

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

152 FERC ¶ 63,016

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

Docket No. IN13-15-000

INITIAL DECISION

(Issued August 13, 2015)

APPEARANCES

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Carmen A. Cintron, Presiding Administrative Law Judge

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I. INTRODUCTION

1. The issue in this case is whether BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company (collectively, BP) violated Section 1c.1 of the Commission's regulations 18 C.F.R. § 1c.1 (2014), and section 4A of the Natural Gas Act (NGA), 15 U.S.C. § 717c-1 (2012) and to ascertain certain facts relevant for any application of the Commission's Penalty Guidelines.¹ This decision finds that BP violated Section 1c.1 of the Commission's regulations and section 4A of the NGA.

2. As ordered by the Commission factual findings are made on the statutory factors relevant to a civil penalty and to the factors set forth in the Penalty Guidelines. To wit, (i) the number of violations are at a minimum 48 and the days on which the violations occurred are 49; (ii) BP's manipulation resulted in financial losses of \$1,375,482 to \$1,927,728 on the next-day natural gas markets at Houston Ship Channel (HSC) and Katy during the Investigative Period, the amount of natural gas involved in BP's sales of next-day, fixed-price physical gas at HSC in the Investigative Period was 10,632,400 MMBtus, the amount of natural gas involved in the financial natural gas positions at HSC in the Investigative Period was 25,310,000 MMBtus, and the losses were during 49 trading days of the Investigative Period; (iii) the current violation is less than five years after a prior Commission adjudication and adjudications of similar misconduct by the CFTC and DOJ, as a result, BP's conduct warrants an increase of 2 points in their culpability score; (iv) BP's conduct here also contravenes the terms of a permanent injunction with the CFTC which warrants a 2 point increase in their culpability score; (v) BP did not have an effective compliance program ; and (vi) the Texas team's gross profits from the manipulation were between \$233,330 and \$316,170 and net profits between \$165,749 and \$248,589.

II. PROCEDURAL HISTORY

3. By Order issued May 15, 2014, the Commission set a hearing to address whether BP violated section 1c.1 of the Commission's regulations, 18 C.F.R. § 1c.1 (2014) and section 4A of the NGA, 15 U.S.C. § 717c-1 (2012).² The Commission also ordered factual findings to ascertain facts relevant to the application of the Penalty Guidelines. Rehearing is currently pending Commission action.

¹ *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 (2010) (Penalty Guidelines).

² *BP America Inc. et al*, 147 FERC ¶ 61,130 (2014) (Hearing Order).

4. On May 19, 2014, Chief Judge Curtis L. Wagner, Jr. issued an order establishing a procedural schedule subject to Track II of the procedural time standards for hearing cases and designated the undersigned as the presiding judge.³

5. The hearing commenced on March 30, 2015 and concluded on April 15, 2015. At the conclusion of the hearing the record was closed. As provided by Chief Judge Wagner's December 12, 2014 Notice to the Public on Procedures for Handling Exhibits and Developing the Electronic Hearing Record, a joint exhibit list and official hearing exhibits were filed by the Commission's Enforcement Staff (Enforcement Staff) and BP on April 22, 2015. Enforcement Staff and BP filed a Joint Motion to Adopt Transcript Corrections on May 1, 2015. This motion was granted on May 14, 2015. Enforcement Staff filed a Motion to Reopen the Record to correct certain exhibits on May 7, 2015. This Motion was granted on May 12, 2015. Enforcement Staff filed the corrected exhibits on May 12, 2015. Initial briefs were filed on May 15, 2015. Enforcement Staff filed a Revised Initial Brief on May 22, 2015. Reply briefs were filed on June 12, 2015.

III. ISSUES

A. **Issue 1:** Whether BP violated section 1c.1 of the Commission's regulations, 18 CFR § 1c.1, and Section 4 of the Natural Gas Act (NGA), 15 U.S.C. § 717c-1 with respect to its trading of next-day, fixed-price natural gas at Houston Ship Channel (HSC) from September 18, 2008 through November 30, 2008 [Investigative Period].

1. Conduct

Parties Contentions

6. Enforcement Staff contends BP's Texas team of the Southeast Gulf Texas (SEGT) desk had a pre-existing HSC-Henry Hub spread position which included short index exposure at HSC and long index exposure at Henry Hub. This financial position would benefit when the spread between daily physical gas prices at HSC and Henry Hub grew wider. According to Enforcement Staff the Texas team directly used a scheme to defraud, engaging in uneconomic trading in the physical markets at HSC during the Investigative Period. EF IB⁴ at 25. These actions suppressed the HSC *Gas Daily* index,

³ *BP America Inc. et al*, Docket No. IN13-15-000 (May 19, 2014).

⁴ "EF IB" refers to Enforcement Staff's Revised Initial Post-Hearing Brief, filed May 22, 2015. "EF RB" refers to Enforcement Staff's Reply Brief, filed June 12, 2015.

Counsel for both parties were instructed to comply with 18 C.F.R. § 385.2003 (2014) when filing their Reply Briefs, which provides that for filings with the

allowing the Texas team to profit on its financial positions. EF IB at 25. Enforcement Staff cites Commission precedent for the proposition that a series of affirmative acts lacking a profit or non-manipulative explanation can provide evidence of market manipulation. EF IB at 26. Enforcement Staff maintains that based on the totality of evidence in this case, BP engaged in fraud using a fraudulent artifice, device or scheme to manipulate natural gas trading. EF IB at 27.

7. Hurricane Ike made landfall on September 13, 2008, causing HSC prices to decrease sharply relative to Henry Hub. EF IB at 29, n. 79. This resulted in the Texas team having a large realized and unrealized profit, based on the team's HSC-Henry Hub financial spread position. EF IB at 29, n.79. Lower HSC prices provided the Texas team with an economic windfall on their pre-existing September financial spread positions that were exposed to HSC's *Gas Daily* index. EF IB at 29-30. After profiting from this position, the team had a financial incentive to slow how fast the spread was shrinking. EF IB at 30. The Texas team subsequently increased their short exposure to the HSC *Gas Daily* index for both October and November 2008. EF IB at 30.

8. Enforcement Staff also contends that another sign the Texas team manipulated natural gas prices was by increasing physical natural gas positions in a way that would suppress the HSC *Gas Daily* index price. EF IB at 31.

9. Following Hurricane Ike, the Texas team changed its next-day, fixed-price natural gas trading and transport in eight different ways. EF IB at 32. This included:

(1) a shift almost entirely to net selling, that led them to become the seller with the largest market share in the next-day, fixed-price market at HSC during the Investigative Period; (2) an increase in the percentage and volume of the Texas team's fixed-price sales at HSC; (3) a shift to selling heavier volumes at HSC early in the trading day, including selling 35% of their gas at HSC before Katy even began trading; (4) a shift to buying at HSC later in the day as compared to earlier periods; (5) a shift to transporting substantially more gas to HSC from Katy using BP's HPL⁵ transport; (6) an increase in the percentage of sales at HSC that were uneconomic compared to contemporaneous prices at Katy; (7) a shift to posting aggressively lower offers compared to other sellers at HSC; and (8) an increase in the frequency of sales made by hitting bids.

Commission, “[c]itations to specific pages of documents filed via the Internet should use the page numbers appearing in the PDF . . . version of the document available on the Commission’s website.” In the interest of consistency, citations to briefs in this initial decision cite to Initial and Reply briefs’ PDF page numbers.

⁵ Houston Pipeline System.

EF IB at 32 (footnotes omitted).

10. These in trading patterns differ from the Texas team's actions during the Pre-Investigative Period (Pre-IP).⁶ EF IB at 32. Enforcement Staff additionally avers that the changes in trading patterns during the Investigative Period cannot be explained by any economic or profit rationale, general market conditions, or comparison to HSC's other two largest sellers' behavior. EF IB at 32-33. Nor can they be explained by a financial crisis, hurricane-related claims, and BP's baseload. EF RB at 19-20. According to Enforcement Staff, the change in trading patterns reveals the Texas team's manipulative strategy. EF IB at 33. In addition to directly impacting prices, the Texas team's trading also indirectly affected pricing by "marking" or "framing" the open. EF IB at 37. The team injected false information early in the trading session, intending to influence later offers and trades by other market participants. EF IB at 37. This would force the HSC *Gas Daily* price downward. EF IB at 37.

11. Enforcement Staff contends that profitability is another indication of an entity engaging in market manipulation. EF IB at 37. Here, the Texas team's net losses on physical trades suggest the Texas team manipulated natural gas markets. EF IB at 37-40.

12. On the other hand, BP states that Enforcement Staff failed to demonstrate that BP (1) used or employed any device, scheme, or artifice to defraud; or (2) engaged in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity with respect to its trading of next-day, fixed-price natural gas at HSC during the Investigative Period. BP IB⁷ at 15-16.

13. BP first contends that the Pre-IP comparison period is an inappropriate comparison to the Investigative Period. BP IB at 16. The Pre-IP does not account for seasonality differences, volatile and falling natural gas prices, the financial crisis, and weather events that occurred during the Investigative Period. BP IB at 18. In addition, the Pre-IP's baseload positions were not comparable to the Texas team's Investigative Period's baseload positions. BP IB at 18. BP claims it had a higher baseload amount during the Investigative Period than it did during the Pre-IP, contributing to BP's changes

⁶ Dr. Abrantes-Metz defines the Pre-IP as trade dates from January 2, 2008 through September 10, 2008. EF IB at 32, n. 93. Dr. Abrantes-Metz chose those dates because Comfort became the primary Texas team physical trader in January 2008. EF IB at 32, n. 93. He executed 87 percent of the Texas team's trades at HSC and Katy from January 1, 2008 through the end of the Pre-IP. EF IB at 32, n. 93.

⁷ "BP IB" refers to BP's Initial Post-Hearing Brief, filed May 15, 2015. "BP RB" refers to BP's Post-Hearing Reply Brief, filed June 12, 2015.

in trading behavior. BP IB at 18. Dr. Abrantes-Metz's consideration of a short Pre-IP also fails to consider all available data. BP IB at 18. Though BP concedes she expanded the definition of the Pre-IP in her rebuttal testimony, she applied the expanded Pre-IP to only some analyses. BP IB at 18-19. The data was available for Dr. Abrantes-Metz to conduct a full analysis prior to 2007. BP IB at 20. This data included available HPL transport data, which dated farther back in time versus the Katy-Ship Sheets Dr. Abrantes-Metz relied on. BP IB at 20. When considering the omitted data, it becomes clear that any changes in BP's trading cannot be considered manipulative. BP IB at 21.

14. BP asserts Enforcement Staff's use of end-of-day *Gas Daily* prices failed to account for intraday activity the Texas team traders observed throughout the trading day. BP IB at 20-21. In multiple instances, the *Gas Daily* price differential between HSC and Katy differed from the intraday prices. BP IB at 21, 22. Moreover, BP's actual profit and loss (P&L) should only be analyzed by reference to the spread at the time BP executed its transactions. BP IB at 22. Using average end-of-day prices could inaccurately reflect a Texas team trading loss if the intraday prices traders were seeing during the course of the day were favorable to BP's trading position. BP IB at 22-23.

15. Additionally, BP argues Enforcement Staff incorrectly analyzed flawed data inputs, both in their witnesses' reliance on the Katy-Ship Sheets and how Enforcement Staff analyzed that data. BP IB at 23. BP contends that Enforcement Staff's "six-legged" analysis, or the six analyses Dr. Abrantes-Metz uses to allege manipulative activity, contain flaws. BP IB at 26. These six analyses include: (1) an analysis of BP's proportion of trading in "fixed-price" instruments versus other instruments; (2) an analysis of the relative "earliness" of BP's trading; (3) a regression analysis of the gas volume shipped by BP from Katy to HSC, and the relationship between the shipped volume versus Katy and HSC's price spread; (4) an analysis of BP's trade executions by "hitting bids"; (5) an analysis of intraday trading and how often BP engaged in "uneconomic" trading; and (6) a "distance" looking at the price difference between the prices of BP's offer-initiated sales at HSC and the next best non-BP HSC offers in the market. BP IB at 26.

16. Enforcement Staff also fails to assess alternative, non-manipulative explanations for BP's trading. BP IB at 39. One of these explanations is that credit limitations affected BP's trading. BP IB at 40. BP contends that the 2008 financial crisis and subsequent credit issues affected the Texas team's trading during the Investigative Period because companies they traded with "were going out of business and cancelling contracts." BP IB at 40. Internally within BP, credit ratings of potential counterparties were lowered to levels that failed to meet BP's credit standards. BP IB at 40. Though Enforcement Staff attempts to discredit Barnhart's testimony because she could not recall these specific parties, such criticism is unwarranted. BP IB at 40. She testified she could not recall the names in part due to the fact that more than six years had passed. BP IB at 40. Additionally, because of ICE's trading practices, Barnhart would not know a

counterparty's identity until the transaction took place, explaining why she could not identify those counterparties. BP IB at 41.

17. Additionally, BP states the record confirms the effects the financial crisis had on the natural gas industry. BP IB at 41. *Platts Gas Daily* published an article on September 19, 2008 discussing how the financial crisis affected natural gas traders. BP IB at 41. Credit limits resulting from the financial crisis were lowered to a level that effectively prevented the Texas team from trading with some counterparties. BP IB at 41.

18. Hurricanes Ike and Gustav provide another alternative explanation for the Texas team's change in trading. BP IB at 42. Barnhart testified that Hurricane Ike affected her trading in September 2008 and prompted BP to deal with numerous problems in fulfilling contracts. BP IB at 42. For example, Luskie sent a communication to Barnhart and Comfort on September 29, 2008, explaining that following Hurricane Ike, roughly 305,000 MMBtu of natural gas were offline and that only a fraction could be cut due to force majeure. BP IB at 35. Additionally, the Department of Energy released reports describing the effects those hurricanes had on natural gas trading. BP IB at 42. Bergin conceded at the hearing that Hurricane Ike created impacts at least through September 2008. BP IB at 43-44.

