

156 FERC ¶ 61,031
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

BP America Inc.
BP Corporation North America Inc.
BP America Production Company
BP Energy Company

Docket Nos. IN13-15-000
IN13-15-001

OPINION NO. 549

ORDER ON INITIAL DECISION AND REHEARING

(Issued July 11, 2016)

TABLE OF CONTENTS

	<u>Paragraph Numbers</u>
I. Overview	4.
A. Statutory and Regulatory Prohibition.....	4.
B. Relevant Natural Gas Markets	7.
C. Relevant Products and Positions	10.
D. BP’s Houston Ship Channel-Henry Hub Spread Position and Hurricane Ike .	14.
E. BP’s Manipulative Scheme	16.
F. Impact on Jurisdictional Markets.....	23.
II. Procedural History	24.
III. Procedural Issues	37.
A. BP’s Rehearing Request of the Commission’s Hearing Order	37.
1. The Hearing Order’s Denial of BP’s Motion to Dismiss for Inadequate Notice and Insufficient Manipulation Allegations	39.
2. BP’s Rehearing Request and Exceptions Regarding Adequacy of Notice and Sufficiency of Manipulation Claim Allegations.....	42.
3. Commission Determination on Adequacy of Notice and Sufficiency of Manipulation Claim Allegations	46.
B. The ID’s Reliance on the <i>Barclays</i> Order Was Not Error.....	56.

C. Burden of Proof; Review of Initial Decision.....	58.
IV. Violation of Anti-Manipulation Rule	64.
A. Manipulative Conduct.....	66.
1. Changes in BP’s Trading Behavior During Investigative Period.....	68.
2. Profitability	128.
3. Confluence of Acts that Constitute or Further a Scheme to Manipulate.....	138.
4. Other BP Exceptions.....	143.
B. Scier/Intent.....	186.
1. General.....	186.
2. November 5, 2008 Recorded Phone Call	195.
3. Motive.....	228.
4. Manipulative Intent and Exculpatory Claims	237.
5. Consciousness of Guilt	264.
6. Rehearing Request	277.
C. Jurisdiction	278.
1. Use of Non-Jurisdictional Transactions in a Manipulative Scheme	283.
2. The Initial Decision’s Findings of Jurisdiction	308.
V. Remedies.....	358.
A. Disgorgement	358.
1. Hearing Order and Initial Decision	358.
2. BP Exceptions.....	362.
3. Enforcement Staff Response	364.
4. Commission Determination	366.
B. Penalty Guidelines Factors	369.
1. Number of Violations	371.
2. Estimate of Loss	377.
3. Adjudication of Similar Misconduct within 5 Years.....	383.
4. Violation of Judicial or Commission Order within 5 Years.....	391.
5. Compliance Program	397.
C. Assessment of Penalties	403.

1. This case arises before the Commission on exceptions to the Initial Decision (ID or Initial Decision) issued by the Presiding Administrative Law Judge (ALJ) (Carmen A. Cintron) on August 13, 2015.¹

2. This case involves allegations by Staff of the Commission's Office of Enforcement (Enforcement Staff) that BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company (collectively, BP) executed a scheme to profit from the market conditions in the aftermath of Hurricane Ike by manipulating the price of natural gas in the Houston region in violation of section 1c.1 of the Commission's regulations,² (Anti-Manipulation Rule), and section 4A of the Natural Gas Act (NGA).³ In the ID, the ALJ found that BP had violated the law, and in particular found that the Texas trading team of BP's Southeast Gulf Texas desk (Texas Team) engaged in uneconomic trading of next-day, fixed-price natural gas at Houston Ship Channel and related transport of natural gas from Katy, Texas to Houston Ship Channel with the requisite intent of depressing the Platts *Gas Daily* index prices at Houston Ship Channel to benefit larger financial spread positions held by BP that settled off the index prices during the period from September 18, 2008 through November 30, 2008 (Investigative Period).

3. We affirm the ALJ's decision. The record shows that BP's trading practices during the Investigative Period were fraudulent or deceptive, undertaken with the requisite scienter, and carried out in connection with Commission-jurisdictional transactions. After reviewing the statutory factors for civil penalties under the NGA, we find that it is appropriate in this case to assess a civil penalty in the amount of \$20,160,000 and require BP to disgorge unjust profits it received as a result of its manipulation of the Houston Ship Channel *Gas Daily* index in the amount of \$207,169. We also deny BP's request for rehearing (Rehearing Request) of the order establishing a hearing in this proceeding.⁴

¹ *BP America Inc., et al.*, 152 FERC ¶ 63,016 (2015).

² 18 C.F.R. § 1c.1 (2015).

³ 15 U.S.C. § 717c-1 (2012).

⁴ *BP America Inc. et al.*, 147 FERC ¶ 61,130 (2014) (Hearing Order).

I. Overview

A. Statutory and Regulatory Prohibition

4. Section 4A of the NGA makes it unlawful for “any entity” to utilize any “manipulative device or contrivance” “in connection with” Commission-jurisdictional transactions. Specifically, section 4A provides the following:

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers.⁵

5. The Commission implemented section 4A of the NGA by adopting the Anti-Manipulation Rule in Order No. 670,⁶ which provides in relevant part:

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission,

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

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the

⁵ 15 U.S.C. § 717c-1. *See also* Energy Policy Act of 2005, Pub. L. No. 109-58, § 315, 119 Stat. 594, 691 (2005) (codified at 15 U.S.C. § 717c-1).

⁶ *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202 (2006) (Order No. 670).

circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.⁷

6. In Order No. 670, the Commission explained that “[f]raud is a question of fact that is to be determined by all the circumstances of the case” and that “include[s] any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market.”⁸ For purposes of establishing scienter, the Commission requires reckless, knowing, or intentional actions taken in conjunction with a fraudulent scheme, material misrepresentation, or material omission.⁹

B. Relevant Natural Gas Markets

7. Enforcement Staff alleges that the manipulative scheme in this case involves the Texas Team and their activities that focused on the Houston Ship Channel natural gas market. The Houston Ship Channel natural gas market is a natural gas market in southeast Texas that generally covers an industrial area extending from the east side of Houston to Galveston Bay and northeastward to the Port Arthur and Beaumont area.¹⁰ A number of interstate and intrastate gas pipelines operate in the area of the Houston Ship Channel market, including the Houston Pipeline System.¹¹

8. The Katy, Texas natural gas market is located west and upstream of Houston Ship Channel. Katy is interconnected to a number of pipelines and is connected to Houston Ship Channel via the Houston Pipeline System.¹² Henry Hub is a natural gas pipeline supply point and market hub in Louisiana on which New York Mercantile Exchange (NYMEX) natural gas futures contracts settle. Henry Hub is often considered the pricing

⁷ 18 C.F.R. § 1c.1.

⁸ See Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50.

⁹ See *id.* PP 52-53.

¹⁰ See, e.g., Enforcement Staff Br. Opposing Exceptions at viii.

¹¹ See, e.g., *id.*

¹² See *id.* at ix.

reference point for the U.S. natural gas market as a whole because of its liquidity, and the difference between the price of natural gas at Henry Hub and that at a local natural gas trading location is typically called “basis.”¹³

9. The Platts *Gas Daily* index is a natural gas index published by Platts on a daily basis each business day at the end of trading at various locations across the country. These locations include Houston Ship Channel, Katy, and Henry Hub. Platts produces the *Gas Daily* index by collecting a daily price survey of market participants who voluntarily agree to report their trades for inclusion in the index. The *Gas Daily* index is based on the volume-weighted average price of the reported fixed-price, next-day¹⁴ physical trades at each location occurring prior to 11:30 am CT.¹⁵ Platts *Gas Daily* publishes a daily index for each business day following the end of trading and, at the end of each month, a monthly average for each published location by averaging the *Gas Daily* prices for that month. During the period at issue in this proceeding, BP reported to Platts its next-day fixed-price physical transactions, including at Houston Ship Channel and Katy, for inclusion in the *Gas Daily* index.¹⁶

C. Relevant Products and Positions

10. Physical natural gas transactions require the buyer or seller to make or take actual delivery of the physical natural gas commodity. By contrast, financial transactions are settled in cash without any requirement to make or take physical delivery of natural gas.¹⁷ In the case of financial natural gas transactions, a trader with a “long” financial position experiences a net financial gain relative to that position if the value of the underlying product against which that financial position is priced increases in value prior to selling out the long position, or prior to the settlement of that financial instrument. Conversely, a

¹³ See *id.* at viii; Ex. OE-001 at 35:2-10.

¹⁴ As relevant to this case, fixed-price transactions involve the purchase or sale of natural gas at a specified dollar amount per million British Thermal Units (MMBtu) that is agreed upon at the time the parties enter into the transaction, and next-day transactions involve making or taking delivery of the natural gas the next day at a specific location. See Enforcement Staff Br. Opposing Exceptions at vii-ix.

¹⁵ See ID at P 68 n.48 (citing Ex. OE-211 at 41 n.22).

¹⁶ See *id.* P 34 n.12; Ex. OE-001 at 42:17-43:10; Ex. OE-085 at 549:7-20.

¹⁷ See Ex. OE-001 at 33:7-10.

trader with a “short” financial position experiences a net financial gain relative to that position if the value of the underlying product against which that financial position is priced falls prior to covering the short position, or prior to the settlement of that financial instrument.¹⁸

11. Both physical and financial natural gas transactions may be consummated on electronic trading platforms or by direct or brokered transactions. Electronic trading platforms, such as the CME Globex and the Intercontinental Exchange, Inc.’s (ICE) WebICE, offer market participants the ability to transact with other counterparties electronically anytime, anywhere.¹⁹ These electronic trading platforms allow all credit verified participants to observe and participate in the market in real-time. Depending on the product, trades executed on an electronic trading platform may be bilateral or exchange cleared. Brokered market transactions are those that are facilitated by a broker who helps to connect buyers and sellers and collects a broker fee. Direct transactions are those that take place when a buyer or seller directly contacts a counterparty with which they wish to do business. Participants in direct and brokered transactions may monitor the electronic exchanges and rely on them for price discovery.²⁰

12. When trading physical natural gas, a trader may place a “bid” or an “offer.” A bid indicates that a trader wants to buy a specified quantity of natural gas, at a specified price, and at a specified location. An offer, by contrast, indicates that a trader wants to sell a specified quantity of natural gas, at a specified price, and at a specified location. When another market participant agrees to sell at the trader’s bid price, that participant has “hit the bid.” When another market participant agrees to buy at the trader’s offer price, that participant has “lifted the offer.” The “bid-ask spread” is the price differential between the highest bid shown by a buyer and the lowest offer shown by a seller.²¹

13. One type of physical natural gas position is a baseload position. Baseload positions are physical contracts that flow equal amounts of gas each day of the flow month.²² In the context of baseload positions, the holder of the position must become

¹⁸ *See id.* at 38:3-7.

¹⁹ Subject to exchange trading schedules and hours.

²⁰ *See* Ex. OE-001 at 35:20-36:12.

²¹ *See id.* at 39:17-40:6.

²² *See* Enforcement Staff Br. Opposing Exceptions at 8.

“flat,” or “flatten” their daily starting position by the end of each trading day in the month. For example, if a trader has a net long month baseload position (i.e., the trader has purchased a physical quantity of natural gas but has not yet sold the full physical quantity to another counterparty), then the trader must sell a net amount of natural gas equal to the starting baseload position by the end of each trading day in the month to flatten that long position.²³ A trader must take physical delivery of the baseload natural gas position, flatten his or her physical position each day prior to delivery, or face a potential penalty.²⁴

D. BP’s Houston Ship Channel-Henry Hub Spread Position and Hurricane Ike

14. As relevant to this case, BP had a financial natural gas position that included short *Gas Daily* index exposure at Houston Ship Channel and long *Gas Daily* index exposure at Henry Hub.²⁵ BP’s short *Gas Daily* index exposure at Houston Ship Channel would benefit if the Houston Ship Channel *Gas Daily* index decreased and BP’s long *Gas Daily* index exposure at Henry Hub would benefit if the Henry Hub *Gas Daily* index increased. These positions combined to create a “spread” position that would benefit when the difference, or spread, between the Houston Ship Channel and Henry Hub *Gas Daily* index prices grew wider.²⁶ In other words, BP’s spread position would financially benefit from a lower Houston Ship Channel *Gas Daily* index price relative to the Henry Hub *Gas Daily* index price.²⁷

15. BP had its Houston Ship Channel-Henry Hub spread position in place when Hurricane Ike made landfall on September 13, 2008, which interrupted the natural gas market and caused Houston Ship Channel *Gas Daily* index prices to decrease sharply relative to Henry Hub *Gas Daily* index prices. This resulted in a sizeable realized profit and unrealized (i.e., potential) profit for BP’s Houston Ship Channel-Henry Hub financial spread position. The more slowly the Houston Ship Channel-Henry Hub *Gas Daily* spread narrowed each day until the end of September, the more money BP stood to make

²³ See Ex. OE-001 at 38:18-39:1.

²⁴ See *id.* at 39:1-3.

²⁵ See, e.g., ID at P 6.

²⁶ See *id.* See also Ex. OE-001 at 51:20-22.

²⁷ See, e.g., Ex. OE-001 at 53:9-12.

on its spread position.²⁸ In particular, Enforcement Staff witness Patrick J. Bergin (Bergin) testified that the value of BP's spread position in late September would retain \$19,800 for every cent that BP could slow the narrowing of the Houston Ship Channel-Henry Hub spread.²⁹ As a result, BP had a financial incentive to slow the shrinkage of the Houston Ship Channel-Henry Hub spread that Hurricane Ike had created.

E. BP's Manipulative Scheme

16. Enforcement Staff alleges that BP devised a manipulative scheme after it discovered that its Houston Ship Channel-Henry Hub spread position had benefited in the aftermath of Hurricane Ike, and realized that, if the spread persisted, it had the potential to be worth millions of dollars.³⁰ Enforcement Staff further alleges that BP's scheme was to manipulate the price of Commission-jurisdictional transactions through uneconomic trading of next-day, fixed-price natural gas at Houston Ship Channel, and transportation of natural gas from Katy to Houston Ship Channel, in a manner designed to artificially suppress the Houston Ship Channel *Gas Daily* index price relative to Henry Hub, and thereby benefit BP's Houston Ship Channel-Henry Hub spread position. In short, what Enforcement Staff has alleged is a cross-product or related-position manipulation, a type of scheme that the Commission has encountered in jurisdictional markets, in which an entity makes uneconomic trades or transport in the physical market in order to influence average prices at a particular location and thereby benefit derivative financial positions whose value is in some measure tied to those prices.³¹

²⁸ ID at PP 7, 36.

²⁹ *Id.* P 37 (citing Ex. OE-001 at 110:13-16).

³⁰ *BP America Inc., et al.*, 144 FERC ¶ 61,100, Enforcement Staff Report and Recommendation at 1 (2013).

³¹ *See, e.g., Barclays Bank PLC*, 144 FERC ¶ 61,041, at P 129 (2013) (describing a related-position manipulation) (*Barclays*); *Constellation Energy Commodities Group, Inc.*, 138 FERC ¶ 61,168 at PP 11-17 (2012) (settlement order describing related-position scheme in power markets); *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 at PP 5-14 (2007) (order to show cause describing related-position scheme in natural gas markets).

17. Specifically, Enforcement Staff alleges that BP changed its next-day, fixed price natural gas trading and transport in the following eight different ways after Hurricane Ike:

- a. a shift almost entirely to net selling at Houston Ship Channel, such that BP became the seller with the largest market share in the next-day, fixed-price market at Houston Ship Channel during the Investigative Period;
- b. an increase in the percentage and volume of BP's fixed-price sales at Houston Ship Channel;
- c. a shift to selling heavier volumes at Houston Ship Channel early in the trading day, including selling 35 percent of its gas at Houston Ship Channel before Katy even began trading;
- d. a shift to buying at Houston Ship Channel later in the day as compared to earlier periods;
- e. a shift to transporting substantially more gas to Houston Ship Channel from Katy using BP's Houston Pipeline System transport;
- f. an increase in the percentage of sales at Houston Ship Channel that were uneconomic compared to contemporaneous prices at Katy;
- g. a shift to posting aggressively lower offers compared to other sellers at Houston Ship Channel; and
- h. an increase in the frequency of sales made by hitting bids.³²

18. Enforcement Staff alleges that these changes in trading and transport patterns forced the Houston Ship Channel *Gas Daily* index price downward, thereby slowing the shrinkage of the Houston Ship Channel-Henry Hub spread and benefiting BP's spread position.³³ By the end of September, BP had made \$3,499,250 in profits on its spread

³² ID at P 9. As noted above, a bid indicates that a trader wants to *buy* a specified quantity of natural gas at a specified price. An offer, by contrast, indicates that a trader wants to *sell* a specified quantity of natural gas at a specified price. When another market participant agrees to sell at the trader's bid price, that participant has "hit the bid." See Ex. OE-001 at 39:17.

³³ See, e.g., ID at P 10.

position, which was a substantially greater profit than BP had made in any prior month in 2008 on similar spread positions.³⁴

19. BP then increased its short exposure to the Houston Ship Channel *Gas Daily* index for both October and November 2008. Through most of October 2008, BP maintained a Houston Ship Channel-Henry Hub short spread position amounting to more than seven contracts³⁵ per day.³⁶ The November Houston Ship Channel-Henry Hub short spread position of 24 contracts per day was larger than BP's spread positions going into any other month of 2008 besides March.³⁷

20. In addition, BP built up its physical baseload position during the Investigative Period so that it had a net long baseload position at Katy, which gave BP a large supply of Katy gas "that they had to sell."³⁸ BP had the option to sell this gas at Katy or Houston Ship Channel, but during the Investigative Period, BP sold it heavily at Houston Ship Channel.³⁹ Before Hurricane Ike, in early September, BP's September daily physical baseload positions were generally balanced between long Katy and short Houston Ship Channel. However, BP expanded its long Katy baseload position, becoming net longer at Katy through the rest of September. BP then substantially increased its long baseload position for October at Katy while decreasing its October short baseload position at Houston Ship Channel. BP did the same for

³⁴ *Id.* P 37 (citing Ex. OE-001 at 79-80).

³⁵ Contracts are stated in terms of multiples of the benchmark NYMEX natural gas futures contract of 10,000 MMBtu. MMBtus is a million British Thermal Units. For example, 31 contracts are 310,000 MMBtus.

³⁶ ID at P 38. BP had a greater Houston Ship Channel-Henry Hub spread position of 17.5 contracts per day when Hurricane Ike hit in September. *See id.* at P 115 n.87. However, BP's Houston Ship Channel-Henry Hub short spread position was only approximately three contracts per day going into October, and BP then increased this to 7.8 contracts per day by October 3 and increased that further later in October. *See Ex. OE-001 at 82.*

³⁷ ID at P 38.

³⁸ *Id.* P 39.

³⁹ *Id.*

November, which again resulted in a larger November net long physical baseload position at Katy.⁴⁰

21. Enforcement Staff witness Dr. Rosa M. Abrantes-Metz (Abrantes-Metz) testified that, in the Investigative Period, BP substantially increased usage of its daily firm transportation capacity on the Houston Pipeline System, which connects Katy and Houston Ship Channel.⁴¹ Abrantes-Metz testified that BP shifted to transporting more gas to Houston Ship Channel using its Houston Pipeline System capacity without regard to profit during the Investigative Period and incurred greater losses on transport during the Investigative Period as compared to the trade dates from January 2, 2008 through September 10, 2008 (Pre-Investigative Period).⁴² The natural effect of increasing supply at Houston Ship Channel relative to demand was to reduce prices.

22. On November 5, 2008, a member of BP's Texas Team, Clayton Luskie (Luskie), had a conversation with a senior BP official James Parker. Soon after this conversation, Luskie called another member of the Texas Team, Grady Comfort (Comfort). This telephone call was recorded by BP. Enforcement Staff alleges that BP's manipulative scheme was revealed by Luskie during this conversation with Parker and the recorded phone call with Comfort.⁴³ Enforcement Staff witness Abrantes-Metz found that, after the November 5 call, BP stopped losing money on transport and its transport performance was more consistent with its performance in September through November 2007.⁴⁴ Similarly, Enforcement Staff witness Bergin testified that BP's physical trading at Houston Ship Channel was profitable over the remainder of November 2008 after the November 5 call.⁴⁵

⁴⁰ *Id.* P 40.

⁴¹ *Id.* P 53.

⁴² *Id.* P 56.

⁴³ *See, e.g., id.* PP 85, 100-03.

⁴⁴ *Id.* P 56.

⁴⁵ *Id.* P 76.

F. Impact on Jurisdictional Markets

23. Enforcement Staff alleged, and the ALJ found, that BP's scheme directly affected sales and transport of natural gas subject to the Commission's jurisdiction in at least three ways. First, the ALJ found that by manipulating the index prices at Houston Ship Channel, the scheme directly affected the value of natural gas subject to the Commission's jurisdiction sold by third parties on at least 46 occasions during the Investigative Period, and therefore the scheme was in connection with purchases or sales subject to the Commission's jurisdiction.⁴⁶ Second, the ALJ found that Enforcement Staff proved that the scheme directly affected the value of "cash-out" transactions performed by pipelines during the Investigative Period.⁴⁷ Cash-outs are Commission-jurisdictional transactions used by pipelines to correct imbalances in the transportation system.⁴⁸ Because there were cash-out transactions in September, October, and November whose prices were tied to the Houston Ship Channel index that BP had manipulated, the ALJ found that the scheme was in connection with purchases or sales subject to the Commission's jurisdiction.⁴⁹ Finally, the ALJ found that on at least 52 occasions during the Investigative Period, BP's Texas Team had also sold Commission-jurisdictional natural gas pursuant to, or whose prices were directly affected by, BP's manipulative scheme.⁵⁰

II. Procedural History

24. On August 5, 2013, the Commission issued an Order to Show Cause (Order to Show Cause) and Notice of Proposed Penalty⁵¹ directing BP to show why the Commission should not find that BP violated the Anti-Manipulation Rule and section 4A of the NGA by manipulating the next-day, fixed-price natural gas market at Houston Ship Channel from mid-September 2008 through November 30, 2008—i.e., during the Investigative Period. In the Enforcement Staff Report and Recommendation

⁴⁶ *Id.* P 147.

⁴⁷ *Id.* P 153.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* P 156.

⁵¹ *BP America Inc., et al.*, 144 FERC ¶ 61,100 (2013).

accompanying the Order to Show Cause (Staff Report), Enforcement Staff alleges that BP engaged in the manipulative scheme at Houston Ship Channel described above with scienter and in connection with jurisdictional transactions.⁵²

25. The Order to Show Cause further directed BP to show why it should not pay NGA civil penalties in the amount of \$28,000,000 and disgorge \$800,000 in unjust profits, plus interest, resulting from market manipulation, or a modification to these amounts as warranted.

26. On October 4, 2013, BP filed an answer to the Order to Show Cause and motions to dismiss. BP denied all material allegations in the Order to Show Cause and contended that the Commission lacked jurisdiction over the transactions alleged to have violated the Commission's regulations and NGA, and therefore requested dismissal without further action.

27. On December 4, 2013, Enforcement Staff filed a reply to BP's answer to the Order to Show Cause and motions to dismiss. On December 19, 2013, BP filed a motion for leave to file a response and a proposed response to Enforcement Staff's reply and Enforcement Staff, in turn, sought leave to file a sur-reply, which leave the Commission denied to both parties.

28. In its Hearing Order issued May 15, 2014, the Commission denied BP's motions to dismiss and directed the ALJ to determine whether BP violated section 4A of the NGA and the Commission's Anti-Manipulation Rule. The Commission further directed the ALJ to make findings respecting subject matter jurisdiction and each of the elements of a manipulation claim, as described in section 1c.1 of the Commission's regulations.⁵³ The Commission also ordered the ALJ to ascertain facts relevant for any application of the Commission's Penalty Guidelines.⁵⁴ As noted, the Commission also denied BP and Enforcement Staff leave to file a response and sur-reply, respectively, under the authority of Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015).⁵⁵

⁵² *Id.*, Staff Report at 35, 69-71.

⁵³ *See* 18 C.F.R. § 1c.1(a); Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

⁵⁴ *See Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 (2010).

⁵⁵ Hearing Order at P 11.

29. BP filed the Rehearing Request of the Hearing Order on June 13, 2014. On July 14, 2014, the Commission issued an order granting rehearing for further consideration.⁵⁶ BP's Rehearing Request is currently pending Commission action. In this order, the Commission denies BP's Rehearing Request, for the reasons set forth below.

30. Enforcement Staff filed its Initial Testimony on September 22, 2014, as amended on October 23, 2014. BP Filed its Responsive Testimony on January 6, 2015. On February 13, 2015, Enforcement Staff filed its Rebuttal Testimony.⁵⁷ The record of the hearing, which commenced on March 30, 2015 and concluded on April 15, 2015, consists of 2,657 transcript pages and 325 exhibits.⁵⁸ Enforcement Staff called at the hearing two experts for summary direct testimony (along with pre-filed written expert testimony)—Abrantes-Metz and Bergin—and eleven adversarial fact witnesses (as well as offering pre-filed written testimony of six of those fact witnesses). BP called live two expert witnesses for summary direct testimony (along with pre-filed written testimony)—Matthew Evans (Evans) and Richard G. Smead (Smead)—both of whom Enforcement Staff cross-examined at the hearing.⁵⁹

31. BP also took live testimony at the hearing of six out of the eleven witnesses called by Enforcement Staff (those who had offered pre-filed written testimony), and cross-examined at the hearing Enforcement Staff's experts Abrantes-Metz and Bergin and the five adversarial fact witnesses who did not pre-file testimony. BP waived cross-examination of Enforcement Staff's third expert, Dr. Ehud Ronn (Ronn), and Ronn's pre-filed testimony and exhibits were admitted as part of the hearing record by stipulation of the parties. By joint motion, the investigative testimony and related exhibits of James Parker were entered into the record.

32. Initial post-hearing briefs were filed on May 15, 2015, and reply briefs were filed on June 12, 2015.

⁵⁶ *BP America Inc., et al.*, Order Granting Rehearing for Further Consideration, Docket No. IN13-15-001, (July 14, 2014) (delegated letter order).

⁵⁷ See BP Br. on Exceptions at 6-7.

⁵⁸ See Enforcement Staff Br. Opposing Exceptions at 5.

⁵⁹ See *id.* at 4-5 (description of hearing and pre-hearing discovery).

33. The ALJ issued the ID on August 13, 2015, which concluded that “the evidence in this case supports the finding that BP violated Sections 1c.1 of the Commission’s Regulations and 4A of the NGA.”⁶⁰ The ID found that BP, through its Texas Team, participated “in a scheme to manipulate the market by selling next-day, fixed price natural gas at [Houston Ship Channel] during the Investigative Period, in such a way that they managed to suppress the *Gas Daily* index and benefit their financial positions.”⁶¹ The ID further found that BP engaged in its manipulative scheme with the requisite scienter and in connection with jurisdictional transactions.⁶² As requested by the Commission, the ID also made findings with respect to the applicability of certain provisions of the Commission’s Penalty Guidelines based on the record developed at the hearing concerning, *inter alia*, BP’s prior conduct and the failure of its compliance program with respect to the alleged unlawful trading at issue.⁶³

34. On September 14, 2015, BP filed a brief on exceptions to the ID (BP Br. on Exceptions). On October 5, 2015, Enforcement Staff filed a brief opposing BP’s exceptions (Enforcement Staff Br. Opposing Exceptions).

35. BP takes exception to the ID in its entirety⁶⁴ and asserts sixty-six (66) specific exceptions to the findings and conclusions set forth in the ID.⁶⁵ BP’s specific exceptions primarily rest upon BP’s disagreement with: (1) the ID’s application of the burden of proof and its finding that Enforcement Staff met its burden of proof;⁶⁶ (2) the ID’s findings that the record evidence supported a finding of manipulation;⁶⁷ (3) the ID’s

⁶⁰ ID at P 82.

⁶¹ *Id.* (“BP took affirmative actions by and through its traders with no profit explanation for Texas [T]eam’s primary responsibility as physical day asset traders other than unlawful gains through successful market manipulation of the Gas Daily index price at [Houston Ship Channel].”).

⁶² *See id.* PP 128, 146.

⁶³ *See, e.g., id.* PP 278-279.

⁶⁴ BP Br. on Exceptions at 2.

⁶⁵ *Id.* at 7-13.

⁶⁶ *Id.* at 8.

⁶⁷ *Id.* at 8-10.

findings regarding the relative merits of the analyses and theories presented by Enforcement Staff's witnesses and BP's witnesses, and the relative credibility of those witnesses;⁶⁸ (4) the ID's conclusion that BP possessed manipulative intent;⁶⁹ (5) the ID's determination that the Commission has jurisdiction over the transactions at issue in this proceeding;⁷⁰ and (6) the ID's application of and findings relating to certain provisions of the Commission's Penalty Guidelines.⁷¹

36. Enforcement Staff endorses the ALJ's ID, asserting that the controlling law and evidentiary record created in this proceeding fully support the ID's findings as to all issues set for hearing, including whether it is appropriate for the Commission to exercise jurisdiction and whether BP violated section 1c.1 of the Commission's regulations.⁷² Enforcement Staff opposes 65 of BP's 66 specific exceptions to the ID.⁷³

III. Procedural Issues

A. BP's Rehearing Request of the Commission's Hearing Order

37. In its Rehearing Request, BP seeks to re-argue adequacy of notice, the sufficiency of Enforcement Staff's manipulation and jurisdictional allegations, scienter, and the application of the Penalty Guidelines—arguments that BP previously raised, and the Commission considered and rejected in the Hearing Order.⁷⁴ Significantly, BP does not

⁶⁸ *Id.*

⁶⁹ *Id.* at 10.

⁷⁰ *Id.* at 10-11.

⁷¹ *Id.* at 11-13.

⁷² Enforcement Staff Br. Opposing Exceptions at 4.

⁷³ *Id.* Enforcement Staff does not oppose BP exception 65, in which BP asserts that the ID erred in finding that Enforcement Staff and BP abused the protective order process. *See id.* at 50 n.207; BP Br. on Exceptions at 13. This exception is addressed below in section IV.C.2.

⁷⁴ *Compare* Rehearing Request at 5-7 (listing issues relating to jurisdiction (issues 1-4), adequacy of notice (issue 5), sufficiency of manipulation claim (issue 6), standard for scienter (issue 7), sufficiency of allegations (issue 8) and application of the Commission's Penalty Guidelines (issue 9)) *with* Hearing Order at PP 35-37 (notice),

(continued...)

raise any materially new arguments or intervening change in controlling law or facts that would merit reconsideration. Accordingly, we affirm the Commission's prior rulings and, therefore, deny BP's Rehearing Request.

38. While denying BP's Rehearing Request, we do address immediately below (and in the relevant scienter and jurisdictions sections of our discussion herein of the ID's findings) the arbitrariness arguments that BP raises in its Rehearing Request and related exceptions.

1. The Hearing Order's Denial of BP's Motion to Dismiss for Inadequate Notice and Insufficient Manipulation Allegations

39. The Hearing Order expressly found that "[Enforcement] Staff alleges a type of conduct that would violate the Anti-Manipulation Rule as a threshold legal matter," and further specified that "[t]he types of conduct prohibited in Order No. 670 include the physical trading and transport of natural gas with the intent to artificially affect prices and benefit financial positions, as [Enforcement] Staff alleged here."⁷⁵ Indeed, the Commission has not been alone in finding that acts undertaken to influence or affect market prices, rather than legitimate economic-based decisions to buy or sell (or to offer or withdraw supply), may constitute market manipulation outside the genuine interplay of supply and demand.⁷⁶

38-41 (sufficiency of manipulation claim), 15-32 (jurisdiction), 43-44 (scienter) and 48-49 (penalty).

⁷⁵ Hearing Order at P 36 & n.96 (citing for comparison *ATSI Communications, Inc. v. The Shaar Fund, Ltd.*, 493 F.3d 87, 100 (2d Cir. 2007) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) (Manipulation in the securities markets "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.")). *See also SEC v. Badian*, No. 06 Civ. 2621(LTS)(DFE), 2008 WL 3914872, at *4 (S.D.N.Y. Aug. 22, 2008) ("Market manipulation is the deliberate and knowing attempt to interfere with the free and efficient operation of the market by manipulative acts in connection with the purchase or sale of securities.").

⁷⁶ *See Barclays*, 144 FERC ¶ 61,041 at PP 50-58 (discussing how respondents "intentionally manipulated Commission-jurisdictional physical markets" where the "evidence demonstrates that the intentional amassing of the positions and trading to influence price were not based on normal supply and demand fundamentals, but rather on the intent to effect a scheme to manipulate the physical markets in order to benefit the

(continued...)

40. The Commission recognized the potential influence of early, heavy-volume trades on the development of a volume-weighted average price, such as the *Gas Daily Index*.⁷⁷

Financial Swaps.”); *see also, e.g., In re Amaranth Nat. 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.”); *Cargill v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971) (“The methods and techniques of manipulation are limited only by the ingenuity of man. The aim must be therefore to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand.”); *U.S. v. Radley*, 659 F.Supp.2d 803, 813 (S.D. Tex. 2009) (“Courts and the CFTC have broadly defined price manipulation in the civil context as the ‘intentional exaction of a price determined by forces other than supply and demand.’”) (quoting *Frey v. CFTC*, 931 F.2d 1171, 1175 (7th Cir. 1991)). In the antitrust context, the Supreme Court has ruled: “[M]arket manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone.” *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

⁷⁷ *See* Hearing Order at P 41 (“[Enforcement Staff] argues that ‘marking the open’ sets the tone early and could have a large impact on the development of the daily volume weighted average price” of the Houston Ship Channel *Gas Daily* index.) (citation omitted). The potential to not only outperform but also to influence or manipulate a volume-weighted average price is the subject of considerable trade press discussion. *See, e.g., Grant Johnsey, VWAP flawed in measuring total cost of trade*, Pension & Investments (Feb. 20, 2006) (“Trading has a greater influence on the [volume-weighted average price] as the order size increase as a percent of daily volume, which typically is the case for illiquid securities.”), *available at* <http://www.pionline.com/article/20060220/PRINT/602200703/vwap-flawed-in-measuring-total-cost-of-trade>; *see id.* (“Manipulation: The [volume-weighted average price] of any security changes over the trading day as trades are printed in the market. Thus, a trader can increase control of the [volume-weighted average price] by increasing the pace of order execution and participating heavily in the market.”); *see also* Matt Levine, *Banks Will Charge Extra for Not Manipulating FX*, BloombergView (Feb. 10, 2015) at n. 3 (“A classic benchmark is volume-weighted average price in equity markets. There is a whole industry of ways for banks to beat the [volume-weighted average price], and to pass on some of the savings to you.”), *available at* <http://bloombergview.com/articles/2015-02-09/banks-will-charge-extra-for-not-manipulating-fx>.

The Hearing Order thus directed that “[t]he ALJ may consider . . . whether [alleged manipulative] activities sent false signals or affected prices in a way that was not reflective of the genuine interplay of supply and demand.”⁷⁸

41. As the Commission succinctly stated:

A fundamental responsibility of the Commission is to ensure that prices are ‘just and reasonable,’ and consequently market-based pricing depends on the ‘accuracy, reliability and transparency’ of the index prices used to settle trades. [Enforcement Staff] has sufficiently alleged, as a threshold matter, that BP’s conduct—including its “marking the open”—violated the Anti-Manipulation Rule. BP’s attempt to distinguish [Enforcement Staff’s] allegations from ‘marking the close’ in futures contracts misses the mark. The pricing period of natural gas indices is the volume-weighted average price for the specified period. Thus, for a daily index such as Houston Ship Channel *Gas Daily*, the relevant pricing period might be the trading day (or certain hours during the day) when reported prices are averaged by volume. This period of time is analogous to the two-minute closing period in futures markets when qualifying trades are averaged.⁷⁹

We affirm the Commission’s prior ruling.

⁷⁸ Hearing Order at P 39.

⁷⁹ *Id.* P 40 (footnotes omitted). On the ground that it “equates price and period,” BP criticizes the sentence in the Hearing Order that states: “The pricing *period* of natural gas indices is the volume-weighted average *price* for the specified period.” Rehearing Request at 30 (quoting Hearing Order at P 40 (emphasis added)). It certainly would have been clearer for the Commission to have stated, as we do now: “The pricing of natural gas indices is based on the volume-weighted average price of transactions during the specified period.” See *Methodology and Specification Guide, Platts: North American Natural Gas* (2014) at 4 (cited in Hearing Order at P 40 n.104) (“The daily midpoint, commonly called the GDA (Gas Daily average), is the volume-weighted average of all the transactions reported to Platts that are used to calculate the index for each point.”).

2. BP's Rehearing Request and Exceptions Regarding Adequacy of Notice and Sufficiency of Manipulation Claim Allegations

42. In its Rehearing Request, BP asserts that the Hearing Order denies due process by failing to provide adequate notice of potentially impermissible behavior, in particular, that the transport and trading activity alleged by Enforcement Staff would be impermissible.⁸⁰ BP acknowledges that the Energy Policy Act of 2005 “might not require the Commission to ‘identify in advance every single fact pattern or scheme that could give rise to a claim of manipulation,’” but claims that “due process requires notice that extends beyond ‘any’ conduct.”⁸¹ BP claims that “[n]either the Commission nor Enforcement Staff has provided any notice to BP or the industry that open-market trades may be considered manipulative.”⁸²

43. BP also asserts that the Hearing Order is arbitrary and capricious because it failed to reject Enforcement Staff’s “implausible theory” that “marking the open” is a basis for a manipulation claim and also failed to accept BP’s December 19, 2013 response (i.e., to Enforcement Staff’s reply to BP’s answer to the Order to Show Cause).⁸³

44. On exceptions, BP continues to make the argument—notably reduced to a single paragraph—that Enforcement Staff’s theory of “marking the open” or “framing the market” does not state a cognizable manipulation claim because it “has never been determined to be illegitimate in any applicable precedent.”⁸⁴

45. BP further argues that the Commission acted arbitrarily in the Hearing Order by determining that Rule 209 of the Commission’s Rules of Practice and Procedure⁸⁵ governs the sufficiency of jurisdictional allegations in the Staff Report accompanying the Order to Show Cause.⁸⁶

⁸⁰ Rehearing Request at 6 (Statement of Issue No. 5), 26-37.

⁸¹ *Id.* at 31.

⁸² *Id.* at 35.

⁸³ *Id.* at 9-10.

⁸⁴ BP Br. on Exceptions at 65.

⁸⁵ 18 C.F.R. § 385.209 (2015).

⁸⁶ Rehearing Request at 7 (Statement of Issue No. 8), 38-39.

3. Commission Determination on Adequacy of Notice and Sufficiency of Manipulation Claim Allegations

46. BP asserts that the Commission acted arbitrarily in the Hearing Order by not dismissing Enforcement Staff's manipulation claim based on a "framing the market" theory for lack of adequate notice and insufficiency.⁸⁷ BP does not dispute that in Order No. 670 the Commission gave notice that engaging in any scheme or device for the purpose of impairing, obstructing, or defeating a Commission-jurisdictional market could fall within the scope of the Anti-Manipulation Rule. Nor can it genuinely be disputed that the types of conduct prohibited in Order No. 670 include the physical trading and transport of natural gas with the intent to artificially affect prices used in the formation of an index, which in turn benefits financial positions, as Enforcement Staff alleges here. The Commission rejects BP's claim that it lacked adequate notice that such conduct could be found to violate the Anti-Manipulation Rule.⁸⁸ BP also claims that "[w]hen reduced" the "framing the market theory rests on allegations that BP's trading was too heavy early in the day and was not sufficiently profitable."⁸⁹ In fact, the Commission

⁸⁷ Upon adoption of the Anti-Manipulation rule, the Commission gave notice that engaging in *any* scheme or device, including for the purpose of affecting (i.e., impairing, obstructing, or defeating) a "well-functioning market," could fall within the scope of the Anti-Manipulation Rule. *See* Hearing Order at P 36 & n.96. That "any" conduct prohibited in Order No. 670 would include the uneconomic physical trading and transport of natural gas with the intent to artificially affect prices and benefit financial positions is no surprise. Indeed, competitive pricing depends on the "accuracy, reliability and transparency" of the index prices used to settle trades; and the Commission has sought to ensure that such reported indexes are free from any "activity that may reflect an attempt to manipulate energy price indices." *Id.* P 40 n.103 (citing prior orders and regulations concerning price discovery in natural gas markets). As the Commission previously noted, "[n]othing in the [NGA] statute or our regulations requires the Commission to identify in advance every single fact pattern or scheme that could give rise to a claim of manipulation." *Id.* P 36. Just as the U.S. Supreme Court has stated that "[n]ovel or atypical methods should not provide immunity from the securities laws," novel schemes or methods do not provide immunity from the Anti-Manipulation Rule in the Commission-regulated markets. *See* Hearing Order at P 37 n.99 (quoting *Superintendent of Ins. v. Bankers Life & Gas Co.*, 404 U.S. 6, 10 n.7 (1971) (quoting *A.T. Brod & Co. v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967))).

⁸⁸ *See* Hearing Order at P 36.

⁸⁹ Rehearing Request at 32.

relied on considerably more than such an admittedly “reduced” version of Enforcement Staff’s allegations in setting this case for a hearing:

Here, the Staff Report includes specific allegations of BP’s use of Houston Pipeline transport to ship natural gas from Katy to Houston Ship Channel, not for the purpose of increasing supply to meet actual or perceived demand, but to engage in heavy selling of natural gas at the open of the Houston Ship Channel Market, *including by* ‘hitting bids’ in unprofitable transactions with the intent to suppress prices, motivated by a desire to benefit BP’s . . . financial positions that settled based on a related Houston Ship Channel Gas Daily index.⁹⁰

47. Moreover, Enforcement Staff’s theory, and ultimate proof at the hearing (as discussed below), rest not only on evidence of unprofitable transport and trading, but also on BP’s significant change in trading patterns, as confirmed by econometric analyses, involving uneconomic transport to Houston Ship Channel and increased early and heavy trading at artificially low prices at Houston Ship Channel, where BP became the largest net seller during the Investigative Period, as well as substantial corroborating evidence of scienter—i.e., showing the intent to suppress the price of the Houston Ship Channel *Gas Daily* index to benefit certain financial positions.

48. BP mischaracterizes and oversimplifies the substance of Enforcement Staff’s theory by asserting that “[t]he ‘marking the open’ or ‘framing the market’ theory asserts that early trading behavior by one market participant will *significantly dictate* [emphasis added] later trading activity of *other* [emphasis BP’s] market participants.”⁹¹ Consistent with the ID, we understand Enforcement Staff’s theory to be more nuanced.⁹² We

⁹⁰ Hearing Order at P 38 (emphasis added).

⁹¹ Rehearing Request at 28.

⁹² See Hearing Order at P 41 (“[Enforcement] Staff argues that ‘marking the open’ sets the tone early and could have a large impact on the development of the daily volume-weighted average price.”). See also ID at P 48 (“Heavy one-directional selling early in the trading session has a greater likelihood of having an indirect, informational impact on the bids, offers, and prices of subsequent market participants. Knowing this, market manipulators attempt to indirectly influence other market participants to shift their trading in the direction that benefits the manipulator.”).

therefore understand that Enforcement Staff's "framing the market" theory does not require accepting, as BP suggests, that one market participant will "significantly dictate" another market participant's trading later in the day. Instead, Enforcement Staff's theory recognizes that large-volume trades will weigh heavily on a volume-weighted index, and that means that large-volume trades executed early in the relevant trading period will have an impact on the developing index, which in turn can influence the trading decisions that other market participants may decide to make later in the same trading period.

49. Even case law on which BP relies shows that manipulation in the securities markets "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."⁹³ Mere dissimilarities between schemes in securities cases and Enforcement Staff's allegations are not grounds for dismissal. As the Supreme Court has stated that "[n]ovel or atypical methods should not provide immunity from the securities laws," novel schemes or methods do not provide immunity from the Anti-Manipulation Rule in the Commission-regulated markets.⁹⁴ Because fraud is fundamentally a question of fact,⁹⁵ the proper inquiry is

⁹³ See *ATSI Communications, Inc. v. The Shaar Fund, Ltd*, 493 F.3d 87, 100 (2d Cir. 2007) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)) (cited in Rehearing Request at 35). Similarly, Enforcement Staff alleges here an intentional scheme to artificially depress the Houston Ship Channel *Gas Daily* index to benefit financial positions that settle off that index.

⁹⁴ See Hearing Order at P 37 n.99 (quoting *Superintendent of Ins. v. Bankers Life & Gas Co.*, 404 U.S. 6, 10 n.7 (1971) (quoting *A.T. Brod & Co. v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967))).

⁹⁵ The Commission has stated that "fraud is a very fact-specific violation, the permutations of which are limited only by the imagination of the perpetrator. Therefore, no list of prohibited activities could be all-inclusive." *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165, at P 24 (2006); see also Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 25; *Lincoln Paper & Tissue LLC*, 144 FERC ¶ 61,162, at P 36 (2013) ("The Commission need not imagine and specifically proscribe in advance every example of fraudulent behavior."); *Competitive Energy Services, LLC*, 144 FERC ¶ 61,163, at P 50 (2013); *Richard Silkman*, 144 FERC ¶ 61,164, at P 50 (2013); *In Re Make-Whole Payments and Related Bidding Strategies*, 144 FERC ¶ 61,068, at P 83 (2013) ("as Order No. 670 emphasizes, fraud is a question of fact to be determined by all of the circumstances of a case, not by a mechanical rule limiting manipulation to tariff violations.").

whether Enforcement Staff proved its allegations of manipulative activity by a preponderance of evidence, and not whether the specific scheme at issue in this case is unique.⁹⁶ BP argues that “[u]nlike the two-minute closing period [in futures settlements] that forms the basis of a ‘banging the close’ manipulation theory, the *Gas Daily* index is computed based on the trades that occur throughout multiple *hours* of trading, up until the industry nomination deadline,” during which period “prices can and do fluctuate.”⁹⁷ However, prices can and do fluctuate during the period in which a futures settlement price is determined, just as during the period in which the Houston Ship Channel *Gas Daily* index is determined. The relevant point is whether prices—here, the Houston Ship Channel *Gas Daily* index based on a volume-weighted average price of transactions—during any such period are subject to manipulation.⁹⁸

⁹⁶ By comparison, the Securities and Exchange Commission (SEC) *does* investigate attempts to manipulate volume-weighted average prices, for example, as used in exchange ratios for convertible debt instruments or mergers. *See, e.g., SEC v. Badian*, No. 06 Civ. 2621(LTS)(DFE), 2008 WL 3914872, at *1, 4 (S.D.N.Y. Aug. 22, 2008); *SEC v. Rhino Advisors, Inc. and Thomas Badian*, Civ. Action. No. 03 Civ. 1310 (RO) (S.D.N.Y. Feb. 26, 2003) (complaint alleging manipulation in connection with short selling to depress price and benefit conversion of a convertible debenture into shares of stock based on a volume-weighted average price), *available at* <https://www.sec.gov/litigation/complaints/comp18003.htm>; *see also SEC v. Rhino Advisors, Inc. and Thomas Badian*, Lit. Rel. No. 18003 (Feb. 27, 2003) (announcing settlement of action), *available at* <https://www.sec.gov/litigation/litreleases/lr18003.htm>.

⁹⁷ Rehearing Request at 29 (emphasis original).

⁹⁸ *See In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 534-35 (S.D.N.Y. 2008), *aff'd*, 2013 U.S. App. LEXIS 19444 (2d Cir. 2013) (allegations that Amaranth manipulated natural gas contract prices by engaging in so-called “slam the close” trades during the thirty-minute period in which NYMEX natural gas futures are determined by the volume-weighted average of transactions). Regardless of whether the time-period during which an index or settlement price is determined is two-minutes, thirty minutes (as in *Amaranth*), or several hours (as in a *Gas Daily* index), or some other period of time, the essential point remains: a volume-weighted average price-based index, like the Houston Ship Channel *Gas Daily* index, plausibly can be subject to manipulation by trading that takes place during the time period in which the volume-weighted average of transactions forming the index is calculated, including by high-volume early trades at deceptively low prices unrelated to the genuine economics of supply and demand that suppress the volume-weighted index.

50. BP also makes the conclusory assertion that “[u]nlike trading heavily during the futures settlement period, there is no rational incentive to trade heavily early in the day when the index is calculated using other participants’ trades throughout the trading day at prices that can vary significantly from your own.”⁹⁹ At a minimum, whether BP’s alleged manipulative conduct could be justified by legitimate economic rational incentives raises disputed material issues of fact, which alone justifies the Commission’s decision to set this matter for a hearing. Moreover, the mere fact that other market participants’ trades are also used in calculating a daily volume-weighted index of transactions, like the Houston Ship Channel *Gas Daily* index, does not negate the existence of, or manipulative effect of early, unusually heavy *volume* transactions, by the *largest* net selling market participant, at lower prices that are intended to suppress the *volume*-weighted index, as alleged here.¹⁰⁰

⁹⁹ Rehearing Request at 30-31.

¹⁰⁰ For illustrative purposes, we continue our apple-picking example from the Hearing Order. *See* Hearing Order at P 41 n.106. Assume an apple-picker takes three bags of apples weighing five-pounds each to a market and starts off trading by selling the first five-pound bag for \$2.00, the second five-pound bag for \$2.05, and the third five-pound bag for \$2.10. Now assume that other apple-pickers trade bags of apples throughout the day, at prices that vary from \$3.00 to \$5.00, ranging from one-pound to three-pound bags, for an additional sixteen pounds of apples. At the end of the trading day, ten bags of apples weighing thirty-one pounds are sold, at prices that range from the opening price of \$2.00 to the closing price of \$5.00. Yet the end-of-day apple index price, if calculated based on the volume-weighted average of transactions during the period, would be only \$2.99. The end-of-day volume-weighted index price is thus less than the price of all other bags of apples sold at various prices throughout the day by all apple pickers other than the initial high-volume seller. In short, this simple example illustrates the potential anchoring—“marking the open,” or “framing”—effect early, heavy transactions can have on the development of a daily volume-weighted index, even as subsequent trades vary significantly in price throughout the trading day.

