingly unbalanced" and "tend[ed] to get increasingly long, though there is some volatility."[171] Hunter argues that his book did, in fact, decrease in size on April 26 and that any trends or subsequent growth are irrelevant.[172] But the linchpin of Hunter's explanation for his April trading was a position reduction strategy, which purportedly required a balanced book. The record reveals "little evidence of trimming," but rather a portfolio that is unbalanced and "growing rather consistently," with no explanation for why this is the case.[173] The make

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[167] Rehearing Request at 61 (citing Ex. RES19-46).

[168] Tr. 822 ("I'm really quite concerned … that if the market goes down and May doesn't go down very much but June forward, which I'm quite long, goes down a lot, I could lose a lot of money").

[169] Affirming Order at P 109, n.209. *See also* Initial Decision at P 185.

[170] Rehearing Request at 61-62 (citing Exs. RES19-27, 19-46). *See also* Tr. 843-47 (Hunter), 1686-88, 1706-08 (Kaminski).

[171] Initial Decision at P 187 (citing Staff Demo. Exs. 49-51). *See also* Ex. RES4-4.

[172] Rehearing Request at 62-63.

[173] Initial Decision at P 188.

up of Hunter's portfolio during this time period is one piece of evidence among others that bears upon the credibility of Hunter's testimony.[174]

E. In Connection with the Purchase or Sale of Jurisdictional Natural Gas

57. Section 4A of the NGA prohibits manipulation "in connection with" Commission-jurisdictional transactions.[175] This element is satisfied where a party "act[s] recklessly with regard to the effect of their trading activity on jurisdictional transactions."[176] In short, there must be "a 'nexus' between the manipulative conduct and the jurisdictional transaction."[177]

1. The nexus between the NG Futures Contract settlement price and physical natural gas transactions

58. In the Affirming Order, we upheld the ALJ's determination of a nexus between Hunter's conduct and Commission-jurisdictional transactions because: "(1) 4,675 NG Futures Contracts went to delivery during the months in question and utilized the NG Futures Contract settlement price as a basis for pricing the physical delivery obligations; (2) the settlement price for NG Futures Contracts is incorporated into physical basis contracts as the largest (or even sole) price component; and (3) the NG Futures Contracts settlement price is incorporated into pricing indices utilized in physical basis transactions. Given the interconnections between the futures market and the physical market, any manipulation of the settlement price of NG Futures Contracts would affect Commission-jurisdictional transactions."[178]

59. Hunter contends that this conclusion is faulty because the record did not contain testimony from "any participant in the physical market that believes that he or she paid an artificially low price for natural gas in February, March, or April 2006."[179] Initially, this argument seemingly calls for proof of reliance, which is not required to establish a

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[174] Affirming Order at P 110.

[175] 15 U.S.C. § 717c-1.

[176] Hearing Order at P 73.

[177] 2007 Rehearing Order at P 22.

[178] Affirming Order at P 119.

[179] Rehearing Request at 64.

violation of NGA section 4A.[180] Moreover, Hunter is incorrect. There is testimony indicating that the NYMEX settlement prices for March, April, and May 2006 – which were manipulated by Hunter – had a substantial effect on the prices paid by the Municipal Gas Authority of Georgia for its natural gas.[181] The record contains further evidence establishing that Hunter's manipulation "coincided" with Commission-jurisdictional transactions.[182]

60. First, more than 4,000 NG Futures Contracts went to delivery during the at-issue months.[183] While the initial price of these transactions is established when the contracts are purchased and sold, the price actually paid or received is determined by the settlement price.[184] A party's margin account will then be credited or debited to reflect the difference from the initial price.[185] Thus, as the ALJ explained, a party who enters or exits the market during the period of manipulation will be directly affected by the manipulation.[186] Hunter claims that this impact – i.e., "whether someone made or lost money on that previously negotiated transaction" – does not constitute "a legally sufficient nexus between the physical market and the financial market."[187] We disagree. The preceding scenario results in a direct impact upon parties engaging in Commission-jurisdictional transactions. That satisfies the broad "in connection with" requirement found in NGA section 4A.

61. There is also a nexus between the NYMEX settlement price and physical basis transactions. Such transactions utilize the NYMEX settlement price plus a negotiated

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[180] *See, e.g., SEC v. Tambone*, 550 F.3d 106, 130 (1st Cir. 2008); *Berko v. SEC*, 316 F.2d 137, 143 (2d Cir. 1963) (same).

[181] Tr. 1451-52 (Billings).

[182] *See, e.g., SEC v. Zandford*, 535 U.S. 813, 822 (2002) (section 10(b)'s "in connection with" requirement is satisfied where "the scheme to defraud and the sale of the securities coincide").

[183] Initial Decision at P 206 (citing Ex. S1 at 39 (Kaminski)).

[184] In this regard, NYMEX Rule 2011(d) provides that "[t]he last settlement price shall price shall be the basis for delivery." *See* Ex. S164.