19. BP offers another alternate explanation for its trading changes: its baseload. BP IB at 36. Evans explained that rational reasons exist to trade early when BP's baseload position was long. BP IB at 45. But Dr. Abrantes-Metz's Pre-IP includes months not reflecting comparable baseload positions. BP IB at 45. She failed to proportionally adjust her analyses to account for the Texas team's Pre-IP smaller open baseload positions. BP IB at 45.

20. Enforcement Staff furthermore only considered BP's trading behavior at HSC, not BP's Katy transactions. BP IB at 45. Nor did Enforcement Staff consider other market participants' trading. BP IB at 45. BP claims that when analyzing its trading outside of Dr. Abrantes-Metz's analyses, BP's trading at HSC was consistent with both its trading with Katy and other market participants' trading. BP IB at 46.

21. Finally, an additional alternate explanation BP offers is its trading strategies. BP IB at 46. The Texas team used both an arbitrage strategy and a speculative strategy during the Investigative Period. BP IB at 46. Enforcement Staff, however, incorrectly assumes that the Texas team employed only an arbitrage strategy during the Investigative Period. BP IB at 46. Enforcement Staff fails to account for the Texas team's speculative strategy in its trades, a strategy that can increase risk. BP IB at 47. Though Enforcement Staff presents alternative trading strategies BP should have pursued during the Investigative Period, each of Enforcement Staff's alternatives ignores the Texas team's need to manage risk with its speculative strategy. BP IB at 47.

22. Enforcement Staff's reliance on *Barclays Bank PLC*, 144 FERC ¶ 61,041 (2013) is misplaced because a federal district court is reviewing the case *de novo*. BP RB at 10. This limits the order's precedential value until the court adopts it. BP RB at 10.

23. BP also states that Enforcement Staff improperly attempts to shift the burden of proof to BP in attacking its witnesses. BP RB at 14. BP criticizes Enforcement Staff's contention that no Texas team member offered a "concrete, legitimate" explanation for their trading; the Texas team members tried to "downplay the[] significance" of their Investigative Period trading patterns; and Evans failed to conduct independent analyses to support alternative theories on what drove the team's trading. BP RB at 15. BP asserts Luskie, Comfort, and Barnhart testified that their trading always reflected an interest in making profits. BP RB at 15-16. Additionally, Evans demonstrated that the Texas team's trading was consistent with trading from 2006 through 2011. BP RB at 16.

24. Furthermore, Evans is not required to conduct an independent analysis into possible non-manipulative explanations for the Texas team's trading. BP RB at 16. It remains Enforcement Staff's burden to show BP's trading cannot be explained by non-manipulative reasons. BP RB at 16. Nor did Enforcement Staff's witnesses properly address the financial crisis, the impacts of Hurricanes Ike and Gustav, or the Texas team's baseload position. BP RB at 16-17.

25. BP also contends that the trading patterns Enforcement Staff identifies contributing to the alleged manipulation are legal. BP RB at 20. These acts include net selling at a particular market, engaging in fixed-price sales, making early sales of natural gas, transporting large amounts of gas, and executing by hitting bids. BP RB at 20.

26. Enforcement Staff also tries to distort the Texas team's profitability. BP RB at 21. Enforcement Staff alleges the Texas team lost on physical natural gas on 67 percent of flow days during the Investigative Period, but Enforcement Staff fails to analyze flow dates from November 6 through the end of the Investigative Period. BP RB at 21. When considering the full Investigative Period, the Texas team lost money on 58 percent of flow days. BP RB at 22. This is evident in Bergin's workpapers. BP RB at 22.

27. Additionally, Enforcement Staff's focus on average losses tends to embellish Enforcement Staff's claims of large losses. BP RB at 23. Bergin's calculated daily P&L reveals many days during the Investigative Period with minimal losses. BP RB at 23-24.

Discussion

28. Section 4A of the NGA establishes the prohibition on market manipulation. The Act provides:

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 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. . .

15 U.S.C. § 717c-1 (2012).

29. The rule dealing with manipulation of natural gas markets is Section 1c.1 of the Commission's regulations, which provides in pertinent 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 omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading or
 - (3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity...

18 CFR § 1c.1.

30. The Commission specified this proceeding's issues in the Hearing Order. The Commission mandated a determination as to whether BP violated section 4A of the NGA and the Commission's Anti-Manipulation Rule. Generally, the order mandated findings "respecting subject matter jurisdiction and each of the elements of a manipulation claim, as described in section 1c.1 of the regulations, namely:

- (i) Conduct: whether BP "directly or indirectly, . . . (1) . . . used[d] or employ[ed] any device, scheme, or artifice to defraud; (2) . . . ma[d]e any untrue statement of a material fact or omit[ted] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (3) . . . engage[d] in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity;"
- (ii) Scienter: whether BP acted with actual intent or recklessness; and
- (iii) "In connection with" a jurisdiction transaction: whether BP's conduct was "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.”

Hearing Order at P 47 (footnote omitted).

31. The Hearing Order also mandated the following findings:

- (i) determine the number of violations, if any, committed by BP and the number of days on which any such violations occurred;
- (ii) make findings regarding loss, the amount of natural gas involved (separately calculating financial and physical natural gas positions), and duration;⁸
- (iii) make findings regarding whether BP “committed any part of the [alleged] instant violation less than 5 years after a prior Commission adjudication of any violation or less than 5 years after an adjudication of similar misconduct by any other enforcement agency”;
- (iv) determine whether “the commission of the [alleged] instant violation violated a judicial or Commission order or injunction directed at [BP] by the Commission or other Federal and state enforcement agencies that adjudicate similar types of matters as the Commission”;
- (v) make findings respecting BP’s compliance program on each of the factors specified in § 1B2.1 of the Penalty Guidelines; and
- (vi) make findings concerning the amount of profits obtained by BP for its alleged manipulative trading conduct, entertaining any reasonable method for calculating this amount,⁹ and provide both a gross number of profits and a net amount that deducts BP’s losses from its physical trading.

Hearing Order at P 47 (footnotes omitted).

32. The evidence in this case shows BP violated section 1c.1 of the Commission’s regulations, 18 CFR § 1c.1 (2014) and section 4A of the NGA, 15 U.S.C. § 717c-1 (2012). BP, through the Texas team,¹⁰ manipulated the market by selling next-day, fixed

⁸ With respect to this item the Commission instructed that this finding should include a reasonable estimate of loss. Penalty Guidelines § 2B1.1, commentary note 2 (C).

⁹ Citing *Barclays*, 144 FERC ¶ 61,041 at P 149 (2013) (concluding in electric manipulation case that disgorgement amount was “reasonable approximation of profits causally connected to the violation . . .”).

¹⁰ During the period at issue in this proceeding (the Investigative Period) the Texas team consisted of Gradyn Comfort, Neshia Barnhart and Clayton Luskie. They were part of BP’s SEGT trading group, which was within BP’s North American Gas and Power

price natural gas at HSC during the Investigative Period, in such a way that they managed to suppress the *Gas Daily* index and benefit their financial positions. Their financial positions benefited from the *Gas Daily* index for HSC being lower than the index at Henry Hub.

33. Enforcement Staff met its burden of proof. One indicia of manipulation is the existence of benefiting financial positions that are “directionally opposite” to physical positions established during the period under investigation, especially if the respondent does not attempt to, or cannot, explain or justify the increases in positions.¹¹ The evidence shows that BP engaged in a scheme to defraud which essentially encompassed trading at a loss at HSC during the Investigative Period. Tr. 1512:23-1513:8; 1815:19-1816:1; 1915:10-24. As a result of its manipulation, BP suppressed the *Gas Daily* index at HSC. This in turn resulted in profit to its financial positions. The evidence of this scheme is demonstrated by the Texas team’s change in its trading patterns, which benefited its financial positions. Confirmation of the manipulation is found in the recorded November 5, 2008 phone call.

34. The evidence in this case shows that during the Investigative Period the Texas team sold next-day, fixed price physical gas at HSC uneconomically with the intent to manipulate the Platts’ HSC *Gas Daily* index¹² price in order to benefit related financial

(NAGP) business unit. Ex. OE-015 at 4 (SEGT organizational chart); Tr. 146:18-147:4 (Lukefahr); Tr. 873:14-874:4 (Barnhart).

¹¹ Evidence of a fraudulent scheme is manipulating one market to benefit a position in another market. *Barclays*, 144 FERC ¶ 61,041 at P 44 (*Barclays*) (Respondents manipulated physical markets under the Commission’s jurisdiction through the use of Physical Positions and Dailies to benefit their Financial Swaps. They engaged in physical manipulation at a financial loss, accepting that such losses were a foreseeable outcome of the scheme. Commission concluded that the net financial losses incurred as a result of the Dailies in the Manipulation Months is one piece of the evidence that leads to the conclusion of a fraudulent scheme and also supports the conclusion that the Respondents possessed scienter). Although the cited case involved manipulation in the electric markets, it is applicable to the conduct in this case because the Commission adopted anti-manipulation rules for electric energy and gas are identical. *See also id.* at PP 7, 32, 38, 40 at n. 137 (description of evidence considered to find manipulation). The fact that *Barclays* is currently in federal court does not diminish its precedential value at this time since that court has not yet ruled. Additionally, so far a motion to dismiss has been denied by the court. *See FERC v. Barclays, et al.*, No. 2:13-cv-2093-TLN-DAD, 2015 WL 2455538 (E.D. Cal. filed May 20, 2015) (affirming Commission jurisdiction to pursue anti-manipulation penalties). Additionally, the Commission cites *Barclays* in the Hearing Order. Order No. 670 at PP 6 and 49.

¹² Platts’ *Gas Daily* index (also known as the *GDD* or *Gas Daily* index) is a

positions that profited by lower HSC *Gas Daily* prices. It also establishes that the Texas team engaged in anomalous trading during the Investigative Period. This anomalous trading was consistent with the intent to suppress the HSC *Gas Daily* index to benefit a short HSC financial position. This short HSC financial position was maintained and even increased by the Texas team during the Investigative Period. Ex. OE-129 at 31.

35. As established by the evidence in this case, during the Investigative Period the Texas team added short HSC financial spread positions which benefited from suppression of the HSC *Gas Daily* index.¹³ Ex. OE-161 at 43:8-10; Tr. 1002:4-7; BP-037 at 69. The majority of this exposure was spread against long Henry Hub *Gas Daily* index exposure. This gave the Texas team a short-HSC-to-long-Henry Hub spread position. The spread position would benefit from lower HSC *Gas Daily* index. Tr. 239:2-8, 690:13-20, 622:9-

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 HSC, Katy, and Henry Hub. The *Gas Daily* index is based on the volume Weighted Average Price (VWAP) of the fixed-price next-day physical trades at each location for which a daily index price is published. Ex. OE-001 at 42:12-22. *See also* Tr. 236:8-23. At the end of the month, Platts calculates and publishes a monthly average for each published location by averaging the *Gas Daily* daily prices for that month. Exs. OE-001 at 43:1-4; OE-008 at 6. During the time frame at issue in this proceeding, BP reported to Platts its next-day fixed-price physical transactions, including HSC and Katy. Exs. OE-085 at 549:7-20; OE-001 at 43:5-10.

¹³ Patrick J. Bergin, testifying for Enforcement Staff, relied on transaction records from BP's trade capture system, Entegrate, and position reports created by former BP employee Keo Lukefahr to determine the Texas team's exposure to the HSC *Gas Daily* index. Ex. OE-001 at 49:7-14. Bergin testified that a trader with a short financial position expects the value of that position to fall prior to covering or buying back the short position, or prior to the position settling financially. *See* Ex. OE-001 at 38:3-7. Bergin has over twenty-three years of experience in the energy industry with leading energy firms. His experience included energy trading and trading operations, investment management, market analysis and risk management, accounting and financial analysis. BP argues that Bergin was involved in manipulative behavior while he was a trader. This is not correct. While he was a trader at Entergy-Koch he traded to eliminate the "choice market created by Enron to return the market to a normal, competitive state." Tr. 1688:11-1690:24 (Bergin). There was never any enforcement action with respect to Bergin's trades. Tr. 1690:21-24 (Bergin). BP also incorrectly attributes Bergin's trading at Entergy-Koch as the cause of CFTC and SEC investigations even though this was not the case. Tr. 1556:9-1559:14 (Bergin). A CFTC settlement related to alleged false price reporting involved people who may or may not have been under Bergin's supervision. Ex. BP-048. It is found that Bergin's credibility was not impeached by this.

23; Ex. OE-206 at 49-50. They also had net long physical baseload positions at Katy and HSC which accomplished the means to suppress that index.¹⁴

36. In the aftermath of Hurricane Ike, in September 2008, the Texas team made a significant profit on the same type of position. Consequently, they had a financial incentive to slow the shrinkage of the spread that Hurricane Ike had “blown out.” Hurricane Ike, made landfall on September 13 (five days before the start of the Investigative Period). As a result of the hurricane, prices at HSC decreased sharply relative to Henry Hub. This resulted in sizeable realized profit and unrealized (potential) profit for the Texas team’s HSC-Henry Hub financial spread position. Exs. OE-001 at 64:19-20, 68:13-70:8; Tr. 682:5-683:15; 668:6-21. The slower the HSC-Henry Hub *Gas Daily* spread narrowed each day until the end of the month, the Texas team stood to make more money. Ex. OE-001 at 69: 14-16, 71: 12-16, 110:1-111:3; Tr. 685:18-23, 686:15-25.

37. Enforcement Staff witness Bergin testified that the value of the Texas team’s spread position in late September would retain \$19,800 for every cent that they could slow the narrowing of the HSC-Henry Hub spread. Ex. OE-001 at 110:13-16. By the end of September, the Texas team had made \$3,499,250 in profits on their spread position, a substantially greater profit than in any prior month in 2008 on similar spread positions. Ex. OE-001 at 79-80.