Price	Volume	Volume-Weighted Average Price	
\$2.00	5 lbs.		\$2.00
\$2.05	5 lbs.		\$2.03
\$2.10	5 lbs.		\$2.05
\$3.00	1 lbs.		\$2.11
\$3.50	2 lbs.		\$2.26
\$4.00	2 lbs.		\$2.44

(continued...)

51. BP's assertion that "[t]he fundamental flaw" in Enforcement Staff's "theory and the Commission's Order is that 'early and heavy trading' at the Houston Ship Channel is not a scheme or artifice to defraud" misses the mark.¹⁰¹ Early, volume-heavy trading at Houston Ship Channel can be part of a scheme or artifice to defraud when the intent and effect is to artificially suppress the volume-weighted Houston Ship Channel *Gas Daily* index to benefit financial positions that settle off that index. As the Commission previously stated: "Trades undertaken solely for bona fide economic purposes are not violative of [the Anti-Manipulation Rule], but the very same trades, if intended to manipulate the market, are indeed prohibited."¹⁰²

52. BP also asserts that "rational economic reasons exist for trading 'early' when BP had a long baseload position." The Commission previously ruled "[a]t the hearing, BP may present evidence as to its business purpose, which will be considered along with [Enforcement Staff's] evidence of manipulation in determining whether a claim for manipulation has been established."¹⁰³ However, as discussed herein, the ID found no credible or convincing evidence to support such business justification to outweigh the inference of manipulation established by Enforcement Staff's evidence.

53. In short, the Commission did not act arbitrarily in denying BP's motions to dismiss and ordering a hearing on this matter, in light of Enforcement Staff's plausible theory of early, heavy-volume, uneconomic open-market manipulation at Houston Ship Channel to benefit related financial positions.¹⁰⁴

\$3.50	3 lbs.	\$2.58
\$4.00	2 lbs.	\$2.69
\$3.50	3 lbs.	\$2.78
\$5.00	3 lbs.	\$2.99

¹⁰¹ Rehearing Request at 27.

¹⁰² Hearing Order at P 42. *Cf. United States v. Doherty*, 969 F.2d 425, 429-30 (7th Cir. 1992) (agreeing with five other circuit courts that "bare check kiting" scheme involving otherwise legal activity falls within the "scheme to defraud" prohibition of the bank fraud statute, 18 U.S.C. § 1344).

¹⁰³ Hearing Order at P 42.

¹⁰⁴ BP cites the Second Circuit's decision in *ATSI Communications, Inc. v. The Shaar Fund, Ltd*, 493 F.3d 87, 100 (2d Cir. 2007) and the Southern District Court of New York's decision in *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d

(continued...)

54. Nor did the Commission act arbitrarily in not accepting BP's additional response (along with Enforcement Staff's proposed sur-reply) in considering its Hearing Order. BP was permitted to file an answer to the Order to Show Cause, which is all the Commission's rules require.¹⁰⁵ Moreover, to the extent that BP desired to present additional evidence, BP was given notice and full opportunity to be heard on any and all evidence presented at the hearing. BP, therefore, suffered no prejudice from having to wait until the hearing to present any additional evidence.

55. BP's argument that the Commission arbitrarily found that Rule 209 governs the sufficiency of allegations in the Enforcement Staff Report accompanying the Order to Show Cause, and that this will create a "double standard" for parties appearing before the Commission on private complaints rather than enforcement actions, is without merit. While applying Rule 209, the Commission previously found that Enforcement Staff sufficiently alleged all the elements of a claim of manipulation, including sufficient jurisdictional allegations to survive a facial challenge to subject matter jurisdiction.¹⁰⁶

513, 534 (S.D.N.Y. 2008), *aff'd*, 2012 U.S. Appl. LEXIS 19444 (2d Cir. 2013), for the unremarkable proposition that "open-market activity, *without more*, cannot constitute market manipulation." Rehearing Request at 35-36 (emphasis added). BP overlooks that Enforcement Staff here has alleged far more than mere trading in the open market. Similarly, BP also quotes from the Southern District Court of New York's decision in *SEC v. Masri*, 523 F. Supp. 2d 361, 367 (S.D.N.Y. 2000) (quoting *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 205 (3d Cir. 2001) ("The difficulty in such 'open market' cases, where the activity in question is not expressly prohibited, is to 'distinguish between legitimate trading strategies intended to anticipate and respond to prevailing market forces and those designed to manipulate prices and deceive purchasers and sellers.")). Rehearing Request at 36. However, any such "difficulty" only confirms that the Commission's decision to send this matter to a hearing for specific findings and conclusions based on a live record was not arbitrary.

¹⁰⁵ See 18 C.F.R. § 385.213(a)(3)(2015).

¹⁰⁶ Hearing Order at PP 17, 20-21. In contrast, BP relies on the Commission's order in *Nat'l Energy & Trade, LP v. Tex. Gas Transmission, LLC*, 121 FERC ¶ 61,064, at P 61 (2007), in which the Commission found specifically that the "fraud" – not the jurisdictional – element of a claim for manipulation had not been sufficiently stated. See also *ATSI Communications, Inc. v. The Shaar Fund, Ltd.*, 493 F.3d at 101 ("A claim of manipulation, however, can involve facts solely within the defendant's knowledge; therefore, at the early stages of litigation, the plaintiff need not plead manipulation

(continued...)

B. The ID's Reliance on the *Barclays* Order Was Not Error

56. BP claims the ID inappropriately relied on the Commission's decision in *Barclays*, 144 FERC ¶ 61,041, which is presently undergoing *de novo* review by a federal district court.¹⁰⁷ BP argues that "although *Barclays* may express the Commission's position on the issues addressed therein, it cannot be deemed precedential unless and until affirmed by the district court that now has jurisdiction over that case."¹⁰⁸

57. However, the mere fact that a Commission order is under *de novo* review by a federal district court does not prohibit reliance thereon by the Commission, Enforcement Staff, or the ALJ. To the contrary, the ID was bound to follow *Barclays* if factually and legally on point, and otherwise was free to follow its reasoning and its underlying precedent by analogy.¹⁰⁹

C. Burden of Proof; Review of Initial Decision

58. On exceptions, BP argues that the ALJ shifted the burden of proof to BP and applied the incorrect standard of proof, while disregarding evidence proffered by BP.¹¹⁰ We disagree.

59. Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d), requires that "the proponent of a rule or order has the burden of proof," which the Supreme Court has construed as the ultimate "burden of persuasion" on an issue.¹¹¹

to the same degree of specificity as a plain misrepresentation claim."); *SEC v. Badian*, 2008 WL 3914872 at * 4 (same).

¹⁰⁷ See *FERC v. Barclays Bank PLC, et al.*, Case No. 2:13-cv-02093-TLN-DAD (E.D. Cal. Petition to Affirm Order Assessing Civil Penalties filed Oct. 9, 2013).

¹⁰⁸ BP Br. on Exceptions at 17.

¹⁰⁹ See ID at P 33 n.11; see also *Cleveland Elec. Illuminating Co.*, 29 FERC ¶ 63,044, at 65,138 (1984) (presiding judge bound to follow Commission precedent on appeal to U.S. Court of Appeals until overturned by that court).

¹¹⁰ BP Br. on Exceptions at 14-16.

¹¹¹ *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 269-71, 275 (1994) (quoting 5 U.S.C. § 556(d) and J. McKelvey, *Evidence* 64 (4th ed. 1932)).

However, when the party with the burden of proof establishes a *prima facie* case supported by credible and credited evidence—as the ALJ found the evidence Enforcement Staff proffered at the hearing—then the burden of producing evidence to rebut, defeat or otherwise outweigh the evidence supporting a claim falls upon the opposing party.¹¹² As BP acknowledges, “the burden of production may shift to BP to produce evidence once [Enforcement Staff] establishes a *prima facie* case.”¹¹³ Such burden of production of evidence is distinct from, and does not shift, the ultimate burden of persuasion on a claim.¹¹⁴ Nor is the burden of production limited to rebutting or meeting a legal presumption, as BP suggests, but applies equally to rebutting or defeating a *prima facie* case on which Enforcement Staff bears the ultimate burden of persuasion.

60. The ID shows that the ALJ understood that Enforcement Staff had the burden of proof—i.e., the burden of persuasion—on its claims at all times. For example, in reaching the conclusion that “Enforcement Staff met its burden of proof,”¹¹⁵ the ID weighed the testimony and documentary evidence supporting a finding of manipulative conduct and of the requisite scienter:

- a. “The evidence in this case shows that during the Investigative Period the Texas [T]eam sold next-day, fixed price physical gas at [Houston Ship Channel] uneconomically with the intent to manipulate the Platts’

¹¹² For example, in *Lundell v. Anchor Construction Specialists, Inc.*, 223 F.3d 1035, 1039-41 (9th Cir. 2000), the Ninth Circuit Court of Appeals found that a Bankruptcy Court did not shift the burden of persuasion by requiring a debtor “to produce evidence sufficient to negate the *prima facie* validity of the filed claim.” Rather, the Ninth Circuit held, “[t]o defeat the claim, the objector must come forward with sufficient evidence and ‘show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves.’” *Id.* at 1039 (citing *Wright v. Holm*, 931 F.2d 620, 623 (9th Cir.1991)).

¹¹³ BP Br. on Exceptions at 15.

¹¹⁴ See *Nat’l Mining Ass’n v. Dep’t of Labor*, 292 F.3d 849, 871-72 (D.C. Circuit 2002) (“*Greenwich Collieries* carefully distinguishes agency regulations that shift the burden of proof (prohibited by the APA ‘except as otherwise provided by statute,’ 5 U.S.C. § 556(d)) from regulations that shift the burden of production (which the APA does not prohibit, see 512 U.S. at 270-80, 114 S.Ct. 2251 (distinguishing burden of proof from burden of production)).”).

¹¹⁵ See ID at P 33.

[Houston Ship Channel] *Gas Daily* index price in order to benefit related financial positions that profited by lower [Houston Ship Channel] *Gas Daily* prices.”¹¹⁶

- b. “As established by the evidence in this case, during the Investigative Period the Texas [T]eam added short [Houston Ship Channel] financial spread positions which benefitted from suppression of the [Houston Ship Channel] *Gas Daily* index.”¹¹⁷
- c. “As a result of [Hurricane Ike], prices at [Houston Ship Channel] decreased sharply relative to Henry Hub. This resulted in sizeable realized profit and unrealized (potential) profit for the Texas [T]eam’s [Houston Ship Channel]-Henry Hub financial spread position.”¹¹⁸
- d. “Enforcement Staff [expert] witness Bergin testified that the value of the Texas [T]eam’s spread position in late September would retain \$19,800 for every cent that they could slow the narrowing of the [Houston Ship Channel]-Henry Hub spread.”¹¹⁹
- e. “Bergin’s testimony is given substantial weight. Consequently, it is concluded that the Texas [T]eam believed that their potential for gain on the [Houston Ship Channel]-Henry Hub spread (even if they just slowed the narrowing of the spread by a few pennies a day) would outweigh any incremental losses from selling more heavily at [Houston Ship Channel].”¹²⁰
- f. “The Texas [T]eam traded successfully in the second-half of September 2008 and slowed the shrinkage of the spread. As a result, they increased

¹¹⁶ *Id.* P 34 (footnote omitted).

¹¹⁷ *Id.* P 35.

¹¹⁸ *Id.* P 36.

¹¹⁹ *Id.* P 37.

¹²⁰ *Id.* P 117 (footnote omitted).

their short exposure to the [Houston Ship Channel] *Gas Daily* index for both October and November 2008.”¹²¹

- g. “Dr. Abrantes-Metz and Bergin confirmed the manipulative scheme by examining the trading data before and during the Investigative Period.”¹²²
- h. “As Dr. Abrantes-Metz testified, the unique confluence of changed trading patterns by the Texas [T]eam in the Investigative Period do not make economic sense and cannot be explained by general market conditions.”¹²³
- i. “The changed trading patterns confirm the outline of the manipulative scheme set forth in the November 5 recorded call.”¹²⁴
- j. “Dr. Abrantes-Metz’s testimony is given considerable weight.”¹²⁵
- k. The intermarket analysis “[s]howing that [BP] chose to make more uncompetitive offers at [Houston Ship Channel] (that resulted in sales) is directly relevant to determining whether there was an intent to manipulate. The more they disregarded clear arbitrage opportunities, by failing to adjust their Katy and/or [Houston Ship Channel] offers, the more likely they had an ulterior (manipulative) motive for the resulting uneconomic [Houston Ship Channel] offer-based sales.[’]”¹²⁶

¹²¹ *Id.* P 38.

¹²² *Id.* P 114.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* P 68.

¹²⁶ *Id.* P 59 n.41 (citing Ex. OE-211 at 113:4-9).

61. The ID also considered whether BP provided evidence to rebut or defeat Enforcement Staff's evidence, including the expert and fact witness testimony:

- a. "Evans does not provide econometric analysis or considers [sic] contemporaneous communications of BP employees."¹²⁷
- b. "Dr. Abrantes-Metz rebutted Evans's seasonality claim."¹²⁸
- c. "Luskie testified that the spread is what dictates whether you flow or not flow, the real-time spread."¹²⁹
- d. "[T]he traders do not address the key grounds for [Enforcement Staff's expert Bergin's] conclusion that their trading at [Houston Ship Channel] and use of [Houston Pipeline System] transport during the Investigative Period was intended to manipulate the [Houston Ship Channel] *Gas Daily* index."¹³⁰
- e. "Comfort agreed with Dr. Abrantes-Metz[']s finding that in the [Pre-Investigative Period] they typically waited a longer period to make the first sale at [Houston Ship Channel] than they did in the Investigative Period."¹³¹
- f. "Evans does not answer Dr. Abrantes-Metz's conclusion that there was a unique confluence of changed trading patterns by the Texas [T]eam in the Investigative Period that do not make economic sense and which cannot be explained by general market conditions."¹³²

¹²⁷ *Id.* P 62.

¹²⁸ *Id.* P 63.

¹²⁹ *Id.*

¹³⁰ *Id.* P 77.

¹³¹ *Id.* P 78.

¹³² *Id.* P 62.

g. “Comfort also did not dispute Dr. Abrantes-Metz[’s] finding that the Texas [T]eam became the seller with the largest share in the next-day fixed-price market at [Houston Ship Channel]” and “various changes in trading patterns on which he was cross-examined.”¹³³

h. “[I]t is concluded that Evans[’] testimony is not given any weight.”¹³⁴

62. The ID found that “BP did not have a valid justification and did not explain the increases in their financial position” and that “[a] valid explanation of its trading would have been a valid defense to the manipulation charges.”¹³⁵ BP mistakenly argues that these conclusions shifted the burden of proof and disregarded BP’s contrary expert testimony.¹³⁶ To the contrary, while finding that Enforcement Staff met its burden of establishing a *prima facie* case of manipulation, the ID properly considered whether BP presented any credible and convincing evidence of a legitimate business purpose to defeat Enforcement Staff’s case.¹³⁷ This is not a shifting of the burden of proof; rather it is the

¹³³ *Id.* P 78 (internal record cites omitted).

¹³⁴ *Id.* P 68 n.52.

¹³⁵ *Id.* P 38 & n.16. BP cites to other similar findings that BP did not rebut Enforcement Staff’s case. *See* BP Br. on Exceptions at 16 n.93 (citing ID at P 40 (“BP did not adequately justify or explain this conduct” relating to increased financial positions.”); *id.* P 77 (“Comfort or BP have not adequately explained the changes in their trading behavior.”); *id.* P 99 (“Comfort or BP have not offered a legitimate explanation of this trading.”); *id.* P 105 (“Comfort has never provided an explanation of why the Texas [T]eam’s trading and use of transport was not being used to affect the index to help their paper position.”)).

¹³⁶ BP Br. on Exceptions at 16 (citing ID at P 38 & n.16).

¹³⁷ The Commission previously stated that “[a]t the hearing, BP may present evidence as to its business purpose, which will be considered along with Enforcement Staff’s evidence of manipulation in determining whether a claim for manipulation has been established.” Hearing Order at P 42; *see also Barclays*, 144 FERC ¶ 61,041 at P 61 (“[A]n entity’s business purposes will be relevant to an inquiry into manipulative intent, but a ‘legitimate business purpose’ is not a dispositive, affirmative defense to manipulation.”)).

weighing of competing evidence, which is what the finder of fact (i.e., the ALJ at the hearing) must do.¹³⁸

63. In short, we find that the ID concluded, after weighing the evidence, that “Enforcement Staff met its burden of proof” to show that BP engaged in conduct with the requisite scienter to constitute manipulation under 18 C.F.R. § 1c.1 and section 4A of the NGA¹³⁹—not that BP had the burden and failed to prove it did not engage in manipulation. We next review the ID’s determinations regarding manipulative conduct, scienter, and jurisdiction, based on the record evidence and BP’s exceptions.

IV. Violation of Anti-Manipulation Rule

64. The Anti-Manipulation Rule prohibits any entity from: (1) using a fraudulent device, scheme or artifice, or making a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase, sale or transmission of natural gas electric energy subject to the jurisdiction of the Commission.¹⁴⁰

65. Enforcement Staff thus bore the burden of proving manipulative conduct and scienter “in connection” with a jurisdictional transaction. We next examine the ID’s findings and BP’s exceptions with respect to all three elements of a claim of manipulation.

¹³⁸ See *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 280 (1994) (“When the party with the burden of persuasion establishes a prima facie case supported by ‘credible and credited evidence,’ it must either be rebutted or accepted as true.”).

¹³⁹ See ID at P 33; see also *id.* P 128 (“Based on the evidence in this record it is found that BP through the Texas [T]eam, acted with intent to manipulate the [Houston Ship Channel] *Gas Daily* index to benefit their financial position. Additionally, it is found that this intent meets the requisite scienter requirement under the Commission’s Anti-Manipulation Rule.”).

¹⁴⁰ See Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49.

A. Manipulative Conduct

66. The ID adopted Enforcement Staff's findings that BP changed its next-day fixed-price natural gas trading and transport in eight ways during the Investigative Period, and that this trading by BP during the Investigative Period was unprofitable. The ID concluded that this evidence supported the finding that BP manipulated the market and suppressed the *Gas Daily* index to benefit its financial positions.¹⁴¹ In this section we address BP's exceptions to these findings regarding its conduct.

67. We also address BP's related challenges to the ID on issues concerning the ID's references to the "confluence" of BP's conduct; use of the Pre-Investigative Period; use of the Katy Ship Sheets; trading evidence at alternative locations, at other times, and by other market participants; the non-manipulative alternative explanations alleged by BP; and credibility of witnesses.

1. Changes in BP's Trading Behavior During Investigative Period

68. As noted above, Enforcement Staff sought to prove that BP changed its pattern of next-day, fixed price natural gas trading and Houston Pipeline System transport in the following eight ways identified by Enforcement Staff expert Abrantes-Metz during the Investigative Period (as compared to the Pre-Investigative Period) to artificially suppress the Houston Ship Channel *Gas Daily* index and benefit its financial positions:

- a. a shift almost entirely to net selling at Houston Ship Channel, whereby BP became the seller with the largest market share in the next-day, fixed-price market at Houston Ship Channel;
- b. an increase in the percentage and volume of BP's fixed-price sales at Houston Ship Channel;
- c. a shift to selling heavier volumes at Houston Ship Channel early in the trading day, including selling 35 percent of its gas at Houston Ship Channel before Katy even began trading;
- d. a shift to buying at Houston Ship Channel later in the day as compared to earlier periods;
- e. a shift to transporting substantially more gas to Houston Ship Channel from Katy using BP's Houston Pipeline System transport;

¹⁴¹ See ID at P 32.

- f. an increase in the percentage of sales at Houston Ship Channel that were uneconomic compared to contemporaneous prices at Katy;
- g. a shift to posting aggressively lower offers compared to other sellers at Houston Ship Channel; and
- h. an increase in the frequency of sales made by hitting bids.

69. After weighing the evidence—including analyses of voluminous trading data and testimony from expert and fact witnesses—the ID found that “this unique confluence of changed trading patterns, which furthered the scheme to suppress the [Houston Ship Channel] *Gas Daily* index, sets apart the Texas [T]eam’s behavior in the Investigative Period from their behavior in the [Pre-Investigative Period] and cannot be explained by any economic or profit rationale, by general market conditions, or by comparison to the behavior of the other two largest sellers at [Houston Ship Channel].”¹⁴² Accordingly, the ID concluded “that the evidence in this case supports the finding that BP violated Sections 1c.1 of the Commission’s Regulations and 4A of the NGA.”¹⁴³

70. On exceptions, BP faults the ID for adopting Abrantes-Metz’s analyses of six of the eight changes¹⁴⁴ in trading patterns identified above. BP does not challenge the first and fourth of Enforcement Staff’s conclusions regarding the changes in BP’s trading patterns, i.e., BP’s shift to net selling at Houston Ship Channel and BP’s shift to buying at Houston Ship Channel later in the day.¹⁴⁵ In BP’s words, this “six-legged stool,” consists of Abrantes-Metz’s analyses of:

- a. BP’s proportion of trading in “fixed-price” instruments versus other instrument types;
- b. the relative earliness of BP’s daily trading;

¹⁴² *Id.* P 42.

¹⁴³ *Id.* P 82.

¹⁴⁴ *See* BP Br. on Exceptions at 30-39.

¹⁴⁵ We address these two trading patterns in the sections below on next day fixed price sales (section IV.A.1.a), and the timing of purchase and sales at Houston Ship Channel (section IV.A.1.b), respectively.

- c. the volume of gas shipped by BP from Katy to Houston Ship Channel and the relationship between the shipped volume and the end-of-day price spread between Katy and Houston Ship Channel;
- d. intraday trading and frequency of “uneconomic” trading with which BP engaged in “uneconomic” trading; and
- e. the “distance” between the prices of BP’s offer-initiated sales at Houston Ship Channel and the next best offers in the market at Houston Ship Channel by non-BP participants; and
- f. BP’s execution of trades by “hitting bids.”

71. In the sections below, we address the analyses of each of the six changes in BP’s trading behavior that BP challenges on exception. In summary, we find that BP has not successfully rebutted Enforcement Staff’s allegations regarding any of the changes in BP’s trading behavior during the Investigative Period that Enforcement Staff identified.

a. Next Day-Fixed Price Sales Analysis

i. Initial Decision

72. The ID concluded that BP became the seller with the largest market share in the next-day, fixed price market at Houston Ship Channel during the Investigative Period.¹⁴⁶ Citing the analysis from Abrantes-Metz, the ID found that BP increased its market share by over five times relative to its Pre-Investigative Period market share. The ID noted that BP accomplished this in part by shifting to net selling at Houston Ship Channel for 98 percent of days in the Investigative Period, as opposed to 30 percent of the days in the Pre-Investigative Period.¹⁴⁷

73. The ID further concluded that BP increased the percentage and volume of its fixed price sales at Houston Ship Channel.¹⁴⁸ Again citing the analysis from Abrantes-Metz, the ID found that BP increased its Houston Ship Channel fixed price sales volume

¹⁴⁶ ID at P 42.

¹⁴⁷ *Id.* PP 44, 52.

¹⁴⁸ *Id.* P 42.

by 344 percent per flow day in the Investigative Period as compared to the Pre-Investigative Period.¹⁴⁹

74. The ID found that these changed trading patterns were consistent with an effort to reinforce artificial downward pressure on the Houston Ship Channel *Gas Daily* index.¹⁵⁰

ii. BP Exceptions

75. BP argues that the ID fails to consider that the Texas Team's fixed-price trading was not unusual when compared to its trading at other locations, its historical trading at Houston Ship Channel, and the trading of other market participants at Houston Ship Channel.¹⁵¹

76. BP claims that the ID improperly adopts Enforcement Staff's allegations and did not consider BP's claims that it increased its rates of fixed-price selling at both Katy and Houston Ship Channel during the Investigative Period.¹⁵² BP concludes that "[t]o credibly attribute the increase in fixed-price sales at [Houston Ship Channel] to the alleged manipulative scheme to suppress prices at [Houston Ship Channel], one must find an absence of the fixed-price instrument shift at the alternative sales locations for which there has been no allegation that BP manipulated prices."¹⁵³

77. Similarly, BP asserts that during five months in the Pre-Investigative Period and "on a longer run history" BP engaged in similar levels of fixed-price sales at Houston Ship Channel.¹⁵⁴ BP further notes that even earlier within the Pre-Investigative Period there are five months in which BP's percentage of fixed price trading on sales at Houston Ship Channel is between 90 and 100 percent of total fixed price sales at that point.¹⁵⁵ BP also faults the ID for failing "to even consider whether BP's increase of

¹⁴⁹ *Id.* P 44.

¹⁵⁰ *Id.* PP 45, 161.

¹⁵¹ BP Br. on Exceptions at 31.

¹⁵² *Id.*

¹⁵³ *Id.* at 32 n.158 (citing Ex. BP-037 at 17:14-17).

¹⁵⁴ *Id.* at 31-32. *See also* Ex. BP-037 at 18:12-16.

¹⁵⁵ BP Br. on Exceptions at 32; Ex. BP-037 at 19.

fixed price sales was consistent with the market as a whole and with the trading of other large market participants that were making sales at Katy and [Houston Ship Channel].”¹⁵⁶

iii. Commission Determination

78. Notably, BP does not dispute or rebut Abrantes-Metz’s two findings regarding her analysis of BP’s next day fixed-price trading at Houston Ship Channel during the Investigative Period, that BP: (1) became the seller with largest market share of fixed-price sales; and (2) increased the percentage and volume of its fixed price sales. In fact, BP fails to respond to the first finding that BP became the seller with the largest market share during the Investigative Period.

79. Regarding the second finding, BP’s expert Evans conceded that BP’s proportion of next-day fixed-price sales at Houston Ship Channel increased during the Investigative Period as compared to the Pre-Investigative Period.¹⁵⁷ Moreover, Evans couched his arguments in terms of the *proportion or percentage* of fixed price trading historically, at Katy and by other market participants, but never analyzed the *volumes* of such fixed price trading. An evaluation of the volumes of fixed price trading is consistent with Abrantes-Metz’s first finding that BP became the seller with the largest market share of fixed-price sales. When considering volumes, it is clear that BP’s increase in fixed price sales during the Investigative Period is anomalous.

80. For example, Abrantes-Metz showed that BP sold an average of 31,599 MMBtus of fixed-price sales per flow day in the Pre-Investigative Period, but sold 140,288 MMBtus of fixed-price sales per flow date in the Investigative Period. Abrantes-Metz further used 2007 data to demonstrate the robustness of her findings to show that during the same timeframe as the Investigative Period in 2007, BP only sold an average of 43,110 MMBtus of fixed-price sales per flow day.¹⁵⁸

81. Similarly, the data also demonstrates that the increase in BP’s average daily volume of fixed-price sales at Houston Ship Channel during the Investigative Period was

¹⁵⁶ BP Br. on Exceptions at 31. *See also id.* at 50-51 (citing Tr. 2515:10-23 (Evans)).

¹⁵⁷ Ex. BP-037 at 16:6-12.

¹⁵⁸ Ex. OE-129 at 43, 46-47.

more than four times higher than BP's increase in average daily volume of fixed-price sales at Katy.¹⁵⁹

82. In addition, Abrantes-Metz noted that if, as BP suggests, other market participants were also selling increased volumes of fixed-price sales during the Investigative Period due to some market-wide phenomenon,¹⁶⁰ BP's market share of fixed price sales during the Investigative Period would have remained nearer to its prior levels of 5 to 10 percent. Instead, she noted that BP increased its share of fixed price sales at Houston Ship Channel to 26 percent during the Investigative Period.¹⁶¹

83. In short, after considering all the evidence, the ID reasonably concluded that Abrantes-Metz's observed increase in market share fixed price sales and "shift" in BP's trading toward fixed-price instruments at Houston Ship Channel during the Investigative Period was supported by the evidence, which BP did not successfully rebut.

b. Timing Analysis of Sales and Purchases at Houston Ship Channel

i. Initial Decision

84. The ID found credible Abrantes-Metz's testimony and analyses that the BP Texas Team shifted to earlier, heavy selling at Houston Ship Channel during the Investigative Period in order to influence price formation.¹⁶² "[T]o maximize the effect of a

¹⁵⁹ See, e.g., Ex. OE-211 at 68-69 (showing that BP's market share of sales transacted at Houston Ship Channel was higher in the Investigative Period relative to comparable baseload months, while BP's market share of sales transacted at Katy in the Investigative Period did not deviate much from comparable baseload months).

¹⁶⁰ See Tr. 2515:19-23 (Evans) ("[S]ome of what she's pointed to as BP's change could logically be just BP's part of the market, the overall market changed, and that's really the ultimate driver of why BP changed, is because everyone changed on average.") (cited in BP Br. on Exceptions at 50-51).

¹⁶¹ Ex. OE-129 at 39, 47.

¹⁶² ID at P 47 ("The earliest trades convey the first available concrete information about price, price direction, and volume in that market on each day. The information of these early trades becomes incorporated into the bids, offers, and prices by subsequent market participants and can persist throughout the trading sessions.").

manipulation, a manipulator will want to trade more very early in the day and at artificially low prices, and this is what the Texas [T]eam did.”¹⁶³ The ID also found credible Abrantes-Metz’s testimony and analyses that BP shifted to later purchasing at Houston Ship Channel during the Investigative Period.¹⁶⁴

85. Enforcement Staff’s expert Abrantes-Metz showed that during the first five minutes of the trading day—which is the most heavily traded interval in the Houston Ship Channel market (approximately 11 percent of daily volume) and, therefore, presents the greatest opportunity to influence prices—the Texas Team’s share of sales at Houston Ship Channel increased from an average of 3 percent during the Pre-Investigative Period to 42 percent in the Investigative Period.¹⁶⁵ The ID explained that more than half the time during the Investigative Period, the Texas Team either made the first sale or sold within *27 seconds* of the first trade at Houston Ship Channel—as compared to a median time of *19.77 minutes* during the Pre-Investigative Period.¹⁶⁶ Abrantes-Metz testified that BP sold 50 percent of its daily gas by 7:35 a.m. at Houston Ship Channel during the Investigative Period, as compared to only 36 percent in the Pre-Investigative Period (nearly a 1.4 fold increase).¹⁶⁷

86. Abrantes-Metz’s analysis showed that the Texas Team also shifted to buying later in the day at Houston Ship Channel as compared to its Pre-Investigative Period trading. For example, she showed that by 7:49 a.m. in the Pre-Investigative Period, BP had typically bought 50 percent of their daily Houston Ship Channel gas purchases, but by 7:49 a.m. during the Investigative Period, they had purchased only 17 percent of their total for the day.¹⁶⁸

¹⁶³ *Id.* P 49.

¹⁶⁴ *Id.* PP 42, 49.

¹⁶⁵ *Id.* P 48.

¹⁶⁶ *Id.* P 51.

¹⁶⁷ *Id.* P 49.

¹⁶⁸ *Id.*

ii. **BP Exceptions**

87. BP argues that the ID erred in accepting Abrantes-Metz's analyses of the timing of BP's Houston Ship Channel sales and purchases. BP does not dispute that it shifted to earlier selling and later buying at Houston Ship Channel during the Investigative Period, but claims that the timing of its trades in the Investigative Period was not a "marker" of manipulation when "viewed in a historical context."¹⁶⁹ BP asserts that "Evans demonstrated . . . that the participation rates [by BP in the first three trades of the day at Houston Ship Channel] during the flow months from January 2006 to December 2011 make clear that BP's participation rates during the Investigative Period were not unusual."¹⁷⁰

88. BP also asserts that the ID errs by ignoring or disregarding the timing of BP's trading at other markets.¹⁷¹ BP claims that Evans demonstrated that the overall earliness of trades by BP at Houston Ship Channel in the Investigative Period was *less* than its earliness at the composite of the non-manipulated Katy locations. BP further argues that the ID fails to consider that BP would not be expected to simultaneously increase its participation in early trades in the Katy markets if it were seeking to execute a manipulative scheme at Houston Ship Channel.¹⁷²

89. According to BP, "Evans also demonstrated that the timing of BP's [Houston Ship Channel] sales in the [Investigative Period] was similar to the next two largest sellers over the earlier time windows of the morning at Houston Ship Channel during that period."¹⁷³ BP argues that "the ID also errs because it disregards BP's 'earliness' rebuttal without explanation."¹⁷⁴

¹⁶⁹ BP Br. on Exceptions at 32.

¹⁷⁰ *Id.* at 33.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 33.

¹⁷⁴ *Id.* at 53.

iii. Commission Determination

90. We affirm the findings in the ID that BP shifted to earlier, heavy selling and later purchases¹⁷⁵ at Houston Ship Channel during the Investigative Period, as demonstrated in the analyses from Abrantes-Metz. We find that, in attempting to refute these findings, BP's expert Evans inappropriately aggregates purchases and sales into "trades" when analyzing the timing of BP's fixed price trading at Houston Ship Channel. A fundamental feature when analyzing the timing of BP's and other sellers' trades at Houston Ship Channel and Katy involved distinguishing sales from purchases. This distinction between purchases and sales is important because the claim of manipulation against BP involves its transport to and *selling* behavior at Houston Ship Channel to suppress prices that affect the *Gas Daily* index, and increased *buying* at Katy to facilitate such sales at Houston Ship Channel. The ID thus reasonably concluded that "[w]hen separated, the data is clear that the Texas [T]eam was almost exclusively selling in the first three trades at Houston Ship Channel and buying in the first three trades at Katy."¹⁷⁶ In contrast, BP fails to articulate why Evans's analyses of earliness is correct to ignore whether each transaction is a buy or sell.¹⁷⁷

91. In response to Evans's arguments that the earliness of BP's trades at Houston Ship Channel was not a marker of manipulation when viewed over a longer time frame, Abrantes-Metz extended her earliness analysis back to 2007. This longer timeframe analysis continued to demonstrate on several different measures that BP's Houston Ship Channel's *sales* shifted to earlier in the trading day during the Investigative Period relative to prior time periods.¹⁷⁸ Accordingly, we find Evans's rebuttal analysis unpersuasive on this point.

¹⁷⁵ As noted above, BP does not dispute in its Brief on Exceptions that it shifted to purchasing later at Houston Ship Channel during the Investigative Period.

¹⁷⁶ ID at P 66 (citing Ex. OE-211 at 79:12-80:2).

¹⁷⁷ BP Br. on Exceptions at 54 (citing Tr. 2523:12-18 (Evans)). Notwithstanding BP's assertions, the ID specifically recognized Abrantes-Metz's finding that BP's shift to early buying at Katy was consistent with the manipulative scheme, because BP was "actually increasing its net Katy long position at the beginning of the day, providing the traders with even more gas to sell and transport to [Houston Ship Channel] as part of the scheme." ID at P 51.

¹⁷⁸ Ex. OE-211 at 78-79, App. A.

92. We also find Evans's alternative "earliness ratio" similarly unpersuasive.¹⁷⁹ Evans asserted, without evidentiary support, that "[i]t stands to reason that one's proportion of trading at any moment of the day would be expected to be higher if, for example, one is 75 [percent] of the overall number of trades rather than 10 [percent] of the overall number of trades in the same moment."¹⁸⁰ Yet Evans provided no explanation or evidentiary basis for assuming that a market participant's proportion of trading at "any moment of the day"—e.g., the first three trades of the day—would increase in proportion to a market participant's overall participation in the daily market. Moreover, when Abrantes-Metz recalculated Evans's "earliness ratios" by separating BP's purchases from sales, she continued to show that BP shifted to earlier sales at Houston Ship Channel during the Investigative Period.¹⁸¹

93. Finally, the ID correctly rejected BP's claim that the Texas Team's early selling was similar to the early selling of the next two largest overall sellers in the Houston Ship Channel market during the Investigative Period—finding that this claim was based "on a deceptive assertion that the Texas [T]eam's 'volume of trading in the first 15 minutes lags behind' these other two sellers."¹⁸² Upon closer inspection, Abrantes-Metz demonstrated that BP's expert focused only on trades that occurred in the 15 minute interval between 6:50 am and 7:05 am each trading day of the Investigative Period, regardless of when the first trades actually occurred on a given day, which varied daily.¹⁸³ Thus, when corrected to account for varying start times for daily trading each date at Houston Ship Channel, the ID properly found that the expert calculations BP relied upon showed that the Texas Team "outpaced all other sellers during the first 15 minutes of trading or that they dominated early selling during this time."¹⁸⁴

¹⁷⁹ See Ex. BP-037 at 27:6-16. Evans's "earliness" ratio is derived by dividing the percentage of BP's participation in the first three transactions (purchases and sales) of the day by BP's overall percentage share (by volume and by number) of transactions in all trades at Houston Ship Channel for the day.

¹⁸⁰ *Id.* at 27:10-13.

¹⁸¹ Ex. OE-211 at 80.

¹⁸² ID at P 66.

¹⁸³ *Id.* (citing Ex. OE-211 at 82:19-83:10).

¹⁸⁴ *Id.*

c. Uneconomic Use of Houston Pipeline System

i. Initial Decision

94. The ID found credible Abrantes-Metz's testimony that the Texas Team substantially increased its usage of BP's daily firm capacity on Houston Pipeline System in order to sell gas at Houston Ship Channel and transported gas to Houston Ship Channel without regard to transport economics (i.e., the Houston Ship Channel-Katy price spread) during the Investigative Period.¹⁸⁵ The ID accepted her testimony that the increase in Houston Pipeline System transport usage was not justified by the price spread between Katy and Houston Ship Channel, that the Texas Team's losses on transport were significant when compared with the time periods prior to the Investigative Period, and that these changes in trading behavior were consistent with an intentional effort to suppress the Houston Ship Channel *Gas Daily* index.¹⁸⁶

95. Using a regression analysis, Abrantes-Metz found that both prior to the Investigative Period and after the November 5 recorded phone call, BP shipped more volume of gas when the price spread between Katy and Houston Ship Channel was greater than the cost of transport, consistent with rational, profit-seeking conduct. However, during the Investigative Period, that statistically significant relationship between volume shipped and price spreads disappeared.¹⁸⁷ In fact, not only did BP transport gas from Katy to Houston Ship Channel without regard for economics in the Investigative Period, but also it transported a statistically significant larger quantity of gas despite the lack of a positive price spread.¹⁸⁸

ii. BP Exceptions

96. BP takes exception to Abrantes-Metz's transport regression analysis, arguing that her analysis: (1) incorrectly used *Gas Daily* end-of-day prices; (2) fails to account for

¹⁸⁵ *Id.* PP 53-57.

¹⁸⁶ *Id.* P 53.

¹⁸⁷ *Id.* PP 56-57.

¹⁸⁸ Ex. OE-129 at 88:4-12.

other decision criteria that influence transport volumes; and (3) does not consider other time periods with comparable baseload positions.¹⁸⁹

97. First, BP claims that using *Gas Daily* end-of-day prices in a regression analysis is inappropriate because such prices are a poor indicator of prevailing intraday spreads.¹⁹⁰ BP uses the example from Evans's analysis of October 17, 2008 intraday prices to argue that, during times of that day when both Houston Ship Channel and Katy were both actively traded, the intraday price at Houston Ship Channel was above or equal to the Katy price yet the volume-weighted average price for that day showed that Houston Ship Channel was lower than Katy average.¹⁹¹ BP also contends that both Luskie and Enforcement Staff's expert witness Bergin testified that the use of the *Gas Daily* prices is a poor indicator of prevailing intraday spread prices.¹⁹² Furthermore, BP points out that Abrantes-Metz's own analysis revealed that in 40 percent of the time during the Investigative Period, the intraday price differential between Houston Ship Channel and Katy was in the opposite direction as compared to the corresponding *Gas Daily* price differential.¹⁹³

98. BP argues that using intraday prices instead of *Gas Daily* prices in a regression analysis is more appropriate. BP claims that Evans's two alternative regression models demonstrate that the relationship between Houston Pipeline System transport volumes and Houston Ship Channel-Katy spreads remains intact during both the Investigative Period and the Pre-Investigative Period.¹⁹⁴ BP's support for these assertions is a 2-3 hour snapshot of 26 trading days that show intraday bids at Houston Ship Channel and Katy and BP's sales at those hubs.¹⁹⁵ BP claims that these intraday trading snapshots show

¹⁸⁹ BP Br. on Exceptions at 33-35.

¹⁹⁰ *Id.* at 34.

¹⁹¹ *Id.* at 34 & n.168 (citing Ex. BP-037 at 43:1-4).

¹⁹² *Id.* at 61.

¹⁹³ *Id.* at 62.

¹⁹⁴ *Id.*

¹⁹⁵ *See* Ex. BP-037 at App. B.

that the Texas Team was behaving economically by switching its sales to a more expensive hub.¹⁹⁶

99. Second, BP claims that Abrantes-Metz’s “regression model failed to account for other rational decision criteria that influence pipeline transport volumes.”¹⁹⁷ BP explains that Evans testified that a change to baseload position “is likely a driver of the amount of capacity that a shipper would transport,” and that “a variety of additional factors could also prompt changes to transportation capacity utilization,” including changes in volatility, liquidity and risk from the Pre-Investigative Period to the Investigative Period.¹⁹⁸

100. Finally, BP claims that Abrantes-Metz’s regression analysis did not consider time periods “beyond the limited [Pre-Investigative Period], a period with physical baseload positions that are not comparable to the [Investigative Period].”¹⁹⁹ BP argues that its historical transportation utilization in the Investigative Period was similar or less than its utilization in comparable periods.²⁰⁰

iii. Commission Determination

101. We find that the ID did not commit error in adopting Abrantes-Metz’s findings based on her regression analysis. The analysis demonstrated that a statistically significant relationship between a difference in daily *Gas Daily* prices at Houston Ship Channel and Katy and BP’s daily transport level existed in the Pre-Investigative Period but disappeared in the Investigative Period.²⁰¹

102. Contrary to BP’s exceptions, the ID appropriately gave “considerable weight”²⁰² to Abrantes-Metz’s regression analysis using *Gas Daily* prices based on the record

¹⁹⁶ BP Br. on Exceptions at 62.

¹⁹⁷ *Id.* at 35.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 34.

²⁰⁰ *Id.* at 33.

²⁰¹ ID at PP 57, 64.

²⁰² *Id.* P 68.

evidence that: (i) BP's traders and compliance department also used *Gas Daily* prices, which are an industry standard of daily benchmarks used in the settlement of financial contracts and daily and monthly physical contracts;²⁰³ (ii) such volume-weighted average prices tended to reflect prevailing intra-day price spreads; and (iii) daily transport volumes used in the regression analysis are determined by a sum of all transactions during a given flow day and thereby represent an aggregate daily figure and not an intraday one, making volume-weighted average price from *Gas Daily* a more appropriate measure of overall daily price level for estimating the relationship between daily Houston Pipeline System transport and daily price level.²⁰⁴

103. We further find that BP quotes Bergin out of context when arguing that he supports use of intraday pricing.²⁰⁵ As Enforcement Staff notes, Bergin's testimony had nothing to do with the use of *Gas Daily* prices, and instead related to how BP's net long Katy baseload position in the Investigative Period did not justify its increased uneconomic trading at Houston Ship Channel.²⁰⁶

²⁰³ *Id.* P 68 nn.49-50 (citing, *inter alia*, Luskie, Comfort, and Simmons testimony). The Texas Team kept track of the volume-weighted average price of trades at Katy and Houston Ship Channel over the course of the trading day in their Katy Ship Sheets, and that volume-weighted average price was used to compute the *Gas Daily* index, which in turn was used to measure their profit and loss associated with transport. *See* Ex. OE-211 at 52:7-11. *See also* ID at P 68 n.51 (citing Ex. OE-257 and Tr. 1736:15-1739:5 (Bergin)).

²⁰⁴ ID at P 68. Moreover, we find that Evans's "corrected" regression analyses using intraday prices contain numerous errors. As Abrantes-Metz notes, Evans inexplicably used a time-weighted average of all observed differences in best available price bids at Katy and Houston Ship Channel (i.e., excluding offers) during only a limited one and two hour window, which included periods before Katy even began trading. *See* Ex. OE-211 at 59:10-17. We also find Evans's graphical evidence of "price based switching" on 26 days lacking because it is also limited to a narrow two-hour window per trading day and only shows bids and not offers. *See* Ex. BP-037 at 46-47, App. B.

²⁰⁵ BP cites to Bergin's direct testimony that "[a]n economic decision does not require that a particular trade turn out to have been profitable at the end of the day – but it means that the trade was the most profitable option at the time of the decision." *See* BP Br. on Exceptions at 35 & n.169.

²⁰⁶ *See* Enforcement Staff Br. Opposing Exceptions at 20 n.60 (citing Ex. OE-001 at 115:1-12).

104. BP argues that *Gas Daily* prices are not a reliable indicator of prevailing intraday spreads and highlights Abrantes-Metz's own analysis showing that 40 percent of the time during the Investigative Period, the intraday price differential between Houston Ship Channel and Katy was in the opposite direction of the corresponding *Gas Daily* price differential.

105. What Abrantes-Metz's analysis demonstrated was that in the majority of all minutes (more than 60 percent) within each trading day in 2008, the intraday price differential was in the same direction as the *Gas Daily* price differential. If, as BP asserts, *Gas Daily* prices were a poor indicator of prevailing intraday prices, and the Texas Team relied on intraday prices to optimize the usage of the Houston Pipeline System transport, the regression analysis should not be able to find a statistically significant relationship between a difference in daily *Gas Daily* prices at Houston Ship Channel and Katy and Houston Pipeline System transport usage by the Texas Team. The regression analysis however did find this statistically significant relationship during the Pre-Investigative Period and no such relationship during the Investigative Period.²⁰⁷

106. BP also faults Abrantes-Metz's regression model for not considering that "other rational decision criteria influence pipeline transport volumes."²⁰⁸ Yet BP failed to provide evidentiary or statistical support for its criticisms in this regard, which the ID found were based on mere conjecture about "possible" alternative explanations.²⁰⁹ For example, BP states that Evans's testimony explained that a change to baseload position "is likely a driver of the amount of capacity that a shipper would transport," and that "a variety of additional factors could also prompt changes to transportation capacity utilization."²¹⁰ The ID reasonably found that the mere hypothetical allegations that

²⁰⁷ The regression analysis found that the relationship between Houston Ship Channel and Katy spread and the Texas Team's transport during the Pre-Investigation Period was statistically significant at the 95 percent confidence level. The regression analysis found that in the Pre-Investigative Period, for every penny increase in the Houston Ship Channel to Katy price spread, the Texas Team shipped, on average, an additional 3,952 MMBtus. See Ex. OE-129 at 91.

²⁰⁸ BP Br. on Exceptions at 35.

²⁰⁹ ID at P 68 n.52.

²¹⁰ BP Br. on Exceptions at 35 (emphasis added); Tr. 2509 (Evans).

changes in volatility, liquidity or risk “*could also* prompt changes to transportation capacity utilization,” are insufficient to find error with the ID’s findings.²¹¹

107. BP finally argues that the use of Houston Pipeline System transport in the Investigative Period was similar or less than its utilization in prior years during comparable seasonal periods, which was overlooked by Abrantes-Metz’s selective comparison of transport utilization in the Investigative Period versus Pre-Investigative Period.²¹² However, based on expert and fact witness testimony, the ID reasonably rejected BP’s seasonality argument.²¹³ In particular, Enforcement Staff’s expert Bergin testified that the mere presence of a particular season does not guide trading behavior and or transport utilization,²¹⁴ while BP’s trader Luskie testified that the spread is what dictates whether you flow or not flow, the real-time spread.²¹⁵ Thus, the fact that Houston Pipeline System transport in the Investigative Period was similar or less than its utilization in prior years during particular seasonal periods has no bearing on the regression results.

²¹¹ BP Br. on Exceptions at 35 (emphasis added). Moreover, we find that Abrantes-Metz’s regression model does account for market conditions that were not captured by the Houston Ship Channel *Gas Daily* price spread. It does so indirectly by including a one day lag of Houston Pipeline System transport volume as an independent variable in the regression analysis. By including this variable, the model is forced to account for the impact that the previous day’s transport values have on today’s transport volumes. If the previous day’s transport volumes are driven by what BP called “other rational decision criteria,” then their impact is accounted for when Abrantes-Metz’s regression model estimates a relationship between today’s Houston Pipeline System transports and today’s Houston Ship Channel and Katy price spread.

²¹² *Id.*; Ex. BP-037 at 41:1-41:4.

²¹³ ID at P 63.

²¹⁴ *Id.* (citing Ex. OE-161 at 28:14-18).

²¹⁵ *Id.* (citing Tr. 574:17-575:13; 584:7-25 (Luskie)).

d. Inter-Market Analysis

i. Initial Decision

108. The ID also accepted, after considering Evans’s criticisms, Abrantes-Metz’s “inter-market analysis to test whether the Texas Team disregarded better arbitrage opportunities in the Investigative Period.”²¹⁶ Enforcement Staff’s expert compared BP’s bid-based and offer-based sales at Houston Ship Channel with the team’s bids and offers at Katy (adjusted for the cost of transport) at the same moment in time when both markets were active.²¹⁷

109. Based on this bid-to-bid and offer-to-offer comparison, the inter-market analysis showed that BP’s uneconomic trading on the offer side increased from 46 percent in the Pre-Investigative Period to 78 percent in the Investigative Period, while its uneconomic trading on the bid side remained relatively similar.²¹⁸ Abrantes-Metz found that BP’s moment-to-moment trading decisions did not reflect a rational, profit-maximizing approach to arbitraging prices between Katy and Houston Ship Channel.²¹⁹ The ID agreed with Abrantes-Metz’s conclusions, finding that the “‘offer-to-offer comparison’

²¹⁶ *Id.* P 59.

²¹⁷ *Id.* In particular, “[i]f the Texas [T]eam hit a bid at [Houston Ship Channel],” then Abrantes-Metz “determined whether the best contemporaneous Katy bid (i.e., the highest active bid price) was ‘within the cost of transport’—meaning that the [Houston Ship Channel] bid that the Texas [T]eam hit was not greater than the best Katy bid by at least \$0.013. When the contemporaneous Katy bid was within the cost of transport, the Texas [T]eam would have been able to sell by hitting the Katy bid and received a higher return than they did by selling at [Houston Ship Channel] and incurring transport costs. Otherwise, it would have been more profit-maximizing to hit the Katy bid and avoid the \$0.013 variable [Houston Pipeline System] transport cost.” Ex. OE-129 at 102:15-103-2. Similarly, if a Texas Team sale was the result of a lifted offer at Houston Ship Channel, Enforcement Staff’s expert looked to see whether the Texas Team’s contemporaneous offer (i.e., the lowest offer) was greater than the Texas Team’s Houston Ship Channel offer that was lifted (minus \$0.013). Ex. OE-129 at 103:4-7. She categorized as “uneconomic” those bid-based and offer-lifted sales at Houston Ship Channel that were within the cost of transport. Ex. OE-129 at 103:7-9.