[185] *See, e.g.*, Initial Decision at P 206, n.95; Ex. S1 at 17 (Kaminski); RES17-1 at 20-21.

[186] *See* Initial Decision at P 206, 210 n.102.

[187] Rehearing Request at 65.

difference in price (*e.g.*, the NYMEX settlement price plus five cents).[188] And in some cases, the NYMEX settlement price serves as the sole price component.[189] The record establishes that these contracts "are widely used for monthly physical delivery in North America."[190]

62. In reaching her conclusions regarding physical basis transactions, the ALJ relied, in part, upon the testimony of Jeffrey Billings. Hunter contends that Billings' testimony should have been excluded because "he had no experience in the physical natural gas market and has never executed a physical natural gas transaction."[191] Commission Rule 509 provides that "[t]he presiding officer should exclude from evidence any irrelevant, immaterial, or unduly repetitious material," or material that "is [not] of the kind which would affect reasonable and fair-minded persons in the conduct of their daily affairs."[192] Thus, "objectionable material will not be struck unless the matters sought to be omitted from the record have no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party."[193]

63. Here, the record indicates that Billings has extensive experience in the natural gas industry and, in his role as a risk manager for the Municipal Gas Authority of Georgia, had responsibility for monitoring and understanding the interrelationship between the futures market and the physical natural gas market.[194] The record therefore supports the

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[188] *See* Initial Decision at P 207; Exs. S1 at 40-43 (Kaminski); S3 at 3-6 (Billings); S17-1 at 15-16 (De Laval); Tr. 1465 (Billings); Tr. 1762 (De Laval).

[189] *See* Initial Decision at P 207; Exs. S1 at 40-43 (Kaminski); S3 at 3-6 (Billings); Tr. 1465 (Billings).

[190] Initial Decision at P 207 (citing Exs. S3 at 5-6 (Billings); S3-1 at 2-4, S1 at 40 (Kaminski)).

[191] Rehearing Request at 64.

[192] 18 C.F.R. § 385.509.

[193] *Power Mining, Inc*., 45 FERC ¶ 61,311, at 61,972 (1988) (citing C. Wright and A. Miller, Federal Practice and Procedure, Civil § 1262 at 268-69 (1969); 2 A Moore's Federal Practice § 12.21[2] (2d ed. 1979)). *See also So. Cal. Edison Co*., 25 FERC ¶ 63,064, at 65,207 (1983) ("Unless proposed evidence is clearly inadmissible, the more appropriate approach is to challenge its weight rather than its admissibility."); *Pac. Gas & Elec. Co.*, 12 FERC ¶ 61,226, at 61,554-55 (1980) ("[a]s a general rule, evidence is to be received liberally in administrative proceedings").

[194] *See, e.g.*, Ex. S3 at 3-4.

ALJ's determination that Billings had the requisite background and experience to testify about how the NYMEX settlement price affects physical natural gas prices. And his testimony regarding the interrelationship of those markets cannot be characterized as irrelevant, immaterial, unduly repetitious, or of the type which would not affect the conduct of reasonable and fair-minded persons.

64. A nexus also exists between the NYMEX settlement price and pricing indices, such as those compiled by Platts, which calculate a volume-weighted average price for transactions taking place during the "Bid Week" – i.e., the last week of the month – at various delivery locations throughout the country. The index prices are generally derived from fixed price and physical basis transactions. At some delivery locations, the index price is calculated solely on the basis of physical basis transactions which, as noted above, use the NYMEX settlement price as the primary price benchmark.[195] Large volumes of natural gas are sold under long term contract utilizing index pricing.[196]

65. During the hearing, Platts price index reports for March, April and May 2006 were introduced into the record,[197] along with Platts Methodology and Specifications Guide, which discusses the manner in which data underlying the indexes are collected and analyzed.[198] Among other things, these indices identify the number of physical basis transactions included in the calculation of the index prices. On rehearing, Hunter does not take issue with these reports. He does, however, argue that two other exhibits – a 2006 American Public Gas Association survey[199] and a 2006 American Gas Association LDC Supply Portfolio Report,[200] both of which address the prevalence of NYMEX-based pricing mechanisms in the physical gas industry – should have been excluded from the record. Hunter contends that the surveys are "pure hearsay" because they were introduced through Billings, who lacked personal knowledge regarding their preparation.[201] The hearsay rule, however, is inapplicable in administrative proceedings.

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[195] *See* Initial Decision at P 208; Exs. S1 at 40-47 (Kaminski); S3 at 6-8 (Billings); RES17-1 at 13-14 (De Laval); Tr. 1445-64 (Billings).

[196] *See* Initial Decision at P 208; Exs. S1 at 47 (Kaminski); S3 at 6-7 (Billings); Tr. 1461-64 (Billings).

[197] Exs. S214-16. *See also* Tr. 1445-52 (Billings).

[198] Ex. S219. *See also* Tr. 1452-56 (Billings).

[199] Ex. S3-1.

[200] Ex. S3-3.