38. The Texas team traded successfully in the second-half of September 2008 and slowed the shrinkage of the spread. As a result, they increased their short exposure to the HSC *Gas Daily* index for both October and November 2008. Through most of October 2008 they maintained a short spread position of over seven contracts¹⁵ per day (total short HSC *Gas Daily* index exposure of over 20 contracts per day). Exs. OE-001 at 82:1-8, 92:11-93:4, OE-277, OE-278; Tr. 1427:10-1435:25. The November HSC-Henry Hub spread position short 24 contracts per day (40 total short HSC *Gas Daily* index exposure) was larger than their spread positions going into any other month of 2008 besides March. Ex. OE-001 at 93:5-9. BP did not have a valid justification and did not explain the increases in their financial positions.¹⁶

¹⁴ See Ex. OE-001 at 37:7-19 (describing the terms “long” and “short” for physical positions).

¹⁵ 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. Ex. OE-001 at 34:17-21.

¹⁶ BP argues that this shifts the burden of proof. That is not correct. A valid explanation of its trading would have been a valid defense to the manipulation charges.

39. During the period at issue in this proceeding, the Texas team increased their short HSC *Gas Daily* index exposure and built up their physical baseload¹⁷ position in the opposite direction. In other words they increased their net long physical natural gas position at Katy and HSC for October and November. This net long physical baseload position gave the Texas team a large supply of Katy gas “that they had to sell.”¹⁸ The baseload positions in question here were large, long Katy positions balanced by small, short HSC positions. Ex. OE-161 at 28. Though the traders had the option to sell this gas at Katy or HSC, the Texas team chose to sell it heavily at HSC during the Investigative Period. Enforcement Staff has demonstrated that the baseload positions were not the results of Hurricane Ike or other circumstances as alleged by BP. Tr. 905: 5-23, 943:6-944:4. These baseload positions were established primarily by Comfort and Barnhart through new transactions with marketers (rather than producers or end users under existing contracts). Ex. OE-161 at 26-27. Enforcement Staff is correct that without this guaranteed supply of natural gas at Katy, the Texas team would not have been able to sell additional volumes of gas at HSC each day to effectuate their manipulative scheme.

40. Before Hurricane Ike, early in September the Texas team’s September daily physical baseload positions were generally balanced between long Katy and short HSC. Exs. OE-161 at 25, OE-123. Hurricane Ike caused some short-term disruptions to supply and demand. The Texas team’s baseload position overall became net longer through the rest of September even after Katy supply came back and HSC demand remained diminished. Ex. OE-001 at 68:7-12, OE-161 at 23:3-11. However, the effects of Hurricane Ike on the Texas team’s physical baseload positions at Katy and HSC did not continue into October and November. Exs. OE-161 at 23:14-24:2; Tr. 943:6-15, 965:1-8. Further, in September, the Texas team increased their long baseload position for October at Katy substantially and decreased their short position at HSC. They started October with a net long baseload position. Ex. OE-001 at 83:4-84:6. In October they did the

¹⁷ Baseload refers to physical contracts that flow equal amounts of gas each day of the flow month. Ex. OE-001 at 34:12-13. According to Luskie, Barnhart and Comfort would have the final say as to the Texas team’s baseload positions between Katy and HSC. Tr. 589:11-15; *see also* Tr. 591:14-592:11.

¹⁸ As Bergin testified, a trader must flatten his physical position each day prior to delivery or face a potential penalty. This is in the context of managing monthly baseload physical positions in the daily cash market (as the Texas team did). The traders must become flat, or flatten their daily starting position, by the end of each trading day. For example, a trader with a net long monthly baseload position (the case with the Texas team in the Investigative Period), 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. Ex. OE-001 at 38:17-39:3; Tr. 438:14-439:4, 153:14-155:23.

same for November, which resulted in a larger November net long physical baseload position. This was their largest position in 2008. Exs. OE-001 at 89:3-12; OE-161 at 1-7 (Figure 2). BP did not adequately justify or explain this conduct.

41. Further evidence of the manipulation scheme is the fact that the Texas team altered their next-day, fixed-price trading in various ways during the Investigative Period. This was done to suppress or slow the narrowing of the HSC *Gas Daily* Index. For instance, they altered the next-day trading of its increased physical natural gas positions in the Investigative Period in a way that would allow suppression of the HSC *Gas Daily* index price.

42. The evidence in this case establishes that after Hurricane Ike, the Texas team's trading and transport of next-day, fixed-price gas at HSC changed to almost entirely net selling. This led them to become the sellers with the largest market share in the next-day, fixed-price market at HSC during the Investigative Period. Ex. OE-129 at 38:9-39:4. They increased the percentage and volume of their fixed-price sales at HSC. Ex. OE-129 at 44:6-46:16. Further, they shifted to selling higher volumes at HSC early in the trading day, including selling 35 percent of their gas at HSC before Katy began trading. Ex. OE-129 at 122:8-15. When compared to earlier periods, they also shifted to buying at HSC later in the day. OE-129 at 158:7-11. The Texas team also transported substantially more gas to HSC from Katy using BP's HPL transport. Ex. OE-129 at 31:21-32:6. There was also an increase in the percentage of sales at HSC that were uneconomic compared to contemporaneous prices at Katy. Exs. OE-211 at 116:5-13; OE-129 at 107:11-16. In addition, there was a shift to posting aggressively lower offers compared to other sellers at HSC. Ex. OE-129 at 190:15-18. Lastly, there was an increase in the frequency of sales made by hitting bids. Ex. OE-129 at 199:6-21. As Enforcement Staff points out, this unique confluence of changed trading patterns, which furthered the scheme to suppress the HSC *Gas Daily* index, sets apart the Texas team's behavior in the Investigative Period from their behavior in the Pre-IP¹⁹ period and cannot be explained

¹⁹ Dr. Rosa Abrantes-Metz (Abrantes-Metz) testifying for Enforcement Staff, defined the "Pre-IP" as the trade dates January 2, 2008 through September 10, 2008. Ex. OE-129 at 38, n. 24. She chose the Pre-IP due to the time frame when Grady Comfort became the primary Texas team physical trader. Comfort executed the vast majority (89 percent) of the Texas team's trades at HSC and Katy from January 1, 2008 through the end of the Pre-IP. Ex. OE-211 at 29-30. This Pre-IP provided a period of eight-and-a-half months of Comfort's trades to compare against the two-and-a-half months of the Investigative Period. *Id.* at 31. Dr. Abrantes-Metz is a PhD economist trained at the University of Chicago. BP challenges this witness's qualifications to testify as an expert in gas trading. However, the fact is that this witness has experience in detecting manipulations of commodities markets and financial benchmarks. "[She] use[s] [her] expertise most frequently in detection of conspiracies and manipulations in a variety of markets" Ex. OE-129 at 10:18-11:2. As an FTC economist she worked on multiple

by any economic or profit rationale, by general market conditions, or by comparison to the behavior of the other two largest sellers at HSC. Enforcement Staff is correct that BP has not adequately explained their behavior and instead merely downplays its significance.

43. Dr. Abrantes-Metz testified that the Texas team trading in the Investigative Period was consistent with an attempt to manipulate the HSC *Gas Daily* index through the next-day fixed-price market at HSC. She based this conclusion in part, on the multiple changes in the Texas team's trading of fixed price gas at HSC after Hurricane Ike and in the Investigative Period. She testified that they increased their net long physical position between Katy and HSC, shifted to net selling for all but one day in the Investigative Period, and increased both the percentage and sales volume of their fixed-price sales at HSC. Additionally, this witness testified that the increase in volume and share was not due just to larger start of day positions, but because the Texas team made the choice to sell nearly all of its daily gas position at fixed-price at HSC. According to Dr. Abrantes-Metz, these changes resulted in the Texas team becoming the seller with the largest market share in the next-day fixed-price market at HSC. Ex. OE-129 at 31:2-14.

44. The evidence in this case shows that the Texas team increased their HSC fixed-price sales volume by 344 percent per flow day in the Investigative Period²⁰ (compared to

investigations related to conspiracies and manipulations in the oil industry. She also developed screens to detect illegal behavior such as collusion, manipulation and fraud. *Id.* at 11:3-16. This witness has also participated in investigations of London Interbank Offered Rate (LIBOR) and has written papers about potential conspiracy by certain financial institutions to manipulate LIBOR. *Id.* at 13:7-11. Dr. Abrantes-Metz has written articles about possible gold and silver conspiracies and manipulations of spot price fixings. *Id.* at 14:3-7. She has worked on oil, silver, gold, platinum and palladium futures, spot and benchmark manipulations-all of which involved physical manipulations to benefit financial positions. Dr. Abrantes-Metz is also consulting on investigations into other commodities manipulations such as non-precious metals. *Id.* at 14:8-11. Further, Dr. Abrantes-Metz has advised authorities around the world on financial regulatory and benchmark reforms and guidelines for best practices, including the U.S. Commodity Futures Trading Commission (CFTC), the United Kingdom's Financial Conduct Authority, the European Commission, and the International Organization of Securities Commissions. *Id.* at 14:12-18. Additionally, she has advised authorities around the world on the development and implementation of screens for conspiracies and manipulations. Ex. OE-129 at 15: 10-15. It is found that Dr. Abrantes-Metz is more than amply qualified to testify in this proceeding.

²⁰ Dr. Abrantes-Metz used trade dates and defined the Investigative Period as September 18-November 30, 2008 (in terms of trade dates it really is November 25, 2008) to correspond with natural gas flow dates. Due to Hurricane Ike's effect on ICE

the January 2, 2008 - September 10, 2008 time period (Pre-IP)). This was accomplished by making pronounced changes in their previous trading patterns at Katy and HSC including: (i) increasing their net long position between Katy and HSC (which resulted in a larger beginning-of-day long position); (ii) shifting to net selling at HSC for 98 percent of days in the Investigative Period as opposed to 30 percent in the Pre-IP and (iii) selling a greater share of their net long position at fixed-price at HSC. Consequently, according to Dr. Abrantes-Metz, the Texas team was the market participant with the largest share of any seller at HSC during the Investigative Period. Their share of the market increased by over five times relative to the Texas team's Pre-IP. *Id.* at 38:6-39:4.

45. The trading data proves that during the Investigative period the Texas team changed their trading patterns by selling high volumes of Katy gas at fixed prices at HSC²¹ at times of the day when the sales volumes would have the largest suppressive effect on prices. During the Investigative Period the Texas team became the largest net seller of next-day, fixed-price gas at HSC. They concentrated their sales at HSC earlier in the day, becoming the seller with the highest early market share during the Investigative Period. Dr. Abrantes-Metz testified that the Texas team's changed trading patterns consistent with an effort to influence other market participants and to reinforce artificial downward pressure on the HSC *Gas Daily* index. These changes to influence others included heavier selling early in the trading day, shifting buying to later in the trading day, selling at artificially low offer prices compared to the rest of the market, and selling by hitting bids at a greater rate than other market participants.²² *Id.* at 31:15-20.

market volumes September 11-17 were excluded from the analysis. Additionally, this witness chose not to include pre-2008 dates in her analysis for various reasons: (1) the bid and offer data on ICE only goes back to the beginning of 2008; (2) the natural gas markets looked very different prior to 2008, and including this data in the analysis would have skewed the results; (3) Grady Comfort did not primarily trade Katy or HSC daily physical positions until January 2008. Ex. OE-129 at 38 n. 24.

²¹ In answer to BP's criticism of Dr. Abrantes-Metz's fixed price analysis, Enforcement Staff argues that if a trader is manipulating, it is much more likely that he will trade as much volume at fixed-price and on one side of the market as possible to establish a large market share. This is exactly what Dr. Abrantes-Metz found and why the Texas team's shift to a high percentage of fixed-price sales was a marker of manipulation. Ex. OE-129 at 89:18-101:4 (calculated excess volume the Texas team shipped to HSC). The Texas team had the option to offset their losses at HSC from the manipulative scheme by selling next-day fixed-price gas profitably at Katy and knowingly simply chose the opposite path.

²² A trader may place a bid exhibiting a desire to buy, or an offer exhibiting a desire to sell, a specified quantity of natural gas at a specified price. Ex. OE-001 at 39:15-19 (Bergin); Tr. 195:1-2, 18-23 (Lukefahr). The bid/offer spread is the price

This was the most important of these changes during the Investigative Period, selling fixed-price gas heavily early in the trading session, which would result in the greatest impact on the developing volume-weighted average price (VWAP). *Id.* at 39:5-10. Further, when they sold by offers, they did so at relatively lower prices. The Texas team placed their offers to sell further away from the offers of other market participants in the Investigative Period than they did in the Pre-IP.²³ Ex. OE-129 at 33:20-22; 34:6-11. *See also* OE-211 at 18:21, 20 (Table 1.A) (increased bid hitting in first five minutes of selling at HSC).

46. According to Dr. Abrantes-Metz, when the Texas team sold at HSC they could either hit the best active bid or post an offer at a price they chose. In the Investigative Period, the team sold 63 percent by hitting bids. In the Pre-IP they only sold by hitting bids 49.6 percent of the time. The Texas team hit bids more frequently than other sellers by 4 percent.²⁴ Ex. OE-129 at 76:9-10. The significance of this is that if a seller intends

difference between the highest bid shown by a buyer and the lowest offer shown by a seller. For example, if a buyer has a \$3.00 bid and a seller a \$3.05 offer, the bid/offer (or bid/ask) spread is \$0.05. Ex. OE-001 at 40:3-6.

²³ Ex. OE-211 at 2, 15-16. Contrary to BP's contentions, the other two early sellers were quite different from the Texas team. Although they also bought gas early, their trading did not show the confluence of factors as the Texas team and they did not change their trading patterns as the Texas team. Ex. OE-211 at 87:8-89:5. BP criticizes Dr. Abrantes-Metz "distance analysis" in comparison to the two next largest HSC sellers during the Investigative Period. However, she testified there were important timing differences between BP and these two sellers. The Pre-IP distances and the timing of the increased distance are distinct for BP and the two largest sellers. The Texas team'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-IP (making its Pre-IP distance pattern difficult to discern). Ex. OE-211 at 16:13-20, 96:10-97:15. Additionally, Dr. Abrantes-Metz explained that one of the sellers was hardly ever among the first three sales at HSC during the Investigative Period. *Id.* at 101:3-8. BP also criticizes the distance analysis because it was not limited to pre-Katy HSC transactions. Dr. Abrantes-Metz used the "full day" distance as a component of her price artificiality calculations and used both "full day" and "pre-Katy" distances in her rebuttal testimony. Under either calculation BP's distance increased from the Pre-IP to the Investigative Period. Exs. OE-129 at 143:1-144:4; OE-211 at 95:3-96:9.