²¹⁸ ID at P 60 (citing Ex. OE-211 at 116:6-8).

²¹⁹ *Id.*

tests whether the Texas [T]eam made less competitive offers at [Houston Ship Channel] in the Investigative Period.”²²⁰

ii. BP Exceptions

110. BP takes exception to the ID’s acceptance of this inter-market analysis claiming that “Abrantes-Metz compared [Houston Ship Channel] sales prices to what she believed were the analogous alternative trade prices that would have been executed in the Katy markets.”²²¹ BP argues that the ID fails to address evidence raised at the hearing that Abrantes-Metz thereby relied on “fictitious trades at the Katy offer prices,” instead of comparing the price of a trade that could have been executed with certainty at the same moment.²²² BP also contends that the inter-market analysis failed to account for the different and changing market conditions that occurred between the trade that was executed at Houston Ship Channel and the trade that was later executed in connection with the offer-based analysis.²²³ Finally, BP argues that the ID fails to acknowledge that the bid-side analysis of the inter-market model showed a lower rate of uneconomic trades in the Investigative Period as compared to the Pre-Investigative Period, which BP claims supports its position. BP adds that this result holds true whether the entire day is assessed, or whether the period only after the first Katy trade of the day is assessed.²²⁴

iii. Commission Determination

111. We affirm the findings in the ID regarding Abrantes-Metz’s inter-market analysis and reject BP’s exceptions. The evidence shows that Abrantes-Metz’s offer-to-offer

²²⁰ *Id.* P 59 n.41. As Abrantes-Metz further explained: “My initial offer-to-offer comparison showed a jump in the instances in which the best Katy offer was less economic than a Texas [T]eam offer than what was lifted at [Houston Ship Channel]. This means that in the Investigative Period, the Texas [T]eam could have, but repeatedly did not adjust their Katy offers lower (or their [Houston Ship Channel] offers higher) to ensure equally profitable sales via offers at either location on a moment-to-moment basis.” Ex. OE-211 at 106:19-107:2.

²²¹ BP Br. on Exceptions at 38.

²²² *Id.* at 38-39 (citing Ex. BP-037 at 51:22-23 and Ex. OE-129 at 115:7-10).

²²³ *Id.* at 39.

²²⁴ *Id.* (citing Ex. BP-037 at 55:3-6 and Ex. OE-211 at 116:12).

comparison tests whether BP made less competitive offers at Houston Ship Channel as compared to Katy during the Investigative Period. As Abrantes-Metz explains in her testimony, “the Texas [T]eam could increase or lower their offer at either Katy or [Houston Ship Channel] at any time . . . if the Texas [T]eam was willing to sell via an offer at [Houston Ship Channel] . . . they should have been willing to post (or adjust) their offer at Katy such that their Katy offer would have been the equivalent of their [Houston Ship Channel] offer price minus the cost of transport.”²²⁵

112. BP argues that the offer-to-offer analysis compares lifted offers at Houston Ship Channel to active offers that were “not executed at the same moment of a comparable [Houston Ship Channel] trade . . . , [nor were ever] executed.”²²⁶ However, the distinction between executed and non-executed offers is immaterial for the inter-market analysis; what matters is that the compared offer at Katy was active at the time of the Houston Ship Channel trade and therefore could have been executed. Likewise, we reject BP’s argument that one can only make the offer-to-offer comparison in situations where Houston Ship Channel and Katy offers are executed at the same moment, or otherwise one must take into account the changing market conditions between the time a trade was executed at Houston Ship Channel and a later trade was executed at Katy. The purpose of Abrantes-Metz’s inter-market analysis was to evaluate the comparability of BP’s simultaneous offers (adjusted for transport) to sell gas at Houston Ship Channel and at Katy, not the comparability of executed transactions at these two locations.

113. BP further contends that Enforcement Staff’s bid-to-bid comparison within the inter-market analysis suggests that BP had a lower rate of uneconomic trades in the Investigative Period as compared to the Pre-Investigative Period. We find that BP’s bid-to-bid comparison ignores the 40 percent of BP’s sales during the Investigative Period that consisted of offer-based sales.²²⁷ Moreover, we find that BP’s conclusions from a bid-to-bid comparison are less compelling than from an offer-to-offer comparison as BP had control over its offer prices but could only hit bids at prices that other market participants posted.²²⁸

²²⁵ Ex. OE-211 at 112:17-22.

²²⁶ BP Br. on Exceptions at 39.

²²⁷ See ID at P 60 n.42 (“In the Investigative Period the Texas [T]eam sold by hitting bid prices 60 percent of the time.”) (citing Ex. OE-211 at 117:1-14).

²²⁸ In addition, we note that Evans underestimates the variable cost of transport (and thus the percentage of BP’s uneconomic sales) by defining as uneconomic only

(continued...)

e. **Distance Analysis**

i. **Initial Decision**

114. Abrantes-Metz also conducted a so-called “distance analysis,” whereby she computed the difference (i.e., distance) between BP’s offer-initiated sales and the best non-BP offer at Houston Ship Channel. This distance analysis measured the degree to which the Texas Team’s consummated trade prices underpriced other market participants during the Investigative Period relative to the Pre-Investigative Period.²²⁹

115. Following Abrantes-Metz’s analysis, the ID concluded that the distance between BP’s offer-initiated sales and the next best offer at Houston Ship Channel increased during the Investigative Period as compared to the Pre-Investigative Period.²³⁰

ii. **BP Exceptions**

116. BP takes exception to the ID’s reliance on the distance analysis, claiming that the ID did not consider BP’s evidence that the distance of BP’s offer-initiated sales at Houston Ship Channel prior to the first trade in the Katy market (i.e., pre-Katy) was “smaller than the penny of ‘distance’ change reported by Abrantes-Metz.”²³¹ According to Evans, the distance of BP’s offer-initiated pre-Katy sales at Houston Ship Channel during the Investigative Period was \$0.025 in the Investigative Period as compared to \$0.017 in the Pre-Investigative Period, for an increase of only \$0.008, which is less than a penny (i.e., \$0.01).

117. BP also argues that the ID fails to consider that the next two most frequent sellers at Houston Ship Channel had equal (\$0.018 for one) or greater (\$0.023 for the other) distance to their offer-initiated sales at Houston Ship Channel as compared to BP’s \$0.018 distance in the Investigative Period. BP adds that even if other market participants increased their offer distance prior to the Investigative Period, the fact

Houston Ship Channel sales that were less than 1.0 cents above the Katy alternative, whereas the actual costs never dropped below 1.2 cents and averaged 1.3 cents during the Investigative Period. *See* Ex. OE-211 at 112-113.

²²⁹ *See* ID at P 58.

²³⁰ *Id.* P 45 n.23.

²³¹ BP Br. on Exceptions at 37-38.

remains that BP's offer distance was consistent with other market participants and that BP's shift was a natural market shift.²³²

118. Finally, BP argues that this "evidence demonstrated that BP's 'distance' was not attributable to the alleged manipulation scheme but was instead consistent with how others were trading."²³³

iii. Commission Determination

119. We disagree with BP. The ID considered the evidence presented in support of both of BP's arguments, and properly rejected them. Whether BP's distance increased by a penny or just shy of a penny at Houston Ship Channel during the Investigative Period depends on whether trades for the entire day or just the portion of the day at Houston Ship Channel prior to the start of trading at Katy (pre-Katy) are considered. As Abrantes-Metz demonstrated, the "full day" difference between BP's offer-initiated sales price and the next best offer was \$0.008 in the Pre-Investigative Period and \$0.018 in the Investigative Period, for an increase of a penny (\$0.01). She also calculated that the pre-Katy (i.e., prior to trading at Katy) difference between BP's offer-initiated sales price at Houston Ship Channel and the next best offer was \$0.017 in the Pre-Investigative Period and \$0.025 in the Investigative Period, for an increase just shy of a penny (\$0.008), as Evans also found.²³⁴ However, the point is not whether BP's increase in distance is a penny or less. Rather, as the ID correctly concluded, the undisputed evidence shows that "[u]nder either calculation BP's distance increased from the Pre-[Investigative Period] to the Investigative Period,"²³⁵ which is consistent with a manipulative scheme to suppress prices by underpricing the next best offer.

120. Nor does evidence that two other market participants had equal or even greater distance to their offer-initiated sales at Houston Ship Channel necessarily diminish an inference of manipulative conduct on the part of BP. Rather, the ID reasonably found that the overall conduct of these other market participants was distinguishable based on a lack of sufficient early trading by one market participant and the timing of another market

²³² *Id.* at 38, 52.

²³³ *Id.* at 38.

²³⁴ Compare Ex. OE-211 at 95:3-13 (Abrantes-Metz rebuttal) with Ex. BP-037 at 60:11-61:3 (Evans).

²³⁵ ID at P 45 n.23.

participant's increases.²³⁶ Further, we disagree with BP that the timing of the increase in distance of another market participant's sales is not important. As Enforcement Staff notes, Abrantes-Metz "testified that this analysis tested whether there was a change in the Texas [T]eam's offers from the Pre-[Investigative Period] to the [Investigative Period]."²³⁷

121. In short, the ID reasonably accepted Enforcement Staff's evidence as demonstrating that BP's consummated offer-initiated sales prices underpriced other market participants during the Investigative Period relative to the Pre-Investigative Period.

f. Bid-Hitting Analysis

i. Initial Decision

122. When selling at Houston Ship Channel, BP could either hit the best active bid or post an offer to sell at a higher price.²³⁸ Following Abrantes-Metz's analysis, the ID found that BP sold 63 percent of the time by hitting bids in the Investigative Period, as compared to only 49.6 percent of the time in the Pre-Investigative Period.²³⁹ The Texas Team also hit bids more frequently than other sellers at Houston Ship Channel by 4 percent.²⁴⁰ The ID found this evidence significant because "if a seller intends to move prices downward, making sales by hitting bids more frequently is an effective way of

²³⁶ *Id.* ("The Pre-[Investigative Period] distances and the timing of the increased distance are distinct for BP and the two largest sellers. The Texas [T]eam's distance increase coincided with the start of the Investigative Period. However, one of the other sellers started increasing their offer distance in July 2008 and the other made very few offer-based sales at all in the Pre-[Investigative Period] (making its Pre-[Investigative Period] distance pattern difficult to discern).").

²³⁷ Enforcement Staff Br. Opposing Exceptions at 25.

²³⁸ *See* ID at P 45 n.22 ("A trader may place a bid exhibiting a desire to buy, or an offer exhibiting a desire to sell, as specified quantity of natural gas at a specified price . . . The bid/offer spread is the price difference between the highest bid shown by a buyer and the lowest offers shown by a seller.") (internal citations omitted).

²³⁹ *Id.* P 46.

²⁴⁰ *Id.* (citing Ex. OE-129 at 76:9-10).

selling at the lowest price available. This is because the highest available bid is always lower-priced than the lowest available offer.”²⁴¹ Abrantes-Metz testified that when a larger seller hits bids more frequently than waiting for offers to be lifted, this may lead to lower prices if other market participants believe that there are ‘anxious’ sellers in the market with positions that need to be liquidated.”²⁴²

ii. BP Exceptions

123. BP takes exception to the ID’s findings, claiming that reliance on bid-hitting as a “marker” of a manipulative scheme wholly ignores the evidence that BP presented.²⁴³ BP argues that its evidence showed that BP’s (i) “[Investigative Period]-bid hitting rates were not unusual when compared to a broader time period” from January 2006 through October 2011;²⁴⁴ (ii) “rate of bid hitting at the Katy locations (which were not alleged to have been manipulated) increased by even more than its rate at Houston Ship Channel during the same period,”²⁴⁵ (iii) bid-hitting increased less than the bid-hitting rates of other market participants at Houston Ship Channel during the Investigative Period;²⁴⁶ and (iv) bid-hitting rates at both Houston Ship Channel and Katy were likely driven by a larger baseload position that BP held during the Investigative Period.²⁴⁷

iii. Commission Determination

124. We find that BP did not rebut the fact that it increased bid-hitting from the Pre-Investigative Period to the Investigative Period. Instead, BP attempts to defeat an inference of manipulation by comparing BP’s allegedly manipulative trading to its conduct over a larger comparative time period, BP’s trading at other locations (i.e., Katy)

²⁴¹ *Id.*

²⁴² *Id.* (citing Ex. OE-129 at 76:11-19).

²⁴³ BP Br. on Exceptions at 36.

²⁴⁴ *Id.* (citing Ex. BP-037 at 49:4-7).

²⁴⁵ *Id.* (citing Ex. BP-037 at 50:14-17).

²⁴⁶ *Id.* at 37 (citing Tr. 2492:5-14 (Evans)).

²⁴⁷ *Id.*

during the Investigative Period, and other market participants' trading at Houston Ship Channel during the Investigative Period. We find these assertions unpersuasive.

125. To show that its bid-hitting rates during the Investigative Period were not unusual, BP relies on Evans's contention that "BP's bid-hitting rate of 63% in the [Investigative Period] is well within [monthly average] historical rates" of bid-hitting between 2006 and 2011.²⁴⁸ But even Evans's own chart shows that out of 72 months in question, only 22 months, or 30 percent, of those months had bid-hitting rates that were higher than that observed during the Investigative Period.²⁴⁹ These statistics on their own show that a 63 percent rate is higher than normal or average rate of bid-hitting, which is consistent with the conclusions derived from Abrantes-Metz's testimony, which showed an increase in bid-hitting when comparing the Pre-Investigative Period to the Investigative Period.

126. Similarly, BP claims that it increased its rates of bid-hitting at Katy by more than it did at Houston Ship Channel during the Investigative Period or that other market participants also engaged in bid-hitting at Houston Ship Channel during the Investigative Period. Abrantes-Metz notes that "[i]n isolation, bid hitting is insignificant, but it's not when applied to the massive increase in volume."²⁵⁰ Enforcement Staff showed that BP's simultaneous increases in net selling, sales volume, and fixed-price sales, including sales increasingly made by hitting bids, collectively had—and was intended to have (*see* Scierer/Intent discussion, below in section IV.B)—a suppressing effect on the Houston Ship Channel *Gas Daily* index. As the ID reasonably found, "the only reasonable conclusion is that early bid hitting was part of the attempt to push early prices down and mark the open."²⁵¹

127. Finally, BP suggests that bid-hitting rates by the Texas Team at both Houston Ship Channel and Katy locations were likely driven by larger baseload positions that they held during the Investigative Period, but provides no data or analysis to support this theory.²⁵²

²⁴⁸ Ex. BP-037 at 49:4-7.

²⁴⁹ *Id.*

²⁵⁰ ID at P 46 n.24 (citing Tr. 1914:1-4 (Abrantes-Metz)).

²⁵¹ *Id.*

²⁵² Tr. 2636:10-21 (Evans) (emphasis added); *see also* ID at P 68 n.52.

Given the lack of evidence, we agree with the ID that “the need to liquidate large baseload positions does not account for the increased bid hitting.”²⁵³

2. Profitability

128. In addition to the eight changes in BP’s trading behavior identified during the Investigative Period, Enforcement Staff sought to prove, based on the testimony of its expert Bergin, that BP’s next-day, fixed price trading at Houston Ship Channel was unprofitable²⁵⁴ during the Investigative Period.

a. Initial Decision

129. The ID found that BP, through its Texas Team, sold next-day, fixed price physical gas at Houston Ship Channel uneconomically with the intent to manipulate the Platts Houston Ship Channel *Gas Daily* Index.²⁵⁵ The ID further found that BP’s financial performance on its next-day physical trading worsened significantly during the Investigative Period as compared to the Pre-Investigative Period. The ID concluded that the change in BP’s trading patterns could not be explained as appropriate profit seeking behavior.²⁵⁶

b. BP Exceptions

130. BP argues that the ID’s consideration of profitability arising from the Texas Team’s physical trading is flawed in three ways. First, BP states that the ID errs by finding that BP’s next-day fixed price physical trading was unprofitable and could

²⁵³ ID at P 46 n.25.

²⁵⁴ Ex. OE-001 at 42-43. The Texas Team’s physical profit and loss (P&L) is calculated by summing the team’s cash P&L at Houston Ship Channel and Katy, and P&L associated with moving physical gas from Katy to Houston Ship Channel. Cash P&L is the difference between the prices of all the Texas Team’s next-day fixed-price trades and their associated Gas Daily price for each day. The P&L associated with moving physical gas from Katy to Houston Ship Channel is calculated by taking the difference between Katy and Houston Ship Channel Gas Daily prices and adjusting that difference by the variable cost of transport on the Houston Pipeline System.

²⁵⁵ ID at P 34.

²⁵⁶ *Id.* P 81.

not be explained as profit seeking. BP points to the ID-adopted Bergin allegations that BP's physical trading lost money on 67 percent of the flow days during the Investigative Period, but argues that the evidence demonstrates that BP lost money on only 58 percent of days during the Investigative Period.²⁵⁷ Second, BP contends that the ID errs by incorrectly concluding that BP was liable for the entire Investigative Period even though the ID acknowledges that BP's physical trading was profitable after November 5, 2008.²⁵⁸ Third, BP asserts that the ID errs by finding that BP had heavy consistent losses during the Investigative Period. BP argues instead that the Texas Team's physical day-to-day trading losses were insignificant on many days during the Investigative Period and that their total losses during the Investigative Period "were driven in large part by one admittedly anomalous trading day" on which the Texas Team lost \$53,540.07. After removing that day from consideration, BP argues that the Texas Team's average losses from physical trades during the Investigative Period of \$4,785 were only slightly higher than the average losses during the Pre-Investigative Period of \$2,878.²⁵⁹ Fourth, BP argues that the losses on physical trades by the Texas Team during the Investigative Period do not signal a changed pattern of behavior because BP experienced losses during the September through November 2007 time period.²⁶⁰

c. Commission Determination

131. BP does not rebut the fact that the Texas Team's next-day physical gas trading was unprofitable during the Investigative Period but was profitable during the Pre-Investigative Period. During the Pre-Investigative Period, the Texas Team averaged \$75,475 in monthly net *profits* on its next-day physical fixed-price trading.²⁶¹ During the Investigative Period, the Texas Team averaged \$15,543 in monthly net *losses* on such trading.²⁶² In contesting the ID's findings concerning profitability, BP focuses on the ID's findings that (1) the Texas Team lost money on a substantially greater percentage of individual days during the Investigative Period than during the Pre-Investigative Period

²⁵⁷ BP Br. on Exceptions at 18.

²⁵⁸ *Id.* at 19.

²⁵⁹ *Id.* at 20 (citing Ex. OE-124).

²⁶⁰ BP Br. on Exceptions at 21.

²⁶¹ ID at P 72.

²⁶² *See* Ex. OE-124 under "Phys P&L by day" worksheet.

and (2) on days when losses were incurred, the scale of the losses was heavier during the Investigative Period than during the Pre-Investigative Period.

132. We are not persuaded by BP's arguments regarding profitability. Furthermore, we disagree with BP's characterization that profitability is the "lynchpin" of the ID's findings.²⁶³ First, there was no error in the ID's conclusion that BP's physical trades lost money on a greater percentage of days during the Investigative Period as compared to the Pre-Investigative Period. As BP points out, it lost money on physical trades at Houston Ship Channel and Katy on 58 percent of all days during the Investigative Period.²⁶⁴ Based on Bergin's testimony, the Texas Team lost money on physical trades at Houston Ship Channel and Katy on 23 percent of all days during the Pre-Investigative Period.²⁶⁵ We find this to be a significant difference in frequency of profitable days of physical trades at Houston Ship Channel and Katy between the Pre-Investigative Period and the Investigative Period.

133. We further note that Bergin found that BP's physical trading resulted in losses on 67 percent of the flow days during the Investigative Period prior to November 5, 2008, the date of the recorded call. As Enforcement Staff explains, "because the Texas [T]eam stopped losing money on transport after the November 5 recorded call, Bergin compared their performance before the [Investigative Period] (profitable) with their performance in the [Investigative Period] until November 5 (unprofitable) to determine whether their trading shifted consistent with an attempt to manipulate the [Houston Ship Channel] *Gas Daily* price."²⁶⁶ Simply by offering the alternative of calculating profitability during the entire Investigative Period, BP not only does not rebut Bergin's testimony and analysis, but also ignores the evidence suggesting that BP likely changed its trading conduct after the November 5 recorded call in response to concerns about compliance monitoring. Specifically, Enforcement Staff presented evidence that traders on the Texas Team knew on November 6, 2008 that BP's compliance department would be looking at their trading as a result of the November 5 call.²⁶⁷ Besides, whether the

²⁶³ See BP Br. on Exceptions at 18.

²⁶⁴ *Id.*

²⁶⁵ Ex. OE-001 at 103:4-5.

²⁶⁶ Enforcement Staff Br. Opposing Exceptions at 22 (internal record cites omitted).

²⁶⁷ See ID at P 76; Exs. OE-001 at 74:1-7; OE-039 at 9; OE-043.

Texas Team lost on 67 percent of flow days (i.e., until November 5, as Enforcement Staff calculates) or 58 percent of flow days during the entire Investigative Period (i.e., through November 30, as BP calculates), the evidence shows that BP's trading of physical fixed-price gas was *unprofitable* during the Investigative Period as compared to the Pre-Investigative Period, when such physical trading was *profitable*.

134. Second, the ID also did not commit error in finding BP liable for a manipulative scheme during the entire Investigative Period, even though BP's physical trading was overall profitable (albeit with losses on some days) during the Investigative Period after November 5. Lack of profitability—i.e., uneconomic trading—is one indicia of manipulative activity, but it is not an absolute requirement in order to find manipulation. The ALJ found that the Texas Team engaged in “various acts”²⁶⁸ as part of a scheme to depress the *Gas Daily* index at Houston Ship Channel during the Investigative Period and, not as BP now contends, that profitability is the “lynchpin” of manipulation.

135. Third, the ID did not err by concluding that BP's physical trades at Houston Ship Channel and Katy, as well as its Houston Pipeline System transport, experienced heavier losses during the Investigative Period on days when its trading was not profitable. Even when excluding September 19 as an anomalous day, the average daily loss of \$4,785 (for days when BP incurred a net loss) based on the September 20 to November 5 period during the Investigative Period, is substantially higher than the average daily loss of \$2,878 (for days when BP incurred a net loss) during the Pre-Investigative Period.²⁶⁹ By another measurement, the Texas Team lost money on 61 days during the eight and a half months of the Pre-Investigative Period and, on 42 days during the two and a half month Investigative Period. These statistics show an increase in the daily frequency of BP's losses from physical trading.

136. Fourth, while BP contends that the Texas Team also experienced losses in 2007, what matters in this case is that the losses during the Investigative Period were accompanied by the change in trading patterns. As such, we do not agree with BP's

²⁶⁸ ID at P 81.

²⁶⁹ BP argued that the ID looked only to average losses rather than day-to-day losses, highlighting the fact that on 11 of the flow days during the Investigative Period the daily loss was less than \$1,500 and during two of those days the loss was less than \$100. But the average loss statistic, presented by the Enforcement Staff expert, accounts for and incorporates the fact that on a number of days during the Investigative Period, the physical trading losses were low, yet still shows that the average losses during the Investigative Period were higher as compared to the Pre-Investigative Period.

argument that losses on their own during September through November 2007 suggest that the ID could not draw any inference from losses during the Investigative Period.

137. In short, the ID did not err in finding that financial performance of BP's next-day physical trading worsened significantly during the Investigative Period as compared to the Pre-Investigative Period.

3. Confluence of Acts that Constitute or Further a Scheme to Manipulate

a. Initial Decision

138. The ID found that the evidence established that, after Hurricane Ike, BP's trading and transport of next-day fixed-price gas at Houston Ship Channel changed to almost entirely net selling, BP increased its percentage and volume of fixed-price sales at Houston Ship Channel, and BP became the seller with the largest market share in the next-day fixed-price market at Houston Ship Channel during the Investigative Period.²⁷⁰ The ID also found that BP shifted to selling higher volumes at Houston Ship Channel early in the trading day, buying at Houston Ship Channel later in the day, and transporting substantially more gas to Houston Ship Channel from Katy using BP's Houston Pipeline System transport. In addition, the ID found that the evidence demonstrated that BP shifted to posting aggressively lower offers compared to other sellers at Houston Ship Channel and that there was an increase in the frequency of BP's sales made by hitting bids. The ID further found that the evidence showed that there was an increase in the percentage of sales at Houston Ship Channel that were uneconomic compared to contemporaneous prices at Katy.²⁷¹ The ID concluded that "this unique confluence of changed trading patterns, which furthered the scheme to suppress the [Houston Ship Channel] *Gas Daily* index, sets apart the Texas [T]eam's behavior in the Investigative Period from their behavior in the Pre-[Investigative Period] and cannot be explained by any economic or profit rationale, by general market conditions, or by comparison to the behavior of the other two largest sellers at [Houston Ship Channel]."²⁷²

²⁷⁰ ID at P 42.

²⁷¹ *Id.*

²⁷² *Id.* ("Enforcement Staff is correct that BP has not adequately explained their behavior and instead merely downplays its significance.").

b. BP Exceptions

139. BP argues that the “ID erroneously concludes that a manipulative scheme is revealed when each of the factors concerning the Texas [T]eam’s trading that underlie the six-legged stool are taken together” and that “the ID fails to look at each alleged trading behavior independently, but instead found the Texas [T]eam liable based on a ‘confluence of factors.’”²⁷³ According to BP, a “‘confluence of factors’ is an artifice designed to avoid criticism of each underlying factor” and a finding of fraud cannot be “based on a ‘confluence of factors’ when the underlying factors are themselves discredited.”²⁷⁴ BP argues that “federal precedent finding liability based on a confluence of factors when the underlying factors are subject to dispute is limited to criminal cases analyzing the sufficiency of reasonable suspicion and/or probable cause to detain a criminal defendant.”²⁷⁵ BP states that the “‘confluence of factors’ on which the ID relies is nothing more than an expanded version of Abrantes-Metz’s six-legged stool which Evans rebutted leg-by-leg through his testimony.”²⁷⁶ According to BP, Enforcement Staff’s “evidence did not eliminate a substantial portion of innocent actors, as the law requires for a confluence to even be considered valid for the ‘much lower’ threshold of reasonable suspicion.”²⁷⁷ BP criticizes the ID for finding “that the two next largest market participants trading at [Houston Ship Channel] did not show the same patterns as the Texas [T]eam,” when (i) those two other large sellers sold gas early at Houston Ship Channel, (ii) “Evans explained that Abrantes-Metz’s distance analysis produces similar results for those same two sellers,” and (iii) Abrantes-Metz admitted not conducting a bid-hitting analysis (a third factor underlying the “confluence”) of those two market participants on an all-day basis.²⁷⁸ BP asserts that “it is reversible error for the ID to find BP liable under the preponderance of evidence standard based on a ‘confluence of factors’ when BP has demonstrated that the underlying factors are themselves incorrect

²⁷³ BP Br. on Exceptions at 40.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 41.

²⁷⁷ *Id.* at 41-42.

²⁷⁸ *Id.* at 42.

and that the same factors implicate innocent actions” and that “[i]t is also error for the ID to fail to consider BP’s arguments criticizing the underlying factors.”²⁷⁹

c. Commission Determination

140. Based on the totality of evidence, including evidence demonstrating BP’s changed trading patterns during the Investigative Period, a lack of profitability associated with these new trading patterns, and no reasonable explanation for these changes, the ID reasonably found that the overwhelming inference to be drawn was that BP engaged in a scheme to artificially suppress the Houston Ship Channel *Gas Daily* index for the benefit of its financial positions. The Commission agrees with this finding.

141. Contrary to BP’s assertions, BP’s expert did not rebut “leg-by-leg” the evidence demonstrating BP’s change in trading patterns during the Investigative Period. Rather, Enforcement Staff proved by a preponderance of the evidence that the Texas Team’s conduct—which included uneconomic transport combined with early, volume-heavy selling at aggressively low prices at Houston Ship Channel during the Investigative Period—viewed together under the circumstances, constituted and furthered a scheme to artificially suppress the Houston Ship Channel *Gas Daily* index. For reasons stated herein, we also find that the ID reasonably distinguished the separate and isolated activities of other market participants from the manipulative scheme that BP was shown to have engaged in during the Investigative Period.

142. Nor does the ID’s use of the phrase “confluence” to describe the collective actions constituting the scheme on which Enforcement Staff bases its claim of manipulation implicate legal doctrine relating to the reasonable suspicion and/or probable cause standard applied to detain a criminal defendant, as BP inaptly argues. This case involves proof of a manipulative scheme in violation of the Commission’s Anti-Manipulation Rule. We, therefore, reject BP’s invitation to review the ID’s findings based on “reasonable suspicion” and “probable cause” doctrines of criminal law that have no apparent relevance here.

4. Other BP Exceptions

143. BP raised various other arguments on exceptions relating to the ID’s findings regarding manipulative conduct, which we address below.

²⁷⁹ *Id.* at 41.

a. **Use of the Pre-Investigative Period for Comparison**

i. **Initial Decision**

144. In finding a change in trading patterns from which to infer manipulation, the ID relied on a comparison of BP's trading conduct during the Investigative Period and the Pre-Investigative Period. The ID noted that Abrantes-Metz defined the Pre-Investigative Period as the trade dates from January 2, 2008 through September 10, 2008,²⁸⁰ and the Investigative Period as the trade dates from September 18, 2008 through November 25, 2008.²⁸¹

145. According to the ID, Abrantes-Metz excluded from her analysis the trade dates from September 11 through September 17, 2008 due to the effect of Hurricane Ike on market volumes.²⁸² Abrantes-Metz also did not include pre-2008 dates in her analysis because: (1) bid and offer data on ICE only goes back to the beginning of 2008; (2) natural gas markets looked very different prior to 2008, and including this data in the analysis would have skewed the results; and (3) Comfort did not primarily trade Katy or Houston Ship Channel daily physical positions until January 2008.²⁸³

ii. **BP Exceptions**

146. BP contends that Enforcement Staff's "selective" Pre-Investigative Period is not representative of BP's trading behavior and, therefore, it was error for the ID to rely on it. BP argues that the ID did not address its critique of the unrepresentative sample size of the Pre-Investigative Period, which undermines Abrantes-Metz's conclusions.²⁸⁴

147. BP contends that the ID incorrectly characterizes BP's witness Evans as arguing that an appropriate comparison period is impossible to find. BP asserts that it provided an appropriate time period using reliable data for every flawed analysis that Abrantes-Metz presented and the ID adopted. BP adds that its expert Evans testified about the

²⁸⁰ ID at P 10 n.6.

²⁸¹ *Id.* P 44 n.20.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ BP Br. on Exceptions at 43-44.

impact of seasonality in gas markets and why one must consider comparable months when looking at the Texas Team's trading in the Investigative Period.²⁸⁵

148. BP further argues that the ID fails to address BP's rebuttal to the three reasons Abrantes-Metz stated for using the Pre-Investigative Period. First, BP states that ICE provided a substantial amount of useful data for prior years, and that bid and offer data were not necessary to conduct Abrantes-Metz's timing analysis. Second, BP argues that Abrantes-Metz has no experience with natural gas, and offered no explanation or support for asserting that natural gas markets looked very different prior to 2008. Third, BP maintains that Abrantes-Metz inappropriately considered only the period when Comfort was trading in Texas, but such an analysis shouldn't exclude prior years' trading data simply because one of the traders was not a member of the trading team in those prior years.²⁸⁶

iii. Commission Determination

149. We disagree with BP. The record evidence supports the reasonableness of Enforcement Staff's selection of the Pre-Investigative Period. As Abrantes-Metz noted, changed trading patterns during a time period under examination can be one indication of manipulation. To determine if a change in trading patterns occurred, a control period must be selected during which no known manipulation occurred, but which is similar to the suspect period.²⁸⁷ Moreover, using a single time control period for multiple analyses allows for more uniform and reliable comparisons of data and avoids the potential to cherry pick results.²⁸⁸

150. In this instance, Comfort executed 89 percent of the Texas Team's fixed price trades at Houston Ship Channel during the Investigative Period. Comfort became the Texas Team's primary Houston Ship Channel trader in January 2008 and also executed 87 percent of the Texas Team's trades at Katy and Houston Ship Channel during the

²⁸⁵ *Id.* at 44-45.

²⁸⁶ *Id.* at 45-46.

²⁸⁷ Ex. OE-211 at 27-28.

²⁸⁸ *See* ID at PP 42 n.19, 44 n.20. In contrast, BP appears to argue that each analysis of a specific alleged change in trading behavior during the Investigative Period should have its own appropriate time period to compare against. *See* BP Br. on Exceptions at 46-49.

Pre-Investigative Period.²⁸⁹ These facts provide an evidentiary basis for selecting the Pre-Investigative Period, which also started in January 2008, as the control period.²⁹⁰ Moreover, the ID noted that Abrantes-Metz extended several of her analyses, including her timing analysis, by using data from previous years, and also conducted “robustness checks” for other analyses with data from other time periods to confirm her results.²⁹¹ Consequently, we find no error in the ID’s acceptance of such a Pre-Investigative Period for comparison.

151. We also find the ID reasonably considered the evidence that BP’s unsupported and generalized claim of “seasonality” was insufficient to warrant disregarding Enforcement Staff’s Pre-Investigative Period in favor of some alternative comparison period of the same months in prior years.²⁹²

b. Use of Katy Ship Sheets

152. The Katy Ship Sheets are an excel spreadsheet, within which the Texas Team tracked daily physical transactions at Katy, Houston Ship Channel, and the amount of gas transported from Katy to Houston Ship Channel. In the “Transport Diff” cell of the spreadsheet, the Texas Team calculated net P&L from transporting natural gas from Katy to Houston Ship Channel.

i. Initial Decision

153. The ID accepted evidence from Katy-Ship Sheets of increased transported volume during the Investigative Period as compared to the Pre-Investigative Period between Katy and Houston Ship Channel by the Texas Team.²⁹³ The ID also accepted

²⁸⁹ Ex. OE-211 at 29-30.

²⁹⁰ ID at 44 n.20.

²⁹¹ *Id.* P 61. *See also* Ex. OE-211 at 26-34.

²⁹² In particular, Enforcement Staff’s expert Bergin testified that the mere presence of a particular season does not guide trading behavior and or transport utilization, while BP’s trader Luskie testified that the spread is what dictates whether you flow or not flow, the real-time spread. *See* ID at P 63 (citing Ex. OE-161 at 39:14-18; Tr. 574:17-575:13; 584:7-25 (Luskie)).

²⁹³ ID at P 55.

Enforcement Staff's use of the "Transport Diff" cell in the Katy-Ship Sheets to determine whether the Texas Team was flowing gas economically during the Investigative Period.²⁹⁴ The ID recognized that the Texas Team used estimates of *Gas Daily* prices in the Katy-Ship Sheets to estimate their net physical P&L on next-day trades.²⁹⁵ Finally, the ID accepted the use of the Katy Ship Sheets by Enforcement Staff for purpose of calculating the Texas Team's cash P&L for the combined Katy and Houston Ship Channel locations and transport P&L, as well as their total physical P&L.²⁹⁶

ii. BP Exceptions

154. BP argues that ID erred by relying on the Katy-Ship Sheets for P&L computations. BP claims that the purpose of the Katy-Ship Sheet reports is to help traders track their daily physical positions and that the reports are inappropriate for P&L purposes.²⁹⁷ BP argues that alternative documentation is more appropriate to determine P&L and that documentation includes monthly mark-to-market reports and the "Texas Fun Sheets."²⁹⁸

155. BP argues that Abrantes-Metz improperly used the daily transport P&L formula in the Katy Ship Sheets (i.e., the "Transport Diff" cell) to determine whether the Texas Team was flowing gas less economically in the Investigative Period because that cell includes the flow of baseload gas. BP argues that the uneconomic flow of baseload gas cannot be considered part of the manipulative scheme because baseload deals have no role in forming the *Gas Daily* index, which is the index alleged to have been manipulated.²⁹⁹

156. Likewise, BP argues that Abrantes-Metz's usage of the Katy-Ship Sheets in her analysis was improper because Katy-Ship Sheets included trades that were not executed on ICE and not included in the *Gas Daily* index.³⁰⁰

²⁹⁴ *Id.* P 62 n.46.

²⁹⁵ *Id.* P 68 n.50.

²⁹⁶ *Id.* P 119 n.94.

²⁹⁷ BP Br. on Exceptions at 65.

²⁹⁸ *Id.* at 66.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 67.

iii. Commission Determination

157. We find that the ID appropriately gave considerable weight to P&L calculations as they were used in Katy Ship Sheets based on (i) the record evidence that the reports were used by the Texas Team to estimate their losses and profits at Katy, Houston Ship Channel, and on their Houston Pipeline System transport in the next-day cash session; and (ii) Luskie's testimony that the P&L formulas embedded in the Katy Ship Sheets were the same formulas that BP's back office used (after the final *Gas Daily* prices were published) to "roll" the Texas Team's next-day physical gas trading results into an aggregate P&L that included all of the Texas Team's other "cash" positions.³⁰¹

158. We affirm the ID's determination that Abrantes-Metz did not err when using the "Transport Diff" cell in the Katy-Ship Sheets for calculating transportation P&L. The cell calculates transportation P&L by first taking the difference between estimated Houston Ship Channel and Katy *Gas Daily* averages. Next, it subtracts cost of transport between Katy and Houston Ship Channel. Finally, it multiplies the *Gas Daily* spread that is adjusted for the cost of transport by the volume of transported gas between those two locations. BP argues that the volume of transported gas figure used in that calculation contains some amount of baseload gas, which is not a factor in the formation of *Gas Daily* index. As Enforcement Staff points out, BP's argument does not undermine the validity of the methodology used in the "Transport Diff" cell for the purposes of assessing economic flow of gas between Katy and Houston Ship Channel. The profit-maximizing decision to flow gas between those two locations, be it baseload or next-day, should still be based on daily prices. The Texas Team always had the option to turn off transport, and sell baseload or next-day gas at Katy, thus removing baseload gas from transport volumes would be inappropriate when assessing whether the Texas Team transport decisions were economic.³⁰²

159. Similarly, BP argues that some of the transactions in the Katy Ship Sheets reflected a transfer among BP affiliates and those transactions could not be executed on ICE and not included in the *Gas Daily* index. BP points out that one of twenty-nine transactions that the Texas Team completed on October 3, 2008 was a transaction among

³⁰¹ ID at P 119 n.94.

³⁰² *Id.* P 62 n.46.

BP affiliates and therefore should not be included in Abrantes-Metz's analysis.³⁰³ While Abrantes-Metz conceded BP's point, she also testified that during the Investigative Period almost all of BP's sales were executed on ICE and points out that inter-affiliate transactions were present during both the Pre-Investigative Period and the Investigative Period, suggesting that the number of those types of transactions is small and their frequency is not different between compared periods, which makes their inclusion in the analysis that aims to show difference between Pre-Investigative Period and Investigative Periods inconsequential.³⁰⁴ We agree with those conclusions.

c. **BP's Rebuttal Evidence of Trading at Alternative Locations, at Other Times, and by Other Market Participants**

160. BP argues that the ID, in accepting Enforcement Staff's claim of manipulative conduct, overlooked or erroneously rejected three types of rebuttal evidence: BP's similar trading at other locations (i.e., Katy) during the Investigative Period, other market participants' similar trading at Houston Ship Channel during the Investigative Period, and BP's historical trading at Houston Ship Channel.

161. BP contends that to credibly attribute BP's trading and transport activity during the Investigative Period to a manipulative scheme to suppress prices at Houston Ship Channel, the Commission must find an absence of such activity at alternative trading locations, at other times, and by other market participants—all instances where BP claims no such manipulation is alleged.³⁰⁵

162. First, BP asserts that the Texas Team's next-day selling behavior at Houston Ship Channel is not indicative of manipulation because they were engaged in similar conduct at Katy. In particular, BP asserts that "the ID ignores that the Texas [T]eam increased its percentage of fixed-price sales at Katy more that it increased its percentage at [Houston Ship Channel] during the [Investigative Period]," and that "BP's rate of bid-hitting at

³⁰³ BP Br. on Exceptions at 67 (citing Tr. 1939:11-21 (Abrantes-Metz)). The testimony cited by BP identifies transactions among BP affiliates as those transactions in Katy Ship Sheets where under counterparty column instead of counterparty name one sees a word "asset."

³⁰⁴ Tr. 1940:2-18 (Abrantes-Metz).

³⁰⁵ See, e.g., BP Br. on Exceptions at 32 n.158.

Katy increased even more than the rate of bid-hitting at [Houston Ship Channel].”³⁰⁶ BP also faults the ID for disregarding Evans’s “earliness” rebuttal without explanation in which, according to BP, “Evans demonstrated that the overall earliness of trades by BP at [Houston Ship Channel] in the [Investigative Period] was less than its earliness at the composite of the Katy Oasis and Katy Enstor locations.”³⁰⁷

163. Second, BP argues that four of the Texas Team’s changed trading patterns on which the ID relies were entirely consistent with its conduct over a longer timeframe. In particular, BP argues that the Texas Team’s “transport utilization in the [Investigative Period] was consistent with its historical utilization,” that “BP’s fixed priced sales were entirely consistent with BP’s fixed-price sales at *various points* in 2006, 2007, 2009, 2010, and 2011,” that “BP’s bid-hitting rate at [Houston Ship Channel] was similar or higher in *numerous other* periods,” and that “its timing of trades at [Houston Ship Channel] . . . during the [Investigative Period] was comparable to its *historical timing* of trades.”³⁰⁸

164. BP further argues that Enforcement Staff’s expert Abrantes-Metz actually demonstrated that the Texas Team’s trading in the Investigative Period was consistent with its trading in prior periods. Citing Table 1.A from Abrantes-Metz’s rebuttal testimony in which she extended her analysis to include data dating back to 2007, BP argues that its trading at Houston Ship Channel during the Investigative Period was similar to its trading in 2007 with respect to seven different metrics Abrantes-Metz used.³⁰⁹

165. Third, BP argues that the ID fails to consider whether other market participants at Houston Ship Channel traded in a similar manner to the Texas Team during the Investigative Period.³¹⁰ In particular, BP asserts that “Abrantes-Metz failed to even consider whether BP’s fixed-price sales volume was consistent with the trading of other large market participants that were making sales at Katy and [Houston Ship Channel],”

³⁰⁶ *Id.* at 53.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 46-49 & nn.225-226 (emphasis added).

³⁰⁹ *Id.* at 49-50. Generally, these metrics measure the Texas Team’s trading and transport volumes and various aspects of the timing of its trades.

³¹⁰ *Id.* at 50.

that “other market participants did increase their bid-hitting at a rate more than the Texas [T]eam,” and that “other market participants increased their offer distance in the [Investigative Period], just as BP did.”³¹¹

i. Commission Determination

166. For the reasons already stated in the discussions above addressing each of the Texas Team’s eight changes in trading behavior at Houston Ship Channel during the Investigative Period, we find BP’s individual pieces of rebuttal evidence to be unpersuasive.³¹² Also, even if BP could convincingly show—as it argues it did in its exceptions—that it engaged in some similar conduct at other locations or at other times, or that there was similar conduct by other market participants, this would not negate Enforcement Staff’s proof of a scheme at Houston Ship Channel during the Investigative Period. As the Commission previously stated, “[t]rades undertaken solely for bona fide economic purposes are not violative of the section 1c.1 of the Commission’s regulations, but the very same trades, if intended to manipulate the market, are indeed prohibited.”³¹³ Based on the totality of evidence presented at the hearing, the ID found, and we concur, that by its collective actions BP engaged in a scheme that was intended to artificially depress the Houston Ship Channel *Gas Daily* index to benefit its financial positions.

d. Non-Manipulative Alternative Explanations

167. The Commission previously stated that BP may present evidence as to its business purpose, which will be considered along with Enforcement Staff’s evidence of manipulation in determining whether a claim for manipulation has been established.³¹⁴

³¹¹ *Id.* at 50-52.

³¹² We disagree with BP that its trading at Houston Ship Channel during the Investigative Period was similar to its trading in 2007 with respect to seven different metrics used by Abrantes-Metz. These metrics, as visually displayed in Table 1.A of Abrantes-Metz’s rebuttal analysis, do not point to a consistent pattern in trading behavior that occurred simultaneously at any one timeframe in 2007, unlike what is demonstrated during the Investigative Period. *See* Ex. OE-211 at 17-20.

³¹³ Hearing Order at P 42.

³¹⁴ *Id.*

i. Initial Decision

168. The ID found BP made only unsubstantiated claims of business reasons to explain the changes in the Texas Team's trading behavior at Houston Ship Channel and use of Houston Pipeline System transport.³¹⁵

ii. BP Exceptions

169. BP argues that the ID ignored evidence that two hurricanes and the 2008 credit crisis affected the Texas Team's trading during the Investigative Period by reducing baseload demand at Houston Ship Channel and by restricting the potential counterparties with whom BP could trade, respectively.³¹⁶ BP argues that the ID incorrectly adopts Bergin's testimony by concluding that the credit crisis had no impact, because the ID only evaluated the number of potential counterparties (which did not change) and did not consider who the counterparties might be and the extent to which they could actively trade with BP or have a need for natural gas. BP further argues that the ID ignored testimony that companies were cancelling contracts and that counterparties were losing credit ratings and were unable to meet credit standards.³¹⁷

170. BP also argues that the ID ignored evidence that Hurricanes Gustav and Ike had an impact on the Texas Team's trading by reducing baseload demand at Houston Ship Channel. BP submits that the ID erroneously relied on Bergin's testimony and failed to engage in any meaningful analysis, despite Bergin's acknowledgement that Hurricane Ike affected natural gas markets. BP adds that the ID cited to Nesha Barnhart's (Barnhart) testimony that Hurricane Gustav had no impacts on points for which she was responsible,

³¹⁵ See, e.g., ID at PP 63, 77, 125.

³¹⁶ BP Br. on Exceptions at 63-65. In addition, BP points to seasonality and baseload positions as possible alternative explanations for the behavior of the Texas Team during the Investigative Period. We address seasonality and baseload as they are raised by BP earlier in this order. See *supra* PP 106-107, 127, 151, 158; see also *infra* PP 169-172.

³¹⁷ BP also faults the ID for ignoring Bergin's admission at trial that he did not consider all available data in conducting a credit analysis. See BP Br. on Exceptions at 63. BP, however, fails to explain how such data would have altered Bergin's conclusions.

but the ID ignored that Barnhart stated she could not speak for Comfort or the points at which he traded.³¹⁸

iii. Commission Determination

171. We find that the ID considered, and reasonably rejected, BP's evidence regarding the effects of the 2008 financial crisis and two hurricanes as insufficient to explain the Texas Team's change in trading behavior during the Investigative Period. While BP makes general assertions in its brief that these events affected the Texas Team's trading, BP fails to connect the impact of these events to the changes in trading behavior that Abrantes-Metz identifies. For example, BP does not explain or demonstrate how a change in who the Texas Team's counterparties might have been after the 2008 financial crisis caused the Texas Team to become the seller with the largest market share of next-day, fixed price sales at Houston Ship Channel or why the Texas Team shifted to selling higher volumes at Houston Ship Channel earlier in the trading day.

172. Accordingly, the ID correctly concluded that there was no evidence that the hurricanes "materially impact[ed] the Texas Team's trading in the [Investigative Period], or their [Houston Ship Channel] and Katy physical baseload positions through October and November 2008."³¹⁹ And while BP cites to a *Platts Gas Daily* article describing the financial crisis and a general reduction in the credit-worthiness of counterparties, BP offers no evidence of any actual impact of the credit crisis on the Texas Team's next-day physical trading.

e. Findings on Credibility of Witnesses

i. Initial Decision

173. In the ID, the ALJ gave Abrantes-Metz's testimony "significant"³²⁰ and "considerable"³²¹ weight, and Bergin's testimony "significant"³²² and "substantial"³²³ weight, while concluding that Evans's testimony "is not given any weight."³²⁴

³¹⁸ *Id.* at 64-65.

³¹⁹ ID at P 63.

³²⁰ *Id.* P 194.

³²¹ *Id.* P 68.

³²² *Id.* PP 127, n.109, 164, 172 n.121.

ii. **BP Exceptions**

174. BP argues that the ID's determinations regarding the credibility of BP's witness Evans and Enforcement Staff's witnesses "are patently unreasonable and warrant no deference."³²⁵ BP asserts that the "[t]he ID ignores almost all of BP's arguments by affording Evans no weight and determining that [Enforcement Staff's] witnesses were credible and worthy of substantial weight."³²⁶

iii. **Commission Determination**

175. In considering the evidence presented, the ALJ "is entitled to deference with regard to the credibility of witnesses and evidence, and the amount of weight to be accorded to particular testimony or evidence."³²⁷ In particular, "the trier of fact is in the best position to evaluate such elusive factors as motive or intent," which "hinge[] entirely upon the degree of credibility to be accorded the testimony of interested witnesses."³²⁸ BP has not demonstrated that the ID's credibility determinations were erroneous, and we therefore reject BP's assertion that those determinations "warrant no deference." On the contrary, the record here shows that the ID thoroughly considered the evidence and each witness' testimony before determining to give Abrantes-Metz's testimony and Bergin's

³²³ *Id.* P 117.

³²⁴ *Id.* P 62 n.52.

³²⁵ BP Br. on Exceptions at 54.

³²⁶ *Id.*

³²⁷ *Entergy Services, Inc.*, 130 FERC ¶ 61,023, at P 53 n.66 (2010). *See also El Paso Natural Gas Co.*, 67 FERC ¶ 61,327, at 62,156 (1994).

³²⁸ *Williams Natural Gas Co.*, 41 FERC ¶ 61,037, at 61,095 (1987) (quoting *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5th Cir. 1986)). *See also Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1078-79 (9th Cir. 1977) ("Weight is given the administrative law judge's determinations of credibility for the obvious reason that he or she sees the witnesses and hears them testify . . . All aspects of the witnesses' demeanor . . . may convince the observing trial judge that the witness is testifying truthfully or falsely. These same very important factors, however, are entirely unavailable to a reader of the transcript.") (internal quotations omitted).

testimony “significant weight”³²⁹ and concluding that “Evans[’] testimony is not given any weight.”³³⁰ Accordingly, we affirm the ID’s credibility determinations.