[201] Rehearing Request at 65.

Such evidence may be admitted where it is otherwise substantial and has probative value.[202] And as noted in the Affirming Order, an authenticating witness is unnecessary where there is sufficient evidence that the material in question is what it purports to be.[203] Here, the challenged surveys were compiled by well-established industry groups. Billings testified that he personally participated in the American Public Gas Association Survey and that he, and other publicly-owned gas systems, rely upon publications from this industry group.[204] The American Gas Association survey contains a number of internal characteristics (such as copyright information, American Gas Association logos, and warranty disclaimers) that support the finding that the exhibit is, in fact, a survey report published by that entity.[205] We therefore affirm, once again, the ALJ admission of these surveys, which were among the evidence relied upon in assessing the link between the futures market and the physical natural gas market.

2. Hunter's recklessness as to the impact of his conduct upon Commission-jurisdictional transactions

66. In the Affirming Order, we found that the record supported the ALJ's conclusion that Hunter acted with reckless disregard as to the impact of his conduct upon Commission-jurisdictional transactions.[206] Hunter takes issue with the Commission's evaluation of the evidence underlying this conclusion.

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[202] *See, e.g.*, 5 U.S.C. § 556(d) ("Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence"); *Mont. Power Co. v. FPC*, 185 F.2d 491, 498 (D.C. Cir. 1950) (same); *City of Centralia*, 27 FERC ¶ 63,058, at 65,223 (1984) ("The hearsay rule is not applicable to administrative proceedings so long as the evidence upon which an order is ultimately based is both substantial and has probative value.").

[203] Affirming Order at P 119, n.225 (citing *Enbridge Pipelines (KPC)*, 102 FERC ¶ 61,310, at P 47-51 (2003)).

[204] Tr. 1436-38, 1456-59 (Billings).

[205] Indeed, the Staff Report relied upon by Hunter cites to and quotes from the American Gas Association survey, and those citations and quotations match language appearing in Ex. S3.3. *See, e.g.*, Senate Report at 25 n.26 ("The American Gas Association (AGA) reports that LDCs continue to rely heavily on monthly price indicies for their long- and mid-term supply agreements. American Gas Association, LDC Supply Portfolio Management During the 2005-2006 Winter Heating Season (September 7, 2006), at p. 3.").

[206] Affirming Order at P 121.

67. First, Hunter argues that the fact he knew some NG Futures Contracts go to delivery is irrelevant "because the settlement price of expiring contracts on the expiry day only impacts the margin accounts of the market participants."[207] Hunter's argument acknowledges that the NYMEX settlement price plays a role in physical natural gas transactions. We disagree that this role is inconsequential. As explained above, parties who enter or exit the market during the period of manipulation will be impacted economically by that manipulation.

68. Hunter goes on to suggest that there is no evidence that he was familiar with, or understood, NYMEX Rule 2011(d), which provides that "[t]he last settlement price shall be the basis for delivery."[208] Amaranth's compliance manual made clear that any trading on NYMEX was subject "to heightened regulatory scrutiny" and must be conducted in compliance with the rules set forth in the NYMEX rulebook.[209] Even if Hunter was not familiar with those rules, he plainly should have been. And the hearing testimony indicates that Hunter was, in fact, familiar with NYMEX Rule 2011(d).[210]

69. Hunter also claims that the Commission erroneously concluded that "he knew 'that NG Futures Contract settlement prices are utilized as a basis for determining the price of physical basis transactions.'"[211] The ALJ, who had the benefit of hearing Hunter's testimony first-hand, found otherwise.[212] That conclusion is supported by the hearing transcript, which reflects Hunter's acknowledgement that he knew physical basis transactions (a) involved the physical delivery of natural gas, and (b) are priced in reference to the NYMEX settlement price for NG Futures Contracts.[213]

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[207] Rehearing Request at 68.

[208] Rehearing Request at 68, n.25 (arguing that "the record reflects that Hunter was simply shown and read the rule by Enforcement Staff").

[209] Ex. S175 at ARAMANTH_REG002936.

[210] Tr. 448-49 (Hunter). Hunter also contends that the "settlement" discussed in NYMEX Rule 2011(d) is not "the final thirty-minute settlement of the prompt-month contract, but [rather] the daily settlement for all contracts." Rehearing Request at 68. This argument is unsupported and contradicts Hunter's own testimony (Tr. 449), and that of other witnesses (*see, e.g.*, Exs. S1 at 16 (Kaminski); S3 at 8-9 (Billings); RES17-1 at 21 (De Laval)).

[211] Rehearing Request at 69 (quoting Affirming Order at P 120).

[212] Initial Decision at P 209.

[213] *See* Tr. 450-54 (Hunter).