²⁴ BP's argument that the "modest increase in bid hitting does not support a manipulative scheme" is refuted by the evidence in this case. As Dr. Abrantes-Metz testified "4 percent [bid-hitting] over 25 or 35 percent market share is large." Tr. 1875:21-22. Further, she testified that "[i]n isolation, bid hitting is insignificant, but it's

to move prices downward, making sales by hitting bids more frequently is an effective way of selling at the lowest possible price available. This is because the highest available bid is always lower-priced than the lowest available offer. Further, Dr. 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.²⁵ *Id.* At 76: 11-19.

47. Dr. Abrantes-Metz testified that the shift to earlier heavy selling at HSC by the Texas team was important because heavy, early selling more significantly influences price formation than later selling. 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 session. Ex. OE-129 at 52:3-9; 64:10-65:4.²⁶ Specifically, this witness testified the first five minutes of

not when applied to the massive increase in volume.” Tr. 1914:1-4. The Texas team shifted to heavy early trading at HSC in an effort to mark the HSC open. Ex. OE-211 at 14:1-2. *See Brian Hunter*, 130 FERC ¶ 63,004 at P 145 n. 65 (2010) (aggressive bid-hitting signals other market participants of high sell volumes in the market). In the Investigative Period the Texas team had an average of 67percent (68 percent in September, 59 percent in October and 76 percent in November) bid initiated sales in the first five minutes at HSC. Combined with an average of 42 percent sales market share in the first five minutes, (40 percent in September, 44 percent in October and 43 percent in November) the only reasonable conclusion is that early bid hitting was part of the attempt to push early prices down and mark the open. Ex. OE-211 at 20.

²⁵ BP argues that there was an increase in bid-hitting at Katy and this negates the manipulative scheme at HSC. BP IB at 34-36. Dr. Abrantes-Metz, however, disputes this assertion in Evans testimony. She concluded that the Texas team shifted to early buying at Katy. According to Dr. Abrantes the early selling at HSC and early buying at Katy is consistent with the manipulative scheme since the Texas team was actually increasing its net Katy long at the beginning of the day, providing the traders with even more gas to sell and transport to HSC as part of the scheme. Ex. OE-211 at 14:1-11. However, Enforcement Staff is correct that the appearance of one or more manipulation markers at Katy does not negate the larger confluence of markers at HSC. *See, e.g.*, Ex. OE-211 at 20, 22 (Tables 1.A., 1.B). Enforcement Staff is also correct that the need to liquidate large baseload positions does not account for the increased bid hitting. Comfort testified that the net long Katy baseload positions were always optimized. Tr. 1413:7-24.

²⁶ Exs. OE-211 at 75:4-10; OE-001 at 106:9-20. The earlier trades carried greater direct impact on prices because the spread between the best bid and best offer was at its widest when trading first started at HSC each day. Ex. OE-129 at 67:6-68:4. Luskie

trading, the most heavily traded interval in the HSC market (roughly 11 percent of daily volume) presented the greatest opportunity to influence prices. *Id.* at 52:12-15; Ex. OE-211 at 74:17-19.²⁷

48. Her findings show that in the Pre-IP, the Texas team's share of sales at HSC in the first five minutes of trading averaged just 3 percent. However, this increased to 42 percent in the Investigative Period. OE-129 at 53:3-7; Exs. OE-263, 264. 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. Repeatedly making one-directional trades very early in a trading session is one way to accomplish this goal, known as "marking" or "framing" the open. Ex. OE-211 at 75:4-10.²⁸ The Texas team's early selling also indirectly impaired the functioning of the next-day fixed-price market at HSC by "marking" or "framing" the open.²⁹ The evidence in this case, supports the finding that the Texas team injected false information very early in

acknowledge that it would be easier to move an index price by trading when the market is illiquid. Tr. 375:13-376:3. He agreed that an indicator of an illiquid market is a wide bid/offer spread. Additionally, he acknowledged that the bid/offer spread at HSC was quite narrow when the market was most active. Tr. 376:7-13. Luskie testified that a trader who makes early sales at HSC before Katy begins trading would not know at the time of the trades whether those sales are economic with regard to either an arbitrage strategy or a speculative strategy. Tr. 387:2-22. He also agreed that one of the risks of selling at HSC before Katy begins trading is the risk that you will have to flow more molecules, and that many of those molecules may or may not be economic. Tr. 548:11-16.

²⁷ Most trading is conducted early in the trading session each day. Platts accepts reported trades until 11:30 am. In 2008, at HSC 71 percent of all volume traded within the Platts reporting window, on average, was traded by 8:00 a.m. Ex. OE-211 at 74:21-75:3. When HSC's price elasticities are lower early in the trading session, a change in supply then has a relatively greater impact than changes in supply later in the trading session. Ex. OE-129 at 171:5-8.

²⁸ Luskie agreed that early trades may cause traders to reassess their view in that moment. Tr. 598:19-599:5. Additionally, he agreed that it would be less likely for traders to change their view late in a trading session because there would be less liquidity. Tr. 604:11-19.

²⁹ *Barclays*, 144 FERC ¶ 61,041 at PP 56-57 (the trading "injected inaccurate information into the market and impaired the functioning of the Commission-regulated physical markets").

the trading session to influence subsequent bids, offers, and trades by other market participants and thereby move the HSC *Gas Daily* price downward.

49. Additionally, Dr. Abrantes-Metz testified that during the Investigative Period, the Texas team sold the majority of their gas earlier in the morning than they had previously. On an average day in the Investigative Period, the Texas team sold 50 percent of its daily gas by 7:35 a.m., compared to only 36 percent in the Pre-IP (nearly a 1.4 fold increase). Additionally, they also bought gas much later. According to this witness, by 7:49 a.m. in the Pre-IP, the Texas team had typically bought 50 percent of their daily HSC gas purchases. On the other hand, in the Investigative Period, they purchased 17 percent of their total for the day by 7:49 a.m. Ex. OE-129 at 57:9-15. According to Dr. Abrantes-Metz, to maximize the effect of a manipulation, a manipulator will want to trade more very early in the day and at artificially low prices, and this is what the Texas team did. Ex. OE-129 at 171:11-13.

50. Dr. Abrantes-Metz testified that the Texas team was selling earlier relative to other market participants at HSC. They also sold earlier in the day and bought later in the day, in comparison to the Pre-IP. *Id.* at 59:3-8. Relative to other trades during the Investigative Period, the Texas team consistently sold earlier and bought later than in the Pre-IP. *Id.* at 54-56. From the start of trading and the first Texas team sale 27 seconds transpired (median time) during the Investigative Period. *Id.* at 61:1-6.

51. The Texas team's selling pattern at HSC during the Investigative Period reveals that more than half of the time, they either made the first trade or sold, less than 27 seconds after the first trade at HSC. On the other hand, during the Pre-IP, the median time until the Texas team's first sale was 19.77 minutes. This led Dr. Abrantes-Metz to find that the Texas team moved to significantly earlier trading during the Investigative Period. *Id.* at 61:6-10. Ex. OE-260; OE-211 at 14. Responding to BP witness Evans in her rebuttal testimony, Dr. Abrantes-Metz testified that in the Pre-IP, the Texas team tended to wait at least 20 minutes after trading began at Katy before they began selling at HSC. However, this pattern changed suddenly in the Investigative Period, when they began selling about 10 minutes before the first Katy trade. Ex. OE-211 at 16:9-13. Dr. Abrantes-Metz also testified that the Texas team shifted to early buying at Katy. She asserted that this is consistent with the manipulative scheme since they were actually increasing its net Katy long at the beginning of the day, providing the traders with even more gas to sell and transport to HSC as part of the scheme. Ex. OE-211 at 14:2-11.

52. The evidence in this case shows that the Texas team became a large, nearly-exclusive HSC net seller during the Investigative Period.³⁰ They flooded the HSC market

³⁰ Dr. Abrantes-Metz testified that the Texas team shifted from net buying on most days in the Pre-IP to net selling on 98 percent of the trading days in the Investigative Period. Exs. OE-129 at 43:7-13; OE-211 at 9:15-17; OE-001 at 104:17-105:3; OE-161

with substantial volumes of gas from their built-up Katy long physical position. The increased sales volumes exerted downward pressure on the HSC *Gas Daily* index.³¹ The combination of the Texas team's larger net long and increased net selling in the Investigative Period allowed them to be a larger net seller of Katy gas at HSC (and thus exert downward pricing pressure at HSC) during the Investigative Period.³² Ex. OE-129 at 44:1-4.³³

53. Dr. Abrantes-Metz found that the Texas team substantially increased their usage of BP's daily firm transportation capacity on HPL in the Investigative Period. According to this witness, these actions increased the supply of next-day fixed-price gas at HSC. Dr. Abrantes-Metz also found that these increases in usage were not price justified by the price spread between Katy and HSC, and the team's losses on transport were significant when compared with the time periods prior to the Investigative Period. To Dr. Abrantes-Metz, these changes in the Texas team's usage of their HPL capacity were consistent with an intentional effort to suppress the HSC *Gas Daily* index. Ex. OE-129 at 32:4-6. Their trading at HSC, not Katy was a significant factor for their physical losses. During the Investigative Period, the Texas team was both the least profitable seller at HSC and the most profitable seller at Katy (measured against the HSC and Katy *Gas Daily* indices, respectively). Dr. Abrantes-Metz testified this indicated that the Texas team was injecting volume into the HSC market despite economics. Yet in the Pre-IP, the Texas team managed to have the second highest HSC cash P&L and the fifth highest cash P&L at Katy. Ex. OE-211 at 91-93.

54. Concerning the HPL transport capacity Dr. Abrantes-Metz testified that using this existing capacity posed much less risk since the HPL monthly demand charge was already being deducted from the Texas team's P&L so their only additional cost of using

at 12:12-14.

³¹ Ex. OE-129 at 78-79. Tr. 382:18-23 (Luskie) (acknowledging that "flooding a market with molecules it does not need" could be a sign of market manipulation); Tr. 622:9-23 (Luskie) (agreeing that adding supply into HSC, holding other factors constant, would lower prices and benefit a short financial position at HSC).

³² I agree, this uneconomic behavior utilizing their transport capacity to flood the HSC market with gas volumes placing downward pressure on the index price for the benefit of their financial positions is evidence of manipulation. This behavior is beyond mere speculative trading or arbitrage since they were intentionally exerting market control to extract rents unlawfully.

³³ Ex. OE-001 at 104:11-105:11. (traders must have known that these changed trading patterns were likely to suppress prices at HSC and impact the HSC *Gas Daily* index).

that transport was the variable cost for each MMBtu transported to HSC. She further testified that the Texas team could ramp up the volumes shipped to HSC on HPL without impinging on either their own or other BP unit's use of the capacity, without needing approval to obtain or use a new transport contract and without significantly increasing their existing transport costs. Ex. OE-129 at 79:1-16. Dr. Abrantes-Metz testified that the HPL transport records confirm that the Texas team brought large volumes of non-HSC gas into the HSC market in the Investigative Period. *Id.* at 79:18-80:2. She quantified the HPL usage from January-September 2008 as 32 percent of BP's HPL capacity on average per day. During the Investigative Period, the Texas team increased their HPL capacity utilization to 74 percent on average per day. After the Investigative Period, from December 2008-March 2009 (when the HPL contract ended), the Texas team decreased their utilization of the HPL capacity to 11 percent. Thus, this witness concluded that the Texas team's 74 percent HPL utilization rate in the Investigative Period is anomalous when examined over a longer term. *Id.* at 80:3-13.

55. According to Dr. Abrantes-Metz, from November 2007-August 2008 and from December 2008-March 2009, utilization did not exceed 74 percent. The average monthly utilization during these two time periods was just roughly 24 percent. *Id.* at 80:3-13. Further, measured by volume as demonstrated by the Katy-Ship Sheets, the Texas team's transport of gas to HSC more than doubled during the Investigative Period. In the Pre-IP, the Texas team shipped 58,589 MMBtus per day versus 149,205 MMBtus per day in the Investigative Period. *Id.* at 80:14-20. Additionally, this witness testified that the Texas team used 95 percent or more of the HPL capacity on just three days in the first eight and a half months of 2008. However, in the two and a half months of the Investigative Period they used 95 percent or more of the HPL capacity on sixteen days. They also exceeded BP's daily HPL capacity of 200,000 MMBtus seven times during the Investigative Period. They had not done this at all going back to January 2008 (and only three other times over the thirty-plus months of the HPL three year contract outside the Investigative Period). *Id.* at 81:3-82:2. Moreover, Dr. Abrantes-Metz pointed out that high utilization of the HPL transport by the Texas team only made sense when HSC was consistently trading higher than Katy to justify the additional variable transport costs. Since Katy and HSC traded fairly closely during the Investigative Period, transporting close to the maximum capacity of 200,000 MMBtus in a day-equivalent to 20 contracts-would be difficult to justify because it was uneconomical.³⁴ Further, she demonstrated that on high utilization days, the Texas team was transporting close to all of their Katy gas to HSC. OE-129 at 82:5-15.

³⁴ Daily use capacity was not a simple function of daily index price spread. Ex. OE-206 at 25, 28 (Report Prepared for BP Energy Company, November 13, 2009).