176. According to BP, the ID’s decision that Evans’s testimony was “not given any weight” was based on: “(i) Evans’s education compared to Abrantes-Metz’s education; (ii) instances where the ID found Evans and other witnesses to not be in full agreement; and (iii) a determination that Evans did not disprove [Enforcement Staff’s] allegations.”³³¹ BP argues that the “ID errs in failing to consider Evans’ experience,”³³² failing to address BP’s criticisms of Bergin and Abrantes-Metz,³³³ and failing to consider how Bergin’s pursuit of employment at BP impacts his credibility.³³⁴

177. Notably, BP does not take issue with what it identifies as the second and third bases for the ID’s determination to not afford Evans’s testimony any weight—the instances where Evans and other witnesses contradicted each other and the determination that Evans did not disprove Enforcement Staff’s allegations. These factors provide substantial support for the ID’s credibility determination. As the ID notes, BP’s traders contradicted Evans’s descriptions of natural gas market trading at least three times.³³⁵ First, Evans claimed that a trader would consider a market with a wide bid/offer spread to be a viable comparison to a market with a narrow spread, but Luskie disagreed. Second, Luskie acknowledged that BP’s Texas Team traders measured their next-day fixed-price P&L at Houston Ship Channel and Katy against each location’s *Gas Daily* index price, which contradicted Evans’s assertion that measuring P&L against the *Gas Daily* index is

³²⁹ See, e.g., ID at P 194 (“Dr. Abrantes-Metz testimony is given significant weight.”); *id.* P 127 (“Bergin’s testimony is given significant weight.”); *id.* P 68 (“Dr. Abrantes-Metz’s testimony is given considerable weight.”); *id.* P 117 (“Bergin’s testimony is given substantial weight.”); *id.* P 164 (“Bergin’s testimony is given significant weight.”).

³³⁰ *Id.* P 68 n.52.

³³¹ BP Br. on Exceptions at 55-56.

³³² *Id.* at 56.

³³³ *Id.* at 58-60.

³³⁴ *Id.* at 59.

³³⁵ ID at P 68 n.52.

only relevant when a trader sells gas that was purchased at an index price, and is otherwise insufficient for any other aspect of a trader's book. Third, Evans claimed that offers at Katy were irrelevant when he criticized Abrantes-Metz's inter-market comparison of the Texas Team's Houston Ship Channel sales with contemporaneous bids and offers at Katy. However, Luskie testified that he considered both bids and offers when deciding whether and where to trade.³³⁶ The ID did not err in considering these contradictions, which BP does not dispute, as support for its decision to afford Evans's testimony no weight, particularly where the ALJ was "in the best position to evaluate such elusive factors as motive or intent"³³⁷ because she saw the witnesses and heard them testify and those "important factors . . . are entirely unavailable to a reader of the transcript"³³⁸ such as the Commission in this instance.

178. The ID's decision to not afford Evans any weight is further supported by Evans's failure to disprove any of Enforcement Staff's allegations with his testimony and evidence. First, as the ID notes, Evans offered only possible alternative explanations for the behavior of the Texas Team traders (e.g., seasonality, baseload position, hurricanes and the financial crisis) but "did not test any of his alleged explanations against the data in this case."³³⁹ In determining to afford Evans's testimony no weight, it was reasonable for the ID to consider that Evans's testimony offered only potential alternative explanations, with no support, while Enforcement Staff's witnesses provided analyses to support their explanations for BP's behavior. Potential alternative theories without support cannot be appropriately weighed against theories that are supported by data and analyses; therefore it is reasonable to consider such unsupported alternative theories in determining that Evans's testimony would not be given any weight.

179. The ID also found that Evans failed to disprove Enforcement Staff's allegations in numerous other contexts. For example, the ID found that Evans ignored the most fundamental change in the BP Texas Team's trading behavior, the shift to net selling on 48 of the 49 days in the Investigative Period.³⁴⁰ Similarly, the ID noted that Evans also

³³⁶ *Id.*

³³⁷ *Williams Natural Gas Co.*, 41 FERC ¶ 61,037, at 61,095 (1987) (quoting *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5th Cir. 1986)).

³³⁸ *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977).

³³⁹ *See* ID at PP 62, 68 n.52.

³⁴⁰ *Id.* P 62.

did not respond to Abrantes-Metz's conclusion that BP's transport losses in the Investigative Period were significant as compared to its prior performance.³⁴¹ The ID also found that "Dr. Abrantes-Metz rebutted Evans's seasonality claim" and that "Evans is not correct and that there is no need to limit comparison periods to the same months in prior years."³⁴² In addition, the ID pointed to Abrantes-Metz's testimony that Evans's inter-market results were biased because he included Houston Ship Channel bid-based sales before Katy began trading. Abrantes-Metz testified that "a comparison of the economics of trading at two locations linked by transport is feasible only when both markets are actively trading."³⁴³

180. The ID also cited to Abrantes-Metz's rebuttal of Evans's claim that the BP Texas Team's early selling was similar to the early selling behavior of the next two largest overall sellers in the Houston Ship Channel market in the Investigative Period. Abrantes-Metz stated that Evans's assertion that BP's "volume of trading in the first 15 minutes lags behind" those other two sellers was deceptive because the chart that Evans presented started the clock for the first 15 minutes of trading for every day at 6:50 a.m., and only showed trades between 6:50 and 7:05 a.m. during the Investigative Period, while on average the first trade occurred at 7:15 a.m., or 25 minutes after the time period used by Evans. Abrantes-Metz testified that, as a result, Evans omits 74 percent of the actual trading that occurred in the first 15 minutes of each day's volume at Houston Ship Channel, including more than half of all first trades. When Abrantes-Metz corrected Evans's testimony, her conclusions were supported, as it showed that BP outpaced all other sellers during the first 15 minutes of trading or that they dominated early selling during this time.³⁴⁴ These, and other, examples of Evans failing to disprove Enforcement Staff's allegations support the ID's determination to afford Evans's testimony no weight and the ID reasonably considered those examples in making its determination.

181. The arguments that BP relies on to support its challenge to the ID's credibility determinations focus on the experience of Evans, Bergin, and Abrantes-Metz. BP's recitation of the experience of these witnesses does not provide any basis for overturning the ID's credibility determinations. As an initial matter, we distinguish between the qualifications of the witnesses for purposes of determining the admissibility of their

³⁴¹ *Id.*

³⁴² *Id.* P 64.

³⁴³ *Id.* P 65.

³⁴⁴ *Id.* P 66.

testimony and evidence, and the ID's determinations regarding the credibility of their testimony and evidence. Pursuant to Rule 509 of the Commission's Rules of Practice and Procedure, the ALJ was required to rule on the admissibility of any evidence offered.³⁴⁵ In doing so, Rule 509 provides that "the presiding officer should exclude from evidence any irrelevant, immaterial, or unduly repetitious material" and "[t]he presiding officer may also exclude from evidence any other material which the presiding officer determines is not of the kind which would affect reasonable and fair-minded persons in the conduct of their daily affairs."³⁴⁶ In determining to allow the testimony and evidence provided by these witnesses, the ALJ deemed that these witnesses were sufficiently qualified to provide evidence that met the requirements of Rule 509. After this testimony and evidence was admitted, the ALJ then determined the credibility of that testimony and evidence in light of the complete record in this proceeding. The record shows that the ALJ did not, as BP's exceptions indicate, make its credibility determinations solely on the basis of the witnesses' resumes.

182. For example, BP argues that the ID relies on Bergin's "experience in the energy industry with leading energy firms," in finding Bergin to be credible.³⁴⁷ However, the ID determines Bergin to be credible and gives his testimony weight based on the substance of that testimony.³⁴⁸ BP's mischaracterization of the ID's determination regarding Bergin's credibility and its attacks on his experience are not sufficient to overturn the ID's determination that Bergin's testimony and evidence were credible in light of the complete record.

³⁴⁵ See 18 C.F.R. § 385.509(b)(1) (2015) ("The presiding officer will rule on the admissibility of any evidence offered."); see also *Energy Transfer Partners, L.P.*, 123 FERC ¶ 61,168, at P 17 (2008) ("[T]he ALJ must rule on the admissibility of evidence pursuant to Rule 509 of the Commission's Rules of Practice and Procedure.").

³⁴⁶ 18 C.F.R. § 385.509(a).

³⁴⁷ BP Br. on Exceptions at 58 (citing ID at P 35 n.13).

³⁴⁸ See, e.g., ID at P 117 ("Bergin's testimony is given substantial weight."); *id.* P 127 ("Bergin's testimony is given significant weight."); *id.* P 127 n.109 ("this Bergin testimony is given significant weight."); *id.* P 164 ("Bergin's testimony is given significant weight."); *id.* P 172 n.121 ("Bergin's testimony is given significant weight and BP's arguments are not valid.").

183. We note that BP also claims that Bergin's pursuit of employment with BP impacts his credibility, but the record shows that Bergin testified that he met a BP employee for a lunch during which there was a discussion of possible employment, but that he was not expecting a job offer and that he was not necessarily interested in a job offer either.³⁴⁹ The ALJ heard Bergin's testimony and observed his demeanor and concluded that his credibility was not impeached.³⁵⁰ BP's mischaracterization of Bergin's pursuit of employment with BP does not provide any basis to overturn that conclusion.

184. BP argues that the ID errs in giving Abrantes-Metz significant weight because she had no experience in natural gas markets and had not testified in any case in the United States involving alleged manipulation of natural gas or power markets.³⁵¹ However, the ID directly considered BP's "challenges [to] this witnesses qualifications to testify as an expert in gas trading" and found that she was "more than amply qualified to testify in this proceeding."³⁵² Having determined that Abrantes-Metz's testimony and evidence was admissible under Rule 509, the ALJ then determined that the substance of Abrantes-Metz's testimony and evidence deserved significant weight in light of the record.³⁵³ BP's attacks on Abrantes-Metz's qualifications, which the ID considered sufficient to qualify her testimony and evidence for admission in this proceeding, provide no basis for the Commission to reject the ALJ's determinations regarding the weight and credibility afforded to Abrantes-Metz and her testimony and evidence.

185. BP asserts that the ID errs in failing to consider Evans's experience and then recites his experience and qualifications.³⁵⁴ This does not provide any basis for the Commission to overturn the ID's determination regarding Evans's credibility and the weight given to his testimony and evidence. The ALJ deemed him sufficiently qualified to provide evidence that met the requirements of Rule 509, but after admission, the ALJ determined that his testimony should not be given any weight based on its substance,

³⁴⁹ See Tr. 1545:20-1546:7 (Bergin).

³⁵⁰ ID at P 35 n.13.

³⁵¹ BP Br. on Exceptions at 60.

³⁵² ID at P 42 n.19.

³⁵³ See, e.g., *id.* P 68 ("Dr. Abrantes-Metz's testimony is given considerable weight."); *id.* P 194 ("Dr. Abrantes-Metz testimony is given significant weight.").

³⁵⁴ BP Br. on Exceptions at 56-58.

including the contradictions between his testimony and that of other witnesses, and his failure to disprove Enforcement Staff's allegations in other contexts, neither of which BP disputes in its exceptions. We find no reason to disagree with this determination.

B. Scienter/Intent

1. General

a. Initial Decision

186. The ALJ found in the ID that BP and the Texas Team acted with intent to manipulate the market.³⁵⁵ According to the ID, following the effects of Hurricane Ike, which resulted in significant gains to BP's pre-existing financial positions which settled against Houston Ship Channel *Gas Daily* index prices, BP acted with intent to manipulate the Houston Ship Channel *Gas Daily* index to continue benefitting their financial positions. In reaching that conclusion, the ALJ determined that BP's manipulative intent was manifested on the November 5 recorded call, and inferable from the totality of the evidence, including the actions taken by Comfort and Luskie following that call and the distinctive trading strategy deployed by the Texas Team during the Investigative Period.³⁵⁶

187. The ALJ held that the Texas Team, and in particular Comfort, had the intent to manipulate the Houston Ship Channel *Gas Daily* index.³⁵⁷ The ID established that Comfort was an experienced trader who understood the relationship between the Houston Ship Channel *Gas Daily* index price and the Texas Team's financial positions. Comfort knew he could affect the price at Houston Ship Channel by increasing the transport of natural gas into Houston Ship Channel and with heavy early selling at lower prices.³⁵⁸ The ID also established that Comfort set up the manipulative scheme by substantially increasing the number of financial transactions for October and November 2008 and abandoning his historically economic use of BP's Houston Pipeline System transport capacity.³⁵⁹ According to the ALJ, in coordination with the

³⁵⁵ ID at P 99.

³⁵⁶ *Id.* PP 99, 100.

³⁵⁷ *Id.* P 99.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

Texas Team, Comfort engaged in heavier, earlier selling at Houston Ship Channel supported by larger, long physical natural gas baseload positions at Katy.³⁶⁰ The ID found that the record evidence demonstrates that it was the intention of the Texas Team that their physical trades benefit their financial positions.³⁶¹ The ALJ agreed with Enforcement Staff that BP's scienter may be demonstrated by the conduct of any of the traders, but that establishing Comfort's intent is sufficient.³⁶²

b. BP Exceptions

188. BP challenges all aspects of the ID's findings on scienter. Specifically, BP argues that the ID errs in relying on the November 5 recorded call as evidence of the alleged manipulative strategy that exposed its components and established Comfort's guilt. BP also takes issue with what it asserts are undue inferences from the unrecorded cell phone conversations between Comfort and Luskie on November 5. BP claims that the ID also errs in crediting Abrantes-Metz and Bergin's analysis of the trading data, in failing to consider the numerous flaws in their testimony, and in reiterating their conclusions without criticism or analysis. BP also claims that the ID relies on Bergin's speculative conclusions as to the traders' intentions while disregarding without a reasoned explanation Comfort's and Barnhart's denials of wrongdoing. According to BP, the numerous flaws in Abrantes-Metz's and Bergin's analysis include their conclusion that Comfort's Houston Pipeline System strategy was "consistently losing money." BP asserts that Comfort's use of the Houston Pipeline System transport during the Investigative Period was consistent with the Texas Team's use during the same months in 2006 and 2007. BP argues that the experts should have accounted for the impact on seasonality by looking at comparable months in previous years instead of the Pre-Investigative Period months in 2008. BP also maintains that Bergin's data demonstrates that the team's trades were profitable on 42 percent of the trading days in the Investigative Period, and given the small amounts of their trading losses on the other days, the ID errs in assuming that a profit-maximizing trader would necessarily alter their strategy.³⁶³

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.* P 107.

³⁶³ BP Br. on Exceptions at 27-29.

c. Enforcement Staff Response

189. According to Enforcement Staff, the ID correctly determined, based on the preponderance of the evidence, that the Texas Team traders possessed the requisite intent to suppress the Houston Ship Channel *Gas Daily* index to benefit their financial position. The ID's findings on scienter include a detailed analysis of the record evidence, witness testimony and an assessment of the credibility of the Texas Team traders and expert testimony. Enforcement Staff emphasizes that because scienter is a mental state, "an assessment of the demeanor and credibility of witnesses by the fact finder on this (and any other) element is entitled to substantial deference on review."³⁶⁴

190. Enforcement Staff asserts that the November 5 recorded call indeed confirms the existence of the alleged manipulative strategy, exposed its components and established Comfort's guilt. Further, the inferences that the ID draws from the November 5 unrecorded cell phone conversations were sound and not in error. Enforcement Staff also asserts that BP's contention that the ID errs by adopting a biased comparison period that does not take into account seasonality is dispelled by the testimony of Abrantes-Metz and Bergin. As the experts show, rather than seasonal fluctuations, trading and transport utilization decisions depend on prevailing price spreads.³⁶⁵ Also, BP did not provide evidence for its claim that seasonality is what altered its trading behavior during the Investigative Period.³⁶⁶ Enforcement Staff maintains that BP's contention that the ID errs in adopting Bergin's analysis, which indicates that the Texas Team's trading was profitable on almost 50 percent of flow days, as a basis for finding intent to manipulate misstates the implications of Bergin's testimony in that regard.³⁶⁷ According to Enforcement Staff, the significance of measuring BP's losses was to compare the Texas Team's performance outside the Investigative Period with their performance during the Investigative Period in order to emphasize that the Texas Team stopped losing money on their use of Houston Pipeline System transport after November 5.³⁶⁸ As Enforcement Staff notes, BP has not refuted the evidentiary data confirming that there

³⁶⁴ Enforcement Staff Br. Opposing Exceptions at 32.

³⁶⁵ *Id.* at 29.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 22.

³⁶⁸ *Id.*

was such a change in the Texas Team's profitability, which provides additional evidence of a manipulative scheme.³⁶⁹

d. Commission Determination

191. Based on the weight of the evidence, we affirm the ID's holding that BP possessed the requisite intent to manipulate the market. As stated in Order No. 670, a finding that a party violated the Commission's Anti-Manipulation Rule requires evidence that fraudulent conduct, material misrepresentation or omission was undertaken intentionally, knowingly, or recklessly.³⁷⁰ Because direct proof of scienter is rare, intent must often be based on legitimate inferences from circumstantial evidence,³⁷¹ and as the ID explains, the "inferences are based on the common knowledge of the motives and intentions of men in like circumstances."³⁷² In determining intent, we agree with Enforcement Staff that substantial deference is granted to the ALJ because of the opportunity she has had to assess the credibility of the witnesses in live testimony weighed against the totality of the evidence.³⁷³ We also agree with the ALJ that open market transactions executed with manipulative intent are sufficient to establish scienter.³⁷⁴

192. We determine that the ID's findings on scienter are firmly grounded on the ALJ's careful and comprehensive consideration of the record evidence, witness testimony and the arguments asserted by the parties regarding BP's intent behind the trading strategy implemented during the Investigative Period. We affirm that the evidence incontrovertibly indicates that during the Investigative Period the Texas Team consciously deviated from a profitable physical trading strategy to embark on a demonstrably unprofitable one, which was intended to, and did, manipulate the Houston Ship Channel *Gas Daily* index to the benefit of their financial position. The Texas Team's manipulative intent is verified in the November 5 recorded call and further

³⁶⁹ *Id.* at 23.

³⁷⁰ Order No. 670, FERC Stats. & Regs. ¶ 31,202 at PP 50-53.

³⁷¹ ID at P 98 n.58 (citing *Barclays*, 144 FERC ¶ 61,041 at P 75).

³⁷² *Id.* (citing *Barclays*, 144 FERC ¶ 61,041 at P 75).

³⁷³ Enforcement Staff Br. Opposing Exceptions at 7.

³⁷⁴ ID at P 98 (citing *Barclays*, 144 FERC ¶ 61,041 at PP 50-58).

supported by the ID's reasonable inferences from the November 5 unrecorded calls and subsequent actions taken by Comfort and Luskie.

193. We agree with the ALJ that Comfort departed significantly from his prior trading strategy during the Investigative Period, and that this is strong evidence of intent. The evidence confirms that from the morning of September 18, 2008, Comfort substantially increased his use of BP's Houston Pipeline System transport to move increased supply of natural gas from Katy to Houston Ship Channel. He did so regardless of the economic losses and the price differential between the two locations.³⁷⁵ Comfort's use of Houston Pipeline System transport during the Investigative Period was a marked departure from the typical economic utilization of Houston Pipeline System, which was generally used to arbitrage prices between Katy and Houston Ship Channel.³⁷⁶ The record also confirms that, supported by their larger, long physical natural gas baseload positions at Katy, Comfort and the Texas Team started to execute a strategy of heavier, earlier selling at Houston Ship Channel.³⁷⁷ While implementing their particular physical trading strategy, the Texas Team increased their financial transactions for October and November that benefitted from the Houston Ship Channel-Henry Hub spread.³⁷⁸ The record shows that this pattern of trading behavior continued until the November 5, 2008 recorded phone call when the team's trades came under the scrutiny of BP Compliance.³⁷⁹ We uphold the ID's finding that the Texas Team's actions during the Investigative Period constitute "suspicious timing or repetition of transactions, execution of transactions benefiting derivative positions, and lack of legitimate economic motive or economically irrational conduct," and that pursuant to the Commission's holding in *Barclays*,³⁸⁰ these are evidence of scienter.³⁸¹

³⁷⁵ *Id.* P 99 (citing *Brian Hunter*, 135 FERC ¶ 61,054, at P 88 (2011)).

³⁷⁶ *Id.* PP 99, 109 ("Luskie understood that the Texas [T]eam's use of the Houston Pipeline System transport capacity in this period was different from the typical use of pipeline capacity to arbitrage prices between two locations.").

³⁷⁷ *Id.* P 99.

³⁷⁸ *Id.*

³⁷⁹ Ex. OE-001 at 90:8-11.

³⁸⁰ *Barclays*, 144 FERC ¶ 61,041 at P 62.

³⁸¹ ID at P 113.

194. We further affirm the ID's determination that "to conclude market manipulation in this case, it is sufficient to hold Comfort and Barnhart accountable."³⁸² As the record evidence indicates, Comfort, as the primary trader for the Texas Team had the requisite intent to manipulate the Houston Ship Channel *Gas Daily* index to benefit the team's financial position³⁸³ and Barnhart, as a senior trader, either "knew, gave tacit consent or turned a blind eye to the scheme because she benefitted from it."³⁸⁴ Comfort was responsible for marking the value of the Houston Ship Channel market, estimating the basis and the physical premium and the cash balance of month values for the Texas Team.³⁸⁵ We agree with the ID that Comfort and the Texas Team understood the relationship between the Houston Ship Channel *Gas Daily* index price and their financial positions, and knew that they could affect the price at Houston Ship Channel by using BP's Houston Pipeline System capacity to transport increased supplies from Katy into Houston Ship Channel, coupled with a strategy of heavier, early selling at lower prices at Houston Ship Channel.³⁸⁶ We also agree with the ID that BP has not offered a legitimate and credible rationale for its trading pattern during the Investigative Period.³⁸⁷

2. November 5, 2008 Recorded Phone Call

a. Initial Decision

195. The ALJ found that the November 5 recorded call between Comfort and Luskie confirmed the existence of a manipulative strategy and exposed the broad outlines of its components.³⁸⁸ As the record shows, Luskie first disclosed the Texas Team's manipulative scheme to James Parker, the head of trading for BP Corporation North America, Inc. while at an Assessed Traders Course (ATC), an offsite company trader

³⁸² *Id.* P 109 n. 80.

³⁸³ *Id.* PP 104-106.

³⁸⁴ *Id.* P 107.

³⁸⁵ *Id.* P 107 n.77 (citing Tr. 197:16-23; 198:4-14; 198:20-22 (Lukefahr)).

³⁸⁶ *Id.* P 99.

³⁸⁷ *Id.*

³⁸⁸ *Id.* P 100.

training and assessment course.³⁸⁹ The two had a conversation in Luskie's hotel room during a down period in Luskie's training exercises.³⁹⁰ In an effort to impress Parker,³⁹¹ Luskie told Parker about the Texas Team's physical trading strategy, including the use of Houston Pipeline System transport depending on whether it may or may not help the team's financial position.³⁹² As both Parker and Luskie testified, Parker expressed concern with Luskie's description of the team's trading strategy.³⁹³ He told Luskie that it sounded like market manipulation and suggested he speak to his manager to make sure he was not doing anything wrong.³⁹⁴ Luskie was admittedly "freaked out" by Parker's reaction.³⁹⁵ However, he did not go to talk with his manager Kevin Bass, but instead, turned to Comfort. Knowing that company policy prohibits traders on the trading floor from using their cell phones, Luskie called Comfort on a recorded telephone line.³⁹⁶

196. As the transcript of that call shows, in telling Comfort about his conversation with Parker, Luskie reveals the existence and key elements of the Texas Team's manipulative scheme:

So I was telling him how we, you know, what we are doing at Ship Channel this month . . . what kind of what we do and strategy and what not. And I was telling him about our Houston Pipeline System transport.

³⁸⁹ *Id.* (citing Ex. OE-219 at 52:17-19 (Parker Dep. Tr.)).

³⁹⁰ *Id.* P 108 n.78 (citing Tr. 259:8-260:4 (Luskie)).

³⁹¹ *Id.* P 100 n.64 (citing Tr. 257:15-258:7; 330:6-13 (Luskie); Ex. OE 219 at 18:14-23 (Parker Dep. Tr.)).

³⁹² *Id.* P 100 (citing Ex. OE-162 at 3:5-15); n.64 (citing Ex. OE-016 (recording)); *id.* P 110 (citing Ex. OE-219 at 53:16-18).

³⁹³ *Id.* P 110 (citing Ex. OE-219 at 53:12-13); *Id.* n.82 (citing Ex. OE-219 at 52:23-53:1; 54:15-19; Tr. 263:4-6, 265:12-17 (Luskie)).

³⁹⁴ *Id.* (citing Ex. BP-016 at 7:13-14).

³⁹⁵ *Id.* P 100 & n.64 (citing Ex. BP-016 at 7:8-9; Tr. 266:21-267:1 (Luskie)).

³⁹⁶ *Id.* P 100.

And the way I explained it was not very good. And I came off sounding like we either transport or don't transport solely on the – kind of how we think it's going to affect the index and help our paper position.³⁹⁷

Thus, according to the ALJ, Luskie confirmed (1) the existence of the Houston Ship Channel strategy (“So, I was telling him how we, you know, what we are doing at Ship Channel this month . . . what kind of we do and strategy and what not . . . ”); (2) the use of the Houston Pipeline System transport based on how it affects the index (“And I was telling him about our Houston Pipeline System transport. And the way I explained it was not very good.”); and (3) the existence of a benefiting financial position (“And I came off sounding like we either transport or don't transport solely on the – kind of how we think it's going to affect the index and help our paper position.”).³⁹⁸

197. The ALJ found that the November 5 recorded call is evidence of Comfort's guilt.³⁹⁹ According to her assessment, Comfort was clearly uncomfortable with the conversation. Following the summary of what he told Parker, Luskie asked Comfort, “how would you explain our dealings on Houston Pipeline System and with our paper position that don't make it sound like we're . . . manipulating the index.”⁴⁰⁰ Not only did Comfort fail to provide an economically rational explanation, the ALJ found his angry tone, extended pauses, interruptions and non-responsiveness on the November 5 recorded call all indicative of guilt.⁴⁰¹ As discussed below with respect to the traders' consciousness of guilt, the ID also determined that the November 5 unrecorded calls between Comfort and Luskie were part of an effort to conceal the Texas Team's scheme and thus, further evidence of Comfort's guilt and intent.⁴⁰²

³⁹⁷ *Id.* P 103 (citing Ex. OE 162); *id.* P 101 n.67 (citing Tr. 262:5-15 (Luskie) (Luskie testified that a paper position is the same as a financial position which can consist of financial products and physical products)).

³⁹⁸ *Id.* P 103 (citing Exs. OE-016; OE-162 at 3:5-7; 8-10; 13-15).

³⁹⁹ *Id.* P 104.

⁴⁰⁰ *Id.* P 101 (citing Ex. OE 162 at 3:18-23).

⁴⁰¹ *Id.* P 104.

⁴⁰² *Id.* P 106.

b. BP Exceptions

198. On exceptions, BP contends that the ID's findings on manipulative intent are erroneously based on the November 5 recorded call and on undue inferences drawn from the two November 5 unrecorded telephone calls between Comfort and Luskie.⁴⁰³ Specifically, BP asserts that the November 5 recorded call undermines rather than supports the ID's findings of manipulative intent because Luskie did not reference each element of the trading scheme, such as net selling, hitting bids, and early trading, that the ID concludes was executed by the Texas Team, nor did he provide details of the changes in the team's next-day trading strategy.⁴⁰⁴

199. BP also argues that the ID errs in overlooking the context of the November 5 recorded call.⁴⁰⁵ They maintain that Luskie's statements on the call must be interpreted in light of what the Texas Team observed on October 31, 2008. BP claims that late in the trading session that day the team detected a third party lifting a high volume of offers that increased the *Gas Daily* average price by approximately ten cents.⁴⁰⁶ According to BP, the Texas Team suspected that the trades were an attempt to manipulate the index. BP contends that the basis for Luskie's call to Comfort was to alert Comfort that he had incorrectly explained the Texas Team's trading strategy to Parker in a way that made the Texas Team's strategy sound like the actions taken by that third party on October 31, 2008. Thus, claims BP, the ID's intent finding overlooks Luskie's statement that he had incorrectly described the team's trading strategy to Parker and his acknowledgement that he had misattributed the third party's trades to the Texas Team.⁴⁰⁷

200. BP also claims that the ID errs by ignoring a contemporaneous communication that throws into doubt what Luskie actually told Parker.⁴⁰⁸ On November 7, 2008, Calvin Schlenker, the head of BP's South Gas Trading desk at the time, spoke with

⁴⁰³ BP Br. on Exceptions at 22, 24-25.

⁴⁰⁴ *Id.* at 23-24.

⁴⁰⁵ *Id.* at 22-23.

⁴⁰⁶ *Id.* at 23 n.118 (citing Tr. 365:20-25 (Luskie)).

⁴⁰⁷ *Id.* at 23-24.

⁴⁰⁸ *Id.*

Parker on a recorded call about Parker's conversation with Luskie at ATC.⁴⁰⁹ BP claims that according to the transcript of the call, Parker tells Schlenker that Luskie told him about turning off transport, not using it to benefit a cash-settled financial position.⁴¹⁰ Turning off transport, BP asserts, would be the opposite of what Enforcement Staff contends the manipulative scheme entailed.⁴¹¹

c. Enforcement Staff Response

201. Enforcement Staff contends that BP's exceptions to the ID's determination on scienter spring from their erroneous assertion that the ID's findings were based entirely on the November 5 recorded call. According to Enforcement Staff, although the November 5 recorded call is highly probative of intent, the ID's findings are foremost based on the recognition that Comfort and the Texas Team were sophisticated traders who understood that their financial position at Houston Ship Channel would benefit from a trading strategy characterized by heavy early selling in the wake of Hurricane Ike.⁴¹² The ID's determination is also based on the recognition that the only explanation for Comfort's decision to increase his Katy baseload and financial positions for October and November and utilize Houston Pipeline System transport in an uneconomic manner was to manipulate the *Gas Daily* index for the benefit of his financial position.⁴¹³

202. With respect to the argument that the November 5 recorded call undermines rather than supports a finding of intent because the various elements of Enforcement Staff's alleged trading scheme are not referenced, Enforcement Staff asserts that BP ignores the ID's holding that the call was an "outline of the scheme's key components" and not credited as a full account of the strategy.⁴¹⁴ Likewise, Enforcement Staff asserts that BP's argument that the call is not evidence of the Texas Team's wrongdoing because the traders did not detail the changes to their trading strategy ignores the ID's finding that

⁴⁰⁹ ID at P 111 n.83.

⁴¹⁰ BP Br. on Exceptions at 23 n.123 (citing Ex. BP-029 at 4).

⁴¹¹ *Id.* at 23.

⁴¹² Enforcement Staff Br. Opposing Exceptions at 33.

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 34.

Comfort “shut-down” Luskie’s effort to ask follow-up questions and otherwise continue the conversation.⁴¹⁵

203. Further, Enforcement Staff argues that Luskie’s reference on the November 5 recorded call to a third party’s potentially manipulative conduct and his claim that he inaccurately described the trading strategy to Parker are not relevant.⁴¹⁶ That is because the ID’s findings on scienter “rest on Comfort’s end of the conversation – specifically Comfort’s angry demeanor, multiple interruptions of Luskie’s statements and questions, long pauses, non-responsive statements, and ultimately, his inability to provide a non-manipulative explanation of *his own trading*,”⁴¹⁷ which the ID assessed in the context of Comfort’s “changed trading patterns and his other actions after the recorded call.”⁴¹⁸

204. Enforcement Staff contends that regardless of what Luskie did or did not specifically say on the November 5 recorded call, or to Parker at ATC,⁴¹⁹ the finding that Luskie’s claims of error are not credible is soundly based on the ID’s finding that Luskie was a competent trader who had relevant experience working with the team and was fully capable of understanding, and did understand, the Texas Team strategy.⁴²⁰ With respect to BP’s argument that there is a lack of clarity as to what Luskie actually told Parker at ATC, Enforcement Staff argues that this argument is a “red herring”⁴²¹ and because the November 5 recorded call corroborates the trading data, “exactly what Luskie told Parker is irrelevant to the question of whether BP engaged in market manipulation.”⁴²² On November 3, 2008, a phone call was recorded in which the Texas Team discussed how dependent their monthly profits were on Houston Ship Channel weakening against other

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* at 36.

⁴¹⁷ *Id.* at 35 & n.134.

⁴¹⁸ *Id.* at 36.

⁴¹⁹ *Id.* at 35.

⁴²⁰ *Id.* at 36.

⁴²¹ *Id.* at 35 & n.134.

⁴²² *Id.*

locations. This confirms that Luskie understood the Texas Team's positions and trading activities during the Investigative Period.⁴²³

d. Commission Determination

205. We determine that the ALJ conducted a detailed and methodical review of the November 5 recorded call, including the context and the circumstances surrounding the conversation,⁴²⁴ and affirm the ID's conclusion that the call supports a finding of manipulative intent and guilt on the part of Comfort and the Texas Team. We agree with the ID's finding that on the November 5 recorded call Luskie exposed the existence of a distinct trading strategy deployed by the Texas Team during the Investigative Period and the primary components of that scheme.⁴²⁵ We also agree with the ID that Comfort's reaction to Luskie's statements and his failure to provide a satisfactory answer to Luskie's question regarding the propriety of the Texas Team's trading strategy on the call, or elsewhere in the record, is probative of Comfort's guilt.⁴²⁶

206. We reject BP's argument that the November 5 recorded call undermines rather than supports the ID's findings on intent. Recognizing that Luskie may not have mentioned every element of the manipulative strategy does not refute the ID's finding that Luskie disclosed the existence and broad contours of that strategy. As Enforcement Staff explains, the call offered an outline of the strategy that was sufficient to confirm the trading data analysis conducted by Abrantes-Metz and Bergin. As discussed herein, their testimony shows that Luskie accurately described the existence of a specific strategy involving BP's capacity on Houston Pipeline System and revealed that the Texas Team was executing unprofitable physical trades in order to affect the Houston Ship Channel *Gas Daily* index in a manner that would benefit the team's financial position.

207. We concur with the ID's finding that Comfort's reaction to Luskie's remarks on the November 5 recorded call reveals manipulative intent. Comfort was fully aware that the call was being recorded.⁴²⁷ It is reasonable to infer that because of that Comfort was

⁴²³ ID at P 108 n.79 (citing Exs. OE-021; OE-163 (transcript)); *id.* P 121 (citing Exs. OE-021 (recorded call); OE-163 (transcript); Tr. 670:21-672:14 (Luskie)).

⁴²⁴ *Id.* P 99.

⁴²⁵ *Id.* P 103 (citing Exs. OE-016; OE-162 at 3:3:5-7; 8:10; 3:13-15).

⁴²⁶ *Id.* PP 99, 104, 105.

⁴²⁷ *Id.* P 102 n.69.

anxious. It explains his long awkward pauses and repeated attempts to interrupt Luskie's line of inquiry.⁴²⁸ We agree with the ID that Comfort seems in a hurry to end the call, which is confirmed by Comfort's testimony that he was "most certainly not comfortable with Clayton's call . . . at that point in time," and that he "wanted that to be off a recorded line."⁴²⁹ As the transcript shows, Comfort tries to interrupt Luskie while he is in the process of asking Comfort for a rational explanation of the Texas Team's trading strategy that does not "sound like" manipulation.⁴³⁰ Further, we agree with the ID that Comfort's failure to respond credibly and cogently to Luskie's question on the call or anywhere in the record evidence is probative evidence of Comfort's intent and guilt.⁴³¹

208. We reject BP's argument that the ALJ overlooked the context of the November 5 recorded call.⁴³² The ID took the events of October 31 into consideration but concluded that "Luskie's contention that the tape is a mischaracterization is not credible"⁴³³ precisely in part because Luskie had participated in the discussion with Comfort and Barnhart regarding the third party's potentially manipulative trades.⁴³⁴ As the ALJ states, the Texas Team recognized that the third party was engaged in possible manipulation of the physical market. They speculated that the party may have an opposite financial position that benefitted from an increase in the *Gas Daily* index.⁴³⁵ Thus, it is reasonable for the ALJ to infer from his participation in that conversation that Luskie could recognize the components of a physical-for-financial market manipulation scheme. It is not credible that Luskie would have been incapable of accurately articulating the Texas Team's strategy for Parker, or that he somehow misattributed to the Texas Team the manipulative trades of that third party.

⁴²⁸ *Id.* P 102; Ex. OE-162.

⁴²⁹ ID at P 102 n.69 (citing Tr. 283:18-284:7; 1206:1-9 (Comfort)).

⁴³⁰ *Id.* P 104; Ex. OE-162 (transcript).

⁴³¹ ID at P 102 & n.68.

⁴³² BP Br. on Exceptions at 22-23.

⁴³³ ID at P 108.

⁴³⁴ *Id.* (citing Tr. 368:2-371:13 (Luskie)).

⁴³⁵ *Id.*

209. Further, it is not clear from the November 5 recorded call or the record evidence whether Luskie actually believed he had incorrectly described the Texas Team's trading to Parker or was merely trying to provide cover for himself on a call he knew was being recorded.⁴³⁶ Regardless, Comfort's reaction to Luskie's statements and Comfort's failure to provide a satisfactory answer to Luskie's question regarding the propriety of the Texas Team's trading strategy on the call indicate manipulative intent. Luskie was an intelligent and competent trader and had relevant experience working with the Texas Team.⁴³⁷ Luskie also knew that the use of Houston Pipeline System capacity during the relevant period was a departure from the typical use to arbitrage prices between Katy and Houston Ship Channel.⁴³⁸ We also agree with the ALJ that based on the November 3, 2008 recorded phone call Luskie understood the Texas Team's positions and trading activities during the Investigative Period.⁴³⁹

210. The record evidence shows that Luskie not only understood the components and purpose of the Texas Team's trading strategy, but actually helped execute it. In August 2008 and again for three days in October, Luskie traded the team's Houston Ship Channel-Katy position when Comfort was out of the office.⁴⁴⁰ In August, before the Investigative Period, Luskie generated positive cash and transport P&L. In October, however, Luskie's trades were consistent with the Texas Team's manipulative trading behavior; he lost money on his transport from Katy to Houston Ship Channel and sold early at Houston Ship Channel.⁴⁴¹ Luskie told Parker he liked being allowed to trade Comfort's Houston Ship Channel and Katy positions when Comfort was out of the office.⁴⁴² We do not find it credible that Luskie's consistency with the Texas Team's

⁴³⁶ *Id.* P 100 n.65 (citing Tr. 287:4-15 (Luskie)).

⁴³⁷ *Id.* P 108.

⁴³⁸ *Id.* P 109.

⁴³⁹ *Id.* P 108 n.79 (citing Exs. OE-021; OE-163 (transcript)); *id.* at P 121 (citing Exs. OE-021 (recorded call); OE-163 (transcript); Tr. 670:21-672:14 (Luskie)).

⁴⁴⁰ *Id.* P 108 (citing Tr. 450:16-25; 488:18-22 (Luskie)).

⁴⁴¹ *Id.* P 109 (citing Ex. OE-239 (Luskie's Oct. 16, 2008 next-day fixed prices trades on ICE); Ex. OE-236 (Luskie's Oct. 17, 2008 next-day fixed price trades on ICE); Tr. 566:22-567:12 (Luskie)).

⁴⁴² *Id.* at P 100 n.64 (citing Tr. 260:5-23 (Luskie)).

trading strategy before and during the Investigative Period was a mere coincidence and thus, agree with the ID's determination that Luskie's trades on behalf of Comfort corroborate that Luskie understood the components and objectives of the manipulative scheme, and that having helped execute the trades in October, he was a party to the manipulation.⁴⁴³

211. We uphold the ID's conclusion that BP's argument that Luskie did not accurately describe the alleged scheme to Parker is contradicted by the evidence. Parker stated in his deposition that the "gist" of what Luskie said to him at ATC was that he "could or would make a decision not to flow his transport if it could benefit his cash position."⁴⁴⁴ Furthermore, Parker testified that he was concerned with what Luskie told him about the Texas Team's trading and transport activities because it sounded as if they were trading their physical positions for the benefit of their financial positions, which could be market manipulation.⁴⁴⁵ Although what Luskie specifically told Parker may be disputed, it alarmed him enough to advise Luskie to speak to his manager to make sure he was not doing anything wrong.⁴⁴⁶ As Parker stated, he was "really surprised" at what Luskie told him and that he "thought that either he was just trying to show how clever he could be somehow in a naïve, misguided way or that he – or that there was actually a problem."⁴⁴⁷ We also agree with Enforcement Staff that "exactly what Luskie told Parker is irrelevant to the question of whether BP engaged in market manipulation."⁴⁴⁸

212. We fully support the ID's decision to grant substantial weight to Bergin's testimony⁴⁴⁹ and thus, reject BP's argument that the ID erred in its intent findings because it relied on Enforcement Staff's "flawed" trading analysis.⁴⁵⁰ Based on their analysis,

⁴⁴³ *Id.* P 109.

⁴⁴⁴ *Id.* P 111 n.83 (citing Ex-OE-219 at 53:16-22).

⁴⁴⁵ *Id.* P 110 (citing Ex. OE-219 at 53:12-13 (Parker Dep. Tr.)).

⁴⁴⁶ *Id.* (citing Ex. BP-016 at 7:13-14 (Luskie)).

⁴⁴⁷ *Id.* P 110 n.82 (citing Ex. OE-219 at 54:15-19; Tr. 263:4-6, 265:12-17 (Luskie)).

⁴⁴⁸ Enforcement Staff Br. Opposing Exceptions at 35 n.134.

⁴⁴⁹ ID at P 117.

⁴⁵⁰ BP Br. on Exceptions at 24.

Luskie accurately provided the broad outlines of the Texas Team's manipulative scheme during the Investigative Period on the November 5 recorded call.⁴⁵¹ We agree with Bergin that the recorded call in turn confirms that the team's trading behavior during the Investigative Period was intentional.⁴⁵²

213. As discussed above in section I.D, following Hurricane Ike, which made landfall on September 13, 2008, prices at Houston Ship Channel declined sharply relative to Henry Hub.⁴⁵³ The decline made the Texas Team's pre-existing Houston Ship Channel-Henry Hub spread positions very valuable.⁴⁵⁴ Starting on September 18, 2008, the evidence shows that there was a decided shift in the Texas Team's physical trading pattern.⁴⁵⁵ In 2008 before the Investigative Period, the Texas Team was generally a net buyer at Houston Ship Channel and a net seller at Katy.⁴⁵⁶ It utilized BP's Houston Pipeline System transport capacity to arbitrage prices between the two locations.⁴⁵⁷ During the Investigative Period, however, the team became a net buyer at Katy, increased the use of BP's Houston Pipeline System transport capacity to deliver gas from Katy for sale at Houston Ship Channel, and started selling heavy and early next-day gas at Houston Ship Channel.⁴⁵⁸ We agree with the ID that the preponderance of the evidence confirms that the intended purpose of the team's new physical trading behavior was to suppress the Houston Ship Channel *Gas Daily* index in order to benefit the Texas Team's Houston Ship Channel-Henry Hub spread positions.⁴⁵⁹

⁴⁵¹ ID at PP 114, 118.

⁴⁵² Ex. OE-001 at 101:7-14.

⁴⁵³ ID at P 115 (citing Ex. OE-001 at 68:13-19).

⁴⁵⁴ *Id.* P 115 n.88.

⁴⁵⁵ *Id.* P 115; Ex. OE-001 at 104:13-15.

⁴⁵⁶ Ex. OE-001 at 53.

⁴⁵⁷ *Id.* at 88; 115 n.15.

⁴⁵⁸ ID at P 99.

⁴⁵⁹ *Id.*

214. We also support the ID's determination, based on Abrantes-Metz's and Bergin's testimony, that the Texas Team possessed the requisite intent to manipulate.⁴⁶⁰ The team knew that their Houston Ship Channel-Henry Hub spread positions had become very profitable as a result of Hurricane Ike.⁴⁶¹ At the end of trading on September 12 for flow days September 13 to 15, the Texas Team actualized a profit of \$812,040, making the total mark-to-market value of the spread to \$1,193,050.⁴⁶² By the end of trading day on September 16, the total mark-to-market value of the position had increased to \$3,499,425.⁴⁶³

215. Despite the jump in the value of their spread positions, the Texas Team realized only \$1,618,585 of the gains that followed Hurricane Ike.⁴⁶⁴ Barnhart testified that on September 17, 2008, she received an offer to close out 4 contracts of their 17.5 contracts per day spread position in a balance of month trade, but closed out only 1 contract.⁴⁶⁵ As Barnhart admitted, she lost the opportunity to immediately lock in a substantial portion of the value realized after Hurricane Ike.⁴⁶⁶ As the ID states, the ability of the Texas Team to realize the value on the remaining balance of their spread positions would be determined by the Houston Ship Channel-Henry Hub spread for the balance of September.⁴⁶⁷ Bergin determined that in late-September, for each cent that the Texas Team could slow the narrowing of the spread, their spread value would

⁴⁶⁰ *Id.* P 114.

⁴⁶¹ Ex. OE-001 at 69:3-4; 70:3-8; ID at P 115 n.88 (citing Tr. 682:5-684:21 (Luskie); Ex. OE-161 at 47:13-48:3 (Bergin Reb. Test.); Ex. OE-021 (Nov. 3 call); Ex. OE-163 (transcript); Tr. 671:24-672:20 (Luskie)).

⁴⁶² Ex. OE-001 at 69:5-8.

⁴⁶³ *Id.* at 69:9-10.

⁴⁶⁴ ID at P 115 n.88 (citing Ex. OE-001 at 69:1-14).

⁴⁶⁵ Ex. OE-001 at 70:20-71:5.

⁴⁶⁶ ID at P 115 (citing Tr. 1034:25-1035:7 (Barnhart); Ex. OE-001 at 70:9-71:5 (description of lost opportunity)).

⁴⁶⁷ ID at P 115 n.91 (citing Ex. OE-001 at 69:1-16; 71:12-16).

retain \$19,800.⁴⁶⁸ The Texas Team had an incentive to manipulate the Houston Ship Channel *Gas Daily* index.

216. As Bergin testified, the Texas Team's physical-for-financial manipulation scheme was plausible because even with the new strategy of selling heavy and early at Houston Ship Channel, the Texas Team expected only small losses on physical fixed-price trading.⁴⁶⁹ Before the Investigative Period in 2008, the team lost no more than \$10,000 on their fixed-priced trades, with a largest one day loss of \$12,864.⁴⁷⁰ The likelihood of losing \$19,800 per day on their physical trade was low.⁴⁷¹ As Bergin stated, "[i]n evaluating the Texas Team traders' intent, it makes more sense to think in terms of the probabilities of an upside versus a downside result."⁴⁷² As it turned out, the team made more than \$1.5 million in profit from September 18 to the end of the month due to the continuing wide spread between Houston Ship Channel and Henry Hub, but lost only about \$34,000 on their next-day physical trading.⁴⁷³

217. According to Bergin, Luskie's references on the November 5 recorded call to the components of the Texas Team's trading strategy corroborate that the team's trading behavior during the Investigative Period was intentional.⁴⁷⁴ In addition, Bergin's conclusions as to intent are squarely rooted in rational inferences derived from his and Abrantes-Metz's analysis of the Texas Team's trading data. First, Bergin demonstrated that the Texas Team's physical trading in the Investigative Period shifted to being consistently unprofitable.⁴⁷⁵ During the January-August 2008 period before the Investigative Period, the team had consistent net profits on its physical gas trading,

⁴⁶⁸ *Id.* P 116 (citing Ex. OE-001 at 110:13-16).

⁴⁶⁹ *Id.* (citing Ex. OE-001 at 110:4-12).

⁴⁷⁰ *Id.* P 117 n.92 (citing Ex. OE-001 at 103, Figure 12; Tr. 677:19-25 (Luskie)).

⁴⁷¹ *Id.* (citing Tr. 677:19-25 (Luskie); Ex. OE-001 at 110-111; Tr. 210:7-21 (Lukefahr)).

⁴⁷² *Id.* P 116 (citing Ex. OE-001 at 110:4-22).

⁴⁷³ *Id.* P 118 (citing Ex. OE-001 at 72:14-18; 78:14-20).

⁴⁷⁴ Ex. OE-001 at 101:7-14; 102:8-15.

⁴⁷⁵ *Id.* at 101:20-102:8.

averaging \$75,475 per month.⁴⁷⁶ By contrast, during the Investigative Period up to the November 5 phone call, the Texas Team had net losses on its physical gas trading. These net losses were \$34,372 during September 19-30,⁴⁷⁷ \$51,567 during October,⁴⁷⁸ and \$15,484 during November 1-5.⁴⁷⁹ Moreover, the team lost money on their trades on 67 percent of the flow days during the Investigative Period whereas prior to the Investigative Period, they lost money on only 23 percent of the flow days.⁴⁸⁰ As discussed in section IV.A above addressing the ID's findings regarding manipulative conduct, Bergin's analysis shows that on days when there were losses there was also a change in the scale of those losses. Before the Investigative Period, the team's average one-day losses were \$2,878, with the largest one-day loss of \$12,864. During the Investigative Period, the daily loss averaged \$6,262 and the largest single day loss was \$53,540.⁴⁸¹ As Bergin explained, the losses the Texas Team sustained during the Investigative Period are all the more suspect given that a next-day gas trader with a baseload position generally has the option of limiting their losses by selling more of their beginning-of-day daily gas at fixed-price, which the Texas Team apparently did not do.⁴⁸² Also suspect is the fact that the Texas Team continued to trade profitably at Katy during the same period.⁴⁸³ Based on his analysis, Bergin concluded that the Texas Team's shift to trading losses was intentional.

218. Second, Bergin establishes intent by connecting the unprofitability of the Texas Team's trading behavior during the Investigative Period to the changes in the team's trading strategy in the Investigative Period that were likely to increase the team's

⁴⁷⁶ *Id.* at 102:19-20.

⁴⁷⁷ *Id.* at 61:18. Excluding the anomalous trading day of September 19, BP had a net gain of \$19,168 during this period.