70. Hunter argues that it is inappropriate for the Commission to consider an August 30, 2006 letter from Amaranth to NYMEX – which notes that the NYMEX settlement price for prompt month contracts is "a key benchmark for physical and financial contracts involving natural gas"[214] – because there is no evidence that he played a role in preparing the letter.[215] During August 2006, Hunter was the lead natural gas trader for Amaranth. The letter reflects a communication from Hunter's company to the exchange upon which Hunter traded. The letter addressed the linkage between the trading of the commodity in which Hunter specialized and the physical market for that commodity. The assertions in the letter are consistent with Hunter's testimony regarding the interplay between the NYMEX exchange and the physical gas market.[216] We therefore do not believe that it was improper to consider this letter when analyzing Hunter's recklessness as to the impact of his trading activity upon Commission-jurisdictional natural gas sales.

F. The Proceedings Afforded Hunter Due Process

71. Hunter contends that the Commission proceedings failed to afford him due process of law. Hunter claims that (a) he lacked fair notice that his conduct could subject him to liability under NGA section 4A, (b) the evidentiary hearings were tainted as a result of the ALJ's use of technical advisors, and (c) the Commission prejudged the case against him. These arguments are addressed in turn below.

1. Hunter had fair notice that his conduct could subject him to liability under NGA section 4A.

72. Due process requires that an agency provide adequate notice of the substance of a rule before penalizing a private party for violating that rule.[217] Fair notice is provided where the statute or regulation at issue (and any agency interpretation thereof) is "sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives of the regulations are meant to achieve, would have fair warning of what the regulations require."[218] We believe that a

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[214] Ex. S166; *see also* Affirming Order at P 121.

[215] Rehearing Request at 70.

[216] *See, e.g.*, Tr. 448-54 (Hunter).

[217] *See Howmet Corp. v. EPA*, 614 F.3d 544, 553 (D.C. Cir. 2010).

[218] *Freeman United Coal Mining Co. v. Fed. Mine Safety and Health Review Comm.*, 108 F.3d 358, 362 (D.C. Cir. 1997). *See also General Electric Co. v. EPA*, 53 F.3d 1324, 1329-30 (D.C. Cir. 1995) (a party has fair notice "[i]f, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would

(continued…)

reasonably prudent person, familiar with the conditions giving rise to, and objectives meant to be addressed by, NGA section 4A would understand that the statute prohibits the manipulation of the settlement price of NG Futures Contracts, when such manipulation impacts Commission-jurisdictional natural gas sales.

73. Section 4A was enacted in response to the manipulation of prices in the western energy markets during 2000-01.[219] The statute makes it unlawful for "any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas … any manipulative device or contrivance … 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."[220] Hunter contends that this language (and that found in the Anti-Manipulation Rule) gives no indication "that any standards other than those under the CEA would apply to NYMEX futures contract transactions."[221] In Order No. 670, we explained, however, that "[i]f any entity engages in manipulation and the conduct is found to be 'in connection with' a jurisdictional transaction, the entity is subject to the Commission's anti-manipulation authority."[222] The Commission further explained that NGA section 4A would apply whenever "there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction,"[223] and provided an example of such a nexus where a "non-jurisdictional transaction" is undertaken "with intent or with recklessness" as to the effect on the price of jurisdictional transactions.[224] While Order No. 670 did not address the precise set of facts at issue in this case, such precision is not required to satisfy due process.[225]

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be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform").

[219] *See* 151 Cong. Rec. S 9344 (July 29, 2005) (Sen. Cantwell). ("This bill also takes steps to respond to the disastrous western energy crisis … [by] put[ting] into place the first ever broad prohibition on manipulation of electricity and natural gas markets.").

[220] 15 U.S.C. § 717c-1.

[221] Rehearing Request at 76.

[222] Order No. 670 at P 16. *See also id*. at P 25 (NGA section 4A "will permit the Commission to police all forms of fraud and manipulation that affect natural gas and electric energy transactions and activities the Commission is charged with protecting").

[223] Order No. 670 at P 22.

[224] Order No. 670 at P 22.

[225] *See, e.g., Isaacs v. United States*, 301 F.2d 706, 713 (8th Cir. 1962) ("we recognize that the forms of fraud are as multifarious as human ingenuity can devise; that courts

(continued…)

74. Hunter goes on to argue that he could not have been on notice that the conduct challenged here – which he describes as "lawful trading with an intent to affect market prices" – could violate NGA section 4A because, in Hunter's view, such conduct is not prohibited by the CEA. Hunter's argument regarding the scope of the CEA is incorrect,[226] and largely irrelevant to the question of whether he had notice that his conduct could violate NGA section 4A. Congress directed that the term "manipulative device" under NGA section 4A be construed in accordance with section 10(b) of the Exchange Act.[227] And under that statute, the term "manipulative device" has been interpreted to encompass otherwise lawful trading undertaken with manipulative intent.[228] We therefore reject Hunter's contention that he lacked adequate notice.

75. Hunter similarly asserts that he "had no reason to know that the maximum penalty on this record that could be imposed for his conduct at the time that he acted would exceed $300,000," which Hunter contends is the maximum amount assessable under the

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consider it difficult, if not impossible, to formulate an exact, definite and all-inclusion definition thereof; and that each case must be determined on its own facts"); *Freeman United Coal Mining*, 108 F.3d at 362 ("by requiring regulations to be too specific [courts] would be opening up large loopholes allowing conduct which should be regulated to escape regulation").