56. On a consistent basis, outside the Investigative Period the Texas team transported gas from Katy to HSC based on price responsiveness since January 2007.³⁵ However, during the Investigative Period the Texas team shifted to transporting more gas without regard to profit. Not including the Investigative Period, the Texas team reliably transported a greater volume of gas from Katy to HSC when it was profitable (when the HSC price was higher than the Katy price, adjusted for the cost of transport). They transported lesser quantities when it was not profitable. Ex. OE-211 at 40:1-41:13. During the Investigative Period, when the price spread was mostly negative (Katy price exceeded HSC price), the Texas team transported large volumes of gas (similar to the levels transported outside the Investigative Period when the price spread was positive). As a result of this trading, when the price spread was negative the Texas team incurred greater losses on transport as compared to their Pre-IP. Exs. OE-129 at 83-87; OE-211 at 41 (Figure 7), 42-45.³⁶ Further, Dr. Abrantes-Metz found that the Texas team stopped losing money on transport after the November 5th call. Following the November 5, 2008 call, their transport performance was more consistent with their performance in September through November 2007. Ex. OE-211 at 46:1-7.

57. The evidence in this case shows that there is statistical confirmation of the Texas team's shift to transporting more gas without regard to the HSC-Katy price spread in the Investigative Period. Using a regression analysis, Dr. Abrantes-Metz found that there was a statistically significant relationship between the HSC-Katy price spread and volumes transported by the Texas team in the Pre-IP. This relationship disappeared in the Investigative Period. Exs. OE-129 at 88-101; OE-211 at 47-48, 48. Dr. Abrantes-Metz measured the price spread using *Gas Daily* prices at each location. She estimated that the Texas team shipped 3.66 million MMBtus of "excess" gas to HSC – 35 percent of their total volume sold at HSC in the Investigative Period - that could not be explained by the HSC-Katy price spread. Exs. OE-129 at 97-100; 211 at 49. Dr. Abrantes-Metz concluded from her regression analysis that the Texas team traders must have been aware that they were transporting at least one-third of their Katy gas to HSC, contrary to market incentives. This "excess" gas transported on HPL from Katy to HSC furthered their manipulative scheme. Dr. Abrantes-Metz testified that this consistent excess transport is one of the strongest indicators of a manipulative scheme in this case. Ex. OE-129 at 100:4-11.

58. Additionally, Dr. Abrantes-Metz found that the Texas team underpriced the rest of the HSC market to a greater degree in the Investigative Period, both over the full trading

³⁵ Earliest available data showing transport solely from Katy to HSC.

³⁶ Luskie acknowledged that if the Texas team sold Katy gas at HSC when Katy was priced higher, they would lose both on the price differential and on transport. Tr. 542:3-10.

day and especially before Katy began trading.³⁷ OE-211 at 94-96. She supported this with her “distance” analysis. Ex. OE-129 at 126-127. This analysis quantified the Texas team decision to sell via offer by underpricing the rest of the market in the Investigative Period relative to the Pre-IP. The analysis showed that they priced their offers aggressively low during the Investigative Period. According to Dr. Abrantes-Metz, this was further evidence that the Texas team was selling in the next-day fixed price market at HSC with the intent to suppress the HSC *Gas Daily* price. Ex. OE-211 at 94:7-16.

59. Dr. Abrantes-Metz developed an inter-market analysis³⁸ to test whether the Texas team disregarded better arbitrage opportunities in the Investigative Period. This tested whether the Texas team had more favorable (profit maximizing) arbitrage opportunities at Katy on a moment-to-moment basis when they sold at HSC. Exs. OE-129 at 105:7-106:4; OE-211 at 123:8-26:13. Her underlying assumption was that a rational, profit-maximizing trader should seek the best price and be indifferent to where gas is sold.³⁹ Specifically, the witness compared the Texas team’s bid-based and offer-based sales at

³⁷ For the Texas team’s sales at HSC before Katy began trading (35 percent of their total sales at HSC in the Investigative Period) Dr. Abrantes-Metz analyzed these sales in several ways including a “distance analysis.” Ex. OE-129 at 126. *See* Ex. OE-129 at 130-36 (Ex Post Analysis of Sales at HSC Before the First Katy Trade).

³⁸ This test was of the Texas team’s sales at HSC when both markets were active. Ex. OE-129 at 106:8-10; Tr. 1844:2-11. Both markets must be active to conduct this comparison because the bid/offer spread in an inactive market is much wider than the spread in an actively trading market, this makes the inactive market not comparable to an active market. Trading began at HSC on average 15 minutes before trading started at Katy in 2008. Ex. OE-129 at 106:5-14. The bid/offer spread in an inactive market cannot be used for inter-market comparisons because without contemporaneous trades, resting bids and offers do not provide sufficiently accurate pricing information. According to Dr. Abrantes-Mets this pricing inaccuracy of the resting bids and offers is relevant here because the HSC-Katy spread is often close to or within the cost of transport when both markets were active. Ex. OE-129 at 106:15-107:3. The Katy bid/offer spread was often wider than the cost of transport before Katy began trading, making the resting Katy bids and offers too wide to establish an accurate point of comparison. But after Katy opened, the spreads between HSC and Katy bids and between HSC and Katy offers quickly converged and these markets may be reliably compared. *Id.* at 107:3-7.

³⁹ Luskie agreed that a trader should be indifferent to whether to sell at Katy or HSC as an arbitrage strategy, and should only want to sell at the most economic point. Tr. 587:13-21.

HSC with available bids and offers at Katy (adjusted for the cost of transport)⁴⁰ at the same moment in time when both markets were active.⁴¹ Exs. OE-129 at 109-11; 113-16; OE-211 at 125-26; Tr. 1848:19-1849:25.

⁴⁰ Ex. OE-129 at 105:17-20. BP in its IB argues that Enforcement Staff has the flawed assumption that the Texas team employed only one trading strategy (arbitrage) during the Investigative Period. BP IB at 46. There is no record support for this. Further, Dr. Abrantes-Metz discussed the economics of the pre-Katy sales at HSC by stating that the Texas team was “routinely passing up better opening prices at Katy for at least some of their Katy gas.” Ex. OE-129 at 131:17-20. *See also* Ex. OE-129 at 104:3-105:4. Bergin testified consistent with the traders taking a “view,” as Luskie noted the traders combined arbitrage and speculative approach. Ex. OE-161 at 68:4-69:22. *See also* Tr. 580:7-21. Again Enforcement Staff is correct that the record is devoid of any evidence supporting that “speculative strategies” were the drivers of the Texas team’s trading patterns and losses in the Investigative Period. BP cites Luskie’s testimony that speculative strategies may lose money. BP IB at 47 (citing Tr. 484:19-20 Luskie). However, Luskie also agreed with Bergin that heavy, early selling at HSC increased fixed-price risk. Tr. 482:23-483:1 (Luskie) (speculative view increased risk); Tr. 547:9-12 (Luskie) (“The more you sell at Ship early . . . you are increasing your risk . . .”). *See also* Tr. 1398:22-1999:8 (Comfort) (if you are selling faster than the rest of the market you are increasing your price risk). Bergin testified that if the Texas team’s heavy, early selling at HSC in the Investigative Period had been based on a legitimate speculative view, they would have changed their trading when it produced consistent losses. Ex. OE-161 at 69:8-22. I agree, speculative strategies are to protect from losses in physical markets for primarily asset optimizing traders like the Texas team. BP was failing during the September to November time frame at issue in this case. There could only be other reasons for this behavior which is not “hedged” or risk management-based. It is found that speculative strategies do not explain the trading in this case or the heavy, early selling.

⁴¹ BP is critical of the offer-to-offer portion of Dr. Abrantes-Metz intermarket analysis. BP witness Evans wrongly examines what other buyers were doing at Katy (a Katy offer-initiated trade at the exact moment a Texas team offer was lifted at HSC). This does not test whether the Texas team was adjusting their HSC and Katy offers to maximize the potential of their HPL transport capacity. Ex. OE-211 at 112:7-114:2 (Abrantes-Metz). As Enforcement Staff points out, Dr. Abrantes-Metz did not suggest that the Texas team withdraw HSC offers and place Katy offers instead. Her analysis using Katy offer prices highlighted instances when the Texas team traders chose to post HSC offer but were simultaneously unwilling to post comparable Katy offer. *Id.* at 114:3-12. Dr. Abrantes-Metz “offer-to-offer” comparison tests whether the Texas team made less competitive offers at HSC in the Investigative Period. “Showing that they chose to make more uncompetitive offers at HSC (that resulted in sales) is directly relevant to determining whether there was an intent to manipulate. The more they

60. Dr. Abrantes-Metz testified that in the Investigative Period, the Texas team increased their percentage of sales at HSC that were uneconomic compared to contemporaneous prices at Katy. The Texas team's uneconomic trading on the offer side increased from 46 percent in the Pre-IP to 78 percent in the Investigative Period while its behavior on the bid side remained fairly constant.⁴² Ex. OE-211 at 116:6-8. She found the Texas team's moment-to-moment trading decisions did not reflect a rational, profit-maximizing approach to arbitraging prices between Katy and HSC. However, the Texas team sold much more economically at Katy both in the Pre-IP and in the Investigative Period. The Texas team sold economically at Katy 87-91 percent of the time in the Pre-IP, and 84-88 percent in the Investigative Period. The rate of economic sales at HSC was about 30 percent lower. Ex. OE-129 at 121: 1-11. This witness testified that the Texas team became indifferent to selling economically at HSC during the Investigative Period. In other words, they exhibited a preference for selling gas at HSC instead of at the location where they could get the best price. At HSC, their performance was lower during the Investigative Period to a point where they seem to be indifferent as to whether they were actually making money at HSC. Tr. 1849:8-25. According to Dr. Abrantes-Metz, this economic indifference is another indication of their scheme to suppress the HSC *Gas Daily* price.⁴³ Ex. OE-129 at 120:1-4.

61. BP is critical of Dr. Abrantes-Metz analysis, including the time frame she used for her Pre-IP. In response to these critiques, she extended her analysis and reached the same conclusions. Ex. OE-211 at 26:2-27:11; 78:6-79:7; 138 (extending to beginning of 2007 the analysis of number of minutes between first transaction at HSC and the Texas team's

disregarded clear arbitrage opportunities, by failing to adjust their Katy and/or HSC offers, the more likely they had an ulterior (manipulative) motive for the resulting uneconomic HSC offer-based sales. *Id.* at 113:4-9.

⁴² The explanation of the bid-sales being similar in both periods is twofold. First, they only controlled their offer prices. They could only hit bids at prices that buyers gave. Second, hitting a bid is always lower than the best offer in a market, hitting the bid will produce a lower price than placing an offer. Thus, every time the Texas team sold by hitting a HSC bid, they were exerting downward pressure on price. In the Investigative Period the Texas team sold by hitting bid prices 60 percent of the time. Ex. OE-211 at 117:1-14.

⁴³ If the Texas team was willing to post an offer at HSC, they should have been willing to reduce their current Katy offer or place a new Katy offer at a price just above their HSC offers (net of transport). Conversely, they could have raised their HSC offer above the cost of transport. Ex. OE-129 at 112:1-10; OE-211 at 112:14-23. Luskie agreed that selling by offers posted at both Katy and HSC you would want to make as much at each place. Tr. 587:22-588:7.

first HSC sale); 134-35 (analysis from beginning of 2007 of timing of the Texas team selling and buying at HSC each day); 136-37 (BP was an earlier seller and later buyer in the Investigative Period relative to their behavior in both the Pre-IP and late September through November 2007).⁴⁴ She used data from previous years in two important analyses in her testimony. First, to show the Texas team's increased utilization of their HPL capacity in the Investigative Period. Second, as part of her regression analysis of the Texas team's transport of gas on HPL (which included a version that started one year prior to the Investigative Period and extended to a post-period of one year at the end of the Investigative Period). Ex. OE-211 at 26:11-16. In her initial testimony, she also used 2007 data to demonstrate the robustness of her findings that the Texas team changed certain trading patterns in the Investigative Period."⁴⁵ Ex. OE-211 at 27:1-11.

62. Moreover, Dr. Abrantes-Metz is correct that Evans does not provide econometric analysis or considers contemporaneous communications of BP employees. Ex. OE-211 at 8:10-12. Additionally, Evans does not answer Dr. Abrantes-Metz's conclusion that there was a unique confluence of changed trading patterns by the Texas team in the Investigative Period that do not make economic sense and which cannot be explained by general market conditions. Dr. Abrantes-Metz is further correct that Evans uses generalized defenses to explain the Texas team's behavior without supporting data or analysis and by distorting Dr. Abrantes-Metz analyses. Further, he ignores the most fundamental change in the Texas team behavior in the Investigative Period: the shift to net selling on 48 of the 49 days. Ex. OE-211 at 2, 9, 15-16. Dr. Abrantes-Metz testifies that Evans ignored the majority of her examination of early trading at HSC. "Evans fails to address the cumulative evidence that the Texas team went from being a negligible participant in the earliest minutes of HSC trading in the Pre-IP to become the largest seller in this time frame in the Investigative Period." Ex. OE-211 at 72:13-17. According to Abrantes-Metz, Evans also does not respond to her conclusion that the Texas team's transport losses in the Investigative Period were significant as compared to

⁴⁴ Bergin proved that using HPL transport data back to 2006 is useless and can lead to misleading results because it does not contain specifics about the particular receipt and delivery points on HPL between which BP was moving gas. Ex. OE-161 at 41:3-5. BP's former experts Black & Veatch conducted an analysis of the Texas team's HPL transport between November 2007 and November 2008 which produced very similar results to those in Bergin's testimony. Tr. 2611:4-2614:24 (Evans).