⁴⁷⁸ *Id.* at 86:6.

⁴⁷⁹ *Id.* at 90:5.

⁴⁸⁰ *Id.* at 103:1-7.

⁴⁸¹ *Id.* at 103:8-15.

⁴⁸² *Id.* at 104:1-4.

⁴⁸³ *Id.* at 104:4-6.

impact on the Houston Ship Channel *Gas Daily* index.⁴⁸⁴ As Bergin stated, he and Abrantes-Metz observed a material change in the Texas Team's physical trading and utilization of the Houston Pipeline System transport from September 18, 2008.⁴⁸⁵ The team augmented their net long baseload position at Katy, increased their use of the Houston Pipeline System transport for delivery of Katy gas to Houston Ship Channel, and increased their next-day fixed-priced sales at Houston Ship Channel.⁴⁸⁶ According to Bergin, Abrantes-Metz also showed that the team shifted to trading heavily and early at Houston Ship Channel and to more uneconomic trading.⁴⁸⁷ Bergin concluded that "the Texas Team traders must have known that these changed trading patterns were likely to suppress prices at Houston Ship Channel and impact the Houston Ship Channel *Gas Daily* index."⁴⁸⁸ We agree.

219. As Bergin explained, the inference of intent is justified because, according to basic economic principles known to all traders, increasing supply, all other conditions being equal, will depress prices.⁴⁸⁹ The evidence indicates that, using supply the Texas Team transported from Katy to Houston Ship Channel, they were selling approximately three and a half times more gas at Houston Ship Channel during the Investigative Period than earlier in 2008.⁴⁹⁰ We agree with Bergin that the team must have known that they were adding supply to the Houston Ship Channel market,⁴⁹¹ with an attendant effect on prices. Also, as Bergin notes, Abrantes-Metz testified that during the Investigative Period the Texas Team traded larger volumes during the earliest minutes of the trading session at Houston Ship Channel when the bid-ask spread was generally the widest and the price impact of trades would be greater than trades later in the session.⁴⁹² According

⁴⁸⁴ *Id.* at 102:5-7.

⁴⁸⁵ *Id.* at 104:13-15.

⁴⁸⁶ *Id.* at 104:15-17.

⁴⁸⁷ *Id.* at 104:19-22.

⁴⁸⁸ *Id.* at 105:4-5.

⁴⁸⁹ *Id.* at 105: 6-8.

⁴⁹⁰ *Id.* at 105:8-10.

⁴⁹¹ *Id.* at 105:10-11.

⁴⁹² *Id.* at 105:12-106:4.

to Abrantes-Metz, the Texas Team was almost half the sell side of the market in the first few minutes of trading at Houston Ship Channel.⁴⁹³ We agree with Bergin that “it is reasonable to infer that Comfort, as an experienced trader, would have been aware that during early trading the bid-ask spread is generally wider than the rest of the trading day.”⁴⁹⁴ Based on that awareness, it is also reasonable to infer that Comfort traded heavily in the earliest minutes of the trading session with the intent of having the greatest possible impact on prices. Bergin’s inference that the Texas Team knew that their new trading behavior would suppress prices is further warranted because, as he testified, during the Investigative Period the team’s next-day fixed-price trading at Houston Ship Channel was executed almost entirely on ICE.⁴⁹⁵ This is significant because trading on ICE provides greater transparency to the market of the Texas Team’s fixed-price selling at Houston Ship Channel and unlike off-ICE trades, the prices and quantities of transactions are instantly disseminated in the market.⁴⁹⁶ As Bergin stated, natural gas traders pay attention to aggressive market behavior and certain selling patterns such as those deployed by the Texas Team at Houston Ship Channel. Such behavior may guide traders’ decisions or at least influence them to reassess their views.⁴⁹⁷

220. Bergin’s conclusion as to intent is further based on evidence of coordinated decisions in the physical and financial market that the Texas Team took in order to continue their manipulative scheme from September into November. Bergin stated that the team’s decision to increase their exposure to the Houston Ship Channel *Gas Daily* index in late September through October, which were the most unprofitable physical trading he observed at Houston Ship Channel, is a strong indication that the Texas Team believed that they were succeeding in suppressing Houston Ship Channel prices to the benefit of their financial position.⁴⁹⁸ As the ID stated, Comfort must have been aware of the losses the Texas Team sustained since the negative physical P&L was calculated daily and shown on the Katy Ship Sheets, which Comfort used during each cash

⁴⁹³ *Id.* at 106:4-5.

⁴⁹⁴ *Id.* at 106:5-8.

⁴⁹⁵ *Id.* at 106:21-107:1.

⁴⁹⁶ *Id.* at 107:1-5.

⁴⁹⁷ *Id.* at 106:9-20.

⁴⁹⁸ *Id.* at 107:9-108:15.

session.⁴⁹⁹ We agree with Bergin's testimony that there had to be a "conscious reason"⁵⁰⁰ to continue implementing an unprofitable trading strategy and "that the most likely explanation is found in the Texas Team's decision to increase their exposure to the Houston Ship Channel *Gas Daily* index in October, and again for November."⁵⁰¹

221. As Bergin testified, at the time of Hurricane Ike and throughout the Investigative Period, the Texas Team held a short Houston Ship Channel to Henry Hub spread position tied to the Houston Ship Channel *Gas Daily* index.⁵⁰² That index was directly affected by the team's next-day fixed-price trades at Houston Ship Channel.⁵⁰³ Bergin's analysis shows that primarily in September bidweek, the Texas Team increased their Katy and Houston Ship Channel net long position for October⁵⁰⁴ and increased their Houston Ship Channel-Henry Hub swing spread position of approximately 3 contracts per day to 7.8 contracts per day by October 3.⁵⁰⁵ With the spread positions in place, the Texas Team

⁴⁹⁹ ID at P 119 (citing Tr. 1285:3-7 (Comfort); Ex. OE-211 at 29:7-14 (Abrantes-Metz); Tr. 1419:8-15 (Comfort); Ex. OE-013 (Katy Ship Sheets); Ex. OE-014 at 6, 12-13 (explanation of Katy Ship Sheets); OE-001 at 49:15-50:4, 59:10-60:2; 158:4-23 (Bergin)).

⁵⁰⁰ Ex. OE-001 at 108:1.

⁵⁰¹ *Id.* at 108:2-4.

⁵⁰² *Id.* at 108:4-7.

⁵⁰³ *Id.* at 108:7-10.

⁵⁰⁴ *Id.* at 83:6-84:6. Bidweek consists of the last five trading days of the month when fixed-price and physical basis natural gas trades for next-month delivery are most often executed, and those transactions made during bidweek are included in the volume-weighted average price to determine the next-month physical index for a given trading location. The resulting index prices are often used as the benchmark price in next-month natural gas transactions. *See, e.g., id.* at 24:6-9.

⁵⁰⁵ *Id.* at 81:11-82:4. As Bergin testified, a "swing swap is a derivative product in which the buyer 'pays' a fixed, mutually agreed-upon price to the seller, and 'receives' the Platts *Gas Daily* index price for a particular location (such as [Houston Ship Channel]) each day. Conversely, the seller of the swing swap 'receives' a fixed price and 'pays' the *Gas Daily* index price for the location each day. The buyer of a swing swap will profit if the *Gas Daily* prices increase relative to the fixed price, while the seller will profit if the relevant *Gas Daily* prices decrease relative to the fixed price. Swing swaps

(continued...)

became a net seller of next-day fixed-price gas at Houston Ship Channel on all but one day in October.⁵⁰⁶ As was the case in September, the sales at Houston Ship Channel were driven by substantial sales of Katy gas very early in the trading window⁵⁰⁷ enabled by the increased use of Houston Pipeline System transport.⁵⁰⁸ The Texas Team continued their physical trading pattern throughout October despite sustaining losses on 74 percent of the days in October.⁵⁰⁹ Their net physical P&L loss was \$59,012 for the month.⁵¹⁰

222. Despite the negative P&L that the Texas Team traders saw on their Houston Ship Channel physical trading and transport during October, the Texas Team built a larger net long Katy baseload position for November⁵¹¹ and a coordinated financial short position at Houston Ship Channel.⁵¹² While the Texas Team's September and October baseload positions were partially built earlier in 2008, they built their November positions, from less than three to over twenty contracts per day, almost entirely during October bidweek even after having sustained three weeks of a largely negative October P&L.⁵¹³ The team continued their late September and October trading pattern of heavy and early selling and suffered a loss of \$15,484 on their physical trading in November until the November 5 recorded phone call.⁵¹⁴

are typically traded in lieu of index swaps once the IFERC index price for a location begins to settle during bidweek." *Id.* at 28:17-29:2.

⁵⁰⁶ *Id.* at 85:4-5.

⁵⁰⁷ *Id.* at 85:8-86:2.

⁵⁰⁸ *Id.* at 85:5-7.

⁵⁰⁹ *Id.* at 86:10-17.

⁵¹⁰ *Id.* at 86:4-9.

⁵¹¹ *Id.* at 88:7-8.

⁵¹² *Id.* at 92:11-93:9.

⁵¹³ *Id.* at 89:3-9.

⁵¹⁴ *Id.* at 90:5.

223. We agree with Bergin that barring some clear new market information, a profit-maximizing trader would not have continued a strategy that was clearly not profitable.⁵¹⁵ We agree with the ID that the traders were seemingly indifferent to their next-day physical P&L on their Houston Ship Channel trading.⁵¹⁶ As the ID noted, on the November 3 recorded call, “no mention was made of the physical cash P&L at Houston Ship Channel on that day, even though cash had been strong and the Texas Team had been a large fixed-price seller.”⁵¹⁷ Also, during the first eight and half months of 2008, the Texas Team turned off their transportation on 183 of 261 flows days, or 70 percent of the time.⁵¹⁸ Evidently both Comfort and Luskie understood the concept of unwinding transport and yet chose not to do so during the Investigative Period.⁵¹⁹ If the Texas Team wanted to optimize their transportation they would have attempted to unwind as much of their transportation as possible when prices at Katy were higher than Houston Ship Channel and sell Katy gas and buy Houston Ship Channel gas, as they did before the Investigative Period.⁵²⁰

224. The manipulative intent of the Texas Team is also clear from its trading behavior considered in light of its P&L. Before the Investigative Period, Comfort was able to consistently generate profits on both his next day physical trading at Houston Ship Channel and his use of Houston Pipeline System transport capacity.⁵²¹ During the Investigative Period, Comfort and the Texas Team abandoned their profitable physical trading strategy for one that was unprofitable. By contrast, the evidence shows that once the team’s trading came under the scrutiny of BP Compliance they once again started to generate profits from physical trading. In fact, the Texas Team’s physical trading

⁵¹⁵ *Id.* at 88:11-14.

⁵¹⁶ ID at P 123 (citing Tr. 678:15-18 (Luskie)).

⁵¹⁷ *Id.* (citing Tr. 675:4-18 (Luskie); Ex. OE-021 (November 3 call); OE-163 (transcript)).

⁵¹⁸ *Id.* P 127 (citing Ex. OE-161 at 77:7-78:2, Figure 2).

⁵¹⁹ *Id.* (citing Tr. 384:8-385:11 (Luskie); Ex. OE-243; Tr. 702:2-23 (Comfort)).

⁵²⁰ *Id.* (citing Ex. OE-161 at 77:7-78:2, Figure 2).

⁵²¹ *Id.* P 120 (citing Ex. OE-001 at 102:16-22).

remained profitable for the remainder of November, generating a profit of \$54,794 on their net physical P&L and an overall net profit of \$39,309.⁵²²

225. As discussed above, the Commission in *Barclays* found that the requisite scienter for a finding of manipulation can be supported by “suspicious timing or repetition of transactions, execution of transactions benefiting derivative positions, and lack of legitimate economic motive or economically irrational conduct.”⁵²³ The record evidence shows that these elements were part of the Texas Team’s trading strategy during the Investigative Period. We agree with the ID’s conclusion that the Texas Team’s monthly positions and trading activity were intentional acts to further their manipulative scheme.⁵²⁴ We support Abrantes-Metz’s conclusion as to “the essential statistical impossibility” that the confluence of the factors observed is due to anything else but manipulation.⁵²⁵

226. In light of Bergin’s testimony and the weight of the record evidence, we support the ID’s finding that the November 5 recorded call confirms that Luskie accurately described the Texas Team’s manipulative strategy and that Comfort had the intent to manipulate the Houston Ship Channel *Gas Daily* index in order to benefit the Texas Team’s financial positions.⁵²⁶ Enforcement Staff is correct that the ID’s inference of BP’s intent from the November 5 recorded call is not based on what Luskie specifically said or did not say to Comfort, but rests on Comfort’s “end of the conversation.”⁵²⁷ We agree that Comfort’s reaction to Luskie’s call on November 5 shows guilt.⁵²⁸ After Luskie reiterated what he told Parker, Luskie asked Comfort for a non-manipulative explanation for the Texas Team’s trades.⁵²⁹ As the ID noted, on Comfort’s side there are

⁵²² Ex. OE-001 at 90:8-11.

⁵²³ *Barclays*, 144 FERC ¶ 61,041 at P 62.

⁵²⁴ ID at P 123.

⁵²⁵ *Id.* P 126 (citing Tr. 1915:13-24; 1911:3-5 (Abrantes-Metz); Ex. OE-211 at 20, 22-25 (Tables 1.A, 1.B, 2 and 3)).

⁵²⁶ *Id.* P 99.

⁵²⁷ Enforcement Staff Br. Opposing Exceptions at 35 (citing ID at P 104).

⁵²⁸ ID at P 99.

⁵²⁹ Ex. OE-162.

long awkward pauses between statements and interruptions until he hesitatingly responds with respect to Luskie's question that most of the time "we ship economically."⁵³⁰ As Luskie testified, he terminated the call because he realized that Comfort did not want to have the conversation on a recorded line.⁵³¹ Comfort confirmed that he was indeed uncomfortable and wanted to terminate the call.⁵³² It was reasonable for the ALJ to infer that Comfort was trying to stop Luskie from revealing any further incriminating information on a call that he knew was being recorded.⁵³³

227. Nothing in the record indicates that Comfort ever provided a rational explanation for his trades during the Investigative Period.⁵³⁴ At the hearing, Luskie testified that Comfort never answered his question as to why what the Texas Team was doing was not manipulation. He admitted that Comfort, who he described as never lost for words when asked about what he was doing as a trader or what the Texas Team was doing, "was to some extent incoherent" in trying to explain the team's trading strategy during the Investigative Period.⁵³⁵ Two follow-up unrecorded calls between Comfort and Luskie also took place on November 5. Both Luskie and Comfort testified that Comfort did not provide Luskie with an economic explanation of the Texas Team's trades on either of the calls. In fact, neither Luskie nor Comfort can recall any discussion in which Comfort substantively explained why the Texas Team's trades during the Investigative Period were not manipulative.⁵³⁶ We agree with the ID that Comfort's demeanor and his failure to provide a cogent explanation for the Texas Team's trades on the call or elsewhere in

⁵³⁰ *Id.*

⁵³¹ ID at P 102 n.69 (citing Tr. 283:18-284:7 (Luskie)).

⁵³² *Id.* (citing Tr. 1206:1-9 (Comfort)).

⁵³³ *Id.* P 104.

⁵³⁴ *Id.* P 102 & n.68 (citing Ex. OE-162 (transcript); Tr. 280:25-281:17 (Luskie)).

⁵³⁵ *Id.* (citing Ex. OE-162 (transcript); Tr. 280:25-281:17 (Luskie)).

⁵³⁶ *Id.* P 102.

the record are highly probative of guilt.⁵³⁷ For the reasons stated above, we concur with the ID that the November 5 recorded conversation is an admission against interest.⁵³⁸

3. Motive

a. Initial Decision

228. The ID found that while proof of motive is not required for scienter, nevertheless there is evidence of motive in this case.⁵³⁹ The ID found that Comfort had a profit motive to manipulate the physical market based on testimony that because “[f]inancial traders generally receive a higher percentage of the value they generate” than physical traders, Comfort—who executed both financial and physical trades—“had an incentive to make more money on his financial than physical book.”⁵⁴⁰ The ID also found that the fact that Comfort was concerned that Barnhart received a larger bonus than he did, and that he had a desire for greater compensation, showed that he had motive to find a way to increase his compensation. Further, the ID found the fact that Comfort continued to work at BP contradicted his assertions that he was wealthy enough to retire and thus he had no motive to manipulate.⁵⁴¹

b. BP Exceptions

229. In its brief, BP argues that the evidence demonstrates that Comfort did not possess a motive to manipulate.⁵⁴² BP claims that after it demonstrated the falsity of claims that Comfort had motive because he had left his previous position and feared for his job, Enforcement Staff manufactured a new motive that Comfort wanted to stay in his job to

⁵³⁷ *Id.* P 102 & n.68 (citing Ex. OE-162 (transcript); Tr. 280:25-281:17 (Luskie)).

⁵³⁸ *Id.* P 104 n.104.

⁵³⁹ *Id.* P 105 & n.73.

⁵⁴⁰ *Id.* P 105 n.73 & P 255 (quoting Ex. OE-028 at 3). *See also* Tr. 663:24-664:6 (Luskie) (Luskie testifying that speculative traders were paid much more than asset optimization traders).

⁵⁴¹ *Id.* P 105 n.73.

⁵⁴² BP Br. on Exceptions at 26.

earn a bonus, and that there is no reasoned basis for that position. BP contends generally that the ID ignores substantial evidence showing an absence of motive.

230. BP argues that the ID's determination that motive to manipulate exists based on the industry standard compensation structure prejudices intent because if it were true all traders would have incentive to manipulate to achieve a higher bonus. BP also argues that the evidence indicates that Comfort was highly regarded in the industry and thus had no motive to tarnish this reputation through market manipulation. BP points out that Comfort's net worth in 2007 was substantial and that he testified that the only incentive he had to remain employed at BP was to trigger retiree medical benefits, which vested prior to the alleged scheme. Thus, BP argues, the fact he continued to work does not demonstrate intent to manipulate. BP also contends there is no evidence to support the presumption that Comfort had a motive to manipulate the market because he did not retire as soon as he was financially able to do so.⁵⁴³

c. Enforcement Staff Response

231. Enforcement Staff argues that the ID correctly found that the evidence demonstrates Comfort had a motive to manipulate. Enforcement Staff states that the conclusion is supported by evidence showing that: (1) Comfort wanted "greater compensation" in addition to bonus; (2) Comfort believed his bonus was directly tied to the P&L that he and his team generated; and (3) Comfort cared about his status at BP, and the fact that his position on the Texas Team as asset optimizer was a regression in his career.⁵⁴⁴ Thus, the ID's finding of manipulation was grounded not only on a generic conclusion that his compensation was tied to his performance but was based on substantial record evidence.

232. Enforcement Staff also claims that Comfort's live testimony and inconsistencies between it and the record, further indicate manipulative motive. For instance, Comfort consistently insisted he was a "value trader" even after he had been demoted to physical trader. These assertions are contrary to record BP document evidence.⁵⁴⁵ Enforcement Staff points out that even though Comfort spent most of his career as a physical trader, only moved to being a financial trader at BP Cali (California) desk for a short period of time, and was placed on the Texas Team as an asset trader after losing his financial trader

⁵⁴³ *Id.* at 27.

⁵⁴⁴ Enforcement Staff Br. Opposing Exceptions at 40-43.

⁵⁴⁵ *Id.* at 41.

job, Comfort still refused to recognize his status and insisted he remained a “value trader.”⁵⁴⁶

233. Enforcement Staff argues that the ID was justified in finding that Comfort’s desire for greater compensation is motive for manipulation. Enforcement Staff notes that Comfort claimed that the largest money makers for the Texas Team were because of him, even though the record evidence indicates that Barnhart generated more positive value in 2008 than Comfort.⁵⁴⁷

234. Enforcement Staff contends that the ID properly recognized that BP’s Texas Team structure provided Comfort the motive and opportunity to engage in physical-for-financial manipulation. Comfort’s hybrid trader status gave him authority to trade next day physical gas at locations where he was permitted to put on potentially benefitting financial positions. The compensation structure also gave a greater percentage of profits to “speculative financial traders” than to those trading physical assets. Thus, Comfort was structurally incentivized to focus and make more money on his financial than his physical book. This gave Comfort the motive to trade uneconomically physically to boost his financial profits.⁵⁴⁸

235. Enforcement Staff also argues that the fact Comfort continued to work at BP contradicts claims he was wealthy enough to retire.

d. Commission Determination

236. We affirm the determination in the ID that Comfort had motive to manipulate the market. BP’s Texas Team structure provided Comfort with a heightened incentive, motive, and opportunity to engage in physical-for-financial manipulation.⁵⁴⁹ Comfort’s hybrid trader status gave him authority to trade next day physical gas at locations where he was permitted to put on potentially benefitting financial positions. That structure gave a greater percentage of profits to “speculative financial traders” than to those trading physical assets. Thus, Comfort was structurally incentivized to make more money on his

⁵⁴⁶ *Id.* at 41 (citing Tr. 1165:13-18 (Comfort)).

⁵⁴⁷ *Id.* at 42 (citing Ex. OE-028 at 3).

⁵⁴⁸ *Id.*

⁵⁴⁹ Enforcement Staff Br. Opposing Exceptions at 43.

financial than his physical book.⁵⁵⁰ That incentive structure in turn gave Comfort the motive to make uneconomic physical trades (which contributed less to his personal compensation in any event) in order to boost his profits from his financial trades (which contributed more to his personal compensation). Accordingly, we affirm the ID's finding that Comfort had motive to manipulate the market, and that motive establishes Comfort's intent to do so.

4. **Manipulative Intent and Exculpatory Claims**

237. BP claims that the ID ignores evidence refuting manipulative intent, including the unequivocal testimony of Comfort and Barnhart denying any wrongdoing. BP also claims that the ID failed to consider Comfort's and Barnhart's explanations for the trading behavior. Enforcement Staff challenges that assertion, pointing out that the ID in fact considered Comfort's and Barnhart's testimony and found their claims of non-wrongdoing, and alleged legitimate explanations for the Texas Team's trading patterns during the Investigative Period, not credible.⁵⁵¹

a. **Initial Decision**

238. The ID agreed with Enforcement Staff's assessment at hearing that Comfort's non-persuasive explanations or his failure to offer legitimate economic reasons for his trading is evidence of Comfort's intent to manipulate.⁵⁵² The ID rejected as non-credible Comfort's testimony that all his trades stand on their own as legitimate economic trades and fall within legal, regulatory and ethical guidelines. The ID noted that his claim was undermined by the fact that Comfort never explained why he did not alter his trading pattern even after losing consistently during the Investigative Period. The ID also stated that Comfort "never explained why he always made money before but lost money during the Investigative Period."⁵⁵³ Further, the ID found that Comfort conceded at the hearing that he traded differently during the first eight months of 2008 than during the

⁵⁵⁰ See ID at P 255.

⁵⁵¹ Enforcement Staff Br. Opposing Exceptions at 43-44.

⁵⁵² ID at P 125.

⁵⁵³ *Id.*

Investigative Period, and that his explanation that he just made some “incorrect trades” was “not believable” in light of the contrary record evidence in the case.⁵⁵⁴

239. The ID also found that Enforcement Staff expert witness and testimony conclusively showed Comfort’s explanations to be not credible.⁵⁵⁵ The ALJ found Abrantes-Metz’s testimony to show conclusively that the confluence of factors in this case indicates that there is no legitimate reason to explain the Texas Team’s trading patterns other than manipulation. The ID found that Comfort’s trading was intentional and executed to suppress the Houston Ship Channel *Gas Daily* price. The ID found this conclusion was supported by several factors, including Comfort’s shift to early heavy trading at Houston Ship Channel. The ID found that the evidence in the case shows that selling early at Houston Ship Channel with no active Katy market could not have been a legitimate arbitrage strategy but was a speculative strategy.⁵⁵⁶ The ID noted that while Comfort and Luskie try to describe this behavior as taking a speculative view, they acknowledge that selling heavy early created greater risk and resulted in heavier losses during the Investigative Period.

240. The ID also found further evidence of Comfort’s intent to manipulate the market and suppress the price at Houston Ship Channel in BP’s expert Evans’s unsupported testimony that the heavy sales were the result of a long baseload position, with physical risk associated with flattening the increased long position, and which outweighed the risk of cash (P&L) losses by selling disproportionately early. The ID stated that Bergin’s testimony that Evans is incorrect was more credible and supported by Comfort’s concession that he never recalled having had a baseload position at Katy during 2008 that he found was too large to optimize.⁵⁵⁷

241. The ID also found that Luskie’s and Barnhart’s testimony contradicts Evans’s claims that trading during the Investigative Period was to “manage risk,” as they essentially testified to the opposite. The ID also gave weight to Abrantes-Metz’s testimony that it would be irrational for a successful physical trader, such as Comfort, to

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.* P 126.

⁵⁵⁶ *Id.* (noting that Luskie’s testimony evidences this speculative strategy: “I’m buying gas without knowing which way the market is going, so I’m just taking a view on the market and hoping to make money on it.” Tr. 472:25-473:3; 580:7-15 (Luskie)).

⁵⁵⁷ *Id.*

persist in a consistently losing strategy such as selling early, unless he possessed an ulterior bad motive.

242. The ID further found that Bergin's testimony conclusively shows that Comfort's explanatory allegations are not credible.⁵⁵⁸ It noted that Bergin testified that Evans's explanation, that early selling at Houston Ship Channel was the result of an increased long baseload position which carried "physical risk" associated with flattening that increased long baseload position, and that this "physical risk" outweighed the risk of losses on the cash P&L ("price risk") created by selling disproportionately early, is incorrect.⁵⁵⁹ Further, the ID found that the record shows that Comfort and Luskie understood the concept of "unwinding their transport" as described by Bergin.⁵⁶⁰ Yet in his testimony, Comfort could not explain why the Texas Team only "turned off" transport a single day during the Investigative Period, in contrast to doing so seventy percent of the time in the first eight months of 2008.⁵⁶¹ The ALJ also found that Comfort's claim that he had no specific memory of "not turning off transport" during the Investigative Period as non-credible.⁵⁶²

243. The ID determined that Comfort's trading behavior was consistent with the intent to suppress Houston Ship Channel *Gas Daily*, and inconsistent with Evans's claims that it was responsive to Houston Ship Channel/Katy price differentials. Thus, the ALJ gave greater weight to Bergin's testimony, and found Comfort's lack of memory on these

⁵⁵⁸ *Id.* PP 126-127.

⁵⁵⁹ *Id.* P 126 (citing Ex. OE-161 at 58:6-59:14).

⁵⁶⁰ The ID notes Bergin testified a "rational trader seeking to optimize their transportation would have attempted to unwind as much of their transportation as possible when prices at Katy were higher than [Houston Ship Channel] by selling Katy gas and buying [Houston Ship Channel] gas." *Id.* at P 127 (citing Ex. OE-161 at 75:13-15). It also finds Comfort and Luskie understood the concept of unwinding transport as part of economic decision-making based on transportation. Tr. 384:8-385:11 (Luskie); Ex. OE-243; Tr. 702:2-23 (Comfort).

⁵⁶¹ The record shows the Texas Team "turned off transport" 183 of 261 flow days in the eight months prior to the Investigative Period, which resulted in positive P&L. Ex. OE-161 at 77.

⁵⁶² ID at P 127.

significant matters, and his claims that he did nothing wrong, not credible in light of the record evidence.⁵⁶³

b. BP Exceptions

244. BP argues that the ID failed to address or meaningfully consider its arguments that its traders lacked manipulative intent, and instead relies on Enforcement Staff's purportedly flawed data analysis.⁵⁶⁴ BP claims that the ID unreasonably disregards Comfort's and Barnhart's testimony and their denials of wrongdoing. BP argues the ID erred by relying on Bergin's "speculative conclusions" as to the traders' intent and inferring the Texas Team's intent from the movement of the Houston Ship Channel-Henry Hub spread without considering the traders' testimony explaining the trading behavior.

245. BP also argues that the ALJ erred by failing to consider alleged numerous flaws in Bergin's and Abrantes-Metz's analysis, which it claims form the basis of the ID's finding of intent. It asserts that the conclusions of intent based on findings that Comfort did not explain why he did not change his trading strategy after "consistently losing money" were undermined by the P&L and Bergin's data, which BP asserts shows that the Texas Team's trades were profitable on 42 percent of the days during the Investigative Period. BP claims that contrary to the ID, Comfort's use of Houston Pipeline System transport in the Investigative Period was consistent with the Texas Team's use of that same capacity in the same months during the prior years.⁵⁶⁵ BP further argues it was error to assume a trader in Comfort's position should have changed strategy due to such losses because they were not significant losses.⁵⁶⁶

246. BP also claims that conclusions in the ID regarding manipulative intent were based on unsupported suppositions.⁵⁶⁷ BP argues, for example, that the ID erred in relying on Enforcement Staff's contentions that "it is a common practice to hide losses in

⁵⁶³ The ID also finds Barnhart's exculpatory testimony to be not credible for similar reasons. *Id.* P 127 & n.109.

⁵⁶⁴ BP Br. on Exceptions at 27.

⁵⁶⁵ *Id.* at 28.

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.*

large book” and that Comfort relied on the size of the overall books to disguise intentional losses. According to BP, there is no record evidence to support the “common practice” theory, no evidence to support the claims that Katy Ship Sheet’s aggregation of the team’s P&L (i.e. the “books”) were “large” in the context of BP’s overall trading operations, and no evidence that the Texas Team hid losses in those books.

247. BP also claims the ID erred by inferring intent from Luskie’s alleged understanding that the Texas Team’s use of the Houston Pipeline System capacity during the Investigative Period was different from “typical use.”⁵⁶⁸ According to BP the two periods examined (the 8 months in 2008 prior to the Investigative Period and the Investigative Period) reflect seasonal differences, and so there is no reason to expect the trading strategies to be the same. BP also asserts that the ID was wrong to assume that Luskie did not understand a physical-for-financial manipulative scheme. BP claims the evidence is clear that Luskie knew what constituted such a scheme, even if it was not a topic listed specifically in his compliance training materials.

c. Enforcement Staff Response

248. Enforcement Staff argues that contrary to BP’s claims, the ID specifically considered and rejected BP’s arguments that its traders lacked manipulative intent,⁵⁶⁹ and explained why those claims are not credible.⁵⁷⁰ Enforcement Staff notes that the ID rejected Comfort’s testimony that his trades stand on their own for the multiple reasons discussed above, including because Comfort could not explain why he made money prior to, but lost it after, the Investigative Period, and because his answer that he merely “made some incorrect trades” was not credible especially in light of Comfort’s testimony that he agreed that the Texas Team had a positive P&L prior to the Investigative Period but suffered losses during the Investigative Period. Enforcement Staff also asserts that Comfort’s lack of a reasonable explanation for why he did not change his trading strategy during the Investigative Period after consistently losing money damages his credibility.

249. Enforcement Staff also argues that the ID’s determination that Comfort’s exculpatory testimony was not credible was supported by Bergin’s testimony. Enforcement Staff claims Bergin’s testimony shows that the Texas Team turned off transport just one day during the Investigative Period, though it had done so seventy

⁵⁶⁸ *Id.* at 29.

⁵⁶⁹ Enforcement Staff Br. Opposing Exceptions at 45-46.

⁵⁷⁰ *Id.* at 46-47 (citing ID at PP 125,127).

percent of the time in the first eight and a half months of 2008. Enforcement Staff also points to Bergin's testimony that contradicts or dispels several of BP's defensive claims, including testimony undermining BP's hedging defense,⁵⁷¹ disproving claims that the increase in financial gains would outweigh the financial losses,⁵⁷² showing that the trading strategy was not done to meet industrial or large customer needs, and responding to BP's claims that there are possible and other legitimate explanations for the Texas Team's trading actions.⁵⁷³

250. Enforcement Staff also disputes BP's contention that there was no evidence to support the claim that Comfort relied on the size of BP's overall trading book to hide his losses, and that he believed the scheme would go undetected.⁵⁷⁴ Enforcement Staff claims the ID relied primarily on the traders' live testimony to reach this conclusion, and thus it was reasonable for the ALJ to conclude that Comfort knew he could engage in a manipulative scheme, with resulting losses, with little fear of detection.

d. Commission Determination

251. We find that the ID properly found that the weight of evidence in this proceeding shows that Comfort, Barnhart and the Texas Team had the intent to manipulate the market, and that their exculpatory claims and alleged legitimate explanations are not credible.

252. The claim that the ID disregarded Comfort's and Barnhart's testimony without reasoned explanation is incorrect. As Enforcement Staff notes, to the contrary, the ALJ did not ignore the traders' testimony but rather considered it and found it not credible.⁵⁷⁵ As the ID noted, Comfort's non-persuasive explanations and failure to offer legitimate economic motives for his trading strategy are evidence of his intent to manipulate the market. The ID found that Comfort's failure to explain why he did not alter his trading strategy during the Investigative Period after consistently losing money with his trades, and lack of explanation for why he made money prior to the Investigative Period but lost

⁵⁷¹ Ex. OE-001 at 108.

⁵⁷² *Id.* at 109.

⁵⁷³ *Id.* at 112-115.

⁵⁷⁴ Enforcement Staff Br. Opposing Exceptions at 47-48.

⁵⁷⁵ *See, e.g.*, ID at P 125.

money during the Investigative Period, strongly contradict Comfort's assertions that his trades stand on their own merit. Further, as the ALJ pointed out, while Comfort's testimony disagrees with Bergin's and Abrantes-Metz's conclusions, notably Comfort does not contest their analyses of his trading. The evidence shows in fact that Abrantes-Metz's conclusion that Comfort's trading patterns during the Investigative Period resulted in consistent physical losses of a magnitude that was much greater than any losses in the previous eight and a half months is accurate. Moreover, even Comfort admits that his trading patterns at Houston Ship Channel during the Investigative Period were different than his trading during the first eight and a half months of 2008.⁵⁷⁶ We agree with the ALJ that the assertion that Comfort simply and innocently "made some incorrect trades" is inconsistent with the record evidence.

253. The testimony of Enforcement Staff's witnesses further demonstrates that Comfort's explanations lack credibility. First, Abrantes-Metz's testimony establishes that there was no legitimate reason to explain the Texas Team's trading patterns other than manipulation.⁵⁷⁷ As noted in the ID, the evidence indicates that Comfort's trading was intentional and executed to suppress the Houston Ship Channel *Gas Daily* prices. This evidence includes the shift to heavy early selling at Houston Ship Channel, and Comfort's inability to provide a legitimate explanation for this change. The record indicates that this could not have been an arbitrage strategy but was a speculative strategy that created more risk and produced heavier losses during the Investigative Period than previous trading periods. Comfort and Luskie essentially admitted these facts,⁵⁷⁸ and acknowledge that they created more risk by heavy early selling at Houston Ship Channel.⁵⁷⁹

⁵⁷⁶ Tr. 1286:9-1293:4; 1293:5-15 (Comfort).

⁵⁷⁷ See, e.g., ID at P 126 (citing Tr. 1915:13-24, Tr. 1911:3-5 (Abrantes-Metz); Ex. OE-021 at 20, 22-25)).

⁵⁷⁸ Regarding pre-Katy sales at Houston Ship Channel Luskie testified that "I'm buying gas without knowing which way the market's going. So I'm just taking a view on the market and hoping to make money on it." Tr. 472:25-473:3; 580:7-15 (Luskie).

⁵⁷⁹ See, e.g., ID at P 126 & n.99 (citing Tr. 482:23-483:1 (Luskie) (speculative view increases risk); Tr. 547:9-12 (Luskie) ("The more you sell at Ship early . . . you are increasing your risk that you're going to be right or wrong."); Tr. 1398:22-1399:8 (Comfort) (a trader selling faster than the rest of the market is increasing his price risk.)).

254. Additionally, Bergin's testimony supports the ID's conclusion that Comfort's exculpatory claims lack credibility, and also refutes the other purportedly "legitimate" reasons for the trading strategy. First, as the ID recognized, Evans claimed that the early selling at Houston Ship Channel was the result of a "larger physical gas position."⁵⁸⁰ The implication is that the Texas Team sold early at Houston Ship Channel because they had a substantial risk associated with flattening their increased physical gas position. Thus, according to BP, the Texas Team sold early at Houston Ship Channel not as part of a manipulative scheme but because the Texas Team believed the risk of not flattening its physical position outweighed any risk of losses on their cash P&L (also referred to as "price risk") created by selling early. As Bergin demonstrated, however, the Texas Team's Houston Ship Channel price risk from selling early at Houston Ship Channel far outweighed their physical risk of flattening their long baseload position during the Investigative Period.⁵⁸¹ Based on Bergin's testimony debunking Evans's explanation, and Comfort's concession that he could not recall having a baseload position at Katy in 2008 that was too large to optimize, the Commission affirms the ALJ's finding that Bergin's testimony was more reliable in this regard, and that Evans's explanation as to the reasons for increased heavy early trading at Houston Ship Channel was unpersuasive.

255. Bergin's testimony also demonstrates Comfort's lack of credibility with respect to his exculpatory statements, and refutes those claims. As the ID noted, Bergin shows that the Texas Team "turned off its transport" only one day out of 73 during the Investigative Period, in contrast to the first eight and a half months of 2008 when it did so seventy percent of the time, or 183 out of 261 flow days.⁵⁸² Bergin also showed that the Texas Team's decision to turn off the transport when prices dictated in the period before the Investigative Period resulted in an overall positive P&L for that time period.⁵⁸³ Further, Bergin testified that a "rational trader seeking to optimize their transportation would have attempted to unwind as much of their transportation as possible when prices at Katy were higher than Houston Ship Channel by selling Katy gas and buying Houston Ship Channel gas. The record shows that Comfort and Luskie understood this concept of unwinding the transport, but that Comfort could provide no reason why the Texas Team did not turn off the Houston Pipeline System transport when economic to do so during the Investigative Period. Comfort also denied any specific memory of not turning off

⁵⁸⁰ Ex. BP-037 at 28-29.

⁵⁸¹ Ex. OE-161 at 47-48, 49-54.

⁵⁸² ID at P 127 (citing Ex. OE-161 at 77-78).

⁵⁸³ Ex. OE-161 at 77-78.

transport during the Investigative Period. Bergin's testimony convincingly shows that the Texas Team's trading behavior during the Investigative Period was consistent with the intent to suppress the Houston Ship Channel *Gas Daily* index.⁵⁸⁴ Accordingly, it was reasonable for the ALJ to give Bergin's testimony significant weight in finding that the Texas Team had the intent to manipulate the market, especially in light of Comfort's lack of memory on significant issues and his persistent claims that he did nothing wrong because trading was business as usual during the Investigative Period.

256. Bergin's testimony also refuted BP's other explanations of purportedly legitimate reasons for its trading activities during the Investigative Period. For example, Bergin successfully rebutted BP's claim that the physical and financial positions at Houston Ship Channel had the appearance of "hedged" proportions, and thus any manipulative effort would have been unprofitable.⁵⁸⁵ As he explained, that claim is misleading because the Texas Team had substantial exposure to the *Gas Daily* index in the Investigative Period that benefitted from lower Houston Ship Channel *Gas Daily* prices, and the traders' own testimony and actions confirm the belief that their exposure to the *Gas Daily* index was critical to their ultimate P&L. This is evidenced, as Bergin noted, by Barnhart's email to her supervisor describing their Houston Ship Channel to Henry Hub spread position,⁵⁸⁶ and her positive reaction to the increase in that spread after Hurricane Ike.⁵⁸⁷

257. Bergin also refuted BP's argument that in an attempted manipulation, any benefits to the Texas Team's financial position would not outweigh its losses on the physical side.⁵⁸⁸ As Bergin pointed out, while the Texas Team could be fairly confident that their trades were lowering the price at Houston Ship Channel, they could not have known the extent to which their fixed price selling was suppressing the Houston Ship Channel market. Yet, as experienced traders, they most likely knew that their index position was more volatile, and thus potentially more profitable, than their physical position. Additionally, the Texas Team could have been confident that because their physical

⁵⁸⁴ As noted in the ID, this testimony of Bergin's essentially refutes the claim by Evans that the use of the Houston Pipeline System transport during the Investigative Period was in response to Houston Ship Channel /Katy price differentials.

⁵⁸⁵ Ex. OE-001 at 108.

⁵⁸⁶ Ex. OE-024.

⁵⁸⁷ Ex. OE-087.

⁵⁸⁸ Ex. OE-001 at 109.

trading P&L had historically been positive, just increasing volume and selling early to increase the financial spread would likely only result in minimal losses, and if that assumption turned out to be wrong, the team could revert to economic trading and use of the Houston Pipeline System transport.

258. Bergin's testimony also considered and rejected the possibility of other legitimate explanations for the Texas Team's trading strategy.⁵⁸⁹ For example, he demonstrated that the Texas Team's increased net long baseload positions at Katy and Houston Ship Channel was not done to serve increased industrial or customer load. As Bergin explained, the increased net long baseload position meant the Texas Team had to sell more in the next day market to "get flat" physically. If the Texas Team had bought more gas at Katy to service industrial or larger customer demand at Houston Ship Channel, then there should have been a corresponding increase in the Texas Team's Houston Ship Channel short baseload position. Instead, BP's baseload demand at Houston Ship Channel decreased during the Investigative Period. As Bergin noted, this shows that the Texas Team's long net baseload position at Katy was not related to an increased short physical position at Houston Ship Channel but instead a voluntary choice made by the team.⁵⁹⁰ Additionally Bergin noted that the majority of the Texas Team's counterparties at Houston Ship Channel were marketers, not industrial customers.

259. Bergin also refuted BP's claim that the Texas Team's long physical position at Katy was a means of providing the team greater optionality with respect to the Houston Pipeline System transport.⁵⁹¹ As Bergin explained, the team's net long position at Katy did not give them a greater option of whether to sell or not to sell. In contrast, it created an effective must-sell scenario in which optionality was limited to the location of that sale, i.e., the Texas Team either had to sell at Houston Ship Channel or to sell at Katy. Thus, instead of a more balanced long and short position between Katy and Houston Ship Channel, which would have provided greater selling optionality, the Texas Team's long Katy position resulted in a must sell obligation that reduced their optionality with respect to the best use of the Houston Pipeline System transport.

260. Finally, Bergin demonstrated that the Texas Team's uneconomic trading cannot otherwise be legitimately explained by their long baseload position. As he noted, an economically rational trader would seek to optimize his transportation options, and thus

⁵⁸⁹ *Id.* at 112.

⁵⁹⁰ *Id.* at 112.

⁵⁹¹ *Id.* at 113.

regardless of the size of the Texas Team's positions at Katy and Houston Ship Channel, they should have been making economic decisions (i.e. the most profitable option at the time of the decision) with regard to their use of the Houston Pipeline System transport. As the record shows, however, this is not what the team did. Instead the Texas Team sold Katy gas at Houston Ship Channel when it would have been more economic to sell the gas at Katy.⁵⁹²

261. BP's claims that the ID relies on "unsupported suppositions" are unavailing. BP asserts that the "ID erroneously accepts and relies on Enforcement Staff's contention that 'it is a common practice to hide losses in large books' and that Comfort relied on the size of the overall book to disguise intentional losses."⁵⁹³ According to BP, there is no record evidence to support those conclusions. Contrary to BP's claims, the ID did not simply rely on Enforcement Staff's contentions on this issue but noted the specific reasons why Comfort knew that the way the Texas Team kept its books and calculated its cash P&L made it unlikely that BP's management or BP Compliance would detect comfort's scheme.⁵⁹⁴ Among the evidence supporting this claim is the fact that the Katy Ship Sheet was the only document that showed the Texas Team's P&L on their next day physical trading at Katy and Houston Ship Channel. BP Compliance, however, did not review the Texas Team's P&L in 2008.⁵⁹⁵ As further noted, the evidence indicates that the cash P&L reported to management did not delineate the individual components of the Katy Ship Sheet in a manner that would isolate or make apparent Comfort's actions.⁵⁹⁶

262. Further, according to Luskie the Houston Ship Channel and Katy next day P&L was a relatively small component of BP's daily P&L. The ID also found evidence that Comfort knew his losses would be hidden in BP's larger trading books by the fact that he continued trading profitably at Katy during the Investigative Period, indicating that he knew his larger losses on Houston Pipeline System transport and against the Houston Ship Channel index would likely be overlooked. The ID found this conclusion is further buttressed by the fact that the P&L cell on the Katy Ship Sheet combined the Houston Ship Channel and Katy trades against these indices. Thus, contrary to BP's claim, there

⁵⁹² *Id.* at 115 & n.15.

⁵⁹³ BP Br. on Exceptions at 28.

⁵⁹⁴ ID at P 124.

⁵⁹⁵ *Id.* P 124 (citing Tr. 2121:13-2122:6 (Simmons)).

⁵⁹⁶ *Id.* P 124 n.95 (citing Tr. 610:24-611:10 (Luskie)).

is record evidence to support Enforcement Staff's arguments in this regard, and based on this evidence it was reasonable for the ALJ to conclude that Comfort relied on the size of the overall book to disguise his intentional losses and to believe he would not be caught.

263. While the ID found intent based on Luskie's testimony,⁵⁹⁷ that inference is not critical to the finding in the ID that the Texas Team had a motive to manipulate the market. As noted in the ID, BP's intent may be established by the conduct of any of the traders, and because Comfort was the "point owner" of the Texas Team, intent for the Texas Team can be established solely through Comfort's intent and actions.⁵⁹⁸ Further, the claim that Luskie did understand what a physical-for-financial manipulative scheme is not contrary to the ID, and does not further BP's argument. The ID in fact questioned Enforcement Staff's theory that Luskie was "guileless," finding the record evidence shows that Luskie knew the scheme because he revealed it to Parker.⁵⁹⁹ The fact that Luskie understood the scheme weighs further in favor of finding motive and intent on part of the Texas Team.

5. Consciousness of Guilt

a. Initial Decision

264. The ID found that Comfort had consciousness of guilt. It noted that Comfort's hostile responses to Luskie on the November 5 recorded call and Comfort's lack of a legitimate explanation for his trading practices during the Investigative Period are evidence of Comfort's guilt.⁶⁰⁰ The ID found particularly suspect that Comfort never explained why the Texas Team trading and use of transport was not being used to affect the index to help their paper position.⁶⁰¹ It noted again that Comfort's explanations are

⁵⁹⁷ See *supra* P 247.

⁵⁹⁸ ID at P 107.

⁵⁹⁹ *Id.* P 108.

⁶⁰⁰ *Id.* P 104.

⁶⁰¹ *Id.* P 105.

not credible, and that even Luskie found them vague and inadequate.⁶⁰² The ID also found Comfort's false exculpatory statements to be an indication of Comfort's guilt.⁶⁰³

b. BP Exceptions

265. BP argues that the ID erred in accepting Enforcement Staff's consciousness of guilt theory. According to BP the ID's conclusions as well as the precedent upon which it relies are inapplicable in the current proceeding. BP claims first that the "consciousness of guilt" concept is only applicable in criminal proceedings where a defendant has been found to have made false exculpatory statements.⁶⁰⁴ BP further asserts that consciousness of guilt requires proof of false exculpatory statements, which it claims is lacking here. BP argues that Comfort's denial of misconduct is not a false exculpatory statement, and that the ID ignores BP evidence regarding the non-manipulative reasons for the Texas Team's trading behavior during the Investigative Period.⁶⁰⁵

c. Enforcement Staff Response

266. Enforcement Staff argues that the ID's findings as to consciousness of guilt are correct. It asserts that BP's claims that Comfort simply denied any misconduct, and that such statements were not false, conflates Comfort's attempted explanations of his trading

⁶⁰² *Id.*

⁶⁰³ *Id.* (citing *Al-Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010). *E.g.*, *United States v. Berrios*, 676 F.3d 118, 130 (3d Cir. 2012) ("[F]alse exculpatory statements may be introduced as evidence of the defendant's consciousness of guilt of the underlying charges . . ."); *United States v. Vu*, 378 F. App'x 908, 909 (11th Cir. 2010) ("[I]t is reasonable for the jury to infer that a defendant's false statement to police demonstrates a consciousness of guilt."); *United States v. Elashyi*, 554 F.3d 480, 495 (5th Cir. 2008) ("[Defendant's] false exculpatory statement provide [] persuasive circumstantial evidence of [his] consciousness of guilt.") (citing *United States v. Diaz-Carreon*, 915 F.2d 951, 955 (5th Cir. 1990); *United States v. Clark*, 45 F.3d 1247, 1251 (8th Cir. 1995) ("The false exculpatory statement instruction is aimed at pretrial fabrications, on the theory that the innocent do not fabricate to avoid being accused of crime.")).

⁶⁰⁴ BP Br. on Exceptions at 29.

⁶⁰⁵ *Id.* at 30 & n.153.

on the November 5 recorded telephone call (which Enforcement Staff claims were false exculpatory statements),⁶⁰⁶ with Comfort's after the fact blanket denials of misconduct in testimony and at the hearing.

267. Enforcement Staff also argues that consciousness of guilt is not limited to criminal proceedings but has been applied in a variety of civil contexts, including trademark infringement and employment discrimination cases.⁶⁰⁷

d. Commission Determination

268. We find that the ID properly applied the consciousness of guilt theory in this proceeding, and that the record supports a finding of Comfort's guilt. As the ALJ found, Comfort's demeanor on the recorded call with Luskie and Comfort's inability to provide a legitimate and credible explanation for his trading strategy during the Investigative Period are evidence of his guilt.⁶⁰⁸

269. As to the recorded phone call, we agree with the ALJ's perception of Comfort's angry tone and his non-responsive answers and lengthy pauses, and we agree that this all shows his consciousness of guilt. Further, we agree with the ALJ that Comfort's demeanor on the call indicated that he wanted to prevent Luskie from revealing any further incriminating information on the recorded line. It is reasonable for the ALJ to conclude that based on this evidence, Comfort had guilt.

270. We agree with the ID that Comfort was unable to explain his trading on the recorded call, and that this fact is strong evidence that he was guilty of a manipulative scheme. As an experienced trader, Comfort should have been able to provide legitimate explanations for his trading strategy. Instead, his tone and demeanor on the call show that he did not want to discuss the trading on the recorded line. Moreover, we agree with the finding in the ID that Comfort's and Luskie's allegation that the reason Comfort was unable to give an explanation on the recorded call was due to Luskie's inaccurate

⁶⁰⁶ Enforcement Staff claims Comfort's explanations and justifications on the November 5 telephone call (i.e. that the Texas Team shipped "economically on [Houston Pipeline System] most of the time," that they were at times unable to unwind their transport, and that the Texas Team's next day decisions were complicated and multiple) were false. Enforcement Staff Br. Opposing Exceptions at 43-44.