[226] *See also Volkart Bros., Inc. v. Freeman*, 311 F.2d 52, 58 (5th Cir. 1962) (holding that manipulation under the CEA includes "any and every operation or transaction or practice . . . calculated to produce a price distortion of any kind in any market either in itself or in relation to other markets"); *Enron Corp*., 2004 U.S. Dist. LEXIS 28794, at *14 ("[b]uying or selling in a manner calculated to produce the maximum effect upon prices, frequently in a concentrated fashion and in relatively large lots is one form of manipulation [under the CEA], among others"); *In re Amaranth Natural Gas Commodities Litig*., 587 F. Supp. 2d 513, 534 (S.D.N.Y. 2008) ("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) (same).

[227] 15 U.S.C. § 717c-1. *See also* Order No. 670 at P 30 ("We intend to adapt analogous securities precedents as appropriate to specific facts, circumstances, and situations that arise in the energy industry.… [This] will provide a level of substantial certainty with respect to how the regulations will operate that the Commission is not typically able to provide where a pre-existing body of law and precedent is not readily available.").

[228] *Markowski*, 274 F.3d at 529.

CEA.[229] Again, the CEA is not relevant here. And NGA section 22 is clear that the potential penalty for market manipulation is "$1,000,000 per day per violation for as long as the violation continues."[230] Moreover, as explained above, Hunter had fair notice that his conduct was proscribed by NGA section 4A and the Anti-Manipulation Rule. He was thus on notice that such conduct could subject him to the penalty provisions of the NGA.

2. The ALJ's use of technical advisors did not deprive Hunter of due process

76. The ALJ appointed two economists from the Commission's Office of Administrative Litigation to serve as technical advisors and assist in her review of the evidence adduced in this case. On August 14, 2009, shortly before the start of the evidentiary hearings, Hunter moved to disqualify the ALJ on the grounds that her communications with these advisors were improper and denied him due process. In an order issued on August 18, 2009, the Commission denied Hunter's motion.[231] Hunter now argues that the Commission erred in failing to disqualify the ALJ and should reverse the Initial Decision and remand the matter to another ALJ.[232] But Hunter did not seek rehearing of the Commission's decision until May 23, 2011, when he filed his request for rehearing of the Affirming Order. Pursuant to section 19 of the NGA, a party must file a request for rehearing within 30 days after issuance of an aggrieving Commission decision.[233] This deadline is statutorily-based and therefore cannot be waived or extended.[234] Hunter's challenge to the Commission's decision must therefore be rejected as untimely.

77. Even if the Commission had the authority to address Hunter's claim, we would reject it. Initially, in an appropriate case, an ALJ has the authority to enlist the services of

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[229] Rehearing Request at 80.

[230] 15 U.S.C. § 717t-1.

[231] *Brian Hunter*, 128 FERC ¶ 61,163 (2009).

[232] Rehearing Request at 81-87.

[233] 15 U.S.C. § 717r(a). *See also* 18 C.F.R. § 385.713(b).

[234] *See, e.g., Ceresco Power and Light*, 134 FERC ¶ 61,188, at 61,921 (2011) ("Because the 30-day rehearing deadline is statutorily based, it cannot be waived or extended, and the request for rehearing … must be rejected as untimely"); *Public Service Co. of New Hampshire*, 134 FERC ¶ 61,041 (2011).

technical advisors.[235] Here, the ALJ explained that the economic issues underlying this case were "very complex" and that she would therefore utilize the technical advisors as "sounding boards," akin to specialized "law clerks."[236] Hunter contends that the ALJ's discussions with her advisors amounted to improper *ex parte* communications, as he had no ability to cross examine the advisors.[237] But technical advisors, like law clerks, are not sources of evidence and therefore their communications are not the proper subject of cross examination.[238]

78. Hunter argues alternatively that, even if technical advisors may be utilized, such use was improper here since discussions regarding economic testimony could have played a role in an evaluation of Hunter's manipulative intent, which Hunter contends is

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[235] *See, e.g., Ex parte Peterson*, 253 U.S. 300, 312 (1920) ("Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties"); *General Elec. Co. v. Joiner*, 522 U.S. 136, 149 (1997) (Breyer, J., concurring) (endorsing the appointment of special masters and specially trained law clerks to assist district courts with scientific or technical evidence); *Techsearch LLC v. Intel Corp*., 286 F.3d 1360, 1377 (Fed. Cir. 2002) ("[a] technical advisor is helpful in assisting the court in understanding the scientific and technical evidence it must consider"); *Ass'n of Mexican Am. Educators v. California*, 231 F.3d 572, 591 (9th Cir. 2000) ("[i]n those rare cases in which outside technical expertise would be helpful to a district court, the court may appoint a technical advisor"); *Reilly v. United States*, 863 F.2d 149, 156 (1st Cir. 1988) (the power to appoint a technical advisor "inheres generally in a district court"); *United States v. Green*, 544 F.2d 138, 145 (3d Cir. 1976) ("the inherent power of a trial judge to appoint an expert of his own choosing is clear").