⁴⁵ Evans essentially reasons that it is impossible to find an appropriate comparison period. This disregards the fact that Dr. Abrantes-Metz is an experienced economist and she can design analyses that use the best available data and can test the results to ensure robustness.

their prior performance. Ex. OE-211 at 47:1-7. These losses were calculated using the traders' own methodology.⁴⁶

63. Dr. Abrantes-Metz rebutted Evans' seasonality claim. She testified that daily trading decisions depend entirely on relative prices and the opportunity to arbitrage spreads. Ex. OE-211 at 36:15-17. Additionally, Bergin testified that the mere presence of a particular season does not guide trading behavior or transport utilization. Ex. OE-161 at 39:14-18. Luskie testified that the spread is what dictates whether you flow or not flow, the real-time spread. Trs. 574:17-575:13; 584:7-25. Therefore, it is found that Evans is not correct and that there is no need to limit comparison periods to the same months in prior years. Moreover, Bergin found that the hurricanes did not materially impact the Texas team's trading in the Investigative Period, or their HSC and Katy physical baseload positions through October and November 2008. Ex. OE-161 at 23. Barnhart herself admitted Ike had no impact on her trading in this period. Tr. 903:25-904:15; 901:21-902:16 (no material impact from Hurricane Gustav). Additionally, Bergin concluded that there was no material change in overall liquidity at HSC and Katy, or in the relative liquidity between the two locations, in the Investigative Period that

⁴⁶ The Texas team's "Katy-Ship Sheets" contained a cell which calculated a daily estimate ("Transport Diff") which represented their transport P&L. It accounted for the cost of transport. To calculate the Transport P&L, the Katy-Ship Sheet formula subtracted the Texas team estimated Katy *Gas Daily* daily and variable cost of transport from their estimated HSC *Gas Daily* daily. Exs. OE-129 at 83:817-84:9; Ex. OE-001 at 59:10-60:5; Tr. 431:20-432:8 (Luskie). Dr. Abrantes-Metz calculated the traders' performance on transport with the same methodology of the Katy-Ship Sheets but she used actual *Gas Daily* prices instead of the traders' estimates. Ex. OE-129 at 84:10-85:2. BP's Compliance Department considered this same information in their analysis of the Texas teams' trading in the Investigative Period. See, e.g., Tr. 2250:4-25 (Galiccia).

In its IB, BP argues that Dr. Abrantes-Metz improperly used the daily transport P&L formula in the Katy Ship Sheets ("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 "only next-day fixed price bench trades factor into the *Gas Daily* index." BP IB at 24-25. Enforcement Staff responds that this argument was never presented to Enforcement Staff's witnesses and it was not advanced by any of BP's witnesses. In addition, Enforcement Staff avers that BP's new argument ignores the fact that daily prices determine the flow of all gas, baseload or next-day ("bench deals" according to BP), because the Texas team always had the option to turn off transport. See Paragraph 127 at n. 104, *infra*. As a result, Enforcement Staff is correct that it is not inconsistent to consider the "transport diff" cell attributable to baseload gas.

would have affected the Texas team's ability to optimize their HPL transport between these two locations, or that would explain the Texas team's increased selling at HSC but not at Katy. Ex. OE-161 at 32-34. Barnhart admitted that both markets were liquid during the Investigative Period. Tr. 996:21-24. Further, Bergin testified there was a significant decrease in volume traded in the days right after Hurricane Ike at HSC and Katy. However, trading volumes returned to their average Pre-IP levels by October. Ex. OE-161 at 33:3-7.

64. As Dr. Abrantes-Metz testified, outside the Investigative Period, the HSC-Katy price differential was the primary driver of the Texas team's transport decision from Katy to HSC. Ex. OE-211 at 40-41. During the Investigative Period, this pattern disappeared. *Id.* Additionally, Dr. Abrantes-Metz studied their behavior in four prior months with comparable baseload positions as in the Investigative Period. She found that their behavior in the prior months was very different. Ex. OE-211 at 62-71; 62-63 (in the Investigative Period there was a reversal of the historical trends to transport to HSC with a short HSC baseload, and to sell on net more volume at Katy than at HSC when they had a net long Katy baseload).

65. Dr. Abrantes-Metz also testified that Evans' inter-market results were biased because he included HSC bid-based sales before Katy began trading.⁴⁷ According to Dr. Abrantes-Metz, a comparison of the economics of trading at two locations linked by transport is feasible only when both markets are actively trading. During the Investigative Period Katy began trading 15 minutes after HSC. As a result, an inter-market analysis should not include the Texas team's sales at HSC before the first Katy transaction. Before Katy started trading, the Texas team's trading at HSC cannot be classified as arbitrage because there are no actionable prices at Katy that a rational buyer or seller would act upon, this witness testified. Ex. OE-211 at 117:15-118:2.

66. Dr. Abrantes characterizes Evans' first three ratio analysis as very misleading because he does not separate out buys and sells. Ex. OE-211 at 79:8-10. When separated, the data is clear that the Texas team was almost exclusively selling in the first three trades at HSC and buying in the first three trades at Katy. *Id.* at 79:12-80:2. Additionally, Dr. Abrantes-Metz states that Evans bases his claim (that the Texas team's early selling was similar to the early selling behavior of the next two largest overall sellers in the HSC market in the Investigative Period) on a deceptive assertion that the Texas team's "volume of trading in the first 15 minutes lags behind" these other two sellers. According to Dr. Abrantes-Metz, Evans distorts irrefutable evidence that the

⁴⁷ Evans did not review the traders depositions or hearing testimony refuting his position on the use of contemporaneous bid spreads to calculate the Texas team's next-day gas P&L. Tr. 2559:1-17. On the other hand Enforcement Staff witnesses recognized the importance of the contemporaneous HSC-Katy spreads in their analyses and considered the Texas team traders testimony, records and data.

Texas team was the dominant net-seller in the earliest moments of HSC trading through the Investigative Period. Ex. OE-211 at 82:12-18. Dr. Abrantes-Metz found that the other two largest companies were large buyers of fixed-price gas at HSC in the Investigative Period, unlike BP. Moreover, these two companies did not shift the timing of their sales at HSC in the Investigative Period like BP did. Ex. OE-211 at 16, 23, 25, 87-89. This Enforcement Staff witness goes on to state that Evans started his clock for the first 15 minutes of trading for every day at 6:50 am, and only shows trades between 6:50 and 7:05 a.m. during the Investigative Period. However, on average the first trade occurred at 7:15 a.m. or 25 minutes after the time period used by Evans. Consequently, Dr. Abrantes-Metz testified that Evans omits 74 percent of the actual trading that occurred in the first 15 minutes of each day's volume at HSC, including more than half of all first trades. Ex. OE-211 at 82:19-83:10. When Dr. Abrantes-Metz corrected Evans testimony her conclusions were supported showing that BP outpaced all other sellers during the first 15 minutes of trading or that they dominated early selling during this time. Ex. OE-211 at 85:1-15.

67. Further, Dr. Abrantes-Metz stated that Evans approach fails to replicate how a trader arbitrages between two locations, and also biases the results of his analysis by inappropriately increasing the rate of allegedly economic sales, as the sale price at HSC (in an active market) will always be higher than a resting bid at Katy before Katy has begun actively trading. Ex. OE-211 at 118:17-21; Tr. 1840:21-1841:3 (no liquidity at Katy); 1844:15-25. BP witnesses agreed with the proposition that both markets must be active in order to evaluate arbitrage opportunities between the two locations. Additionally, these BP witnesses also agreed that you would not be able to assess the market price at a location where the bid/offer spread is too wide. *See, e.g.*, Tr. 376:7-16; 544:5-9; 583:15-25; 584:1-6; 585:1-5; 706:1-707:11 (Luskie). *See also* Tr. 193:17-22 (Lukefahr) (agreeing that physical traders generally should have good awareness of the bid/ask spread in the market in which they are trading). Abrantes-Metz is also critical of the fact that Evans only considered bid-to-bid comparisons rather than offer-to-offer comparison as well. She asserts that by doing this he sidesteps the fact that the Texas team's uneconomic trading on the offer side increased almost two fold from the Pre-IP to the Investigative Period. Ex. OE-211 at 116:5-9.

68. The use of *Gas Daily* prices in Dr. Abrantes-Metz's regression analysis is appropriate. First, BP's traders and the Compliance Department used *Gas Daily*⁴⁸ prices. In addition, *Gas Daily* prices are the daily benchmark for prices at their respective locations, and are used for settlement of financial contracts and daily and monthly physical contracts.⁴⁹ She testified that *Gas Daily* prices are an industry standard and

⁴⁸ The *Gas Daily* price is calculated as the volume-weighted average price of next day fixed price trades occurring prior to 11:30 a.m. CT. Ex. OE-211 at 44, n. 22.

⁴⁹ As Luskie testified, measuring performance against the *Gas Daily* index is

appropriate to use within the regression analysis. Ex. OE-211 at 48:12-20.⁵⁰ Second, the volume-weighted prices tend to reflect prevailing intra-day price spreads. *Id.* at 58. Third, because daily transport volume is determined by all the transactions over the day, the transported volumes should correlate with the entire day's prices.⁵¹ Dr. Abrantes-

appropriate when traders engage in a mix of arbitrage and speculative strategies, such as selling at HSC before Katy begins trading. Tr. 472:7-473:3. In this situation, it is only at the end of the day using *Gas Daily* prices that a trader knows if that decision was profitable. Luskie testified when you are taking a "view" means that you are implicitly trying to beat the HSC and Katy *Gas Daily* index. Tr. 477:22-478:3. This is the case also when a trader sells their beginning of day position faster than the rest of the market, taking a "bearish" intra-day view of prices. Tr. 761:21-762:10. Comfort also testified that selling all of your position in the first five minutes of trading increases the risk of losing money against the *Gas Daily* index. Tr. 1105:4-13.

⁵⁰ The traders used *Gas Daily* prices to estimate their Transport P&L each day. Ex. OE-001 at 59:10-60:13; 78:14-20, 102:16-104:10 (Bergin) (explaining calculation of the Texas team's net physical P&L); OE-211 at 90:5-93:4 (Abrantes-Metz) (explaining use of *Gas Daily* prices for cash and transport P&L calculations). Tr. 1482:18-1484:5 (Bergin) (used *Gas Daily* prices to calculate P&L based on his experience and on what Texas team traders used in Katy Ship Sheets). Tr. 430:14-431:16, 486:8-20, 606:6-24, 647:22-648:2 (Luskie) (agreeing that the Katy Ship Sheets are the Texas team's best estimate of their net physical P&L on next-day trades). Comfort testified he used the Katy Ship Sheets, which used HSC and Katy *Gas Daily* estimates, to verify Bergin's computation of the Texas team net physical fixed-price P&L. Tr. 1363:18-1364:15. Therefore, it is found that BP's own witnesses established the fact that Enforcement Staff witnesses used the Katy Ship Sheets correctly. BP Compliance used *Gas Daily* prices for the analysis in its draft report on the Texas team's trading in the Investigative Period. Ex. OE-042 at 22-23; Tr. 2187:18-2188:20 (Simmons); OE-206 at 27-29.

Contrary to BP's assertions, price movement on September 18 does not contradict Enforcement Staff's experts' testimony. Despite losses at HSC (Texas team fared the worst of all sellers against the HSC index during the Investigative Period) the traders persisted in their trading pattern for two and a half months and consistently and predictably lost money. Ex. OE-211 at 90:10-91:2; 92-93 (Figs. 28-31) (Abrantes-Metz).

⁵¹ Bergin testified that the next-day fixed-price P&L on the Texas team's net long position at Katy was determined by the volume weighted average of the Texas team sales against the Katy *Gas Daily* index. Ex. OE-257; Tr. 1736:15-1739:5. He explained that the HSC *Gas Daily* index is first added to compute cash P&L, it is then subtracted as part of the "transport diff" or "bridge value." Tr. 1736:15-1739:5. By selling early at HSC, before Katy started trading and faster than the rest of the HSC market, the Texas traders added short price risk to their position. Ex. OE-161 at 53:20-22.

Metz found that they did in the Pre-IP. *Id.* at 58-59. Accordingly, Dr. Abrantes-Metz's testimony is given considerable weight.⁵²

⁵² Evans has not traded gas and his educational and professional achievements pale in comparison to Dr. Abrantes-Metz. He has a bachelors' degree in international business from Ithaca College. Tr. 2475:24-2476:3; 2546:16-2550:4. Enforcement Staff is correct that he only offered possible alternative explanations for the behavior of the Texas traders (seasonality, baseload position, hurricanes and the financial crisis) but had not read the traders depositions and did not test any of his alleged explanations against the data in this case. *See, e.g.*, Tr. 2563:11-16 (Evans) ("Because market manipulation law, as I understand it, requires a decision around intent, it's not something economists can do. It's not something I can do with data is rationally concluded on intent. Therefore, that would prevent a wholesale statement about whether somebody did or didn't [manipulate]."); *Id.* at 2570:3-11; Tr. 2559:1-20. Tr. 2633:11-13 (Evans) (agreeing that he offered seasonal factors as a "possibility"); Tr. 2640:5-18 (Evans) (he did not argue that seasonal patterns explained the Texas team's transport of gas from Katy to HSC in the Investigative Period, and that he performed no statistical analysis on seasonal patterns.). Tr. 2634:1-4 (Evans) (he only offered the larger net Katy baseload as a "plausible explanation." Tr. 2633:17-18, 2638:17-21 (it was not his hypothesis that Hurricane Ike was responsible for the Texas team's trading behavior in the Investigative Period). Tr. 2637:17-25 (Evans) (not offering as a hypothesis as an economist that the financial crisis was responsible for the Texas team's trading behavior in the Investigative Period).

During cross examination Evans agreed that he had no analysis to support his assertion that the Texas team's baseload position was a "logical explanation" for their trading in the Investigative Period. Tr. 2636:10-21; 2634:1-4 (plausible explanation); 2635:11-16 (possible ... potential reason). The Texas team traders contradicted Evans' testimony. Luskie disagreed with Evans that a trader would consider a market with a wide bid/offer spread to be a viable comparison with a market with a narrow bid/offer spread. Compare Tr. 2621:7-2622:25 (Evans) with Tr. 376:7-16; 544:5-9; 583:15-25; 584:1-6; 585:1-5; 706:1-707:11 (Luskie). Luskie disagreed with Evans [Tr. 2537:17-2539:11 (Evans)], asserting that the Texas team traders measured their next-day fixed-price P&L at HSC and Katy against each location's *Gas Daily* index price in the Katy Ship Sheets. Tr. 486:8-20 (Luskie). *See also* Tr. 606:6-24 (Luskie) (agreeing that the Katy-Ship Sheets reflected the Texas team's best estimate of their net physical P&L on next-day trades). Evans stated that the Texas team's Katy-Ship Excel sheets were insufficient for capturing the "real P&L for the Texas team." Tr. 2537:10-16. Comfort testified that he used the Katy Ship sheets to verify Bergin's computation of the Texas team's net physical fixed-price P&L. Tr. 1363:18-1364:14 (Comfort).