⁶⁰⁷ *Id.* at 44.

⁶⁰⁸ ID at P 104 (citing Exs. OE-016 and OE-162).

description of the Texas Team's trading⁶⁰⁹ are not credible and are contrary to the record evidence in this case. As noted in the ID and discussed above, Luskie at the time accurately described the scheme.⁶¹⁰

271. Further, we agree with the ID that Comfort made false non-credible exculpatory statements on the recorded phone call. As justifications for his trading strategy, Comfort claimed that the Texas Team "shipped economically" most of the time, that there were times they could not "unwind" their position, and that multiple factors go into cash trading decisions.⁶¹¹ However, the record shows that the Texas Team did not ship economically on Houston Pipeline System most of the time during the Investigative Period. As discussed above, to the contrary they failed to "unwind" their positions or "turn off" the transport numerous times during the Investigative Period, even when it would have been economic to do so.⁶¹² Additionally Comfort testified that he could not recall a time when he was unable to unwind his Houston Ship Channel and or Katy positions.⁶¹³ Thus, we find it was reasonable for the ALJ to conclude that these false and non-credible statements were strong evidence of Comfort's guilt.⁶¹⁴

272. We also agree with the ALJ that Comfort's additional (unrecorded) phone calls are another indicia of Comfort's guilt.⁶¹⁵ The ID found that the purpose of Comfort's unrecorded "calls was to start a cover-up of the facts to make sure Luskie got his facts 'straight' before he got back to Parker."⁶¹⁶ The ID further found that Luskie called

⁶⁰⁹ Ex. BP-014 at 7:1-11 (Comfort Resp. Test.); Ex. BP-016 at 9:1-3 (Luskie Resp. Test); Tr. 272:24-273:6 (Luskie).

⁶¹⁰ ID at P 104.

⁶¹¹ *Id.* P 105 & n.74.

⁶¹² Ex. OE-161 at 74-78.

⁶¹³ Tr. 1413:7-24 (Comfort).

⁶¹⁴ Federal Courts have found that it is a "well settled principle that false exculpatory statements are evidence – often strong evidence – of guilt." *Al Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010).

⁶¹⁵ ID at P 106.

⁶¹⁶ *Id.* (citing Tr. 285:4-286:5 (Luskie)).

Comfort back less than a minute after the recorded call ended, and Comfort returned his call two minutes later. They had two phone conversations lasting ten and nine minutes each. The ID also found that although Luskie and Comfort do not recall the details of these calls, Luskie testified that he was called “stupid and foolish” for saying those things on a recorded line, while Comfort generally remembered being angry during the first call.⁶¹⁷ The ID found that Comfort’s and Luskie’s limited recollections are not credible.⁶¹⁸

273. Enforcement Staff argues that BP misstates the ID’s findings with respect to the November 5 unrecorded calls. According to Enforcement Staff, BP argues that the ID erred in adopting inferences from the two unrecorded calls when the traders could not recall details of the calls. According to Enforcement Staff, however, the ID determined that Comfort and Luskie’s limited recollections of the unrecorded calls were not credible.⁶¹⁹ Also, although BP contests the ID’s finding that the unrecorded calls were another indicia of Comfort’s guilt, Enforcement Staff asserts that the ID’s finding is fully supported by the circumstances of the calls,⁶²⁰ including the fact Comfort and Luskie continued their conversation on their cell phones just minutes later after Luskie said he had to run and terminated the recorded conversation,⁶²¹ Comfort’s testimony that he wanted to get off a recorded line, and Comfort’s testimony that the purpose of the conversation was to help Luskie “get his facts straight before talking to Parker.”⁶²²

274. We find no reason to disagree with the ID’s determination that it is not credible that neither Comfort nor Luskie can recall the details of what would have been two critical telephone calls. Comfort testified that the purpose of the unrecorded calls was to help Luskie “organize his thoughts” and “get his fact straight” before getting back to Parker to assure him that the Texas Team’s trading strategy was compliant. Based on

⁶¹⁷ *Id.* (citing Tr. 292:1-13 (Luskie); Ex. OE-231 at 183:17-18; Tr. 1216:10-14, 1230:6-9 (Comfort)).

⁶¹⁸ *Id.*

⁶¹⁹ Enforcement Staff Br. Opposing Exceptions at 37.

⁶²⁰ *Id.* at 38.

⁶²¹ *Id.*

⁶²² *Id.* at 39.

this testimony, the Commission agrees with the ALJ that the unrecorded calls were part of an effort to conceal the manipulative scheme.

275. We also find it significant that following the call, Luskie contacted someone from the Market Monitor staff but also went back to Parker to assure him that he was incorrect about the Texas Team's trading, that the team did not transport to influence the index and that sometimes they had to ship uneconomically due to liquidity issues. Although he failed to convince Parker that nothing was amiss, Luskie's conduct reinforces the finding in the ID that his unrecorded calls with Comfort on November 5 were part of an effort to conceal the Texas Team's scheme.

276. We also reject BP's claims that the consciousness of guilt theory is only applicable to criminal proceedings. As Enforcement Staff points out, courts have relied on the consciousness of guilt theory concept in several civil contexts such as trademark infringement and employment discrimination cases.⁶²³ Thus we find it was reasonable for the ALJ to find that Comfort had consciousness of guilt, and that his guilt was evidence of his intent to manipulate.

6. Rehearing Request

277. BP requests rehearing as to whether the Hearing Order's determination that it is incorrect that recklessness must be extreme or severe to meet the scienter requirement of a manipulation claim is arbitrary or capricious. For the reasons stated in the Hearing Order, we deny the request. We maintain that in Order No. 670, the Commission did not adopt a more specific definition of recklessness necessary to establish a violation of the Anti-Manipulation Rule. BP does not raise any materially new arguments or intervening change in controlling law or facts that would merit reconsideration.

C. Jurisdiction

278. The third element of establishing a violation of NGA section 4A and the Anti-Manipulation Rule is determining whether the conduct in question was "in connection with" a transaction "subject to the jurisdiction of the Commission." As relevant to this proceeding, NGA section 1(b) provides that the Commission's NGA jurisdiction extends to (1) transportation of natural gas in interstate commerce, (2) sales for resale of natural gas in interstate commerce, and (3) "natural gas companies engaged

⁶²³ See, e.g., *Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1293 (D.C. Cir. 1998); *Alberto-Culver co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 709-10 (7th Cir. 1972).

in such transportation or sale.” NGA section 1(b) also provides that the Commission’s NGA jurisdiction does not apply to any other transportation or sale of natural gas.

279. The Commission’s NGA jurisdiction has been narrowed by the Natural Gas Policy Act of 1978 (NGPA), as amended by the Wellhead Decontrol Act of 1989. Specifically, NGPA section 601(a)(1)(A) and (2)(A)(ii) provides that “the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to any natural gas solely by reason of” (1) any first sale of natural gas as defined in NGPA section 2(21) or (2) any transportation authorized by the Commission under NGPA section 311(a).⁶²⁴ As explained in more detail below, the “first sales” exempted from our NGA jurisdiction generally include all sales by entities that occur upstream of sales by interstate pipelines, intrastate pipelines, local distribution companies (LDCs), and their affiliates. However, sales by those pipelines, LDCs and their affiliates are not exempt first sales, unless the volume of natural gas sold is attributable to their own production.

280. BP contends that, in order to demonstrate a violation of NGA section 4A, Enforcement Staff must show that BP used jurisdictional sales for resale and transportation transactions to manipulate the Houston Ship Channel price index. BP contends that NGA section 4A does not apply to the use of non-jurisdictional transactions to manipulate a price index, even if that index may be used to price jurisdictional sales by third parties. BP therefore argues that a showing that it engaged in non-jurisdictional sales for the purpose of manipulating the Houston Ship Channel price index is insufficient to show a violation of NGA section 4A. BP further contends that Enforcement Staff has not shown that any of the transactions alleged to constitute its manipulative scheme were subject to the Commission’s NGA jurisdiction.

281. In the Hearing Order, the Commission held that NGA section 4A’s prohibition of manipulative conduct extends to the use of non-jurisdictional transactions in a manipulative scheme that directly affects jurisdictional transactions. BP requested rehearing of the Hearing Order’s holding on this issue and argues in its exceptions to the Initial Decision that the ALJ erred in finding a violation of section 4A based on its use of non-jurisdictional transactions to manipulate the Houston Ship Channel price index. In the first section below, the Commission denies BP’s Rehearing Request and rejects BP’s exceptions related to that issue.

⁶²⁴ NGPA section 601(a) contains certain other exemptions not here relevant.

282. The ALJ also found that (1) BP's manipulative scheme directly affected the prices of third party sales for resale that are subject to the Commission's NGA jurisdiction and (2) BP used jurisdictional, as well as non-jurisdictional fixed price sales for resale as part of its manipulative schedule to affect the Houston Ship Channel index price. BP excepts to these findings. In the second section below, the Commission denies these exceptions.

1. Use of Non-Jurisdictional Transactions in a Manipulative Scheme

a. Hearing Order and ID

283. In the Hearing Order, the Commission held that NGA section 4A permits it to assert jurisdiction over conduct that directly affects jurisdictional transactions, even if the conduct would otherwise be non-jurisdictional. The Commission explained that NGA section 4A encompasses "any entity" that "directly or indirectly . . . use[s] or employ[s], *in connection with the purchase or sale of natural gas . . . subject to the jurisdiction of the Commission*, any manipulative or deceptive device or contrivance."⁶²⁵ The Commission stated that Order No. 670 interpreted the "in connection with" provision of NGA section 4A "as encompassing situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction."⁶²⁶ The Hearing Order pointed out that Order No. 670 illustrated the scope of our manipulation authority with an example in which an entity engaging in a non-jurisdictional transaction acts with intent or with recklessness to affect an auction clearing price which sets the price of jurisdictional transactions. While the Order No. 670 example involved the parallel anti-manipulation provisions of the Federal Power Act (FPA), the Hearing Order found that the example described Enforcement Staff's allegations in this case that BP had engaged in a non-jurisdictional transaction with the intent to affect the daily Houston Ship Channel price index that sets the price of jurisdictional transactions and therefore those allegations, if proven, would support a finding that BP's conduct was "in connection with" a jurisdictional transaction.

284. The Hearing Order also found this interpretation of NGA section 4A was consistent with the D.C. Circuit's interpretation of similar "in connection with" language in NGA sections 4 and 5 in *Conoco Inc. v. FERC*⁶²⁷ and *Altamont Gas*

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

⁶²⁶ Order No. 670, FERC Stats & Regs. ¶ 31,202 at P 22.

⁶²⁷ 90 F.3d 536 (D.C. Cir. 1996).

Transmission Co. v. FERC.⁶²⁸ The Hearing Order stated that in those cases the D.C. Circuit held that the Commission ordinarily has the authority to consider a matter beyond its jurisdiction if the matter affects jurisdictional sales, at least if there would otherwise be a regulatory gap. The Hearing Order also rejected BP's reliance on *Hunter*. The Commission explained that case involved a jurisdictional dispute between the Commission and the CFTC, in which the D.C. Circuit held that the Commission did not have jurisdiction because the manipulative scheme involved futures markets over which Congress gave the CFTC exclusive jurisdiction.

285. The Hearing Order accordingly interpreted NGA section 4A as making unlawful the use of non-jurisdictional transactions in a manipulative scheme to affect the prices of jurisdictional transactions. However, the Hearing Order set all factual issues as to whether BP had engaged in such a scheme for hearing.

286. Consistent with the Hearing Order, the ALJ also interpreted section 4A as making unlawful the use of non-jurisdictional transactions to manipulate the prices of jurisdictional transactions. The ALJ rejected BP's contentions that the exercise of the Commission's jurisdiction over such sales for resale was barred by court decisions in *Texas Pipeline Ass'n v. FERC*, 661 F.3d 258 (5th Cir. 2011), *Conoco Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996), and *ONEOK, Inc. v. Learjet Inc.*, 575 U.S. ___, 135 S. Ct. 1591 (2015). The ALJ explained that *Texas Pipeline* was not controlling because that case interpreted section 23 of the NGA, not section 4A which, as the Commission noted in Order No. 670, "closely track[s] the prohibited conduct language in section 10(b) of the Securities Exchange Act of 1934."⁶²⁹ The ALJ further explained that the Supreme Court's decision in *ONEOK* does not require a different result, and in fact simply held that state antitrust lawsuits against alleged manipulation of indexes that affected retail and wholesale rates are not preempted by the NGA.⁶³⁰ Finally, the ALJ explained that the *Conoco* decision also does not control here because the Commission has jurisdiction over matters "intertwined with jurisdictional activity" such as what happened here.⁶³¹

⁶²⁸ 92 F.3d 1239 (D.C. Cir. 1996).

⁶²⁹ ID at P 151.

⁶³⁰ *Id.* P 152.

⁶³¹ *Id.*

b. Rehearing Request and BP Exceptions

287. BP requested rehearing of the Commission’s Hearing Order, specifying nine errors, of which the first four challenged the Commission’s findings on jurisdiction.⁶³² First, BP contends that the Hearing Order erred in holding that the Commission may exercise subject matter jurisdiction as a threshold matter.⁶³³ In particular, BP cites section 1(b) of the NGA and the Fifth Circuit’s holding in *Texas Pipeline Ass’n v. FERC*, 661 F.3d 258 (5th Cir. 2011), for the proposition that the Commission may not pursue anti-manipulation enforcement with respect to fraudulent conduct that occurs outside of Commission-jurisdictional markets, such as the sale or transportation of intrastate natural gas.⁶³⁴

288. Second, BP states that the Hearing Order erred in determining that pursuant to “[s]ection 4A of the NGA and the Anti-Manipulation Rule, the Commission may assert jurisdiction over conduct that directly affects jurisdictional transactions,” or is otherwise authorized to do so.⁶³⁵ Specifically, BP contends that, contrary to Order No. 670 and the penalty assessment order in *Barclays*, 144 FERC ¶ 61,041 at P 113 (involving the parallel FPA provision), the “in connection with” element of section 4A of the NGA does not allow the Commission to enforce its anti-manipulation authority against non-jurisdictional conduct that directly affects jurisdictional markets because, analogizing to the D.C. Circuit’s decision in *Electric Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), such a rationale would have “no limiting principle.”⁶³⁶ BP further states that the Hearing Order “applied a strained and artificially narrow reading of” the D.C. Circuit’s decision in *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013), because, as BP states, *Hunter* was not limited to a dispute between two federal agencies and because the Commission cannot expand its jurisdiction.⁶³⁷ BP similarly argues that the Commission’s jurisdiction is restricted by the D.C. Circuit’s decision in *Conoco v. FERC*, 90 F.3d 536 (D.C. Cir. 1996), and that there is no “regulatory gap” because this is “not

⁶³² Rehearing Request at 5-7.

⁶³³ *Id.* at 5.

⁶³⁴ *Id.* at 13-16.

⁶³⁵ *Id.* at 5.

⁶³⁶ *Id.* at 16-17.

⁶³⁷ *Id.* at 18-19.

such a ‘borderline case’” since “[t]he Commission has *no* jurisdiction over intrastate transport and sales of natural gas.”⁶³⁸

289. Third, BP avers that the Commission does not have jurisdiction over first sales.⁶³⁹ Fourth and finally, BP states that *Chevron* deference would not apply to the Commission’s interpretation of Order No. 670.⁶⁴⁰ In particular, BP contends that the statute explicitly prohibits the Commission from exercising jurisdiction over intrastate transport and sale of natural gas.⁶⁴¹

290. BP reiterates these contentions in its exceptions to the ID, asserting that the ALJ erred in finding jurisdiction. BP contends that Enforcement Staff’s case concerns BP’s transportation of natural gas on an intrastate pipeline, and NGA section 1(b) expressly excludes such transportation from the Commission’s NGA jurisdiction.⁶⁴² BP further states that section 4A of the NGA applies only when the “manipulative device or contrivance” is “used in connection with the purchase or sale of natural gas or transportation services subject to FERC’s jurisdiction under the NGA.”⁶⁴³ BP thus claims that the ID erred by positing “that the Commission may reach any conduct—jurisdictional or not—as long as some other transaction (no matter how remotely) was priced off an affected index.” BP asserts “this is not the law.”⁶⁴⁴

291. In its exceptions, BP also contends that the ID erroneously rejected, without reasoned explanation, all federal precedent the ALJ found inconsistent with its notion of jurisdiction. BP states that the ID incorrectly distinguished *Texas Pipeline Association* on the grounds that the case involved section 23 of the NGA, instead of section 4A.⁶⁴⁵

⁶³⁸ *Id.* at 18-19.

⁶³⁹ *Id.* at 6, 21-24.

⁶⁴⁰ *Id.* at 6.

⁶⁴¹ *Id.* at 24-26.

⁶⁴² BP Br. on Exceptions at 68-69.

⁶⁴³ *Id.* at 69.

⁶⁴⁴ *Id.*

⁶⁴⁵ *Id.* at 72.

Similarly, BP claims that the ALJ erroneously distinguished *EPSA* and *Hunter*, cases which BP argues stand for the proposition that the Commission cannot extend its jurisdiction under the anti-manipulation authority of section 4A.⁶⁴⁶

c. Enforcement Staff Response

292. In its Brief Opposing Exceptions, Enforcement Staff states that BP is incorrect in claiming that federal case law supports its interpretation of section 4A jurisdiction. In particular, Enforcement Staff agrees with the ID that *Texas Pipeline Association* is inapposite and does not involve section 4A of the NGA, which closely tracks section 10(b) of the Securities Exchange Act.⁶⁴⁷ Enforcement Staff also states that the Supreme Court's decision in *ONEOK* is inapposite because that case involved the question of whether the NGA preempted state antitrust claims arising out of conduct affecting jurisdictional and non-jurisdictional sales.⁶⁴⁸ Enforcement Staff states that BP's interpretation of section 4A "would remove from that provision's scope manipulation of natural gas prices simply because the manipulation was effected using intrastate (as well as interstate) sales," and that the ID correctly rejected it.⁶⁴⁹

d. Commission Determination

293. We deny the rehearing request and BP's related exceptions to the Initial Decision. Each of BP's jurisdictional arguments share a common core assumption: that the Commission may not exercise anti-manipulation authority when the fraudulent conduct in question (and not the effect) occurred in non-jurisdictional markets. That is not the case.

294. Consistent with Congress' intent to adopt a "broad prohibition on market manipulation,"⁶⁵⁰ NGA section 4A provides that it shall be unlawful "for *any entity*,

⁶⁴⁶ *Id.*

⁶⁴⁷ Enforcement Staff Br. Opposing Exceptions at 52.

⁶⁴⁸ *Id.*

⁶⁴⁹ *Id.* at 53.

⁶⁵⁰ 151 Cong. Rec. S9255-01, 151 Cong. Rec. S9255-01, 2005 WL 1795006. In considering the proposed Energy Policy Act of 2005, Senator Bingaman remarked that "[t]he conference report has perhaps some of the strongest provisions in the area of protection of energy consumers. Both the electricity and natural gas provisions of the

(continued...)

directly *or indirectly*, to use or employ, in connection with the purchase or sale of natural gas . . . subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers.” Congress’ use of the phrase “any entity” in section 4A indicates its intent to apply the prohibition on manipulative conduct to more than just jurisdictional transactions and the persons engaged in such transactions. NGA section 2(6) defines any “person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale,” as a “natural-gas company.” NGA sections 4 and 5 accordingly apply all their requirements to “natural-gas companies.” If BP were correct that Congress intended to apply the prohibition on manipulative conduct solely to persons engaged in jurisdictional transportation and sales, Congress would have applied the prohibition to any “natural gas company,” consistent with its use of that term in NGA sections 4 and 5. But Congress did not do that. To the contrary, it applied the prohibition to “any entity,” thereby extending the prohibition on manipulative conduct beyond the transactions whose rates terms and conditions the Commission regulates under NGA sections 4 and 5.

295. Of course, the conduct made unlawful by NGA section 4A must have the effect of manipulating the price or terms of sales or transportation transactions that are subject to our NGA jurisdiction. Section 4A limits the prohibition on market manipulation to conduct that is “directly or indirectly . . . in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission.” Pursuant to the authority section 4A grants the Commission to prescribe rules defining manipulative conduct in such manner “as necessary in the public interest or for the protection of natural gas ratepayers,” Order No. 670 interpreted the “in connection with” provision of section 4A “as encompassing situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction.”⁶⁵¹ Order No. 670 also clarified that such a nexus exists when an entity “acts with intent or with recklessness to affect” the price in jurisdictional transactions.⁶⁵²

conference report contain broad new provisions to ensure market transparency and to prohibit market manipulation.”

⁶⁵¹ Order No. 670, FERC Stats & Regs. ¶ 31,202 at P 2.

⁶⁵² *Id.* P 22.

296. However, BP proposes that the Commission's anti-manipulation authority only reaches conduct that occurs entirely within jurisdictional markets, and no further. Put differently, BP suggests that Congress intended to deter manipulation *by* jurisdictional sales or transport, not *of* them. However, because jurisdictional and non-jurisdictional markets have become so intertwined over the past few decades, under BP's theory an entity could manipulate jurisdictional markets and yet avoid our section 4A penalty authority by the simple expedient of employing non-jurisdictional activities as the instrument of fraud. Such a result would leave jurisdictional markets exposed and vulnerable to market manipulation despite Congress' intent to adopt a "broad prohibition on market manipulation"⁶⁵³ and provide "enhanced consumer protection against the kind of market manipulation we experienced in the west coast electricity market 4 years ago."⁶⁵⁴

297. Indeed, if BP's theory were correct, Congress would have failed to achieve its basic purpose in preventing a repeat of important aspects of the western energy crisis, because some of that market manipulation occurred outside jurisdictional markets. For instance, the fictitious trades that some entities reported to the index publishers for the purpose of manipulating index prices that affected jurisdictional transactions would not appear to be jurisdictional (after all, because they were not real, the fictitious trades did not involve the sale or transport of interstate natural gas subject to the Commission's jurisdiction), and thus BP would appear to contend that NGA section 4A does not allow the Commission to take measures against that sort of fraud. This position chooses form over substance.

298. BP's interpretation of the statute is baseless. As described above, the anti-manipulation authority of the Energy Policy Act of 2005 does not simply target manipulative conduct occurring within jurisdictional markets; it also protects jurisdictional markets from fraud. That is why the Commission determined in Order No. 670 that "the 'in connection with' element encompass[es] situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction."⁶⁵⁵ After noting that the energy markets consist of both jurisdictional and non-jurisdictional activity, the Commission made it clear that the "in connection with" element protects jurisdictional markets and that, by exercising its duty to enforce the anti-manipulation provision of section 4A, the Commission is not and does not intend to regulate

⁶⁵³ 151 Cong. Rec. S9335-01, 151 Cong. Rec. S9335-01, 2005 WL 1797575.

⁶⁵⁴ 151 Cong. Rec. H6943-01, 151 Cong. Rec. H6943-01, 2005 WL 1788533.

⁶⁵⁵ Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 22.

non-jurisdictional activities. As stated in Order No. 670, the Commission does “not intend to construe the Final Rule so broadly as to convert every common-law fraud that happens to touch a jurisdictional transaction into a violation of the Final Rule. Rather, in committing fraud, the entity must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction.”⁶⁵⁶ In short, the “in connection with” provision of section 4A authorizes and directs the Commission to achieve Congress’ purpose in protecting jurisdictional markets from manipulation, and in instances when non-jurisdictional activities serve as the instrument of the fraud, then the Commission’s authority to sanction such activities is merely incidental and does not reflect an attempt or intent by the Commission to regulate such activity generally.

299. This is consistent with what the Supreme Court has recently said about the nature of federal and state jurisdiction in today’s competitive but often intertwined energy markets. In *ONEOK, Inc. v. Learjet, Inc.*, a pre-Energy Policy Act of 2005 case presenting the question whether a state-law cause of action for the manipulation of indexes that affected retail sales was subject to the NGA’s field pre-emption because the same manipulation equally affected wholesale sales, the Supreme Court carefully analyzed the changes that had transpired in the energy markets since the NGA was enacted, and chose substance over form.⁶⁵⁷ The *ONEOK* Court recognized that the “Platonic ideal” of a “clear division between the areas of state and federal authority in natural-gas regulation” does “not describe the natural gas regulatory world,” and the decisive issue therefore was whether the state law specifically targeted matters within the Commission’s exclusive jurisdiction.⁶⁵⁸ The Court thus held that state antitrust laws, which are directed at businesses generally and not specifically at matters within the Commission’s exclusive jurisdiction, are not subject to field pre-emption. And, lest it appear that this reflects a one-way ratchet that provides states with the authority to affect matters within the Commission’s exclusive jurisdiction and not *vice versa*, the Supreme Court subsequently issued a decision in *FERC v. Energy Power Supply Ass’n (EPSA)* affirming the Commission’s authority under the FPA to regulate matters in jurisdictional markets that have an incidental—albeit significant—impact on non-jurisdictional matters.⁶⁵⁹ In so doing, the *EPSA* Court explained that statutory terms such as “in

⁶⁵⁶ *Id.*

⁶⁵⁷ *ONEOK, Inc. v. Learjet, Inc.*, 575 U.S. ___, 135 S.Ct.1591 (2015).

⁶⁵⁸ *Id.* at 1601.

⁶⁵⁹ *FERC v. Energy Power Supply Ass’n*, 577 U.S. ___, 136 S. Ct. 760 (2016) (*EPSA*).

connection with” require “a non-hyperliteral reading . . . to prevent the statute from assuming near-infinite breadth” and approved applying “a common-sense construction” interpreting such terms to limit the Commission’s jurisdiction to “rules or practices that ‘directly affect the [wholesale] rate.’”⁶⁶⁰ Accordingly, the Court affirmed the Commission’s authority to regulate demand response in the wholesale markets because “it does not regulate *retail* electricity sales.”⁶⁶¹ The Court noted that it is inevitable that the Commission’s authority would have some effect on non-jurisdictional markets because “[i]t is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other” and thus “transactions that occur on the wholesale market have natural consequences at the retail level.”⁶⁶² Thus it “is of no legal consequence” that “when [the Commission] takes virtually any action respecting wholesale transactions—it has some effect, in either the short or the long term, on retail rates.”⁶⁶³ Put slightly differently, “[w]hen [the Commission] regulates what takes place on the wholesale market, as part of carrying out its charge to improve how that market runs, then no matter the effect on retail rates, [Section 201(b) of the FPA] imposes no bar.”⁶⁶⁴

300. The Commission’s interpretation of the “in connection with” provision of section 4A is entirely consistent with *ONEOK* and *EPSA*. As noted above, the Commission defined that statutory text as requiring a “nexus between the fraudulent conduct of an entity and a jurisdictional transaction.”⁶⁶⁵ “Nexus” is just another way of saying “directly affects,” which is how *EPSA* interpreted phrases such as “in connection with,” and—not incidentally—it is how the Commission itself defined the phrase in the Hearing Order.⁶⁶⁶

⁶⁶⁰ *Id.* at 786 (emphasis and alterations in original).

⁶⁶¹ *Id.* at 775.

⁶⁶² *Id.*

⁶⁶³ *Id.*

⁶⁶⁴ *Id.* at 776.

⁶⁶⁵ Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 22.

⁶⁶⁶ *See, e.g.*, Hearing Order at PP 21, 25.

301. The *EPSA* Court also applied what amounts to a two-part test in determining whether the Commission's demand response rules crossed the jurisdictional Rubicon. The first was whether the rule "addresses—and addresses only—transactions occurring on the wholesale market."⁶⁶⁷ The second was whether "the Commission's justifications for regulating [the conduct] are all about, and only about, improving the wholesale market."⁶⁶⁸ For our present purposes, the Commission's interpretation and application of its "in connection with" anti-manipulation authority is consistent with each of these tests. In Order No. 670, the Commission addressed its anti-manipulation authority solely in terms of protecting jurisdictional markets, expressly disclaiming any attempt to expand its jurisdiction, and defined its scope as requiring that "the entity must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction."⁶⁶⁹ The Commission also justified the Anti-Manipulation Rule as protecting its jurisdictional markets,⁶⁷⁰ and interpreted the provision as reaching only those activities that have a "nexus" to jurisdictional markets.⁶⁷¹ In short, since Congress imbued it with new anti-manipulation authority, the Commission has always interpreted the scope of this authority solely in terms of protecting jurisdictional markets, and as such any effect on non-jurisdictional activities is merely incidental to this protective function.

302. The various court cases relied on by BP do not require a different result. First, BP contends that our interpretation of NGA section 4A is inconsistent with the decision of the Fifth Circuit in *Texas Pipeline Association v. FERC*.⁶⁷² In that case, the Fifth Circuit reversed Order No. 720,⁶⁷³ in which the Commission relied on NGA section 23 to require major non-interstate pipelines which perform no interstate service to post certain scheduled flow information. The Fifth Circuit stated that the central question before it was whether NGA section 23 permits the Commission to compel the owners of intrastate

⁶⁶⁷ *EPSA*, 577 U.S. ___, 136 S. Ct. at 784.

⁶⁶⁸ *Id.* at 776.

⁶⁶⁹ Order No. 670, FERC Stats. & Regs. ¶ 31,202 at PP 16-22.

⁶⁷⁰ *Id.* P 25.

⁶⁷¹ *Id.* P 22.

⁶⁷² *Texas Pipeline Ass'n v. FERC*, 661 F.3d 258 (2011).

⁶⁷³ *Pipeline Posting Requirements Under Section 23 of the Natural Gas Act*, FERC Stats. & Regs. ¶ 31,283(2008), *vacated by Texas Pipeline Ass'n v. FERC*, 661 F.3d 258.

pipelines to post information concerning purely intrastate flow, capacity, and scheduling information on the intranet. The relevant provisions of section 23 permit the Commission to promulgate rules requiring posting of “information about the availability and prices of natural gas sold at wholesale and in interstate commerce” and to obtain that information from “any market participant.” The Fifth Circuit held that the jurisdictional provisions of NGA section 1(b) limit the scope of NGA section 23 and preclude the Commission from requiring wholly intrastate pipelines to disclose capacity and scheduling information.

303. The Fifth Circuit’s decision in *Texas Pipeline Association v. FERC* does not address NGA section 4A and its authorization for the Commission to prescribe rules prohibiting “any entity, directly or indirectly” from engaging in manipulative conduct “in connection with” any jurisdictional transaction. We have not interpreted NGA section 4A as permitting the Commission to adopt any ongoing regulatory requirement applicable to the ordinary business activities of non-jurisdictional entities, such as was at issue in *Texas Pipeline Association v. FERC*, where we required intrastate pipelines to post daily information about purely intrastate transactions not in interstate commerce. Rather, we interpret NGA section 4A as allowing us only to reach non-jurisdictional transactions in which an entity intended to affect or acted recklessly to affect the price of a jurisdictional transaction.

304. BP contends that our interpretation of NGA section 4A as permitting us to reach manipulative non-jurisdictional transactions that affect jurisdictional transactions is contrary to the D.C. Circuit’s opinion in *EPSA v. FERC*.⁶⁷⁴ BP argues that there the court rejected the Commission’s similar assertion of jurisdiction under the FPA over demand response on the ground that it directly affects jurisdictional wholesale rates. BP states that the court held that such an assertion of jurisdiction was foreclosed by the provision in section 201(b)(1) of the FPA that the Commission’s jurisdiction “shall not apply to any other sale of electric energy” than those specifically set forth in that section. BP points out that this provision of the FPA is similar to the provision in NGA section 1(b) on which it relies to claim that NGA section 4A does not permit the Commission to assert jurisdiction to the manipulative use of non-jurisdictional transactions to affect the price of jurisdictional transactions. However, as described above, the Supreme Court reversed the D.C. Circuit’s *EPSA v. FERC* decision, finding that the FPA does permit the Commission to regulate practices that directly affect jurisdictional rates. Here, we interpret NGA section 4A as only permitting us to prohibit the use of non-jurisdictional natural gas sales and transportation as part of a manipulative scheme to directly affect jurisdictional markets. We do not assert any general regulatory authority to regulate the rates, terms, or

⁶⁷⁴ 753 F.3d 216 (D.C. Cir. 2014).

conditions of any such non-jurisdictional natural gas sales or transportation. Applying this protective power to reach fraudulent transactions may have at times a merely incidental and possibly unavoidable effect on non-jurisdictional natural gas, but the purpose of doing so is solely to protect jurisdictional markets from manipulation.

305. BP also contends that the Commission's interpretation of the "in connection with" language in NGA section 4A is inconsistent with the D.C. Circuit's interpretation of similar "in connection with" language in NGA sections 4 and 5 in such cases as *Conoco v. FERC*, 90 F.3d 536 (D.C. Cir. 1996), and *Williams Gas Processing, L.P. v. FERC*, 373 F.3d 1335 (D.C. Cir. 2004). Those cases concerned the issue of when the Commission may rely on similar "in connection with" language in NGA sections 4 and 5 to set aside the corporate form and regulate a gathering affiliate of a natural gas pipeline as if it were a part of the pipeline, despite the fact NGA section 1(b) exempts gathering from the Commission's NGA jurisdiction. In *Conoco v. FERC*, the D.C. Circuit stated that, "as an abstract matter," it had "no reason to doubt the Commission's conclusion that a non-jurisdictional entity could act in a manner that would change its status by enabling an affiliated interstate to manipulate access and costs of gathering."⁶⁷⁵ In *Williams Gas Processing, L.P. v. FERC*, the D.C. Circuit reversed Commission orders exercising this authority in order to assert jurisdiction over a pipeline's gathering affiliate to regulate its rates, terms, and conditions under NGA sections 4 and 5. The court found that the Commission had not shown that actions of the gathering affiliate in charging high rates for its non-jurisdictional gathering services had "frustrate[d] the Commission's effective regulation of the pipeline," stating that the gathering company's affiliate relationship with the pipeline "neither enhanced nor detracted from its ability to charge high rates or impose onerous conditions."⁶⁷⁶

306. Our interpretation of NGA section 4A is not inconsistent with the D.C. Circuit's decisions in *Conoco v. FERC* and *Williams Gas Processing, L.P. v. FERC*. We have interpreted the similar "in connection with" language in that section as only permitting us to reach non-jurisdictional transactions when they are entered into for the purpose of directly affecting jurisdictional transactions, unlike the situation in *Williams Gas Processing, L.P. v. FERC*, where the non-jurisdictional transactions were not shown to have had any effect on the pipeline's jurisdictional transactions. Moreover, we have not interpreted section 4A as giving us any authority to regulate any entity's rates, terms, and conditions for non-jurisdictional services pursuant to NGA sections 4 and 5 on an

⁶⁷⁵ 373 F.3d at 549.

⁶⁷⁶ 373 F.3d at 1342-43.

ongoing basis, as the Commission sought to do in *Williams Gas Processing, L.P. v. FERC*.

307. Finally, the Commission continues to find BP's reliance on the D.C. Circuit's decision in *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013) to be misplaced. In that case, the D.C. Circuit held that the Commission had no jurisdiction with respect to a manipulative scheme carried out in the futures market, because section 2(a)(1)(A) of the Commodities Exchange Act (CEA) gives the CFTC "exclusive jurisdiction" over the manipulation of natural gas futures contracts. BP seeks to analogize NGA section 1(b) to CEA section 2(a)(1)(A), arguing that it similarly provides exclusive jurisdiction to the states to regulate intrastate natural gas sales, including any use of those sales to manipulate interstate sales for resale. However, as already discussed, the Supreme Court has rejected such an interpretation of the FPA jurisdictional provision that corresponds to NGA section 1(b).

2. The Initial Decision's Findings of Jurisdiction

308. The ALJ held that Enforcement Staff has proved Commission jurisdiction through (a) third-party sales for resale transactions priced off the manipulated index; (b) cash-out transactions priced off the manipulated index; and (c) BP's own sales of jurisdictional gas made pursuant to the manipulative scheme.⁶⁷⁷ BP excepts to all these findings. After reviewing the evidence, the ID, and the parties' contentions, we determine that Enforcement Staff proved that BP's manipulative scheme was in connection with jurisdictional purchases or sales of natural gas. In particular, the three bases for jurisdiction submitted by Enforcement Staff—third-party jurisdictional sales priced to the manipulated index; cash-out transactions priced to the manipulated index; and BP's own jurisdictional sales made as part of its manipulative scheme—provide individually and together proof that the Commission has jurisdiction over BP's manipulative scheme. What follows is our discussion on each of these three proffered bases for jurisdiction.

a. Third Party Sales for Resale

i. Initial Decision

309. The ALJ held that the Commission's jurisdiction was proved by third party sales for resale of natural gas whose prices were pegged to the Houston Ship Channel *Gas Daily* index that BP had manipulated.⁶⁷⁸ The ALJ found that, by providing 46

⁶⁷⁷ ID at P 146.

⁶⁷⁸ *Id.* P 147.

instances of third party sales for resale priced off the index,⁶⁷⁹ Enforcement Staff had proved that the sales in question were sales for resale in interstate commerce, and were not first sales.⁶⁸⁰ As an example, the ALJ pointed to a sale for resale by a pipeline affiliate on November 11-12, 2008 “at an interconnect with Trunkline Gas Company, LLC, an interstate pipeline.”⁶⁸¹ The ALJ further stated that this example was not a first sale, that the gas was not attributable to the production gas of the pipeline or its affiliate, and that the transaction was priced off the manipulated Houston Ship Channel *Gas Daily* index.⁶⁸²

310. The ALJ then rejected BP’s arguments to the contrary. BP had argued that the Commission could not exercise jurisdiction over sales that contribute to an index because this would include intrastate transactions.⁶⁸³ The ALJ noted that the Commission had already resolved this legal question in the Hearing Order. BP further argued that accepting jurisdiction over sales for resale affecting an index would be a case of “the exception swallowing the rule” because it would subject all parties reporting transactions to jurisdiction, including those not otherwise subject to the Commission’s jurisdiction.⁶⁸⁴ The ALJ rejected this contention, noting that “a nexus must exist between manipulative behavior and Commission jurisdictional transactions in order for the Commission to properly have jurisdiction.”⁶⁸⁵

ii. BP Exceptions

311. BP does not except to the ALJ’s factual finding that the 46 third party sales for resale presented by Enforcement Staff were subject to the Commission’s NGA jurisdiction and were priced off the Houston Ship Channel *Gas Daily* Index. However, BP states that the ID incorrectly based jurisdiction on those third-party sales. BP

⁶⁷⁹ See Ex. OE-161 at 175-191.

⁶⁸⁰ ID at P 147.

⁶⁸¹ *Id.* P 148.

⁶⁸² *Id.*

⁶⁸³ *Id.* P 149.

⁶⁸⁴ *Id.* P 150.

⁶⁸⁵ *Id.*

contends that “[t]his conclusion requires as its foundation the principle that the Commission’s jurisdiction can extend to sales that it otherwise could not reach merely because such sales might contribute to an index, flatly contradicting the plain language of the NGA” and states that “[t]his would be a classic case of the exception swallowing the rule.”⁶⁸⁶

iii. Enforcement Staff Response

312. Enforcement Staff states that the ID correctly found that third-party sales for resale priced off of the manipulated index provide one basis for jurisdiction over the conduct at issue here.⁶⁸⁷ Enforcement Staff contends that BP errs in claiming that basing jurisdiction on such sales would extend the Commission’s jurisdiction “to sales that it otherwise could not reach merely because such sales might contribute to an index” in contravention of Section 1(b) of the NGA.⁶⁸⁸ Enforcement Staff states that the Commission already rejected this argument in the Hearing Order.⁶⁸⁹ Enforcement Staff further states that BP is wrong in contending that exercising section 4A jurisdiction over BP’s sales intended to manipulate the index would cause “the exception [to] swallow[] the rule.”⁶⁹⁰ Instead, Enforcement Staff avers, BP ignores the “key requirement” of Order No. 670 that there must be a link between the manipulation and FERC jurisdictional transactions.⁶⁹¹ Thus, Enforcement Staff states, the ID correctly found that “not every transaction reported would be subject to Commission jurisdiction; only those transactions where there exists a connection between manipulative behavior and jurisdictional transactions.”⁶⁹²

⁶⁸⁶ BP Br. on Exceptions at 69.

⁶⁸⁷ Enforcement Staff Br. Opposing Exceptions at 49-53.

⁶⁸⁸ *Id.* at 50.

⁶⁸⁹ *Id.* at 51.

⁶⁹⁰ *Id.*

⁶⁹¹ *Id.* (citing Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 22).

⁶⁹² *Id.* (quoting ID at P 150).

iv. Commission Determination

313. We agree with the ID and determine that Enforcement Staff proved jurisdiction with respect to the 46 third party sales. As already discussed, BP's legal argument is incorrect. As held in the Hearing Order and reaffirmed above, the "in connection with" provision of section 4A of the NGA provides authority over manipulative conduct that directly affects wholesale rates.⁶⁹³ The Commission's "in connection with" authority is solely directed at protecting jurisdictional markets, but to do so effectively it must reach conduct that "directly affects" these jurisdictional markets—that is, there must be a nexus between the conduct and the matters within the Commission's regulatory jurisdiction—and in so doing the Commission is not asserting any general regulatory jurisdiction over intrastate or first sale natural gas. This is wholly consistent with the Supreme Court's determination that phrases such as "in connection with" are not to be read in a "hyperliteral" way but rather are read in a common sense way that requires there to be a nexus between the conduct and the jurisdictional market.⁶⁹⁴ As such, any impact on transactions involving non-jurisdictional natural gas is wholly incidental to the Commission's duty to protect jurisdictional markets, and that sort of incidental effect—even if it turns out to be significant in scope—is allowable, as the Supreme Court recently addressed in *EPSA*. Thus, BP is wrong: far from being limited to reaching only jurisdictional transactions, the Commission's anti-manipulation authority protects jurisdictional markets from manipulation, and this protective duty reaches manipulative transactions that directly affect jurisdictional markets—even if the manipulative instruments happen to involve non-jurisdictional natural gas. Accordingly, the NGA authorizes the Commission to employ its anti-manipulation authority to reach transactions involving non-jurisdictional natural gas so long as there is a nexus between those transactions and a matter within the Commission's jurisdiction.

314. Thus, in reviewing the facts presented, and the governing law, we agree that BP's manipulation directly and intentionally affected third-party jurisdictional sales. As addressed above, BP's scheme was designed to manipulate the Houston Ship Channel *Gas Daily* index, which reflects the volume-weighted average prices of relevant physical trades that were reported to the index publisher. The purpose of this scheme was to profit from related financial trades whose value was tied to the manipulated index. That is to say, the scheme was designed to affect index prices in a manner that benefited BP's related positions. The purpose and necessary consequence of manipulating the index

⁶⁹³ Hearing Order at PP 23-26.

⁶⁹⁴ *EPSA*, 577 U.S. ___, 136 S. Ct. at 774.

price was to affect the value of everyone's positions—physical and financial—whose value was tied to the index. And, as Enforcement Staff proved, there were at least 46 instances in which third parties made jurisdictional sales whose value was tied to the Houston Ship Channel *Gas Daily* index that BP manipulated.⁶⁹⁵ As such, we find that BP intended to and did manipulate the price of jurisdictional transactions, and thus the scheme was “in connection with” matters within the Commission's jurisdiction.

315. The ID describes one of these examples in detail. Kinder Morgan Texas Pipeline LLC sold natural gas to Integrys for flow date November 11-12, 2008 (i.e. during the Investigative Period), and the transaction price was pegged to the Houston Ship Channel *Gas Daily* index.⁶⁹⁶ This gas was interstate in nature because it was sold at an interconnect with Trunkline Gas Company, LLC, an interstate pipeline.⁶⁹⁷ This was a sale for resale.⁶⁹⁸ And it was not a first sale because it was not from Kinder Morgan's (or an affiliate thereof's) own production.⁶⁹⁹ In short, this was a transaction for the purchase or sale of natural gas subject to the Commission's jurisdiction, and because the price was pegged to an index that BP intentionally manipulated, the scheme here directly affected and was thus “in connection with” a jurisdictional sale.

⁶⁹⁵ The ID noted that Enforcement Staff and BP “protected a lot of material” in the portions of their briefs at hearing relating to the examples of third party sales for resale that were priced off of the Houston Ship Channel *Gas Daily* index and deemed that protection “unnecessary and [an] abuse of confidentiality rules.” See ID at P 148 n.117. On exceptions, BP argued that the ID erred “in finding that both [Enforcement Staff] and BP abused the protective order process.” See BP Br. on Exceptions at 13 (Exception 65). Enforcement Staff also disagreed with the ID on this point and did not oppose BP's exception. See Enforcement Staff Br. Opposing Exceptions at 50 n.207. We find that it is unnecessary to determine whether the protection of material in this case abused any confidentiality rules, but we encourage parties to avoid unnecessary protection and overprotection of information, especially when that information has been made public elsewhere.

⁶⁹⁶ ID at P 148 (citing Ex. OE-161 at 176; Ex. OE-171 at 2, P 7; Ex. OE-172 at 3, P 6c).

⁶⁹⁷ *Id.* (citing Ex. OE-172 at 3, P 6c).

⁶⁹⁸ *Id.* (citing Ex. OE-171 at 2, P 8).

⁶⁹⁹ *Id.* (citing OE-172 at 3-4, P 6c).

316. After examining the evidence behind the other 45 examples proffered by Enforcement Staff, we agree with the ALJ that Enforcement Staff proved that BP's scheme was "in connection with" jurisdictional transactions.

b. Cash-Out Transactions

i. Initial Decision

317. As a second basis for jurisdiction, the ALJ held that Enforcement Staff further proved jurisdiction through cash-out transactions priced off the manipulated Houston Ship Channel *Gas Daily* index.⁷⁰⁰ Noting that cash-out transactions are jurisdictional, the ALJ found that Northern Natural Gas (NNG) priced its imbalance charges off of the Average Gulf Coast Monthly Index Price, which used the manipulated Houston Ship Channel *Gas Daily* index, during the investigative period.⁷⁰¹ Accordingly, the ALJ found that the Commission has jurisdiction over NNG's cash-out transactions, and therefore BP's manipulative trades were in connection with jurisdictional transactions.⁷⁰²

318. The ALJ then rejected BP's contentions otherwise. BP argued that the cash-out transactions are insufficient to establish Commission jurisdiction because this could lead to establishing "in connection with" jurisdiction over futures transactions where cash-out prices incorporate the NYMEX price as a component.⁷⁰³ The ALJ determined that this was without merit because this proceeding did not implicate NYMEX or CFTC regulated futures. BP further claimed that the Commission's jurisdiction over cash-out transactions was restricted by the D.C. Circuit's decision in *EPSA*. In particular, BP contended that "without boundaries" the Commission's section 4A jurisdiction could extend to include any factor affecting cash-out prices.⁷⁰⁴ The ALJ rejected this argument, stating that the D.C. Circuit's holding in *EPSA* addressed different provisions of the FPA, and held instead that *Barclays* is a more appropriate comparison because the respondents in that matter were found to have "traded 'to affect' an index 'which sets the price of both jurisdictional and non-jurisdictional transactions' and therefore, they are subject to

⁷⁰⁰ *Id.* P 153.

⁷⁰¹ *Id.*

⁷⁰² *Id.*

⁷⁰³ *Id.* P 154.

⁷⁰⁴ *Id.* P 155.

Commission jurisdiction under both Section 222 of the FPA and the Commission's Anti-Manipulation Rule.”⁷⁰⁵ As the ALJ noted, the Commission's finding was subsequently supported by a federal district court reviewing the penalty assessment order.⁷⁰⁶ The ALJ concluded that, as in *Barclays*, Enforcement Staff proved that other market participants traded off of the manipulated Houston Ship Channel *Gas Daily* index, and therefore those transactions—including NNG's cash-out transactions—were “in connection with” the manipulative scheme.⁷⁰⁷

ii. BP Exception

319. BP states that the ID incorrectly based jurisdiction on certain cash-out transactions priced off the manipulated Houston Ship Channel *Gas Daily* index.⁷⁰⁸ BP suggests that doing so would transgress the reservation in section 1(b) of jurisdiction over intrastate gas sales to the states.⁷⁰⁹ BP contends that none of the BP Respondents were subject to a cash-out charge, nor were any of BP's transactions executed in connection with the cash-out transactions at issue here. Instead, BP states, “[l]inking BP's contribution to the [Houston Ship Channel] *Gas Daily* index and Northern Natural's cash-out process would stretch [the Commission's] jurisdiction far beyond the bounds intended by Congress, making that jurisdiction essentially unlimited.”⁷¹⁰ BP cites the D.C. Circuit's *EPSA*

⁷⁰⁵ *Id.* (quoting *Barclays*, 144 FERC ¶ 61,041 at P 115).

⁷⁰⁶ *Id.* (citing *FERC v Barclays, et al.*, No. 2:13-cv-2093-TLN-DAD, 2015 WL 2455538, at 16 (E.D. Cal. May 20, 2015) (“the Court accepts FERC's position that the conduct identified in the Petition – allegedly manipulative – involved Defendants making transactions at California wholesale electricity prices, and via those transactions, further influencing California electricity prices; then, utilities, generators, other power marketers, or individual traders in California and this District made transactions according to those prices.”)).

⁷⁰⁷ *Id.*

⁷⁰⁸ BP Br. on Exceptions at 70-71.

⁷⁰⁹ *Id.* at 71.