[236] Tr. 128. *See also Reilly*, 863 F.2d at 158 (approving of use of technical advisor who served "in the nature of a law clerk" and acted as "a sounding board for the judge").

[237] Rehearing Request at 83-84 ("the very heart of the constitution right to trial is the defendant's right to confront witnesses against him and Hunter was denied this right by the ALJ").

[238] *See, e.g., TechSearch*, 286 F.3d at 1380 ("we reject TechSearch's argument that the district court's failure to subject Dr. Hearn to cross-examination by the parties constitutes reversible error"); *Ass's of Mexican Am. Educators*, 231 F.3d at 591 ("Dr. Klein acted only as a court-appointed technical advisor, and the district court did not err in refusing to allow cross-examination or to require an expert's report"); *Reilly*, 863 F.2d at 159 ("there was neither a right to cross-question [the technical advisor] as to the economics of the situation nor a purpose in doing so").

not a proper subject of discussion between the ALJ and her advisors.[239] This argument proves too much. In virtually any case involving complex, technical testimony – and thus potentially requiring the use of technical advisors – such testimony could be said to bear upon disputed issues of fact. The fact that there may be a relation between technical evidence and the resolution of a disputed issue of fact does not place such technical evidence beyond the bounds of discussion with technical advisors.[240]

79. Hunter also argues that the procedures employed by the ALJ with respect to the appointment and use of the technical advisors did not comply with certain guidelines suggested by the First Circuit in *Reilly v. United States*.[241] Regardless of whether the ALJ utilized the procedures suggested by the First Circuit, we believe the process employed by the ALJ was fair and reflected a proper recognition of the limited role of technical advisors. First, Hunter had notice of the appointment of technical advisors two months before commencement of the hearing. He had an opportunity to, and did, in fact, object to their use before the start of the hearing.[242] The ALJ did explained on the record that the technical advisors "would be used as sounding boards" to assist the ALJ in her evaluation of "very complex" economic evidence.[243] The ALJ further explained that the advisors would "not submit[] testimony," nor "us[e] evidence outside of this record."[244] The ALJ made clear that she had, and would continue to, "independently" review all exhibits and testimony, and would "make a decision independently of what anybody says."[245] The record therefore indicates that the ALJ exercised due care to define the proper role of her technical advisors and to avoid any improper influence from them.

80. Finally, Hunter intimates that it was improper for the ALJ to utilize Commission employees as technical advisors in an enforcement action being pursued by Enforcement

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[239] Rehearing Request at 81-83.

[240] *See, e.g., Reilly*, 863 F.2d at 159 (rejecting claim that judge acted improperly by using technical expert to reconcile opposing testimony of economic experts in case involving disputed damage calculation); *TechSearch*, 286 F.3d at 1378 (approving use of technical advisor regarding scientific testimony and patents in patent infringement case).

[241] Rehearing Request at 86-87.

[242] *See Brian Hunter*, 128 FERC ¶ 61,163 at P 2.

[243] Tr. 128.

[244] Tr. 128-29.

[245] Tr. 129.

Litigation Staff.[246] As we explained previously, however, "the economists assisting Judge Cintron are from the Office of Administrative Litigation, [and] are not serving as litigation staff in this particular proceeding …. [T]hey will be precluded from advising the Commission or any advisory staff regarding the issues in this proceeding."[247] In this regard, Commission Rule 2202 provides that,

> [i]n any proceeding in which a Commission adjudication is made after hearing, no officer, employee, or agent assigned to work upon the investigation or trial of the proceeding, or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.[248]

81. The separation of functions between Enforcement Litigation Staff, the Office of Administration economists, and the Commission ensured that Hunter's due process rights were protected.

3. Hunter Received A Fair Hearing

82. Hunter broadly claims that the "entire administrative process has been irrevocably tainted" by the Commission's "repeated errors," which have created the "improper appearance that the Commission has unfairly pre-judged the outcome of the proceeding without regard for whether the evidence actually supported the market manipulation charge asserted against him."[249] In support of this charge, Hunter initially points to three instances in which the Commission purportedly "failed to adhere to its own rules or prior positions."[250] These issues – (i) rejecting Hunter's unsupported objections, (ii) reiterating that artificial price is not an element of a NGA section 4A claim, and (iii) calculating the number of violations occasioned by Hunter's manipulative scheme – were addressed in

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[246] Rehearing Request at 86.

[247] *Brian Hunter*, 128 FERC ¶ 61,163, at P 7.

[248] 18 C.F.R. § 385.2202 (2009). *See also Separation of Functions*, 101 FERC ¶ 61,340 (2002) (addressing Commission's policy on separation of administrative functions).