Additionally, Lukefahr agreed that if a next-day fixed-price physical trader cannot

69. Likewise, Bergin also testified that starting on September 18 the Texas team made a significant change in their physical trading behavior. In September before the hurricane they were net buyers of next-day fixed-price gas at HSC every day but one. Starting on September 18 and continuing through the Investigative Period, the Texas team became a net seller of next-day fixed-price gas at HSC every day except one, averaging nearly seven contract per day of fixed-price sales at HSC. Ex. OE-001 at 76:1-12. Bergin testified that again in October the Texas team was a net seller of next-day fixed-gas at HSC on every day but one. Ex. OE-001 at 85:2-11. Bergin testified that in connection with increased selling of next-day fixed-price gas at HSC, the Texas team's also increased their utilization of their HPL capacity. According to Bergin, from trade day September 18 for flow day September 19, the Texas team shipped more gas from Katy to HSC on HPL - shipping an average of 15.9 contracts per day compared to an average of 5.3 contracts per day prior to Hurricane Ike. The increase in utilization on a percentage basis was from 27 percent to 80 percent of BP's daily firm HPL capacity. Ex. OE-001 at 77:6-11. Additionally, they used at least 95 percent of their HPL capacity on 16 days in the two and a half months of the Investigative Period. In the eight and a half months of the Pre-IP they did so only three times. Ex. OE-129 at 81:5-11.

70. Additionally, Bergin testified that the physical trading at HSC was consistently unprofitable throughout October. However, at the same time, they had increased their HSC-Henry Hub spread position, from which they profited as the HSC-Henry spread remained wider over the course of October. He also stated that the traders may have believed that their efforts to suppress the HSC *Gas Daily* price were working because through the balance of October, the HSC Henry Hub *Gas Daily* spread exceeded the balance of month marks of \$0.360 and \$0.385 on the days the Texas team increased their spread position. Ex. OE-001 at 87:2-17.

71. With regards to their November Katy and HSC net long positions Bergin testified that they hardly had any Katy or HSC November physical positions going into October (unlike their September and October baseload positions which were partially built earlier in the year). They had to build their November positions almost from scratch in October (largely during bidweek). He states that this was curious since they had already had three weeks of largely negative October physical P&L. The Texas team increased their Katy November long position from less than three contracts to over twenty contracts per day.

consistently beat the *Gas Daily* average, that trader should probably not be trading in that market. Tr. 199:19-200:9. As a matter of fact, criticizing Dr. Abrantes-Metz inter-market study, Evans claimed that offers at Katy were irrelevant. Ex. BP-037 at 51:1-52:22; *see also* Ex. OE-211 at 111:6-14:12 (Abrantes-Metz). But Luskie testified that he considered both bids and offers when deciding to trade: "I think you would be looking at both the bid and offer all the time. It's never a case I'm only looking at one or another." Tr. 586:19-24 (Luskie). Accordingly, it is concluded that Evans testimony is not given any weight.

At the same time they also bought November HSC contracts to flatten their HSC short position to 2.7 contracts. As a result, the Texas team's net long position going into the month was 18.3 contracts per day. *Id.* at 89:1-12.

72. The evidence in this case shows that the Texas team's lost money on their next-day physical gas trading during the Investigative Period and their trading patterns in this time frame cannot be explained as profit seeking behavior. In terms of losses Bergin testified that from September 19 through September 30 the Texas team's physical trading at HSC and Katy and use of the HPL transport was unprofitable. Their net physical P&L (combining cash P&L and transport P&L) lost \$34,372. In contrast, in the time frame January 2008 through August 2008 the Texas team's physical trading was consistently profitable in each months, averaging \$75,475 per month. Ex. OE-001 at 78:14-20; 102:16-22.

73. In October 2008 their physical trading at HSC and use of the HPL transport was unprofitable and showed consistent losses. Their net physical P&L during October was a loss of \$51,567 (\$23,725 loss on their cash P&L from trading at HSC and a loss of \$59,012 on their HPL transport), contrasting with the general success the Texas team had with optimizing the HPL transport in 2008 before the Investigative Period. They lost money on their physical trading on 74 percent of the days in October 2008, according to Bergin. Ex. OE-001 at 86:3-11.

74. In the early part of November (before the November 5 recorded phone call) the Texas team liquidated a large portion of their net long position at HSC in the next-day fixed-price market by continuing the late September and October trading patterns of heavy and early selling. They suffered large losses on their physical trading on those days. *Id.* at 89:13-90:2.

75. According to Bergin, in all they lost money on physical trading on 67 percent of the flow days during the Investigative Period. In the Pre-IP they lost money on physical trading just 23percent of the flow days. Ex. OE-001 at 103:4-7.⁵³ Additionally, Bergin testified that daily losses during the Investigative Period stood out from their minor losses in the Pre-IP. In the Pre-IP when they lost money on their daily physical trading the average daily loss was \$2,878 and no larger than \$12,864. On the days in the Investigative Period when they lost money (prior to the November 5 recorded call), the losses averaged \$6,262 and the largest single day loss was \$53,540. Ex. OE-001 at 103:8-15.

76. Significantly, after the November 5 recorded phone call the Texas team's physical trading was profitable over the remainder of the month. *Id.* at 90:6-15. According to

⁵³ Comfort did not dispute Bergin's testimony in this regard. Tr. 1408:19-1410:6.

Bergin, the reversal in losses indicates that the Texas team may have changed their trading behavior after the November 5 recorded phone call. He states that this would not be surprising since the traders knew on November 6 that BP's Compliance department would be looking at their trading as a result of the call. Ex. OE-001 at 91:1-7. *Id.* at 92:1-10. *See* Exs. OE-256 ("Pre-Katy sales by Comfort"); OE-256 ("Pre-Katy sales by the Texas team").

77. BP has not adequately explained the changes in their trading behavior.⁵⁴ As Bergin testified, the traders do not address the key grounds for his conclusion that their trading at HSC and use of HPL transport during the Investigative Period was intended to manipulate the HSC *Gas Daily* index. He testified that they do not dispute and ignore that: during the Investigative Period, the Texas team shifted to heavy fixed-price selling at HSC, was a net seller on 48 out of 49 Investigative Period days, sold at HSC early in the trading day (before the first Katy trade) much more often, built up a large net long physical baseload position at Katy and HSC during October and November 2008, and incurred consistent losses on both their HSC physical trading and their use of the HPL transport, in contrast to their generally profitable trading at HSC and use of the HPL transport in prior months of 2008. Ex. OE-161 at 12:6-19.

78. Moreover, at the hearing BP witnesses had to admit key elements of Dr. Abrantes-Metz analyses. For instance, Comfort agreed with Dr. Abrantes-Metz finding that in the Pre-IP they typically waited a longer period to make the first sale at HSC than they did in the Investigative Period. Tr. 1376:23-1377:8. Exs. OE-260, 260A and 263. Comfort also did not dispute Dr. Abrantes-Metz finding that the Texas team became the seller with the largest share in the next-day fixed-price market at HSC. Tr. 1392:14-1394:14. Additionally, Comfort did not dispute various changes in trading patterns on which he was cross examined. Some of these changes were flagged by BP's Compliance Department in 2008. Tr. 1405:6-1407:17. *See, e.g.*, Ex. OE-290 through 293 (October 21, 2008 dashboard and trader anomaly reports, flagging Comforts' physical and financial trading at HSC). Tr. 2128:16-2152:7 (Simmons) (discussion of Comfort's trading behavior flagged by BP Compliance).

⁵⁴ BP's defense of physical disruptions on HPL due to the hurricanes is inconsistent with the traders' own statements immediately after the hurricanes. Comfort noted on September 17, 2008 that HPL was back up by September 16, after it was initially "unable to accept deliveries from Katy due to Bammel power loss and shutdown." Ex. OE-192 at 1. Further, this defense is also contradicted by BP's own expert Black and Veatch: "Based on review of available pipeline transportation information, [BP's] utilization of HPL transportation in Oct-Nov 2008 was not limited by operational events such as pipeline operational flow orders or declarations of force majeure." Exs. OE-206 at 4; OE-161 at 20:18-21:3 (Bergin Reb.Test.).

79. *Barclays*⁵⁵ supports the conclusion that there is manipulation in this case. In *Barclays* the Commission established that fraud is a question of fact, to be determined by all the circumstances of a case. It noted the definition of fraud “to include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market.” In the cited case the Commission considered (i) a consistent pattern across the months at issue of building substantial Physical Positions directly opposite to large Financial Swap positions, and the subsequent flattening of those Physical Positions through the use of Dailies in a manner that was inconsistent with fundamental supply and demand concerns but instead was in a direction which would tend to move price to the benefit of Respondents’ Financial Swaps; (ii) the difference in Respondents’ trading behavior in the manipulation months versus the Respondents’ trading behavior in months where manipulation was not alleged to have occurred; (iii) communications among the traders which describe and substantiate the scheme and demonstrate the affirmative, coordinated, concerted, and intentional effort, as well as the individual actions, among the Respondents to effectuate the scheme (iv) Respondents’ failure to respond at all in their answers to allegations made by OE Staff concerning the building of Physical Positions and Financial Swap positions as being part of the manipulative scheme-material allegations that, under the Commission’s rules at the very least, should have been answered - and Respondents attempts to instead address only the Dailies trading, (v) the uneconomic nature of the Dailies trading, (vi) the inconsistency between the Individual Traders’ testimony under oath concerning certain of their communications and behavior, and the explanation the traders present in their Submissions of those same communications and behavior, and (vii) the failure of Respondents’ economic, statistical and legal analyses to provide explanation of or defense for the Physical Position, Financial Swaps and the Dailies trading. *Barclays*, 144 FERC ¶ 61,041 at PP 7, 32.

80. Enforcement Staff is correct that BP’s meager attempts to obfuscate the data and their attempt to analogize the Texas trader’s behavior to that of other two large companies does not explain their changed trading patters during the Investigative Period. *See Barclays*, 144 FERC ¶ 61,041 at P 40 & n. 137 (rejecting Barclays’ minute-by-minute trading analysis as an attempt to “disaggregate” the daily trading. “This attempt at disaggregation . . . is nothing more than an attempt to obfuscate the evidence of the scheme.”). As Dr. Abrantes-Metz testified, “Given all the other examples I have in my testimony, it is difficult to think of any other reason than a motive to manipulate that would justify all of these changes” Tr. 1831:1-1832:4.

81. In the case at bar there are various acts in furtherance of a scheme and the Texas traders’ actions injected inaccurate information into the market and impaired its functioning. The Commission considers profitability as a relevant factor in the determination as to whether an entity engaged in market manipulation. *See, e.g., Barclays*, 144 FERC ¶ 61,041 at P 43. The Texas team’s financial performance on their

⁵⁵ *Barclays*, 144 FERC ¶ 61,041 at PP 7, 32.

next-day physical trading worsened significantly during the Investigative Period. The change in their trading patterns cannot be explained as appropriate profit seeking behavior. Additionally, they increased the use of their HPL transport capacity in the Investigative Period and this also was not economically justified. They increased transport of gas in the Investigative Period when the HSC-Katy price spread was mostly negative and incurred significant losses as compared to their performance in the Pre-IP.

82. It is 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. BP through the Texas team participated in a scheme to manipulate the market by selling next-day, fixed price natural gas at HSC during the Investigative Period, in such a way that they managed to suppress the *Gas Daily* index and benefit their financial positions. Their financial positions benefited from the *Gas Daily* index for HSC being lower than the index at Henry Hub. Among others as described above, BP took affirmative actions by and through its traders with no profit explanation for Texas team's primary responsibility as physical day asset traders other than unlawful gains through successful market manipulation of the *Gas Daily* index price at HSC. See *Barclays*, 144 FERC ¶ 61,041 at PP 7, 32.

2. Scier/Intent

Parties Contentions

83. Enforcement Staff argues that BP, through the Texas team, acted with actual intent to manipulate the HSC *Gas Daily* index to benefit their financial position. EF IB at 49, 51. This intent meets the requisite scier requirement under the Commission's Anti-Manipulation Rule.⁵⁶ EF IB at 50, 51. Intent is evident both through Comfort's actions and the Texas team's trade coordination during the Investigative Period. EF IB at 49.

84. Enforcement Staff asserts Comfort intended to manipulate the HSC *Gas Daily* index following Hurricane Ike's positive effects on the Texas team's financial positions. EF IB at 51. Comfort, an experienced trader, was aware of the financial relationship between the HSC *Gas Daily* index price and the Texas team's financial positions. EF IB at 51. His experience suggests he was also aware that by conducting heavier, early HSC sales he could affect HSC's price. EF IB at 51. Comfort ended his economic use of HPL transport by engaging in a new strategy, increasing natural gas shipments from Katy to HSC, regardless of the price difference. EF IB at 51-52. These actions constitute "suspicious timing or repetition of transactions, execution of transactions benefiting derivative positions, and lack of legitimate economic motive or economically irrational conduct," which the Commission has previously found as evidence of scier. *Barclays*, 144 FERC ¶ 61,041, at P 62, cited in EF IB at 52.

⁵⁶ 18 C.F.R. § 1c.1 (2014).

85. Direct evidence, revealed through a November 5, 2008 recorded call, also shows Comfort's intent to manipulate. EF IB at 52. Enforcement Staff contends that the Texas team's manipulative scheme was revealed by Luskie during the Assessed Training Course (ATC) and a November 5, 2008 recorded phone call (November 5 call) with Comfort. EF IB at 17, 19-20.

86. Enforcement Staff also contends although Luskie understood the Texas team's trading strategy, he did not know it to be unlawful. Enforcement Staff IB at 56. Luskie must have understood the team's strategy because his responsibilities required him knowing the Texas team's positions and the daily P&L calculations. EF IB at 56-57. Additionally, by the November 5, 2008 phone call, he had been on the Texas team for five months. EF IB at 57. But though he understood the Texas team's trading practices, Luskie's limited compliance training did not provide him with the knowledge as to what constituted a physical for financial market manipulation. EF IB at 57. Luskie never questioned the legality of Comfort's physical trading. EF IB at 57.