⁷¹⁰ *Id.*

decision for the proposition that “such an extension of jurisdiction is precluded by federal precedent.”⁷¹¹

iii. Enforcement Staff Response

320. Enforcement Staff states that the ID correctly found that another basis for jurisdiction here was the evidence that, during each month of the Investigative Period, an interstate pipeline priced “cash out” imbalancing charges off of a composite index that used the Houston Ship Channel *Gas Daily* index manipulated by BP.⁷¹² Enforcement Staff urges the Commission to reject BP’s contention that this is not evidence of jurisdiction because none of BP’s own transactions were cash-out transactions and that predicated jurisdiction on this would make the Commission’s jurisdiction “essentially unlimited,” and would include futures transactions subject to the CFTC’s exclusive jurisdiction.⁷¹³ Enforcement Staff states that the ID correctly rejected this proposition because the cash-out transactions at issue did not in fact incorporate transactions subject to the CFTC’s exclusive jurisdiction, and because BP’s manipulation of physical natural gas trades affected the price of Commission-jurisdictional transactions such as the cash-outs.⁷¹⁴ Enforcement Staff also states that the ALJ correctly rejected BP’s claims that predicated jurisdiction on cash-out transactions conflicts with the D.C. Circuit’s holding in *EPSA*.⁷¹⁵

iv. Commission Determination

321. The Commission affirms the ALJ’s finding that another type of jurisdictional third-party transaction—called a “cash out”—was also directly affected by BP’s scheme. Cash-out transactions are a function of the reality of operating the physical pipeline system. Market participants sometimes ship or take delivery of more or less natural gas than their schedules require. If left uncorrected, this creates an imbalance in the pipeline system and requires the pipeline operator to make necessary adjustments. In turn, that means that pipeline operators submit either charges or credits to market participants in

⁷¹¹ *Id.*

⁷¹² Enforcement Staff Br. Opposing Exceptions at 53.

⁷¹³ *Id.* at 54 (quoting BP Br. on Exceptions at 81).

⁷¹⁴ *Id.*

⁷¹⁵ *Id.* at 53-54.

accordance with their imbalances.⁷¹⁶ These cash-in/cash-out transactions are governed by a tariff on file with the Commission, and are subject to the Commission's jurisdiction.⁷¹⁷ As such, if any cash-out tariffs are pegged to an index that was manipulated, and if there was a cash-out transaction whose price was pegged to an index that was manipulated, then that would cause the manipulation to have been "in connection with" a jurisdictional transaction. For the reasons addressed above, we reject BP's contention that the law holds otherwise.

322. Furthermore, we agree with the ID's findings that Enforcement Staff proved jurisdiction here. As the Initial Decision described it, Enforcement Staff proved that during the three months of the Investigative Period, Northern Natural Gas Pipeline priced its imbalance charges off of the Average Gulf Coast Monthly Index Price, which included the Houston Ship Channel *Gas Daily* index.⁷¹⁸ After examining the evidence closely, we agree that the ALJ had it right: during those three months, a pipeline priced its cash-out transactions on the index that BP had intentionally manipulated. This means that BP's manipulative conduct directly affected, and was "in connection with," jurisdictional transactions.

c. BP Sales for Resale

i. Initial Decision

323. In addition to finding that BP's manipulative conduct directly affected third party jurisdictional sales that were priced off the Houston Ship Channel *Gas Daily* Price Index, the ALJ also found that BP itself made jurisdictional fixed price sales for resale as part of its manipulative conduct. Specifically, the ALJ held that Enforcement Staff had also demonstrated Commission jurisdiction by proving 52 examples in which BP's Texas Team engaged in next-day fixed price sales for resale of physical natural gas during the Investigative Period.⁷¹⁹ The ALJ held that these sales were jurisdictional

⁷¹⁶ See, e.g., *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810 (D.C. Cir. 1998) (describing cash-out transactions and affirming the Commission's authority to regulate them).

⁷¹⁷ ID at P 71 (quoting *Transcontinental Gas Pipe Line Corp.*, 55 FERC ¶ 61,446, at 62,379 (1991) ("[C]ash-out transactions . . . are subject to the Commission's jurisdiction under sections 4 and 7 of the Natural Gas Act.")).

⁷¹⁸ *Id.* (citing Ex. OE-173 at 2-3, P 7; Ex. OE 161 at 93:8-94:2).

⁷¹⁹ *Id.* P 156.

because they were made in interstate commerce, they were sales for resale, and they were not first sales.⁷²⁰ The ALJ determined that the testimony of Enforcement Staff expert Bergin proved that these transactions were made in interstate commerce through the pathing of the natural gas, and agreed that such pathing served as a “paper trail” because tracing natural gas molecules is impossible.⁷²¹ The ALJ found that the natural gas in each of the 52 examples had come off of interstate pipelines and was subsequently shipped on intrastate pipelines, which did not transform it into intrastate gas.⁷²² The ALJ further found that the 52 transactions were sales for resale, as demonstrated by the documents used in pathing.⁷²³ Finally, the ALJ found that the 52 sales were not first sales exempt from the Commission’s NGA jurisdiction, because, as Bergin testified, none of the sales came directly from BP’s production.⁷²⁴

324. The ALJ rejected BP’s arguments otherwise. BP claimed that the two example sales presented in Bergin’s direct testimony were not linked to the manipulative trading because both were economic (as that term was used by another Enforcement Staff expert) and because both were traded after 15 percent of the volume had already been traded.⁷²⁵ However, the ALJ found that the two examples were not contradicted by the testimony of Enforcement Staff’s other expert, and noted in particular that the two examples were consistent with BP’s larger scheme to manipulate the Houston Ship Channel *Gas Daily* index.⁷²⁶ The ALJ also rejected BP’s contention that the natural gas at issue in these transactions was not jurisdictional because it flowed over Houston Pipeline System, an intrastate pipeline.⁷²⁷ Instead, the ALJ found that the natural gas at issue was jurisdictional because it had been transported upstream on interstate pipelines, and

⁷²⁰ *Id.*

⁷²¹ *Id.* P 157.

⁷²² *Id.* P 158.

⁷²³ *Id.* P 159.

⁷²⁴ *Id.* P 160.

⁷²⁵ *Id.* P 161.

⁷²⁶ *Id.*

⁷²⁷ *Id.* P 162.

thereafter remained interstate in nature.⁷²⁸ The ALJ similarly rejected BP's claim that it was inappropriate to use pathing, and that Bergin's pathing was inaccurate in any event.⁷²⁹ But the ALJ found persuasive Bergin's testimony that the industry uses pathing as a proxy for tracing gas molecules, and that pathing gas through a pool is possible.⁷³⁰ The ALJ was also persuaded that Bergin's pathing was accurate, noting that he used nomination sheets and balancing sheets to make his determination, and therefore accorded his testimony "significant weight."⁷³¹

325. The ALJ also rejected BP's contention that many of its sales identified by Bergin were exempt from Commission jurisdiction.⁷³² BP had cited about 18 examples of sales involving intracompany sales that it claims are exempt from jurisdiction, because the Commission found in *Utah Power* that intracompany transactions within an electric utility are not sales for resale subject to the Commission's FPA jurisdiction.⁷³³ But the ALJ determined that *Utah Power* did not address downstream transactions, made subsequent to an intracompany sale, involving third parties, and therefore found that these 18 sales identified by Bergin were jurisdictional because they involved sales for resale BP made to third parties after the intracompany sales within BP.⁷³⁴

326. BP cited about 18 other transactions that it claims are non-jurisdictional first sales.⁷³⁵ But the ALJ found that those sales by BP were not from BP's own

⁷²⁸ *Id.*

⁷²⁹ *Id.* PP 163-164.

⁷³⁰ *Id.* P 163.

⁷³¹ *Id.*

⁷³² *Id.* P 165.

⁷³³ *Id.* (citing *Utah Power & Light Co.*, 45 FERC ¶ 61,095, at 61,296 (1988), *order on reh'g*, 47 FERC ¶ 61,209 (1989), *order on reh'g*, 48 FERC ¶ 61,035 (1989), *aff'd in part and remanded in part sub nom., Env'tl. Action, Inc., et al. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991)).

⁷³⁴ *Id.* P 166.

⁷³⁵ *Id.* P 167.

production, and therefore were not first sales.⁷³⁶ BP also stated that those sales were non-jurisdictional because BP did not ship the subject gas on NGA transportation contracts, relying on *Westar Transmission Co.*, 43 FERC ¶ 61,050 (1998).⁷³⁷ In that case, the Commission held that a Hinshaw pipeline would not become subject to the Commission's NGA jurisdiction if it purchased natural gas produced in another state in a first sale exempt from the NGA jurisdiction and transported that gas to its system on an interstate pipeline pursuant to an NGPA section 311 contract. *Westar* also held that such a Hinshaw pipeline's resales of that natural gas as part of its intrastate sales business would not subject its downstream intrastate customers to NGA jurisdiction. BP contended that it transported the natural gas in these transactions to the Houston Ship Channel on an intrastate pipeline under NGPA section 311 contracts and therefore this transportation removes its downstream sales at the Houston Ship Channel from NGA jurisdiction.⁷³⁸

327. But the ALJ held that the evidence showed that the natural gas BP sold in these transactions was shipped to BP by third parties on upstream interstate pipelines under NGA transportation contracts, rather than NGPA section 311 contracts, and that "jurisdiction over natural gas, from a previous upstream transaction, makes these transactions jurisdictional."⁷³⁹ The ALJ agreed with Enforcement Staff's contention that *Delhi Gas Pipeline Corporation*, 19 FERC ¶ 61,189 (1982), provided a better analogy to the case at bar than *Westar*.⁷⁴⁰ As the Commission stated in *Westar*, in *Delhi* "the sale across a state line placing the gas in interstate commerce was not exempt from the NGA, but in [*Westar*] the sale, as well as the transportation, across state lines are both exempt from the NGA."⁷⁴¹ Furthermore, the ALJ noted that unlike the situation in *Westar*, BP "is not a Hinshaw Pipeline, and thus its transactions are not exempt under the NGA."⁷⁴² The ALJ then found that the gas was transported in interstate commerce, and therefore *Westar* did not apply "because the upstream transportation was done pursuant to a

⁷³⁶ *Id.*

⁷³⁷ *Id.* P 168.

⁷³⁸ *Id.* (quoting *Westar*, 43 FERC at 61,140).

⁷³⁹ *Id.*

⁷⁴⁰ *Id.* P 169.

⁷⁴¹ *Id.* (quoting *Westar*, 43 FERC at 61,142).

⁷⁴² *Id.*

Commission jurisdictional, NGA transportation contract thus placing the gas in interstate commerce and Commission jurisdiction.”⁷⁴³

328. BP also claimed that the two examples provided by Bergin in his direct testimony involved small volumes of gas, implicitly arguing that jurisdiction requires a minimum volume of gas.⁷⁴⁴ The ALJ rejected this implicit argument, and held that “[r]egardless of how small the total volume in relation to the larger market, as long as the Commission has jurisdiction, the jurisdiction must stand.”⁷⁴⁵

329. The ALJ also rejected BP’s contention that ten of the jurisdictional sales claimed by Bergin must have been outside the Investigative Period because those sales were made using BP’s September 2007 baseload transportation contract and the Investigative Period did not begin until September 18, 2008. BP further contended that Bergin had conceded the error in his testimony.⁷⁴⁶ The ALJ held that this was a “mischaracterization” of Bergin’s testimony, and in addition determined that the fact that the gas was purchased in September 2007 was beside the point because the gas was in fact sold during the Investigative Period.⁷⁴⁷

330. The ALJ additionally held that BP’s claims that Bergin failed to account for a “mismatch” in gas volumes was without merit.⁷⁴⁸ The ALJ examined the examples provided in Bergin’s direct and rebuttal testimony and determined that there was no mismatch; rather, this merely reflected a situation in which some of the original interstate gas was later shipped with other gas.⁷⁴⁹

331. The ALJ further rejected BP’s argument that jurisdiction was not proved because Bergin’s 52 examples did not cover 39 of the 73 days during the Investigative Period.⁷⁵⁰

⁷⁴³ *Id.*

⁷⁴⁴ *Id.* P 170.

⁷⁴⁵ *Id.*

⁷⁴⁶ *Id.* P 171.

⁷⁴⁷ *Id.*

⁷⁴⁸ *Id.* P 172.

⁷⁴⁹ *Id.*

⁷⁵⁰ *Id.* P 173.

The ALJ instead determined that “when taking into account the end of the month cash-out transactions that relied on the manipulated [Houston Ship Channel] *Gas Daily* index” then “it is clear that all days during the Investigative Period contributed to BP’s Texas Team’s manipulative scheme.”⁷⁵¹

332. Finally, the ALJ denied BP’s reiterated objection that 50 of Bergin’s 52 examples should not have been admitted at the hearing because they were not referenced until his rebuttal testimony.⁷⁵² The ALJ had admitted the examples into evidence at the hearing over BP’s objection, and held that BP’s provided no reason to reconsider that decision.⁷⁵³

ii. BP Exceptions

333. BP states that the ID erred in holding that the 52 examples of sales of next-day natural gas by BP’s Texas Team identified by Bergin provide a basis for jurisdiction.⁷⁵⁴ BP first contends that the 52 examples should not have been introduced into evidence because they “were improperly introduced in rebuttal testimony” because Enforcement Staff “sandbagged BP” in introducing those examples at the rebuttal stage.⁷⁵⁵

334. Next, BP states that the ALJ erred in finding that the fact the gas BP sold in these transactions had been transported to BP over an interstate pipeline was sufficient to support a finding that BP’s sales of that gas were subject to the Commission’s NGA jurisdiction. BP asserts that natural gas that is transported on intrastate pipelines pursuant to NGPA Section 311 may be “interstate” in nature, but that NGPA section 601(a) excludes such gas from the Commission’s NGA jurisdiction. BP relies on *Westar* to argue that section 311 intrastate service has been structured specifically to allow the movement of such gas without any risk that NGA jurisdiction will apply.⁷⁵⁶ Relatedly, BP avers that Bergin was not “an expert on [the Commission’s] jurisdiction over sales

⁷⁵¹ *Id.*

⁷⁵² *Id.* P 174.

⁷⁵³ *Id.*

⁷⁵⁴ BP Br. on Exceptions at 72-73.

⁷⁵⁵ *Id.* at 73.

⁷⁵⁶ *Id.* at 73-74.

and transportation of natural gas” and that the ID erred by relying on his opinion.⁷⁵⁷ BP further contends that the ID incorrectly accepted Bergin’s assertion that he could trace gas through the Houston Ship Channel pool.⁷⁵⁸

335. BP also states that the two examples provided by Bergin in his direct testimony only relate to one day, October 20, 2008, and that there was no link between those trades and the alleged manipulative trading.⁷⁵⁹ BP avers that the first example was not jurisdictional because it was a first sale that was later shipped downstream under Section 311 of the NGPA, which allows movement of non-jurisdictional gas through an interstate pipeline without any risk that NGA jurisdiction will apply. BP states that because the gas was resold within Texas and shipped on NGPA section 311 contracts it remained non-jurisdictional. BP asserts that because this gas was never shipped on an interstate pipeline under an NGA contract, it remained non-jurisdictional, both in terms of transportation and sale, through BP’s sale at the Houston Ship Channel.

336. BP asserts that the second example also was not jurisdictional because it was an intracompany transfer and there was a mismatch in volumes shipped into and out of the Houston Ship Channel pool.⁷⁶⁰ Lastly, BP contends that Bergin’s other 50 examples did not provide evidence of jurisdiction for 39 of the 73 days of the Investigative Period, that none of the 52 examples were tied to the alleged manipulative scheme, that the 50 examples do not establish jurisdiction over the 34 days, that the upstream transactions were sometimes intracompany transfers (not sales for resale), and that Bergin erroneously tried to trace gas through the Houston Ship Channel pool by following the contract path.⁷⁶¹

iii. Enforcement Staff Response

337. Enforcement Staff claims that the ID correctly found that BP’s own sales of jurisdictional natural gas provide another basis for jurisdiction over the manipulative

⁷⁵⁷ *Id.* at 74.

⁷⁵⁸ *Id.* at 75.

⁷⁵⁹ *Id.*

⁷⁶⁰ *Id.* at 76-78.

⁷⁶¹ *Id.* at 77-80.

scheme at issue here.⁷⁶² Enforcement Staff urges the Commission to reject BP's objections. First, Enforcement Staff states that the ALJ was correct in allowing Bergin's additional examples to be introduced in his rebuttal testimony because it was relevant, because Bergin had referred to the examples in his direct testimony, and because it was cumulative of the examples he introduced in his direct testimony.⁷⁶³ Enforcement Staff contends that BP was not "sandbagged," that BP knew that Bergin had identified additional examples of jurisdictional sales, and that BP was not prejudiced.⁷⁶⁴

338. Moreover, Enforcement Staff states that BP is incorrect in claiming that the natural gas at issue in these examples was not jurisdictional because of section 311 of the NGPA.⁷⁶⁵ According to Enforcement Staff, BP's own expert had testified that the purpose of section 311 of the NGPA was to allow intrastate pipelines to transport gas in interstate commerce without the transportation and the pipeline becoming NGA jurisdictional, and not to exempt the sale of the gas in interstate commerce from NGA jurisdiction.⁷⁶⁶ Enforcement Staff quotes BP's expert for the proposition that "gas that is shipped under a [NGPA Section] 311 contract on an intrastate pipeline remains interstate gas, notwithstanding the fact that it is shipped on an intrastate pipeline."⁷⁶⁷ Enforcement Staff then contends that the ID correctly found that "the gas sold by BP at [Houston Ship Channel] was gas, not produced by BP or an affiliate, that came off of an interstate pipeline and was in interstate commerce, was transported on one or more NGPA section 311 contracts, and then was sold for resale by BP."⁷⁶⁸

⁷⁶² Enforcement Staff Br. Opposing Exceptions at 55.

⁷⁶³ *Id.* at 56.

⁷⁶⁴ *Id.* at 57.

⁷⁶⁵ *Id.* at 58.

⁷⁶⁶ *Id.* at 58-59 (citing Ex. BP-030 at 13:9-12 ("[U]nder Section 311, intrastate pipelines are given statutory authority to transport gas *in interstate commerce* without changing jurisdictional status" (emphasis added in brief), and Tr. 2378:14-2379:4 (Smead)).

⁷⁶⁷ *Id.* at 59 (quoting Tr. 2379:5-9 (Smead)).

⁷⁶⁸ *Id.*

339. Additionally, Enforcement Staff states that BP is incorrect in claiming that the 52 examples of BP's jurisdictional sales were not linked to the manipulative scheme.⁷⁶⁹ According to Enforcement Staff, BP based this contention primarily on the time of day when the trades were executed, but Enforcement Staff states that the ID correctly found that the scheme consisted of multiple changes in trading patterns as part of a single scheme, and that the examples of BP's jurisdictional sales were part of and in connection with that scheme.⁷⁷⁰ Enforcement Staff also urges the Commission to reject BP's contention that it was not proved that there were jurisdictional sales on every day of the Investigative Period.⁷⁷¹ Instead, Enforcement Staff avers, it is not required to do that in order to establish that BP's scheme was "in connection with" jurisdictional sales.⁷⁷²

340. Furthermore, Enforcement Staff states that the ID correctly rejected BP's objections that it was not possible to trace the path of the gas sold by BP through a pool, and that Bergin's reliance on balancing sheets was misplaced.⁷⁷³ Enforcement Staff contends that Bergin provided substantial evidence that such pathing is commonly performed in the natural gas industry, and that BP failed to rebut that evidence.⁷⁷⁴ Enforcement Staff states that the ID correctly rejected BP's criticism of the use of balancing sheets, noting that the ALJ found that such sheets "can be used to path natural gas, as they show where gas is sold and where gas is shipped to."⁷⁷⁵ Enforcement Staff also states that the ID found that Bergin relied on nomination sheets as well" and thus correctly gave his testimony significant weight.⁷⁷⁶

⁷⁶⁹ *Id.* at 60.

⁷⁷⁰ *Id.*

⁷⁷¹ *Id.*

⁷⁷² *Id.* at 61.

⁷⁷³ *Id.*

⁷⁷⁴ *Id.* at 61-62.

⁷⁷⁵ *Id.* at 62 (quoting ID at P 164).

⁷⁷⁶ *Id.*

341. Enforcement Staff also avers that BP's contention regarding the mismatch of gas volumes is not meritorious, and that the ID correctly rejected the claim.⁷⁷⁷ Enforcement Staff agrees with the ALJ's finding that the alleged mismatch in volume was merely a situation in which some of the gas was later shipped with other gas, and argues that this has no impact on the Commission's jurisdiction.⁷⁷⁸

342. Enforcement Staff contends that BP is incorrect in claiming that 18 of the examples of BP sales are not jurisdictional because of an upstream intracompany sale.⁷⁷⁹ Enforcement Staff argues that the ID correctly distinguished the case on which BP relies, *Utah Power & Light Co.*, on the basis that it “did not address downstream transactions” and therefore, according to Enforcement Staff, the ID correctly found that BP's subsequent sales for resale to third parties are jurisdictional. Enforcement Staff also states that BP relies on a misstatement of Bergin's testimony regarding an upstream transfer, and states that in fact Bergin's testimony “is clear that the sale for resale occurred when the Texas [T]eam sold the gas at [Houston Ship Channel] to a buyer that purchased it for resale.”⁷⁸⁰

343. Finally, Enforcement Staff claims that the ID was correct in rejecting BP's contention (relying on *Westar*) that 18 other examples of BP sales are not jurisdictional because they involved upstream first sales of gas that was later shipped downstream on NGPA section 311 contracts.⁷⁸¹ Enforcement Staff states that BP is wrong, and that none of the gas sold by BP was a first sale because the gas that BP purchased from third parties was not from BP's own production.⁷⁸²

344. Enforcement Staff further states that BP is mistaken when it claims that the gas remained non-jurisdictional because it was never shipped on an interstate pipeline under an NGA transportation contract.⁷⁸³ Instead, Enforcement Staff states that the ID correctly

⁷⁷⁷ *Id.*

⁷⁷⁸ *Id.* at 63.

⁷⁷⁹ *Id.* at 64.

⁷⁸⁰ *Id.*

⁷⁸¹ *Id.* at 64-65.

⁷⁸² *Id.* at 65.

⁷⁸³ *Id.*

reviewed the evidence when it found that the third party gas was in fact shipped on an NGA transportation contract before it was ultimately sold by BP at Houston Ship Channel.⁷⁸⁴ Enforcement Staff agrees with the ID that *Westar* is inapplicable on this evidence, and that *Delhi Gas Pipeline Corp.* is a more analogous precedent.⁷⁸⁵ Enforcement Staff further agrees with the ID that *Westar* is distinguishable for other reasons, including the fact that, unlike in *Westar*, BP is not a Hinshaw Pipeline, and because the question in *Westar* was whether *Westar* or its downstream customers would become subject to the Commission's jurisdiction as "natural gas companies" whereas the issue here was whether BP made jurisdictional sales of gas in a scheme to manipulate the market.⁷⁸⁶ Enforcement Staff states that the examples of BP's sales were jurisdictional because "they were sales for resale of natural gas in interstate commerce that was not from BP's own or an affiliate's production, and the ID correctly finds that the fact that there was an upstream 'first sale' or upstream transportation on a 311 contract does not make BP's sales of the gas at [Houston Ship Channel] non-jurisdictional."⁷⁸⁷

iv. Commission Determination

345. We find that the ALJ correctly admitted into evidence all of Bergin's testimony concerning BP's jurisdictional fixed price sales, and we affirm the ALJ's finding that BP's manipulative scheme included at least 52 fixed price sales for resale subject to our NGA jurisdiction. Below, we first address BP's exception to the ALJ's evidentiary ruling, and we then address its contentions on the merits of the ALJ's findings concerning jurisdiction.

346. Enforcement Staff's witness Bergin provided in his September 22, 2014 direct testimony a detailed explanation of the documentary support for two examples of BP's next-day, fixed price sales for resale of interstate gas at the Houston Ship Channel.⁷⁸⁸ In addition, Bergin stated in his direct testimony that he had reviewed additional BP sales for resale of interstate gas at Houston Ship Channel on other specified days during the

⁷⁸⁴ *Id.* at 65-66.

⁷⁸⁵ *Id.* at 66.

⁷⁸⁶ *Id.*

⁷⁸⁷ *Id.* at 67 (emphasis in original).

⁷⁸⁸ Ex. OE-001 at 139-155.

Investigative Period.⁷⁸⁹ Bergin stated that Enforcement Staff was still conducting discovery to obtain information about those other sales. In his February 11, 2015 rebuttal testimony, Bergin provided a detailed explanation of the additional 50 examples following the same template he used for the two examples detailed in his direct testimony. The Commission finds that the ALJ reasonably accepted into evidence Bergin's rebuttal testimony on the additional 50 examples, because the subject evidence was relevant, Bergin previously had referred to the examples in his direct testimony, and that the additional examples in his rebuttal testimony were cumulative.⁷⁹⁰ In addition, following the February 11, 2014 submission of the rebuttal testimony, BP had time to prepare to cross examine Bergin on the additional examples at the late March-early April hearing.

347. We now turn to the merits. In each of the 52 transactions at issue, a third party⁷⁹¹ transported the natural gas over an interstate pipeline and one or more NGPA section 311 pipelines to an interconnection with the Houston Pipeline.⁷⁹² The third party then sold the natural gas to BP at that interconnect, and BP transported that gas on the Houston Pipeline under an NGPA section 311 contract to the Houston Ship Channel pool, where BP sold the natural gas. BP recognizes that the natural gas it sold at the Houston Ship Channel pool was in interstate commerce, because the third party from which it purchased the natural gas had transported the gas on an upstream interstate pipeline. BP also does not contest the ALJ's finding that its own sales at the Houston Ship Channel were not "first sale" exempt from the Commission's jurisdiction, because BP is an affiliate of a pipeline and its sales were not from either its own production or that of an affiliate.⁷⁹³ However, BP nevertheless contends that many of these sales were exempt from NGA jurisdiction for various other reasons.

⁷⁸⁹ *Id.* at 156.

⁷⁹⁰ *See* Tr. 1780:18-1787:8; Tr. 1787:9-17 (Bergin).

⁷⁹¹ In some instances, the "third party" from which BP's Texas Team bought the natural gas was another division of BP.

⁷⁹² The details of each example are set forth in Ex. OE-161 at 111-191.

⁷⁹³ NGPA section 2(21)(B) expressly excludes from the first sale definition any sale of natural gas by a pipeline, LDC, or their affiliates, except when the pipeline, LDC, or affiliate is selling its own or an affiliate's production. *Amendments to Blanket Sales Certificates*, Order No. 644, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,153, at P 14 (2003). The record testimony is clear the BP is a pipeline affiliate.

(continued...)

348. First, BP contends that section 601(a) of the NGPA, as interpreted by the Commission in *Westar*, exempts 18 of these sales⁷⁹⁴ from NGA jurisdiction, because the upstream third party sales to BP were exempt first sales and the third party allegedly shipped the natural gas to BP under NGPA section 311 transportation contracts also exempt from NGA jurisdiction. In *Westar*, a Hinshaw pipeline located in Texas purchased natural gas from a producer in Oklahoma in a first sale exempted from the Commission's NGA jurisdiction by NGPA section 601(a)(1). The Hinshaw pipeline transported that gas to its system on an interstate pipeline pursuant to an NGPA section 311(a) contract⁷⁹⁵ exempted from the Commission's NGA jurisdiction by NGPA section 601(a)(2). The Commission held that the Hinshaw pipeline's resales of that natural gas as part of its intrastate sales business would not subject either it or its downstream intrastate customers to NGA jurisdiction. The Commission explained that the only reason the downstream transactions were in interstate commerce and thus potentially subject to NGA jurisdiction was because of the two exempt upstream transactions. As a result, the Commission found that NGPA section 601(a)(1)(D)⁷⁹⁶ and 601(a)(2)(B) exempted all the downstream transactions from NGA jurisdiction, because that section exempts "any person" from becoming a "natural gas company" solely by reason of exempt transactions.

349. BP's reliance on *Westar* to argue that these 18 sales are exempt from NGA jurisdiction suffers from one fatal flaw: in each of those sales, BP was selling natural gas which a third party had previously transported on an interstate pipeline pursuant to an

Ex. OE-37 at 7. *See also* Ex. No. OE-161 at 92:2-3 (Bergin Reb. Test.) ("it is not disputed that the relevant BP entities in this case are pipeline affiliates."). In addition, the ALJ found that BP stated in response to a data request that "BP . . . would not have had any equity gas produced and or delivered in the Katy area" (ID at P 160 (citing, Ex. OE-188 at 6)), and at hearing BP's Witness Clynes agreed that the term "equity gas" referred to natural gas produced by either a BP entity or BP affiliate. *Id.* (citing Tr. 2357:1-4 (Clynes)).

⁷⁹⁴ *See* BP Br. on Exceptions at 78 n.369 (identifying the 18 sales for which it makes this argument). These sales include one of the examples included in Bergin's Direct Testimony (Example 1).

⁷⁹⁵ NGPA section 311(a) permits the Commission to authorize any interstate pipeline to transport natural gas on behalf of an intrastate pipeline.

⁷⁹⁶ This provision is now NGPA sections 601(a)(1)(C).

NGA contract, rather than an NGPA section 311(a) contract.⁷⁹⁷ The various references by Enforcement Staff's witness Bergin to upstream transportation pursuant to NGPA section 311 contracts,⁷⁹⁸ cited by BP, relate to transportation on intrastate pipelines that were necessary to take the gas from the interstate pipeline to Houston Pipeline. Thus, in this case, unlike *Westar*, NGPA sections 601(a)(1) did not exempt the upstream transportation on an interstate pipeline from the Commission's NGA jurisdiction. As a result, it cannot be found that the only reason BP's 18 sales were in interstate commerce was because of upstream exempt transactions. In these circumstances, the reasoning in *Westar* as to why NGPA sections 601(a)(1)(C) and 601(a)(2)(B) would exempt participants in downstream transactions from becoming natural gas companies subject to NGA jurisdiction is inapplicable.

350. Instead, the Commission's decision in *Delhi Gas Pipeline Corp.*⁷⁹⁹ governs in this case. In that case, an intrastate pipeline purchased natural gas in an interstate sale which NGPA section 601(a)(1) did not exempt from NGA jurisdiction. An interstate pipeline transported the natural gas to the intrastate pipeline under an NGPA section 311(a) contract, which NGPA section 601(a)(2) did exempt from NGA jurisdiction. The Commission found that the intrastate pipeline's subsequent sales for resale and transportation of the natural gas were subject to the Commission's NGA jurisdiction, even though the upstream section 311(a) transportation was not. The Commission explained that this was because the upstream sale placing the natural gas in interstate commerce was subject to the NGA and therefore NGPA section 601(a)(1)(D) could not prevent the downstream companies from becoming natural gas companies subject to the Commission's NGA jurisdiction. In short, for the precedent in *Westar* to apply, all upstream transactions, including both sales and transportation, must be exempt from NGA jurisdiction. Here, because the upstream transportation on the interstate pipelines was subject to NGA jurisdiction, BP's subsequent sales for resale in interstate commerce were subject to NGA jurisdiction, despite the fact the third parties' upstream sales to BP in the 18 instances cited by BP were exempt from NGA jurisdiction.

⁷⁹⁷ See Ex. OE-167 at 173-175 (showing that one of the third parties' upstream contracts with an interstate pipeline was pursuant to that pipeline's Part 284, subpart G, NGA section 7 blanket certificate to perform open access transportation service). See also Ex. OE-001 at 141, 142, 145.

⁷⁹⁸ Ex. OE-161 at 110-121 and 129-133.

⁷⁹⁹ 19 FERC ¶ 61,188 (1982).

351. Second, BP contends that the ALJ erred in finding another 18 of its sales were subject to NGA jurisdiction.⁸⁰⁰ BP contends that these sales are exempt from NGA jurisdiction, because these were sales of natural gas it obtained in intracompany transactions. BP stated that in *Utah Power* the Commission held that intra-company transactions by and between the two divisions are not “sales for resale” subject to the Commission’s FPA jurisdiction.⁸⁰¹ This contention by BP fails for the same reason as its contention concerning BP’s sales of natural gas that third parties had sold to it in first sales exempt from NGA jurisdiction. In all 18 of BP’s sales of natural gas it obtained in intracompany transactions, the natural gas had been transported on an upstream interstate pipeline under transportation agreements that were subject to NGA jurisdiction.⁸⁰² Therefore, because the upstream transportation on interstate pipelines was subject to NGA jurisdiction, nothing in NGPA section 601 exempted BP’s subsequent sales of that natural gas at the Houston Ship Channel from NGA jurisdiction.

352. Third, BP asserts that Bergin’s examples of sales for resale are flawed because Bergin attempted to trace gas through the Houston Ship Channel Pool by using BP’s scheduling sheets to match the contract numbers and volumes.⁸⁰³ However, BP argues that the spreadsheets Bergin used to accomplish this were created and maintained for balancing purposes.⁸⁰⁴ Moreover, BP asserts that the pool is a pooling point that aggregates and commingles gas and Bergin failed to account for the mismatch in volumes shipped into and out of the pool.⁸⁰⁵

353. The ALJ addressed this argument in the ID. In response to allegations that Bergin’s pathing was inappropriate, and that it is impossible to trace gas, the ALJ noted that witness Patrick Clynes (Clynes) testified that the Houston Ship Channel Pool “has a lot of gas coming in, a lot of gas going out. Not the same gas, but the same volume,” and

⁸⁰⁰ See BP Br. on Exceptions at 79 n.372 (identifying the sales for which BP makes this argument). These sales also include one of the examples included in Bergin’s direct testimony (Example 2).

⁸⁰¹ ID at P 165 (citing *Utah Power*, 45 FERC ¶ 61,095 at 61,296).

⁸⁰² Ex. OE-161 at 111-122, 126-129, and 132-133.

⁸⁰³ BP Br. on Exceptions at 77 (citing Ex. OE-001 at 154:6-155:30).

⁸⁰⁴ *Id.* (citing Tr. 2315:23-2316:14, 2337:11-2341:7, 2340:5-2341:6 (Bergin)).

⁸⁰⁵ *Id.*

that Bergin agreed that physical molecules cannot be traced.⁸⁰⁶ The ALJ acknowledged Bergin's explanation that the industry uses pathing as a proxy for tracing physical natural gas molecules,⁸⁰⁷ and that there is no distinction between a pool meter and physical meter, in terms of pathing gas. Therefore, the ALJ reasoned that pathing natural gas through a pool is possible.

354. Moreover, the ALJ found that Bergin used both balancing sheets, which reflect where gas is sold and where gas was shipped to, as well as nomination sheets to make his pathing calculations. The ALJ notes that nomination sheets lists all the upstream contracts from where the gas is coming from and where the gas is being taken to, what meter, and one of those meters is the meter for the Houston Pipeline System pool.⁸⁰⁸ In conclusion, the ALJ found that Bergin's testimony is to be given significant weight.

355. Given these findings by the ALJ, we cannot grant significant weight to BP's argument and suggestion that "Bergin relied on BP's scheduling sheets to purportedly track sales and purchases through the [Houston Ship Channel] Pool by matching the contract numbers and volumes."⁸⁰⁹ As pointed out by the ALJ, Bergin also utilized nomination sheets, which list all the upstream contracts from where the gas is coming from and where the gas is being taken to, in order to complete his analysis of the contract path of the subject sales. BP does not discuss how an analysis of these two types of documents would fail to develop a legitimate paper trail of the subject sales. It focuses instead on merely reiterating that scheduling sheets are created and maintained for balancing purposes only. BP also adds that the Houston Ship Channel pool is a pooling point that aggregates and commingles gas and Bergin failed to account for the mismatch in volumes shipped into and out of the pool. The ALJ, discussed this type of mismatch of volumes at the Houston Ship Channel pool as well, finding that this mismatch is "merely a situation where some of the original interstate gas was later shipped with other gas; it does not mean there is a mismatch fatal to proving the Commission's jurisdiction in this

⁸⁰⁶ ID at P 163 (citing Tr. 2341:10-12 (Bergin); Ex. OE-161 at 89:20-21).

⁸⁰⁷ *Id.* (citing Ex. OE-161 at 95:17-19).

⁸⁰⁸ *Id.* P 164 (citing Tr. 1705:9-12 (Bergin)).

⁸⁰⁹ BP Br. on Exceptions at 77 (footnote omitted). As the ALJ stated, Witness "Bergin relied on multiple documents in conducting his pathing calculations. He did not solely rely on balancing sheets in making his calculations, and *suggesting he did otherwise is incorrect.*" ID at P 164 (emphasis added).

case.”⁸¹⁰ BP has not provided any argument to show that any mismatch of volumes at the Houston Ship Channel Pool would somehow invalidate the ALJ’s finding of jurisdiction in this matter.

356. BP argues that in direct testimony, Bergin attempted to present only two examples of BP sales for resale at Houston Ship Channel during the 73 days that comprise the Investigative Period. BP argues that both examples concerned gas that BP transported on October 20, 2008 and neither example is jurisdictional. BP argues that no link between the transactions and the alleged manipulative trading was established. BP asserts that both of the example trades occurred after trading started at both the Houston Ship Channel and Katy markets and were economic trades. BP argues that because of these factors Bergin’s direct testimony examples do not reflect the so-called manipulative characteristics that Abrantes-Metz asserted as the basis for the alleged manipulative scheme. First, the ALJ found that this allegation was contradicted by the testimony of Abrantes-Metz who testified that during the Investigative Period, the Texas Team changed its trading patterns⁸¹¹ and that such trading pattern changes were “consistent with an effort to influence other market participants and to reinforce artificial downward pressure on the [Houston Ship Channel] Gas Daily index.”⁸¹² Accordingly, the ALJ found that the two examples BP focuses on were part of BP’s larger scheme to manipulate the Houston Ship Channel *Gas Daily* index, and are connected to the manipulation.

357. Finally, BP contends that Bergin’s examples of jurisdictional sales were not tied to the manipulative scheme.⁸¹³ BP contends that both the sales included in Bergin’s Direct Testimony occurred after trading began at Houston Ship Channel and Katy, both were economic as defined by Abrantes-Metz, and both were traded after 15 percent of the Houston Ship Channel market had already been traded on that day.⁸¹⁴ Enforcement Staff states that the examples were part of the manipulation.⁸¹⁵ We agree. BP’s proposition

⁸¹⁰ ID at P 172.

⁸¹¹ *Id.* P 161 (citing Ex. OE-129 at 31:1-6).

⁸¹² *Id.* (citing Ex. OE-129 at 31:15-17).

⁸¹³ BP Br. on Exceptions at 78.

⁸¹⁴ ID at P 161.

⁸¹⁵ Enforcement Staff Br. Opposing Exceptions at 60.

appears to us to be that conduct must meet *all* of Abrantes-Metz's indicia before it can be found to be manipulative. But that is not the case. The indicia of manipulation are simply factors that indicate potential manipulation, and a particular sale need not exhibit every factor to be part of a manipulative scheme. In any event, the examples meet at least some of the indicia.⁸¹⁶ Moreover, as Bergin explained, according to basic economic principles known to all traders, increasing supply, all other conditions being equal, will depress prices.⁸¹⁷ The evidence indicates that, using supply that it transported from Katy to Houston Ship Channel, the Texas Team was selling approximately three and a half times more gas at Houston Ship Channel during the Investigative Period than earlier in 2008.⁸¹⁸ BP's 52 jurisdictional sales discussed in this section were part of its increased selling at the Houston Ship Channel. Thus, the Texas Team must have known that these sales were adding supply to the Houston Ship Channel market, with an attendant effect on prices. Therefore, we agree with the ID that the examples were instruments of the manipulation.

V. Remedies

A. Disgorgement

1. Hearing Order and Initial Decision

358. In the Hearing Order, the Commission directed the ALJ to "make findings concerning the amount of profits obtained by BP for its alleged manipulated trading conduct, entertaining any reasonable method for calculating this amount, and provide both a gross number of profits and a net amount that deducts BP's losses from its physical trading."⁸¹⁹

⁸¹⁶ See Ex. OE-161 at 110-174. See also Ex. OE-175 (indicating that BP sold for resale 30,000 MMBtu of natural gas at 8:14 a.m. at Houston Ship Channel to one counterparty on October 28, 2008 to flow the next day); *id.* (indicating that BP sold for resale 10,000 MMBtu of natural gas at Houston Ship Channel on October 9, 2008 at 8:18 a.m. to flow the next day).

⁸¹⁷ Ex. OE-001 at 105:6-8.

⁸¹⁸ *Id.* at 105:8-10.

⁸¹⁹ Hearing Order at P 49 (vi).

359. The ALJ gave consideration to the evidence put forward by Enforcement Staff and by BP. Enforcement Staff contended that BP grossed between \$233,330 and \$316,170 from the scheme.⁸²⁰ Enforcement Staff derived this figure from Bergin's testimony applying Abrantes-Metz's analysis of price impact from "but-for pricing" to BP's exposure to the Houston Ship Channel *Gas Daily* index each month.⁸²¹ From this gross figure, Enforcement Staff contended that Bergin calculated the net profits by deducting the losses from BP's physical trading, resulting in net profits between \$165,749 and \$248,589.⁸²² In particular, Bergin calculated gross profits using BP's total Houston Ship Channel *Gas Daily* exposure each month because such exposure benefited from the index price manipulation, and then used Abrantes-Metz's estimates of artificial price to obtain a second measure of gross profits.⁸²³ The ALJ stated that BP did not dispute the use of the total Houston Ship Channel *Gas Daily* exposure to derive gross profits, or any evidence disputing Abrantes-Metz's methodology.⁸²⁴ Enforcement Staff further approximated BP's net profits by subtracting its next-day fixed-price losses at Houston Ship Channel.⁸²⁵

360. The ALJ rejected BP's counterarguments. First, the ALJ rejected BP's contention that the estimates were not reliable because they were based on hypotheticals; the ALJ noted that the Commission has upheld disgorgement amounts calculated using such methods.⁸²⁶ Next, BP proposed a counterexample which modified Bergin's historical analysis to reflect incremental P&L of Houston Ship Channel compared to Katy, which BP contended was superior because it removed broader market price movements.⁸²⁷ The ALJ found that the hypothetical P&L of \$50,000 could not be supported because it was predicated on the assumption that the team sold all of its physical volumes at Katy rather than Houston Ship Channel; yet the ALJ found that Enforcement Staff never suggested

⁸²⁰ ID at P 265.

⁸²¹ *Id.* P 271 (citing Ex. OE-001 at 118:8-119:2).

⁸²² *Id.* (citing Ex. OE-001 at 119:7-10).

⁸²³ *Id.* P 273 (citing Ex. OE-161 at 51:9-11).

⁸²⁴ *Id.* (citing Ex. OE-129 at 138:1-139:20, 147:6-148:5).

⁸²⁵ *Id.* (citing Ex. OE-161 at 51:12-13).

⁸²⁶ *Id.* (citing *Barclays*, 144 FERC ¶ 61,041 at P 150).

⁸²⁷ *Id.* P 268.

that BP sold all of its gas at Katy.⁸²⁸ BP's next contention was that P&L should be calculated by taking the difference between the recalculated Houston Ship Channel price and the actual index, which results in gross profits of about \$35,000 and no net profits.⁸²⁹ The ALJ denied the approach of using Evans's calculation of P&L against what the index might have been absent BP's sales, in part because it ignored the impact on volume caused by BP's increased sales.⁸³⁰ BP's last proposition was that Bergin's actual P&L calculation should be modified by Abrantes-Metz's hypothetical "but for" analysis to show the financial position's impact on prices.⁸³¹ The ALJ also rejected this contention, stating it is "unreliable since it double-counts BP's losses and it is also inconsistent with his P&L against-the-index."⁸³² Finally, the ALJ stated that while the law supports defendants "when they have shown that the government's disgorgement figure was not reasonable," the ALJ actually found that BP had not established this.⁸³³

361. Accordingly, the ALJ found that Enforcement Staff had proven that the gross profits were between \$233,330 and \$316,170, and that the net profits from the scheme were between \$165,749 and \$248,589.⁸³⁴

2. BP Exceptions

362. In its brief on exceptions, BP states that the ALJ erred in adopting Enforcement Staff's gross profits computations.⁸³⁵ In particular, BP contends that Bergin's profit computations "used a combination of hypothetical variables and actual pricing data and

⁸²⁸ *Id.* P 274 (citing Exs. BP-037: 17-19; OE-161 at 50:16-51:2); Ex. OE-129 at 131:11-132:2).

⁸²⁹ *Id.* P 269.

⁸³⁰ *Id.* P 274 (citing Exs. OE-129 at 65:5-67:2; OE-211 at 75:11-76:2; OE-161 at 52:14-18).

⁸³¹ *Id.* P 270.

⁸³² *Id.* P 274.

⁸³³ *Id.* P 275.

⁸³⁴ *Id.* P 271.

⁸³⁵ BP Br. on Exceptions at 84.

omitted or replaced relevant information” and thus “produced distorted and misleading profit computations that do not accurately reflect the result of BP’s trading activities.”⁸³⁶ BP states that Bergin failed to consider all of BP’s positions, and thereby obscured the financial performance relative to the actual P&L.⁸³⁷ BP also states that Bergin’s historical P&L analysis was flawed “because it used actual P&L instead of incremental P&L” which “excludes the broader price movements that affect P&L in ways that would have occurred with or without the alleged manipulative impacts,” and that Bergin should have used incremental P&L.⁸³⁸ BP also contends that Bergin’s but-for analysis erroneously mixed real pricing data outcomes with counterfactual estimates, and this use of hypothetical gains and actual losses “is an illogical mismatch.”⁸³⁹ BP similarly states that Bergin’s but-for analysis is inconsistent with Staff expert Ronn’s market impact analysis because they do not account for additional alleged losses from exposure to Katy.⁸⁴⁰ Furthermore, BP states that Abrantes-Metz’s price impact analysis was flawed because it did not consider a historical period and a high level of uncertainty embedded in the artificial price estimate.⁸⁴¹

363. Instead, BP contends that a proper methodology would show that it lost money on its trading.⁸⁴² First, BP states that if Bergin’s analysis had applied incremental P&L of Houston Ship Channel compared to Katy, it would have shown that BP lost a net of \$50,000 after transport costs.⁸⁴³ Second, BP states that Bergin’s P&L analysis should be modified to provide what it calls a “more relevant” but-for analysis of P&L, and states that Bergin himself did not challenge this approach.⁸⁴⁴ Third, BP states that modifying Bergin’s actual P&L analysis to use Abrantes-Metz’s but-for calculation of artificial

⁸³⁶ *Id.* at 85.

⁸³⁷ *Id.*

⁸³⁸ *Id.* at 86.

⁸³⁹ *Id.*

⁸⁴⁰ *Id.*

⁸⁴¹ *Id.* at 85.

⁸⁴² *Id.* at 87.

⁸⁴³ *Id.*

⁸⁴⁴ *Id.*

price—what BP calls a “counterfactual” analysis—yields net profits of \$47,000-\$74,000, which BP avers starkly contrasts with Bergin’s estimate of \$225,000-\$304,000.⁸⁴⁵ In so doing, BP argues that the ID fails to address BP’s evidence.

3. Enforcement Staff Response

364. Enforcement Staff urges the Commission to reject BP’s objections and to adopt the ALJ’s findings.⁸⁴⁶ Enforcement Staff emphasizes that the Commission previously determined that disgorgement ““need only be a reasonable approximation of profits causally connected to the violation,”” and states that the ALJ correctly found that Enforcement Staff had done so.⁸⁴⁷ Enforcement Staff contends that BP is incorrect in claiming that there is anything inappropriate about Abrantes-Metz’s estimates of price differences, likening what was done here to what was done in *Barclays*—namely, that “[e]xposure multiplied by an estimate of price difference is what Enforcement Staff did here.”⁸⁴⁸ Enforcement Staff further states that it was not inconsistent to use BP’s total Houston Ship Channel *Gas Daily* exposure to calculate disgorgement, and BP’s Henry Hub exposure to determine intent.⁸⁴⁹

365. Enforcement Staff also contends that the ALJ did not erroneously reject BP’s alternative P&L measures. First, BP’s hypothetical \$50,000 P&L “assumed that the Texas [T]eam sold *all* its physical volumes at Katy instead of [Houston Ship Channel], despite [BP expert Evans’s] admission that Enforcement Staff never suggested BP should always have sold at Katy instead of at [Houston Ship Channel].”⁸⁵⁰ Second, Enforcement Staff states that BP’s “P&L against-the-index” approach used a hypothetical index that removed all of BP’s transactions from the market, and this was incorrect because it ignored the “informational” and “volumetric” effects of BP’s trading on market participants.⁸⁵¹ Enforcement Staff also states that BP is factually incorrect when it

⁸⁴⁵ *Id.* at 88.

⁸⁴⁶ Enforcement Staff Br. Opposing Exceptions at 71-73.

⁸⁴⁷ *Id.* at 71.

⁸⁴⁸ *Id.* at 71-72 n.307.

⁸⁴⁹ *Id.* at 72.

⁸⁵⁰ *Id.*

⁸⁵¹ *Id.* at 72-73.

contends that Bergin did not challenge this approach, and ignores the portion of his testimony where “he explicitly challenged it.”⁸⁵² Third, Enforcement Staff states that BP’s “counterfactual” P&L “double-counted BP’s losses and was inconsistent with [BP’s] ‘P&L against-the-index.’”⁸⁵³ Enforcement Staff instead states that the ALJ was correct in stating that BP’s expert “incorrectly lumped together Abrantes-Metz’s estimates of the price effects of BP’s shift to earlier sales and BP’s transport of excess volume to [Houston Ship Channel], even though these two estimates were not additive.”⁸⁵⁴ Finally, Enforcement Staff states that BP cites to no evidence that overcomes the flaws in its alternative P&L measures.⁸⁵⁵

4. Commission Determination

366. After reviewing the evidence and arguments, we agree with the ALJ that Enforcement Staff provided a “reasonable estimate” of unjust profits. It is well established that, for Enforcement Staff, “disgorgement need only be a reasonable approximation of profits causally connected to the violation.”⁸⁵⁶ Once Enforcement Staff has met its burden of introducing a reasonable approximation, BP is “then obliged clearly to demonstrate that the disgorgement figure was not a reasonable approximation.”⁸⁵⁷ We find that Enforcement Staff proposed a reasonable method and used a reasonable and accurate approach to doing its calculations. The burden then shifted to BP to show that Enforcement Staff’s estimate was not in fact reliable, and that BP’s alternative approach was reasonable.

⁸⁵² *Id.* at 73 (citing in part Ex. OE-161 at 52:4-53:8 and ID at P 274).

⁸⁵³ *Id.*

⁸⁵⁴ *Id.*

⁸⁵⁵ *Id.*

⁸⁵⁶ *Barclays*, 144 FERC ¶ 61,041 at P 148 (quoting *SEC v. Whittemore*, 659 F.3d 1, 8 (D.C. Cir. 2011) (quoting in part *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir.1989))); *see also Zacharias v. SEC*, 569 F.3d 458, 470 (D.C. Cir. 2009) (quoting same); *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995) (the disgorgement amount “need only be a reasonable approximation of the profits causally connected to the violation.”); *Allstate Ins. Co. v. Receivable Fin. Co., LLC*, 501 F.3d 398, 413 (5th Cir. 2007) (quoting same).