[249] Rehearing Request at 87-88.

[250] Rehearing Request at 88.

the Affirming Order and are addressed again herein.[251] None reflects an instance where the Commission pre-judged the case against Hunter or ignored relevant evidence.

83. Hunter argues that these purported errors were "exacerbated by other background facts … that indicate an apparent bias against Hunter's positions."[252] The first of these so-called background facts is the "issuance of the Show Cause Order in the first place."[253] It suffices to say that the Commission has an obligation to police manipulation that affects Commission-jurisdictional transactions. The issuance of a complaint (i.e., the Show Cause Order) alleging such manipulation is not evidence of bias.[254] Hunter's second background fact is the imposition of an "unprecedented $30 million penalty."[255] But, as explained in the Affirming Order, $30 million penalty imposed by the Commission is far less than maximum amount authorized by the NGA.[256] Hunter's final background fact is the Commission's determination that the evidence supports the allegations in the Show Cause Order regarding the nexus between Hunter's manipulative conduct and the physical natural gas market.[257] Disagreement with Hunter's arguments regarding the lack of any such nexus does not mean, however, that the Commission pre-judged those arguments.

84. In sum, the Commission's determinations in this case are the result of reasoned decision making stemming from an evaluation of the extensive record developed by the ALJ and the parties' arguments. There is substantial evidence in the record to support our determinations in the Affirming Order and those herein.

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[251] *See* Affirming Order at P 47, n.72, 54-57, 134-35; *supra* at P 15-17, 31; *infra* at P 85-88.

[252] Rehearing Request at 89.

[253] Rehearing Request at 89.

[254] *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 55 (1975) ("[t]he mere exposure to evidence presented in nonadversary investigation procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing").

[255] Rehearing Request at 89.

[256] *See* Affirming Order at P 135 ("whether violations are counted on the basis of the fills or the NG Futures Contracts utilized in Hunter's manipulative scheme, the resulting number of violations is more than sufficient to support the penalty imposed by the Commission").

[257] Rehearing Request at 89.

G. Calculation of Violations and Imposition of the Civil Penalty

85. In the Affirming Order, the Commission determined that Hunter directed the sale of 6,875 NG Futures Contracts during the at-issue settlement periods in order to effectuate his manipulative trading strategy. The sale of each NG Futures Contract, whether counted individually or collectively as part of the 219 sale orders (or "fills") on the relevant expiration days, constituted a separate violation of the NGA.[258] In light of the number of violations, and a consideration of other appropriate factors, such as the seriousness of the violation and any mitigation measures, the Commission determined that a $30 million penalty was appropriate in this case.[259] Hunter challenges this assessment on a number of grounds.

86. Hunter first argues that, because the Show Cause Order identified the 219 fill orders as the relevant violations, due process considerations bar the Commission from finding in the alternative that the number of violations can be computed by reference to the NG Futures Contracts that were subject to those fill orders.[260] We disagree. The fill orders are simply bundles of NG Futures Contracts. Thus whether calculated on the basis of the number of fills, or the number of NG Futures Contracts within those fills, the conduct at issue and the nature of the violation are the same (i.e., the sale of NG Futures Contracts to exert downward pressure on the settlement price in order to benefit positions held on other exchanges). And both calculations yield a statutorily permissible maximum penalty that is well in excess of the $30 million penalty notified in the Show Cause Order and ultimately imposed in the Affirming Order.[261]

87. Hunter reiterates his contention that the number of violations should be based upon the number of settlement periods affected by his manipulation, rather than the number of NG Futures Contracts used to accomplish that manipulation. He notes that schemes utilizing a limited number of overt acts as a means of manipulation could result

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[258] Affirming Order at 134-35.

[259] Affirming Order at P 136-49.

[260] Rehearing Order at 93-94.

[261] Hunter also claims that the $30 million penalty violates the Eighth Amendment's proscription of excessive fines. Rehearing Request at 91-92. But a fine is not excessive where "Congress has made a judgment about the appropriate punishment." *Kelly v. EPA*, 203 F.3d 519, 524 (7th Cir. 2000). Here, the $30 million penalty is well within the statutory limits imposed by Congress. *See Newell Recycling Co. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000) ("if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment").

in a small number of violations, even though such schemes may have the same impact as those involving a large number of transactions and thus a large number of violations.[262] The Commission, however, will evaluate each manipulative scheme separately and will exercise its discretion in making the fact-specific determination regarding the number of violations occasioned by that scheme and the appropriate penalty.[263] Here, the Commission determined that it was appropriate to consider the vehicle through which Hunter accomplished his manipulative scheme – i.e., the sale of NG Futures Contracts.

88. Hunter also asserts that "the CFTC – the agency with actual expertise and exclusive jurisdiction with respect to the oversight of trading practices on the NYMEX – held in *DiPlacido* that violations under these circumstances should be equated with the total number of settlement periods … rather than such factors as the number of orders placed, the number of [fills], or the number of individual contracts sold during the at-issue periods."[264] But that is incorrect. In *DiPlacido*, which involved a scheme employing uneconomic trades to manipulate the settlement prices of electricity futures contracts on five occasions, the CFTC explained:

> Each count of the Complaint alleging manipulation and attempted manipulation states with respect to these charges that "[e]ach and every act or transaction engaged in by [the respondents] in furtherance of the manipulative scheme, as described above, is alleged herein as a separate and distinct violation." Given that the Complaint alleged numerous transactions and overt acts in furtherance of the manipulative scheme … DiPlacido was on notice that he was being charged with violations that could lead to imposition of a fine in the millions of dollars.[265]

In their litigation against Hunter, the CFTC has similarly charged that "every purchase, sale, bid, offer" in furtherance of the manipulative scheme constituted a separate violation of the CEA.[266] And the Affirming Order cites numerous instances in which regulators

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[262] Rehearing Request at 95.

[263] *See, e.g., Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156, at P 41 (2008) ("We possess broad discretion in fashioning the appropriate remedy, and our choice is carefully tailored to the facts and circumstances of each case.").

[264] Rehearing Request at 92-93.

[265] *In re DiPlacido*, No. 01-23, 2008 CFTC LEXIS 101, at *129 (Nov. 5, 2008).

[266] Complaint in *CFTC v. Amaranth Advisors L.L.C.*, No. 07-6682 (S.D.N.Y. 2007) at ¶ 74.

have looked to the overt acts contained within a manipulative scheme in determining the number of violations occasioned by that scheme.[267]

89. In determining the appropriate penalty, the Commission considered the seriousness of Hunter's violation (*e.g.*, the harm caused by that violation, whether it was willful action) and the existence of any mitigating factors, such as a commitment to compliance and cooperation with the Commission's investigation.[268] Based on that analysis "and the entire record in this proceeding," the Commission concluded "that a civil penalty of $30,000,000 is appropriate and sufficient to discourage Hunter and others from engaging in market manipulation."[269] Hunter takes issue with one aspect of the Commission's analysis, namely the finding that Hunter's conduct had a direct and substantial impact upon Commission-jurisdictional transactions.[270] In this regard, the Affirming Order explained that "Hunter's manipulation of the NG Futures Contract settlement price had a direct and substantial impact upon (1) those 4,675 NG Futures Contracts that went to delivery during the months in question, (2) physical basis contracts that incorporated the manipulated settlement prices, and (3) pricing indices utilized in physical basis transactions during the at-issue months."[271]

90. Hunter first reiterates his contention that his manipulation of the settlement price could not have impacted NG Futures Contracts that went to delivery because the prices for those contracts were negotiated when they were purchased.[272] We have previously explained why this does not mean that such transactions were insulated from the effect of Hunter's manipulation.[273]

91. Hunter goes on to claim that his manipulative conduct would have had a minimal impact upon physical basis trades conducted in February 2006, because only those physical basis trades that occurred after the February settlement period could be materially affected.[274] This argument rests upon a mischaracterization of the mechanics

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[267] Affirming Order at P 135 (collecting cases).

[268] *See, e.g.*, Affirming Order at P 136-47.

[269] Affirming Order at P 148.

[270] Rehearing Request at 96-98.

[271] Affirming Order at P 138.

[272] Rehearing Request at 97.

[273] *See supra* P 60.

[274] Rehearing Request at 97.

of physical basis transactions. The record reveals that such transactions are typically "negotiated as a fixed difference in price, or price differential to NYMEX before the final settlement price is known [ ]; once the NYMEX price settles, the negotiated differential is added to the NYMEX price, and the total determines the price of natural gas at the specific location."[275] Thus, Hunter's manipulation of the trading related to the February 2006 NG Futures Contract settlement price directly impacted the physical basis trades executed during that month. Hunter's manipulative scheme similarly impacted physical basis trades executed during March and April 2006 as well.[276] Moreover, Hunter does not dispute that manipulation of the settlement price during the at-issue months would impact pricing indices utilized in physical basis transactions.[277]

92. The Commission therefore confirms its determination that a $30 million penalty is appropriate in this case, in light of the nature and seriousness of Hunter's violations and the absence of any significant mitigating factors.

The Commission orders:

Hunter's request for rehearing is hereby denied.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[275] Ex. S1 at 40 (Kaminski). *See also* Exs. S3 at 4-5 (Billings); RES17-1 at 15-16 (DeLaval).

[276] *See, e.g.*, Exs. S214, S215, and S216 (monthly index price guides for March, April and May 2006, including information regarding physical basis transactions used to compile the indices). *See also* Tr. 1445-56 (Billings).

[277] *See, e.g.*, Affirming Order at P 119, 138. *See also* Exs. S3-1 at 2 (2006 survey noting that 90% of respondents utilized index pricing for natural gas purchases); S3.3 at 3 (noting that, in 2005-2006, local distribution companies relied heavily on monthly price indices for the long and mid-term supply agreements).

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