⁸⁵⁷ *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989).

367. We agree that one reasonable approach to estimate gross gains is to calculate the product of the estimate of the scheme's impact on prices (that is, the amount by which the index was moved by the manipulation) and the subject's benefiting position (that is, the volume exposed to the manipulated index). It follows that subtracting losses suffered in the physical trades (which were used to manipulate the index) from the gross gains is a reasonable way to approach disgorgement. We do not agree with BP that this is unreasonable.⁸⁵⁸ From our assessment of the evidence, we agree with the ALJ that this is the approach that Enforcement Staff used here, and that Enforcement Staff's approach was reasonable.

368. The next question is whether Enforcement Staff made reasonable calculations in determining gross and net gains. We find that it did. Enforcement Staff reasonably calculated that the gross gains here were in the range of \$233,330 to \$316,170, and that the net gains were between \$165,749 and \$248,589. Given this reasonable range, we will select the mid-point. Accordingly, we find that BP should be disgorged of \$207,169.

B. Penalty Guidelines Factors

369. In the Hearing Order, the Commission directed the ALJ to make certain fact findings that relate to certain elements of the Penalty Guidelines.⁸⁵⁹ In particular, the ALJ was to make findings as to (1) the number of violations, if any, and the number of days on which such violations occurred; (2) the amount of loss, the quantity of natural gas affected (financial and physical), and the duration; (3) whether BP "committed any part of the [alleged] instant violation less than 5 years after a prior Commission adjudication . . . or less than 5 years after an adjudication of similar misconduct by any other enforcement agency"; (4) whether the violation "violated a judicial or Commission

⁸⁵⁸ Because we find that Enforcement Staff's approach was reasonable, we do not need to address BP's alternatives. Nevertheless, we find that the alternative approaches as articulated by BP are not more reasonable than Enforcement Staff's approach. In particular, it was not necessary to require that BP's losses include transportation costs between Katy and Houston Ship Channel, and we see no advantage in using a model that simply removes a market participant's manipulative trades from the market, thereby ignoring the dynamic impact on other traders. We also agree with Staff that BP's third proposal appears to double-count BP's losses.

⁸⁵⁹ Hearing Order at PP 48-49.

order or injunction”; and (5) findings respecting BP’s compliance program, including each of the factors specified in § 1B2.1 of the Penalty Guidelines.⁸⁶⁰

370. The ALJ made findings respecting these five factors. We will address each in turn. BP makes a general objection that the ALJ’s conclusions regarding the statutory factors for assessing penalties are flawed, and contends that Enforcement Staff was unable to substantiate its computations or allegations.⁸⁶¹ We reject that general proposition, and address each of the factors in turn.

1. Number of Violations

a. Initial Decision

371. Two sets of proposals were put before the ALJ. Enforcement Staff contended that BP committed hundreds of violations during the 49 trading days of the Investigative Period, with a minimum of 48 violations.⁸⁶² Specifically, Enforcement Staff pointed to four types of affirmative conduct that occurred, and that during the Investigative Period BP made 680 fixed-price sales, 101 bid-initiated sales at Houston Ship Channel when a more economical offer existed at Katy, and 129 offer-initiated sales when the team could have made more money at Katy.⁸⁶³ By contrast, BP maintained that no violations occurred or, in the alternative, that the number of days was fewer than the 73 total days of the Investigative Period.⁸⁶⁴ Specifically, BP contended that Abrantes-Metz failed to identify any day when the manipulation occurred, and Bergin identified only a few of the trade days containing the alleged manipulative characteristics.⁸⁶⁵

372. The ALJ found that the evidence shows that BP “had hundreds of affirmative acts in furtherance of the manipulative scheme during the Investigative Period” including

⁸⁶⁰ *Id.* at P 49(i)-(vi). The Sixth Factor, gross profits, is addressed in the disgorgement section above.

⁸⁶¹ BP Br. on Exceptions at 80-81.

⁸⁶² ID at P 175.

⁸⁶³ *Id.* P 177.

⁸⁶⁴ *Id.* P 180.

⁸⁶⁵ *Id.* PP 181-182.

“680 fixed-price sales at Houston Ship Channel, 101 bid-initiated sales at Houston Ship Channel when they could have hit a more economic bid at Katy, and 129 offer-initiated sales when they could have sold more economically by adjusting their price at Katy.”⁸⁶⁶ The ALJ then stated that “[i]f each individual trade is treated as a separate violation the facts support a high number of violations.”⁸⁶⁷ The ALJ noted that Enforcement Staff’s recommendation of 48 minimum violations was predicated on the notion that “all transactions on a given day are treated as a single violation.”⁸⁶⁸ However, the ALJ concluded that “Commission rules allow counting each act as a violation” and that “the record supports the finding that BP committed, at a minimum, 48 violations.”⁸⁶⁹

b. BP Exceptions

373. BP states that the ALJ erred in finding 48 violations over 48 days “because BP was a net seller as [Houston Ship Channel] during each of the 48 days.”⁸⁷⁰ In particular, BP contends that it could not have engaged in the manipulative scheme on days when its physical trading was profitable.⁸⁷¹ BP also states that it was error to find that there were 680 manipulative fixed-price sales at Houston Ship Channel because “[m]aking fixed-price sales, selling towards the beginning of a trading session, and selling via offer-initiated transactions are not prohibited by the Commission’s rules or the NGA.”⁸⁷² BP further states that it could not be held liable for violations for the days on which Staff did not allege jurisdiction, and that trades executed on several of the days had none of the characteristics of the scheme alleged by Enforcement Staff.⁸⁷³

⁸⁶⁶ *Id.* P 187.

⁸⁶⁷ *Id.*

⁸⁶⁸ *Id.*

⁸⁶⁹ *Id.*

⁸⁷⁰ BP Br. on Exceptions at 81.

⁸⁷¹ *Id.*

⁸⁷² *Id.* at 82.

⁸⁷³ *Id.*

c. Enforcement Staff Response

374. Enforcement Staff states that BP errs in proposing that each violation must carry every indicia of manipulation, noting that the Commission implicitly rejected that approach in *Barclays*.⁸⁷⁴ Enforcement Staff agrees that the ALJ was correct in stating that the Commission treats each purchase, sale, or transactions as a separate violation, “and thus requires no proof that each purchase, sale, or transaction within that scheme is ‘in connection with’ a jurisdictional transaction.”⁸⁷⁵ Enforcement Staff therefore contends that because Enforcement Staff proved that the anti-manipulation rule applies to the scheme, and because the scheme was “in connection with” jurisdictional transactions, therefore every act done pursuant to the scheme was subject to the Commission’s anti-manipulation authority.⁸⁷⁶

d. Commission Determination

375. This is an important issue because we may not issue a penalty that is greater than the maximum authorized by Congress.⁸⁷⁷ Our statute calls for a maximum penalty of \$1,193,970 per day per violation.⁸⁷⁸ Accordingly, it is fundamental to determine the number of violations and number of days in order to ensure that any penalties we may assess are not in excess of that cap.

376. We agree with the ALJ that every transaction made pursuant to a manipulative scheme counts as a separate violation. Accordingly, based on the evidence before us, while the ALJ was correct that this matter involved at least 48 violations, we find that it actually involved well over 600 violations, and—depending on how the various transaction are counted—perhaps more than 900. Therefore, we find that the maximum penalty for the scheme here is at least \$716 million.

⁸⁷⁴ Enforcement Staff Br. Opposing Exceptions at 67-68.

⁸⁷⁵ *Id.* at 68 (citing ID at P 187 n.122).

⁸⁷⁶ *Id.*

⁸⁷⁷ See *Barclays*, 144 FERC ¶ 61,041 at P 120. See also *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (the Sentencing Guidelines may not enhance criminal penalties beyond the statutory maximum).

⁸⁷⁸ NGA Section 22, 15 U.S.C. § 717t-1; *Civil Monetary Penalty Inflation Adjustments*, 155 FERC ¶ 61,230 (2016).

2. Estimate of Loss

a. Initial Decision

377. With respect to the estimate of loss, the ALJ noted that Enforcement Staff's position was that the manipulation "artificially depressed the [Houston Ship Channel] *Gas Daily* index" which "resulted in financial impact of \$1,375,482 to \$1,927,728 on next-day natural gas markets at [Houston Ship Channel] and Katy during the Investigative Period."⁸⁷⁹ The ALJ also stated that Enforcement Staff's expert Bergin concluded that the volume of BP's physical natural gas sales was approximately 10.6 Bcf, and the volume of its financial positions was approximately 25.3 Bcf.⁸⁸⁰ The ALJ then stated that BP objected on the ground that there were no financial impacts, and because, they contended, Abrantes-Metz's price impact analysis was flawed since her estimates were small (ranging from a half-penny to 2.2 cents) and did not control "for price changes at the related Texas/Gulf area or other fundamental control variables."⁸⁸¹ According to the ALJ, BP also objected that Enforcement Staff's expert Ronn erred by including Katy trades in the price impact model, maintaining that Abrantes-Metz "never found evidence of manipulative activity at Katy,"⁸⁸² and that Bergin's conclusions are unsupported.⁸⁸³

378. The ALJ first stated that proof of "artificial price is not required to find violations of the Anti-Manipulation Rule,"⁸⁸⁴ and that calculating the amount by which the index was manipulated by BP is relevant to determining market harm and gross profits. The ALJ then assessed the testimony of Abrantes-Metz concerning the metrics used to quantify the scheme's impact on prices, which included (1) selling Katy gas at Houston Ship Channel when better prices were available at Katy, (2) selling more volume earlier in the day to increase market share during the period of greatest price discovery, (3) selling at artificially low prices at Houston Ship Channel by offering prices lower than

⁸⁷⁹ ID at P 188.

⁸⁸⁰ *Id.*

⁸⁸¹ *Id.* P 189.

⁸⁸² *Id.* P 190.

⁸⁸³ *Id.* P 191.

⁸⁸⁴ *Id.* P 192 (citing *Barclays*, 144 FERC ¶ 61,041 at P 59 & n.191).

contemporaneous orders by other market participants, and (4) by increasing the proportion of their sales by hitting bids.⁸⁸⁵ The ALJ then noted that this led to Abrantes-Metz's conclusion that, conservatively speaking, the scheme suppressed the index by a range of 1.5 cents to 2.2 cents between September 19 and 30, by 1.2 cents to 1.5 cents in October, and by a half-cent to 7 tenths of a cent in November.⁸⁸⁶ The ALJ also found that because Abrantes-Metz adequately refuted BP's expert's criticism and because that same expert did not challenge her methodology, her testimony "is given significant weight."⁸⁸⁷ The ALJ then noted that Enforcement Staff expert Ronn calculated the financial impact by multiplying the sum of open interest positions by Abrantes-Metz's estimates of price impact, yielding a product of approximately \$1.3 to \$1.9 million.⁸⁸⁸ Meanwhile, the ALJ stated that Bergin calculated the amount of physical gas involved in BP's sales as being approximately 10.6 Bcf, and that the volume of affected financial positions was approximately 25.3 Bcf.⁸⁸⁹

379. The ALJ stated that the Commission's penalty assessment order in *Barclays* supports Enforcement Staff's approach in this matter, and agreed that Enforcement Staff's calculation was conservative "since it is limited to ICE transactions directly affected by the Texas [T]eam's behavior and excludes those in which BP was a seller . . . because it does not account for off-ICE transactions," and because "it excludes counterparty transactions netted out through offsetting trades."⁸⁹⁰ Accordingly, the ALJ concurred with Enforcement Staff's estimates of loss.

b. BP Exceptions

380. BP contends that the ALJ erred in finding that Enforcement Staff's estimates of loss were reliable, stating that Abrantes-Metz's estimated range of price impact is too wide and does not control for price changes at related locations or other fundamental

⁸⁸⁵ *Id.* P 193 (citing Ex. OE-129 at 138:1-18, 140:1-17, 141:3-142:7, 143:1-144:2, and 144:5-145:16).

⁸⁸⁶ *Id.* P 194 (citing Ex. OE-129 at 146:9-147:1).

⁸⁸⁷ *Id.*

⁸⁸⁸ *Id.* P 195.

⁸⁸⁹ *Id.* P 196.

⁸⁹⁰ *Id.* P 197.

variables.⁸⁹¹ BP further states that Enforcement Staff expert Ronn compounded the error by incorporating Abrantes-Metz's analysis into his calculations, ignoring the fact that Enforcement Staff expert Bergin had identified only 24 trade days on which jurisdictional sales had been made, and including days on which BP's physical trading had been profitable.⁸⁹² BP finally contends that the ALJ erred by not addressing BP's argument that the price impact analysis should include trades at Katy, and that Bergin's computation of natural gas volumes was overstated because it included all of BP's positions and not simply those on days in which conduct described by Abrantes-Metz occurred and on which Bergin had asserted involved jurisdictional transactions.⁸⁹³

c. Enforcement Staff Response

381. Enforcement Staff states that its estimate of loss was conservative and that the ALJ correctly accorded substantial weight to the price artificiality estimate by Abrantes-Metz and the loss estimate by Ronn.⁸⁹⁴ Enforcement Staff states that Abrantes-Metz provided substantial testimony on how she quantified BP's suppression of prices at Houston Ship Channel, and that BP fails to substantiate its claim that she failed to control for certain variables.⁸⁹⁵ Enforcement Staff further states that the Commission in *Barclays* endorsed the methodology that Ronn used to estimate total losses, and also states that Ronn's estimate was conservative because it did not include non-ICE transactions directly affected by the scheme or BP's sales.⁸⁹⁶ Enforcement Staff states that BP is incorrect in stating that Ronn should not have included Katy in his loss calculations because it was undisputed why Ronn did so (because Katy prices were highly correlated to Houston Ship Channel prices, and price discovery by Katy market participants was mostly done at Houston Ship Channel), and because the scheme thus had an impact on prices at Katy.⁸⁹⁷ Enforcement Staff also states that its unjust profit calculation from

⁸⁹¹ BP Br. on Exceptions at 83.

⁸⁹² *Id.* at 83-84.

⁸⁹³ *Id.* at 94.

⁸⁹⁴ Enforcement Staff Br. Opposing Exceptions at 69.

⁸⁹⁵ *Id.*

⁸⁹⁶ *Id.* at 69-70.

⁸⁹⁷ *Id.* at 70.

BP's Houston Ship Channel conduct is not inconsistent with the impact of that conduct at Katy.⁸⁹⁸

d. Commission Determination

382. We agree with the ALJ's findings regarding the amount of loss. We find that Enforcement Staff's methodology produced a reasonable approximation. We also find, contrary to BP's contention, that Enforcement Staff proved that every trade was at a minimum "in connection with" jurisdictional transactions because every trade made pursuant to the manipulative scheme went into an index that, in turn, affected the price of jurisdictional transactions such as cash-out sales. We also reject BP's contention that Enforcement Staff must prove that every trade bore the same characteristics of manipulation; there is no singular list of characteristics that will be found in every manipulation or every transaction or act made in furtherance of a manipulative scheme.

3. Adjudication of Similar Misconduct within 5 Years

a. Rehearing Request

383. BP timely requested rehearing from the Commission's order directing the ALJ to make factual findings on the Penalty Guidelines factor relating to the question whether BP committed any part of the violation less than 5 years after an adjudication by the Commission.⁸⁹⁹ In particular, BP contends that consent decrees are not adjudications, that the decrees were entered into three years prior to the Penalty Guidelines, and that the Commission does not have authority to find that BP violated a district court's permanent injunction. We deny rehearing. BP misconstrues the nature of the factual findings directed here. The Penalty Guidelines do not have independent force of law—they are simply a means that the Commission has selected to assist in assessing civil penalties according to the factors set out in the statute. As such, whether BP is found to have violated an injunction or other court decree does not subject BP to independent liability for the act, nor does it increase BP's NGA penalties beyond that which Congress has authorized. Instead, such findings provide a means by which the Commission will determine the proper penalties that BP will be assessed within the Commission's statutory authority. Moreover, the alleged prior adjudication occurred after Congress passed the Energy Policy Act of 2005. As such, it is not necessary for a court or other government agency to have found that BP violated an injunction or other court decree in

⁸⁹⁸ *Id.* at 70-71.

⁸⁹⁹ Rehearing Request at 38-43.

order for the Commission to consider BP's conduct in relation to that injunction or other court decree.⁹⁰⁰

b. Initial Decision

384. The ALJ noted that Enforcement Staff claimed that the scheme “violated three relevant settlements and are therefore subject to enhanced penalties under the Penalty Guidelines.”⁹⁰¹ This includes one self-reported capacity release violation and two separate actions alleging propane manipulation with the Commodities Futures Trading Commission and Department of Justice.⁹⁰² Enforcement Staff also alleged that BP's conduct violated a permanent injunction in its CFTC settlement because the scheme constituted manipulation of a commodity in interstate commerce.⁹⁰³ The ALJ then noted that BP contended that Enforcement Staff did not meet its burden of proving a violation within five years of a prior Commission or similar adjudication.⁹⁰⁴ In particular, BP stated that the prior settlement between BP and the Commission did not involve any company that was a party to this matter, and the consent agreement was in any event unrelated to the alleged manipulation here.⁹⁰⁵ BP further argued that the prior settlements with CFTC and the Department of Justice (DOJ) are not “adjudications” within the meaning of the Penalty Guidelines, in part because the settlements preceded the Commission's release of the Guidelines.⁹⁰⁶ BP also stated that because the

⁹⁰⁰ In loosely analogous circumstances, federal courts may use criminal conduct for which the defendant has not been convicted to enhance penalties under the Sentencing Guidelines. *See, e.g., United States v. Smith*, 370 F. App'x 29, 37-38 (11th Cir. 2010); *United States v. Ashqar*, 582 F.3d 819, 823-25 (7th Cir. 2009); *United States v. Sampson*, 245 F. App'x 263, 269-70 (4th Cir. 2007); *United States v. Frias*, 39 F.3d 391, 392 (2d Cir. 1994).

⁹⁰¹ ID at P 198.

⁹⁰² *Id.* (citing *In re BP Energy Co.*, 121 FERC ¶ 61,088 (2007)).

⁹⁰³ *Id.* P 199.

⁹⁰⁴ *Id.* P 204.

⁹⁰⁵ *Id.* P 205.

⁹⁰⁶ *Id.* P 207.

Commission's policy statements are not precedential, the statements in the Guidelines are not binding and cannot be treated as having the force of federal law.⁹⁰⁷

385. The ALJ noted that the Penalty Guidelines provide that an organization's culpability score may be enhanced if it committed the current violation less than five years against a prior Commission adjudication of any violation or an adjudication of similar misconduct by any other enforcement agency.⁹⁰⁸ The ALJ found that BP had entered into three settlements which constitute prior history of adjudication under the Guidelines—the 2007 settlement with the Commission (involving a \$7 million penalty), and 2007 consent agreements with DOJ and CFTC for alleged manipulation of the propane market (totaling \$225 million in penalties and \$53.5 million restitution).⁹⁰⁹ The ALJ found that the scheme at issue in the propane settlements constituted an adjudication of similar misconduct to the scheme at issue here.⁹¹⁰ The ALJ further found that the fact that the Guidelines are in a non-binding policy statement does not obviate their use, and noted that agencies routinely speak through policy statements.⁹¹¹ The ALJ further found that the fact that the conduct occurred before the Guidelines does not mean that the Commission cannot take Guidelines factors into consideration in determining appropriate sanctions for market manipulation.⁹¹² Finally the ALJ found that while the entities specifically at issue in those prior settlements were not the same as the BP subsidiaries at issue here, it is well established that “the Commission can disregard corporate forms when necessary to fulfill its statutory obligations.”⁹¹³

⁹⁰⁷ *Id.* P 208.

⁹⁰⁸ *Id.* P 212.

⁹⁰⁹ *Id.* P 213 (citing *In re BP Energy Co.*, 121 FERC ¶ 61,088 (2007); *Commodity Futures Trading Comm'n v. BP Prods. N. Am. Inc.*, No. 06-cv-03503, Consent Order for Permanent Injunction and Other Relief, ¶¶ 14-15, 38-43 (N.D. Ill. Oct. 25, 2007); *United States v. BP America, Inc.*, Deferred Prosecution Agreement, No. 07 CR 683, ¶¶ 7-9 (N.D. Ill. Oct. 25, 2007)).

⁹¹⁰ *Id.* P 212.

⁹¹¹ *Id.* PP 214-215.

⁹¹² *Id.* P 217.

⁹¹³ *Id.* P 218 (citing *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy & Ancillary Services*, 127 FERC ¶ 61,269, at P 221 (2009); *Capital Tel. Co. Inc. v. FCC*,

(continued...)

c. BP Exceptions

386. BP states that the ALJ erred in concluding that the three prior settlements should be treated as adjudications, stating that the Penalty Guidelines are merely a statement of policy that does not justify treating them as such.⁹¹⁴ BP further states that settlements are not akin to trial judgments and that the Commission has never established a rule that prior settlements should be treated as adjudications.⁹¹⁵ BP then states that the three settlements at issue here should not be treated as adjudications because they involved a subsidiary that is not named in this matter, that subsidiary had no expectation that the consent order would be treated as an adjudication, and because the agreement with DOJ was eventually dismissed once BP had satisfied its conditions.⁹¹⁶ Finally, BP contends that the prior settlements should not be treated as adjudications for Penalty Guidelines purposes because they were entered into nearly three years before the Commission articulated the Guidelines.⁹¹⁷

d. Enforcement Staff Response

387. Enforcement Staff states that BP's contention that the Penalty Guidelines are non-binding is a meritless defense.⁹¹⁸ Enforcement Staff states instead that the Commission routinely uses the Guidelines to evaluate the two statutory factors required by the NGA.⁹¹⁹ Enforcement Staff also states the BP is incorrect that Commission settlements cannot constitute "adjudications" under the Guidelines because all such settlements can

498 F.2d 734, 738 (D.C. Cir. 1972) ("[C]ourts have consistently recognized that a corporate entity may be disregarded in the interest of public convenience, fairness and equity . . . [W]hen the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.")).

⁹¹⁴ BP Br. on Exceptions at 88.

⁹¹⁵ *Id.* at 89.

⁹¹⁶ *Id.* at 89-90.

⁹¹⁷ *Id.* at 90.

⁹¹⁸ Enforcement Staff Br. Opposing Exceptions at 73.

⁹¹⁹ *Id.* at 74.

only be approved by the Commission after it has satisfied itself that a violation occurred.⁹²⁰ Enforcement Staff also states that BP cannot avoid an enhanced penalty stemming from the 2007 Commission settlement because one of the respondents here was named in that order, and that the BP subsidiaries named here should not be able to use corporate formalities to escape responsibility for the CFTC and DOJ settlements.⁹²¹

e. Commission Determination

388. We reject BP's contention that this factor cannot be applied here because the settlements or conduct occurred before the Penalty Guidelines were promulgated. The Guidelines do not have the force of law, and as such BP is only subject to the Commission's determination of penalties. At the outset, we note that the Penalty Guidelines are merely advisory,⁹²² and were promulgated to assist the Commission in assessing penalties according to the relevant statutory factors enunciated in Section 22(c) of the NGA: (1) "the nature and seriousness of the violation" and (2) "the efforts to remedy the violation."⁹²³ Thus, BP is subject to the penalties and factors that Congress enunciated in the Energy Policy Act of 2005. Since the Guidelines are merely a means by which the Commission achieves the assessment that Congress directed, applying them here does not implicate questions about retroactive rulemaking.

389. As was stated in the *Revised Policy Statement on Penalty Guidelines*, the Commission rejected the "suggestion that we not treat prior settlements as 'adjudications' that would trigger the prior history enhancement under the Penalty Guidelines."⁹²⁴ Accordingly, we agree with the ALJ that BP's prior settlement with the Commission counts as a prior adjudication.

⁹²⁰ *Id.* at 74-75.

⁹²¹ *Id.* at 75.

⁹²² *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216, at P 32 (2010) ("our decision to adopt a guidelines-based approach does not restrict the discretion that we have always exercised and will continue to exercise in order to make an individualized assessment based on the facts presented in a given case.").

⁹²³ 15 U.S.C. § 717t-1(c).

⁹²⁴ *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216, at P 162 (2010).

390. The next question is whether the CFTC and DOJ settlements also count as prior history. BP contends that they do not because those settlements involved different corporate subsidiaries. The ALJ held, and BP did not contend otherwise, that the Commission has authority to disregard the corporate form when necessary to achieve the purposes of the statute. BP did not persuade the Commission to find otherwise, and the interests of justice and appropriate deterrence militate in favor of treating the prior settlements as applicable under this factor.

4. Violation of Judicial or Commission Order within 5 Years

a. Rehearing Request

391. BP timely requested rehearing from the Commission's order directing the ALJ to make factual findings on the Penalty Guidelines factor relating to the question whether BP committed any part of the violation less than 5 years after an adjudication by the Commission.⁹²⁵ For the reasons stated above, we deny rehearing.

b. Initial Decision

392. The ALJ noted that Enforcement Staff stated that it is not required to prove a violation of the Commodity Exchange Act in order to use the 2007 consent order to enhance penalties here, because the Guidelines themselves contain no such requirement.⁹²⁶ By contrast, BP contended that by failing to prove that the scheme directly violated a judicial order, Commission order, or injunction, this factor cannot be used to enhance penalties.⁹²⁷ BP also stated that Enforcement Staff did not prove a violation of the consent order here because the subsidiary who was party to that agreement was not named in this matter.⁹²⁸ Moreover, BP contended that the consent agreement enjoined violations of the Commodity Exchange Act, which was not proved

⁹²⁵ Rehearing Request at 38-43.

⁹²⁶ ID at P 219.

⁹²⁷ *Id.* P 220.

⁹²⁸ *Id.* P 221.

here.⁹²⁹ Finally, BP stated that Enforcement Staff waived this issue because its brief “groups this issue and the preceding issue together.”⁹³⁰

393. The ALJ stated that the Penalty Guidelines provide that an organization’s culpability score may be enhanced if the conduct violated a judicial or Commission order or injunction by federal and state enforcement agencies.⁹³¹ The ALJ found that BP’s conduct contravenes the terms of the permanent injunction that was part of the 2007 settlement with CFTC, and therefore is covered by § 1C2.3(d) of the Guidelines, and therefore warrants a 2-point enhancement to BP’s culpability score.⁹³² The ALJ further found that § 1C2.3 does not require a finding by the court that issued the order that the conduct in this matter violated that order.⁹³³

c. BP Exceptions

394. BP states that the ALJ erred in ignoring the separate corporate identities of the BP subsidiaries at issue in this proceeding as compared to the entities at issue in the prior orders.⁹³⁴ BP notes that the Commission “may disregard the corporate form” but to do that it “must determine that doing so would be necessary to fulfill its statutory duties.”⁹³⁵ BP also contends that the ALJ did not engage in reasoned decision making in determining that BP violated an order in the CFTC matter because the injunction applied to a different BP subsidiary and because it claims the injunction applied only to violations of the Commodity Exchange Act.⁹³⁶ BP therefore states that the ALJ could not have found a

⁹²⁹ *Id.* P 222.

⁹³⁰ *Id.* P 223.

⁹³¹ *Id.* P 224.

⁹³² *Id.* P 225.

⁹³³ *Id.*

⁹³⁴ BP Br. on Exceptions at 90-91.

⁹³⁵ *Id.* at 91 (citing *Adm’rs of the Tulane Educ. Fund v. Ipsen Pharma, SAS*, 112 F. Supp. 2d 24, 28 (D.D.C. 2011); *Schattner v. Girard, Inc.*, 668 F.2d 1366 (D.C. Cir. 1982)).

⁹³⁶ *Id.* at 91-92.

violation of that injunction because there is no evidence of such a violation in the record.⁹³⁷ BP also states that it complied with the DOJ agreement.⁹³⁸

d. Enforcement Staff Response

395. Enforcement Staff states that BP offers no support for its position that the ALJ cannot find that BP violated the injunction in the 2007 CFTC Consent Order because that provision related to the Commodity Exchange Act.⁹³⁹ Enforcement Staff states that the injunction included as an example manipulation of the price of a commodity in interstate commerce, which is what is alleged to have happened here.⁹⁴⁰ Enforcement Staff further states that it is appropriate for the Commission to cite to the CFTC injunction for the sole purpose of addressing appropriate penalties under the NGA.

e. Commission Determination

396. We agree with the ALJ that BP's culpability score should be enhanced because its manipulative scheme violated another order within five years. To perform our penalty analysis, we do not—and need not—find that the conduct violated the Commodity Exchange Act or any other statute; rather, the question is merely whether the conduct is prohibited by the plain language of a prior order. Here, the CFTC order prohibited the company from manipulating any commodity, and that is what happened here. Moreover, the fact that DOJ rescinded the Deferred Prosecution Agreement after BP established compliance with it does not mean that we cannot look to that order in determining whether the conduct here violated it. And as addressed above, we are not persuaded that BP's formal corporate structure precludes us from applying this factor here.

⁹³⁷ *Id.* at 92.

⁹³⁸ *Id.*

⁹³⁹ Enforcement Staff Br. Opposing Exceptions at 76.

⁹⁴⁰ *Id.* (citing *CFTC v. BP Prods. N. Am., Inc.*, Consent Order for Permanent Injunction and Other Relief, Civil Action No. 06-cv-03503, ¶ 83(a)(i) (N.D. Ill. Oct. 25, 2007)).

5. Compliance Program

a. Initial Decision

397. Enforcement Staff submitted that BP's compliance program was ineffective for three reasons: it failed to prevent or detect the scheme at issue here during the Investigative Period; its internal inquiry constituted a "whitewash" of the scheme; and in moving to discredit Luskie's concerns, BP demonstrated more concern with self-protection than uncovering the truth.⁹⁴¹ BP countered that its compliance program was effective, contending that Enforcement Staff did not introduce any evidence addressing the program's effectiveness and focused instead on attempting to discredit it while disregarding evidence to the contrary.⁹⁴² Instead, BP contended, the evidence showed that the compliance program was effective, and that compliance staff did not try to cover up questionable trading behavior.⁹⁴³

398. The ALJ noted that the Commission directed that findings be made respecting BP's compliance program under the factors listed in § 1B2.1 of the Penalty Guidelines.⁹⁴⁴ The ALJ recited the factors of § 1B2.1, and stated "[t]o be effective a compliance program must minimally meet these seven factors."⁹⁴⁵ The ALJ then found that BP's compliance program did not satisfy those factors.⁹⁴⁶ As an initial matter, the ALJ also found that Enforcement Staff's support for BP's compliance program during the investigatory phase of this proceeding does not mean that Staff cannot introduce its subsequent discovery, during the administrative litigation phase, of evidence that the program was not in fact satisfactory.⁹⁴⁷ The ALJ then proceeded to analyze the seven factors, as follows:

⁹⁴¹ ID at P 226; *see also id.* PP 227-231.

⁹⁴² *Id.* P 233.

⁹⁴³ *Id.* PP 235-236.

⁹⁴⁴ *Id.* P 237 (citing Hearing Order at P 49(v)).

⁹⁴⁵ *Id.* PP 238-239.

⁹⁴⁶ *Id.* P 239.

⁹⁴⁷ *Id.* P 240.

Factor 1: Internal Standards and Procedures to Prevent and Detect Violations. The ALJ found that BP did not have strong internal standards that would prevent and detect violations, including the facts that its reports excluded certain markers of manipulation and Compliance did not always follow up when reports flagged questionable trading behavior.⁹⁴⁸

Factor 2: High-Level Management Knowledge and Oversight of Internal Compliance Programs. The ALJ found that BP's management's actions show minimal oversight, including having inappropriate conversations about Luskie's statements, predetermining the outcome of the internal process before the investigation was complete, and not taking the allegations seriously.⁹⁴⁹

Factor 3: Reasonable (Due Diligence) Efforts to Screen Out "Bad Actors." The ALJ found that BP had failed to screen out "bad actors" because its reports and reporting requirements could not and did not effectively screen out "bad actors," nor was there evidence of any follow-up when certain trading was flagged.⁹⁵⁰

Factor 4: Reasonable Communications and Training Efforts. The ALJ found that while BP's compliance team frequently attended manager meetings, they did not use it as an opportunity to review compliance procedures or otherwise take an active role in the meetings.⁹⁵¹ The ALJ also found that although traders attended anti-manipulation training, there was no evidence that the training addressed physical-for-financial manipulation.⁹⁵²

⁹⁴⁸ *Id.* PP 241-243.

⁹⁴⁹ *Id.* PP 244-248.

⁹⁵⁰ *Id.* P 249.

⁹⁵¹ *Id.* P 250.

⁹⁵² *Id.* P 251.

Factor 5: Reasonable Steps to Evaluate Program Effectiveness, Including Confidential Avenues for Employees to Report Noncompliance. The ALJ found there was no evidence that BP took any steps to evaluate the effectiveness of its compliance program, and that in fact the actions by compliance members indicated a lack of support for employees to report violations.⁹⁵³

Factor 6: Compliance Incentives and Noncompliance Sanctions. The ALJ found that BP's compliance program lacked incentives for employees to comply with the anti-manipulation rules, and that in fact there were affirmative incentives for certain traders *not* to comply because, as the ALJ found, "financial traders generally receive a higher percentage of the value they generate, versus physical traders."⁹⁵⁴ Accordingly, traders who traded both physical and financial "would benefit . . . to do well in financial trading."⁹⁵⁵ As such, traders in that position would make more money by not complying with the rules. The ALJ also rejected BP's contention that its "Passport to Work" program was an incentive to comply with the rules, and noted BP cited no evidence in the record that completing the program was required for all employees.⁹⁵⁶

Factor 7: Reasonable Responsive Steps After a Violation has been Detected. The ALJ found that BP had failed to take reasonable steps after detecting a violation.⁹⁵⁷ The ALJ in particular found that after detecting the violation, BP's compliance personnel took minimal actions conducive to complying with the company's protocols (such as notifying the Independent Monitor, who in turn notified CFTC), and BP did not take reasonable steps afterwards, for while the initial report included a review of BP's physical and

⁹⁵³ *Id.* PP 252-254.

⁹⁵⁴ *Id.* P 255.

⁹⁵⁵ *Id.*

⁹⁵⁶ *Id.* PP 255-256.

⁹⁵⁷ *Id.* P 257.

financial positions, this data was deleted from later drafts.⁹⁵⁸ At the same time, language was inserted into the draft stating that no violations had been found, and then BP ended the internal inquiry before it was completed.⁹⁵⁹

Accordingly, the ALJ found that BP is not entitled to compliance credit.⁹⁶⁰

b. BP Exceptions

399. BP contends that the ALJ erred in finding that BP's compliance program failed to satisfy the factors set forth in the Penalty Guidelines.⁹⁶¹ In particular, BP states that Enforcement Staff had previously said that the terms of the compliance program "reflected applicable industry practices" and that BP provided it with sufficient resources.⁹⁶² BP contends that these statements constitute admissions by a party opponent and cannot be ignored.⁹⁶³ With respect to each of the factors, BP avers the following:

Factor 1: Internal Standards and Procedures to Prevent and Detect Violations. BP states that the ALJ's finding that BP failed to have strong internal standards to prevent and detect violation was baseless and inconsistent.⁹⁶⁴ BP further states that the ALJ erred by ignoring the "countless other sources of data to which BP Compliance had access that contained" information such as its financial and physical positions, and that there is no evidence that the reports could have been improved by including additional data.⁹⁶⁵ BP contends that it was incorrect to fault the compliance program for failing to have followed up on a single report

⁹⁵⁸ *Id.* PP 258-261.

⁹⁵⁹ *Id.* PP 262-263.

⁹⁶⁰ *Id.* P 264.

⁹⁶¹ BP Br. on Exceptions at 92.

⁹⁶² *Id.* at 93.

⁹⁶³ *Id.*

⁹⁶⁴ *Id.* at 94.

⁹⁶⁵ *Id.* at 95.

because there was no company-wide requirement that they follow up every time a daily report flagged a trade.⁹⁶⁶

Factor 2: High-Level Management Knowledge and Oversight of Internal Compliance Programs. BP states that the ALJ concedes that it had a hierarchy of high-level officials involved in compliance, plus an independent monitor, and further states that the ALJ was incorrect in faulting management oversight because one manager “made an admittedly bad joke.”⁹⁶⁷

Factor 3: Reasonable (Due Diligence) Efforts to Screen Out “Bad Actors.” BP states that the ALJ erred in finding that BP failed to make reasonable efforts to screen out “bad actors,” because the evidence shows that BP utilized measures to enhance its compliance program.⁹⁶⁸

Factor 4: Reasonable Communications and Training Efforts. BP further states that the ALJ erred in finding that BP’s communication efforts and training were flawed, contending instead that the evidence shows that compliance officers frequently attended manager meetings, and that the training was not deficient simply because the training slides in one exhibit did not specifically address physical-for-financial manipulation.⁹⁶⁹ BP states that the slides in that exhibit included warnings about transacting outside the market price, and that Luskie’s testimony referred to “semiregular” conversations with compliance officers.⁹⁷⁰

Factor 5: Reasonable Steps to Evaluate Program Effectiveness, Including Confidential Avenues for Employees to Report Noncompliance. BP states that the ALJ erred in finding that BP’s program was not conducive to employees reporting compliance violations, and notes one instance in which a trader reported a line manager for a violation.⁹⁷¹ BP further states that its confidential “Helpline” and its

⁹⁶⁶ *Id.*

⁹⁶⁷ *Id.* at 96.

⁹⁶⁸ *Id.*

⁹⁶⁹ *Id.* at 96-97 (citing Ex. OE-047).

⁹⁷⁰ *Id.* at 97.

⁹⁷¹ *Id.* at 98.

requirement that employees report violations should satisfy this factor, and the facts specific to Luskie's incident "is wholly irrelevant to whether BP meets the objective standard for this factor."⁹⁷²

Factor 6: Compliance Incentives and Noncompliance Sanctions. BP states that the ALJ was incorrect in finding BP deficient in this regard because, it contends, a financial trader's potential to receive a higher percentage of the value they generate than a physical trader is not indicative of the lack of compliance.⁹⁷³ BP states that the record does not support a finding that BP's bonus structure paid traders a percentage of their individual P&L, and that the ALJ erred in finding that the fact that Comfort traded both financial and physical did not mean he had an incentive to make more money on his financial than physical book.⁹⁷⁴

Factor 7: Reasonable Responsive Steps After a Violation has been Detected. BP also contends that the ALJ erred in finding that BP did not take reasonable steps after detecting a violation.⁹⁷⁵ BP states that the fact that certain language was removed from the report is not problematic, and the ALJ's finding that BP ended its internal inquiry on November 5 ignores the record evidence.⁹⁷⁶ Finally, BP states that there are no requirements that the company "continue an internal investigation in the face of investigations by two federal agencies."⁹⁷⁷

c. Enforcement Staff Response

400. Enforcement Staff contends that the ALJ correctly determined that BP's compliance program did not satisfy the factors recited in the Penalty Guidelines. As a general matter, Enforcement Staff states that the ALJ was not bound by Enforcement Staff's preliminary statements made during the investigation, and that it was Enforcement Staff's subsequent discovery of previously unknown facts that led Enforcement Staff to

⁹⁷² *Id.*

⁹⁷³ *Id.*

⁹⁷⁴ *Id.* at 99.

⁹⁷⁵ *Id.*

⁹⁷⁶ *Id.*

⁹⁷⁷ *Id.* at 100.

recommend finding that BP's compliance program was unsatisfactory.⁹⁷⁸ This included the discovery of serious deficiencies in BP's compliance program in early 2009 after it deposed one BP witness, and BP's production of legible copies of compliance reports that flagged certain trading.⁹⁷⁹ Further, Enforcement Staff states that the evidence does not support making Enforcement Staff's preliminary statements binding, and that BP should not get self-reporting credit simply for furnishing a copy of the call to the independent monitor.⁹⁸⁰ Enforcement Staff also states that the ALJ was correct in rejecting as evidence of the program's effectiveness the fact that the DOJ moved to dismiss the Deferred Prosecution Agreement since that action was unrelated to the conduct at issue here.⁹⁸¹

401. Staff then addresses each of the 7 factors as follows:

Factor 1: Internal Standards and Procedures to Prevent and Detect Violations. Enforcement Staff states that the ALJ did in fact assess and describe the intended or theoretical purpose of the compliance reports that BP claims validate its program, and that BP's own witnesses identified numerous deficiencies and limitations of those reports.⁹⁸²

Factor 2: High-Level Management Knowledge and Oversight of Internal Compliance Programs. Enforcement Staff states that the ALJ correctly found that BP's management did not exercise appropriate oversight of compliance, and that BP's rebuttal fails because the "point of the factor" is "to determine whether management was *actually* committed to ensuring Compliance's effectiveness."⁹⁸³ Enforcement Staff then states that the evidence showed that BP's management's

⁹⁷⁸ Enforcement Staff Br. Opposing Exceptions at 78.

⁹⁷⁹ *Id.* at 79.

⁹⁸⁰ *Id.*

⁹⁸¹ *Id.* at 80.

⁹⁸² *Id.* at 81-82.

⁹⁸³ *Id.* at 82.

instinct was to discredit Luskie and to defend its long term employees from allegations of market manipulation without first examining the trading behavior.⁹⁸⁴

Factor 3: Reasonable (Due Diligence) Efforts to Screen Out “Bad Actors.” Enforcement Staff states that BP cites no evidence to support its assertion that it took reasonable efforts to screen out “bad actors.”⁹⁸⁵ Enforcement Staff also states that the ALJ correctly noted that BP’s compliance group failed to follow-up on flagged trading.⁹⁸⁶

Factor 4: Reasonable Communications and Training Efforts. Enforcement Staff states that the ALJ correctly found no evidence that BP’s compliance group actively participated in weekly meetings with traders, and that compliance personnel did not regularly communicate with traders and that BP’s anti-manipulation training efforts were deficient.⁹⁸⁷

Factor 5: Reasonable Steps to Evaluate Program Effectiveness, Including Confidential Avenues for Employees to Report Noncompliance. Enforcement Staff states that the record contains no evidence that BP took steps to evaluate the effectiveness of its compliance program or that it regularly reviewed its program in any fashion.⁹⁸⁸

Factor 6: Compliance Incentives and Noncompliance Sanctions. Enforcement Staff states that BP’s traders lacked incentives to comply with anti-manipulation rules.⁹⁸⁹ In particular, Enforcement Staff cites BP’s bonus program as rewarding financial traders with more profit than physical traders, which Enforcement Staff contends created incentives for hybrid traders to shift their profits from physical to financial.⁹⁹⁰

⁹⁸⁴ *Id.*

⁹⁸⁵ *Id.* at 83.

⁹⁸⁶ *Id.*

⁹⁸⁷ *Id.* at 84.

⁹⁸⁸ *Id.* at 85.

⁹⁸⁹ *Id.* at 86.

⁹⁹⁰ *Id.*

Factor 7: Reasonable Responsive Steps After a Violation has been Detected. Enforcement Staff states that the ALJ correctly found that BP's compliance program did not take reasonable steps after receiving the November 5 call.⁹⁹¹ In particular, Enforcement Staff states that BP's objections ignore the fact that the company had in fact represented that it was conducting an internal investigation and would keep the monitor in the loop, when in fact it abandoned the inquiry shortly after the government investigations began.⁹⁹² Moreover, Enforcement Staff states that the BP compliance inquiry did not review actual trading patterns with the traders even though, as one witness had said, the truth could be found in the data.⁹⁹³

d. Commission Determination

402. For the reasons stated in the ALJ's findings, we agree that BP's compliance program does not satisfy the factors listed in § 1B2.1 of the Penalty Guidelines. After reviewing the facts, we are not persuaded by BP's objections, and find instead that BP's compliance program was deficient in structure and operation.

C. Assessment of Penalties

403. The next step is to assess penalties. Assessing penalties under Section 22 of the NGA involves two critical steps. The first is to ascertain the statutory maximum, so that we can be sure that the penalties we assess are not in excess of what Congress has authorized. The second step is to apply the two statutory factors—seriousness and efforts to remedy—to determine the appropriate amount of penalties to assess.

404. As addressed above, we find that this matter involves well over 600 violations, and perhaps more than 900. Each manipulative violation lasted for at least one day. Accordingly, the largest penalty authorized by Congress is in excess of \$716 million (at \$1,193,970 per day per violation), which is far higher than the penalties we will assess in this proceeding.⁹⁹⁴

⁹⁹¹ *Id.* at 87.

⁹⁹² *Id.* (citing Tr. 2028:14-24 (Simmons)).

⁹⁹³ *Id.* at 88 (citing Ex. OE-196 at 5:16-6:1-6).

⁹⁹⁴ NGA Section 22(a), 15 U.S.C. § 717t-1(a).

405. Regarding the second step, we have promulgated the non-binding Penalty Guidelines to assist us in applying the two statutory factors listed in section 22 of the NGA.⁹⁹⁵ Under § 1C2.1 of the Penalty Guidelines, we first ascertain the base penalty amount, which is derived from the violation level. For manipulation matters, we begin with a base violation level of 6.⁹⁹⁶ As addressed above, BP's manipulative scheme caused financial losses of between \$1,375,482 and \$1,927,728, which adds 16 to the base violation level.⁹⁹⁷ The scheme affected more than 35 Bcf of physical and financial natural gas, which adds another 6 to the base violation level.⁹⁹⁸ This results in a violation level of 28, which corresponds to a base penalty amount of \$6.3 million.⁹⁹⁹

406. Next, we determine the culpability score, which correlates to minimum and maximum multipliers that establish the penalty range.¹⁰⁰⁰ The base culpability score is 5.¹⁰⁰¹ Here we add two points for the prior adjudication within 5 years of the violation, and another 2 points for BP's violation of a Commission or judicial order within 5 years of the scheme.¹⁰⁰² Then we subtract one point because BP cooperated during the investigation.¹⁰⁰³ BP receives no deduction for its compliance program, or for self-reporting.¹⁰⁰⁴ This yields a culpability score of 8, which corresponds to a minimum and maximum multiplier of 1.6/3.2.¹⁰⁰⁵

⁹⁹⁵ NGA Section 22(c), 15 U.S.C. § 717t-1(c).

⁹⁹⁶ Penalty Guidelines §2B1.1(a).

⁹⁹⁷ *Id.* §2B1.1(b)(1)(I).

⁹⁹⁸ *Id.* §2B1.1(b)(2)(C).

⁹⁹⁹ *Id.* §1C2.2(b).

¹⁰⁰⁰ *Id.* §1C2.3.

¹⁰⁰¹ *Id.* §1C2.3(a).

¹⁰⁰² *Id.* §1C2.3(c) & (d).

¹⁰⁰³ Staff Report at 73; Penalty Guidelines §1C2.3(g)(2).

¹⁰⁰⁴ Penalty Guidelines §1C2.3(f) & (g)(1).

¹⁰⁰⁵ *Id.* §1C2.4.

407. The product of the culpability score multipliers and the base penalty amount is \$10.08 to \$20.16 million. This is the range determined by our calculation of the Penalty Guidelines.¹⁰⁰⁶

408. Finally, because the Penalty Guidelines provide merely a “first step in determining an appropriate penalty,¹⁰⁰⁷ and because “the Commission cannot predict how it will measure loss in every case” since “[t]here may be circumstances when precise calculations cannot be made” and “the availability of evidence will likely vary from case to case,”¹⁰⁰⁸ we must undertake an independent assessment of the violation in order to determine whether the amount calculated under the Penalty Guidelines is reasonable and appropriate under the NGA.¹⁰⁰⁹ As reiterated in the *Barclays* penalty assessment order, “the ‘decision to adopt a guidelines-based approach does not restrict the discretion that we have always exercised and will continue to exercise in order to make an individualized assessment based on the facts presented in a given case.’”¹⁰¹⁰

409. We find the violation here to have been very serious. BP manipulated the market to profit from a natural disaster, and it did not stop after a trade or two but rather kept the scheme going for nearly three months. BP’s scheme did not simply defraud its counterparties; by manipulating the Houston Ship Channel index, BP affected the price of natural gas throughout the Houston region and thereby altered the value of physical and financial transactions of everyone trading in the region—even those who did not trade with BP. This sort of “ripple effect” is one reason why the manipulation of natural gas indexes is so damaging: other market participants and consumers are the inevitable victim of the sort of scheme that BP’s traders concocted. The Commission deregulated wholesale natural gas prices to achieve Congress’ directive that rates be just and reasonable, but this sort of market manipulation undermines the value and stability of our deregulated markets, and if left undeterred ultimately may raise questions about whether the benefits of deregulation outweigh the costs. Furthermore, with respect to efforts to

¹⁰⁰⁶ *Id.* §1C2.5(a)-(b).

¹⁰⁰⁷ *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 at P 19.

¹⁰⁰⁸ *Id.* P 206.

¹⁰⁰⁹ *See Barclays*, 144 FERC ¶ 61,041 at P 125 (undertaking independent assessment of penalties under the FPA).

¹⁰¹⁰ *Barclays*, 144 FERC ¶ 61,041 at P 125 (quoting *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 at P 32).

remedy the violations, we note that BP cooperated with Enforcement Staff's investigation, but BP did not self-report the violation, did not use its internal inquiry to assist Enforcement Staff, and did not take other steps to remedy the harm.

410. Accordingly we find that the appropriate civil penalty here is at the top of the Guidelines range: \$20.16 million.

The Commission orders:

(A) The Commission affirms the ID, as discussed in the body of this order.

(B) The Commission directs BP to pay to the United States Treasury by a wire transfer a sum of \$20,160,000 in civil penalties within 60 days after the issuance of this order, as discussed in the body of this order. If BP does not make this civil penalty payment within the stated time period, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19(a) (2015) from the date that payment is due.

(C) The Commission directs BP, within 60 days after the issuance of this order, to disgorge its unjust profits in the amount of \$207,169 to the Low Income Home Energy Assistance Program (LIHEAP) of the state of Texas for the benefit of its energy consumers.

(D) BP's Rehearing Request is denied, as discussed in the body of this order.

By the Commission. Chairman Bay is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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IN13-15-000.DOCX.....1-199