87. The coordination between the Texas team's physical and financial trades during the Investigative Period is circumstantial evidence of the team's scienter. EF IB at 58. Looking to the Texas team's month-to-month trading decisions in physical and financial markets shows their efforts to implement a manipulative scheme. EF IB at 58-59.

88. Enforcement Staff asserts Comfort's explanations for his trading during the Investigative Period also suggest his improper intent. EF IB at 66. Comfort's pre-filed testimony stated that his trades met all "compliance, regulatory, legal, and ethical guidelines," based on his understanding. EF IB at 67. During the hearing, his explanation for a change in his trading patterns during the Investigative Period "was that '[w]e did make some incorrect trades.'" EF IB at 67. Comfort's pre-filed and hearing testimony do not address why the Texas team failed to take steps to "unwind" or "turn off" HPL transportation when doing so would be economic. EF IB at 68. Additionally, Comfort consistently shifted his trading during the Investigative Period to heavy, early HSC selling. EF IB at 67. This led to consistent losses, suggesting he had a motive to pursue this strategy. EF IB at 67-68. This evidence overcomes Comfort's weak denial of wrongdoing BP relies on. EF RB at 23. Enforcement Staff contends that Comfort's motive to manipulate natural gas trading was due to concern for his status at BP and the amount of his compensation. EF RB at 24.

89. Enforcement Staff further represents that Barnhart's testimony should be given no weight. EF IB at 69. She is biased, as she was a member of the Texas team who benefitted from the manipulation. EF IB at 69-70. Barnhart either knew Comfort's manipulative scheme or refused to acknowledge it. EF IB at 70. Barnhart's testimony at hearing also contradicted her pre-filed testimony. EF IB at 70. Like Comfort, Barnhart's denials of wrongdoing are outweighed by evidence to the contrary. EF RB at 23-24.

90. BP maintains that there is no direct or circumstantial evidence to support Enforcement Staff's claim that BP acted with actual intent or recklessness. BP IB at 48. BP argues that the "Tape"⁵⁷ shows no intent to manipulate. BP IB at 50. The "Tape" does not support the six analyses Enforcement Staff witness Dr. Abrantes-Metz provides in proving a manipulative scheme. BP IB at 51. Specifically, the "Tape" fails to refer to (i) the Texas team's trading of fixed-price instruments; (ii) the timing of the Texas team's HSC trading; (iii) that the Texas team's HPL transport was driven by a Katy-HSC spread; (iv) whether the Texas team executed trades through bid-hitting; (v) increasing offer "distance" at HSC; and (vi) whether the Texas team was engaged in uneconomic trading. BP IB at 52. Additionally, Comfort's reactions—pausing and hesitating throughout the call—do not suggest guilt. BP RB at 27. Rather, his reactions reveal his irritation at the false suggestion by a third party that he acted improperly, knowing this was on a recorded line, and understanding this call would lead to an unwarranted and long investigation. BP RB at 27.

91. BP contends the unrecorded calls between Comfort and Luskie immediately following the November 5 recorded call cannot show intent, as neither trader can recall the substance of those conversations. BP RB at 27. Any suggestion as to the content or purpose of those call are speculative. BP RB at 27.

92. Moreover, Luskie has testified he was mistaken in his characterization of the Texas team's transport. BP IB at 51, 52. He also received effective anti-manipulation training. BP IB at 53. Luskie understood generally what constituted a physical for financial manipulation at the time of the November 5, 2008 recorded call with Comfort, but made a mistake in his explanation to Parker. BP IB at 52-54.

93. BP further argues that the Texas team traders have consistently denied intent. BP IB at 54. Both Comfort and Barnhart were trained on the prohibition of market manipulation, testified they individually never engaged in market manipulation, and have never been involved in any compliance incident. BP IB at 54. Barnhart also testified that she never saw Comfort or Luskie engage in any improper or questionable trading activity, including market manipulation. BP IB at 54. Comfort, Barnhart, and Luskie all provided numerous reasons why their trading strategy during the Investigative Period was non-manipulative. BP IB at 55.

94. BP contends Parker, a supervisor at BP, further refutes Enforcement Staff's theory. BP IB at 55. Parker, a BP trading supervisor with whom Luskie had a conversation with at the ATC, recalled that Luskie discussed how to aid a cash position

⁵⁷ BP does not go into detail explaining what the "Tape" is; however, based on the context of the arguments, it is assumed that the "Tape" is the November 5, 2008 recorded call between Luskie and Comfort.

by not flowing transport. BP IB at 55. This contrasts with Enforcement Staff's theory the Texas team hurt its cash position by transporting gas to HSC. BP IB at 55.

95. BP also states that the evidence contrasts with Enforcement Staff's theory of Comfort's motive in engaging in manipulative behavior. BP IB at 55. Enforcement Staff suggests Comfort wanted to generate P&L to provide him with a sizable bonus and continue employment beyond 2008. BP IB at 55-56. While Enforcement Staff suggests that Comfort's move from BP's West team to the Texas team was due to his trading abilities, BP suggests that Comfort's departure was due to circumstance. BP IB at 57. Comfort was a highly-regarded natural gas trader. BP IB at 57. [CONFIDENTIAL] His move to the Texas team occurred because of marketplace changes. BP IB at 56-57. Additionally, the record suggests Comfort's one incentive to stay with BP was to reach his 50th birthday, whereby he would have life-long medical benefits. BP IB at 50. Comfort turned 50 in August 2008, prior to the Investigative Period, and therefore there was no incentive for him to stay. BP IB at 58.

96. BP contends no evidence in the record suggests the Texas team coordinated physical and financial trading decisions. BP RB at 29. Barnhart's failure to purchase three additional BALMO contracts on September 17 was not the beginning of a manipulative scheme. BP RB at 29. No evidence exists that the team engaged in trading that caused consistent and heavier losses, contrasting with Enforcement Staff's allegation that Comfort would have seen negative P&L daily. BP RB at 30.

97. BP also states no evidence of a cover-up exists. BP RB at 30. BP's daily reports-"dashboard" reports, Trader Anomaly reports, spade reports, and large transactions reports-would have made it difficult or impossible for a trader to hide a manipulative scheme. BP RB at 30-31. Both the Independent Monitor and BP Compliance oversaw BP's trading activities. BP RB at 31. Finally, BP employees were trained and informed of their obligation to report instances of potential misconduct or violation of the law. BP RB at 31.

Discussion

98. To establish scienter the Commission requires reckless, knowing, or intentional actions taken in conjunction with a fraudulent scheme, material misrepresentation, or material omission. It is knowing or intentional misconduct designed to deceive or defraud. Recklessness satisfies the scienter element. *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202 (2006) (Order No. 670) at PP 50-53. *See also, Maxim Power*, 151 FERC ¶ 61,094, at P 83 (2015). Fraud can be established by all the circumstances of a case. Order No. 670 at 50. Likewise, scienter can be shown through both direct and circumstantial evidence and it is often proven through circumstantial evidence based on the totality of the evidence. The Commission has held that, "[t]he presence of a fraudulent intent is rarely susceptible of direct proof,

and must instead be established by legitimate inferences from circumstantial evidence.⁵⁸ These inferences are based on the common knowledge of the motives and intentions of men in like circumstances.⁵⁹ Open market transactions undertaken with manipulative intent are sufficient to establish scienter.⁶⁰

99. Enforcement Staff is correct that BP acted with intent. The evidence shows that the Texas team, and in particular Comfort, had the intent to manipulate the HSC *Gas Daily* index after the effects of Hurricane Ike's which resulted in significant gains to their pre-existing financial positions (subject to the HSC *Gas Daily* index price). Comfort was aware of what he was doing. He knew the relationship between the HSC *Gas Daily* index price and the Texas team's financial positions. He increased the financial transactions for October and November 2008. He and the team had a new strategy of heavier, earlier selling at HSC supported by their larger, long physical natural gas baseload positions at Katy. Comfort was an experienced trader. He knew he could affect the price at HSC by transporting increased supplies and with heavier, early selling at lower prices. The evidence in this case shows that Comfort abandoned his historically economic use of his HPL transport to increase shipments of natural gas from Katy to

⁵⁸ *Barclays*, 144 FERC ¶ 61,041 at P 75.

⁵⁹ *Barclays*, 144 FERC ¶ 61,041 at P 75 (citing *U.S. v. Sullivan*, 406 F.2d at 186 (2d Cir. 1969)). See *Maxim Power*, 151 FERC ¶ 61,094 at P 88 n. 209; *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("circumstantial evidence is not only sufficient, but may be more certain, satisfying and persuasive than direct evidence."); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n. 30 (1982) ("proof of scienter ... is often a matter of inference from circumstantial evidence"); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1118 (D.C. Cir. 2009) ("A person's state of mind is rarely susceptible of proof by direct evidence, so specific intent to defraud may be, and most often is, inferred from the totality of the circumstances, including indirect and circumstantial evidence."); *United States v. Salameh*, 152 F.3d 88, 143 (2d Cir. 1998) ("[A]s a general rule most evidence of intent is circumstantial . . ."); *United States v. O'Brien*, 14 F.3d 703, 306 (1st Cir. 1994) (citation omitted) ("Guilty knowledge, like specific intent . . . seldom can be established by direct evidence. This principle has particular pertinence in respect to fraud crimes which, by their very nature, often yield little in the way of direct proof.").

⁶⁰ *Barclays*, 144 FERC ¶ 61,041 at PP 50-58 (citing *Brian Hunter*, 135 FERC ¶ 61,054 at P 51 n. 78); see also *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."); *SEC v. Masri*, 523 F. Supp. 2d 361, 368 (S. D. N. Y. 2007) (otherwise legitimate trades with real customers can constitute unlawful manipulation solely due to the actor's fraudulent purpose).

HSC without regard to his economic losses or the price differential between these two points.⁶¹ The way he reacted to the November 5 call shows guilt. Additionally, the evidence shows that the intent of the Texas team traders was for their physical trades to benefit their financial positions. Comfort or BP have not offered a legitimate explanation of this trading.

100. The manipulative trading behavior was disclosed by Clayton Luskie⁶² on November 5, 2008, to a senior BP official James Parker.⁶³ This happened during a

⁶¹ *Brian Hunter*, 135 FERC ¶ 61,054 at P 88 (Commission upholding finding that Hunter's trading pattern during the manipulation months "departed significantly from his prior practice," which was additional evidence of an intent to manipulate).

⁶² In 2006, out of college Luskie was hired into BP's three-year "Graduate Development Program" (GDP). This gave him a career path into employment if he successfully completed work in various divisions. Tr. 224:20-225:13. He began working with the Texas team in July 2008 in his final year of the GDP program. In July 2008, Luskie was a cash trader/optimizer. Tr. 225:21-23. His primary responsibility as a trader was to optimize BP's transportation capacity in the cash market on the Kinder Morgan Tejas pipeline and to trade the Tennessee Zone 0 pool. Tr. 229:10-230:1. He also did daily position tracking, and calculated profit and loss. Tr. 240:13-241:3. To do this he needed to have a thorough understanding of the Texas team's positions and the daily P&L calculations. Tr. 227:17-230:25; Tr. at 1420:12-1422:3 (Comfort) (Luskie generally had a good understanding of the Texas team's positions, daily P&L, and of Comfort and Barnhart's views). He had limited authority to trade short term physical products. Tr. 229:17-230:10; 252:22-24. He calculated the Texas team's daily P&L and traded physical gas to balance some of the Texas team's intrastate pipelines at small pools. Tr. 161:25-162:6 (Lukefahr); Tr. 229:13-230:25 (Luskie). At this point in time Luskie had already concluded he wanted to be a trader. Tr. 321:20-22. He had created the "Texas Fun Sheet" which tracked the team's forward positions and he was writing a widely circulated "Daily Texas Trading Update" email. He communicated to others in the NAGP his observations about the day's cash trading in the Texas markets. Tr. 240:18-241:22; 242:2-243:4 (Luskie).

Luskie's talents were recognized by others at BP as Keo Lukefahr (former South Commercial Manager and later SEGT book lead) testified she like Luskie because of his intelligence and his curiosity. Tr. 151:18-24. Lukefahr, Comfort and Barnhart mentored Luskie. Tr. 151:10-13 (Lukefahr); 279:11-16 (Luskie). He was one of two out of nine who passed the November 2008 ATC. Tr. 255:16-18. His evaluation stated: "He consistently performed at a high level and understood almost all concepts." "He was quick to identify arbitrage opportunities ... and aggressively pursued them." "Clayton could comprehend all of the fundamental information and used it in applying appropriately sized Value Trades. He was very confident in what he did and could

private conversation in a hotel room while Luskie was attending an off-site trader training and assessment program.⁶⁴ Soon after this conversation, Luskie called Comfort, at the time, the primary physical trader for HSC. This is known in this record as the recorded November 5, 2008 phone call.⁶⁵ In this recorded phone call Luskie told Comfort what he had told Parker and stated: “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 HPL transport. 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.” Ex. OE-162 at 3:5-15. Luskie referred to the Texas team’s use of their HPL transport⁶⁶ “to affect the

explain the rationale behind all of his trades.” Ex. BP-018.

⁶³ Ex. OE-219 at 52:17-19 (Parker Dep. Tr.) (he wanted to meet Luskie because he was the top performer at the ATC).

⁶⁴ Luskie testified that he told Parker he liked being allowed to trade Comfort’s larger and more active HSC and Katy positions when Comfort was out of the office. Tr. 260:5-23. Luskie also testified that he was trying to impress Parker. Luskie knew Parker was the head of trading for BP North. Tr. 257:15-258:7; 330:6-13; *see also* Ex. OE-219 at 18:14-23 (Parker Dep. Tr.). Luskie admitted he, “absolutely freaked out” due to Parker’s reaction. Ex. BP-016 at 7:8-9; Tr. 266:21-267:1.

⁶⁵ Luskie called Comfort on the trading desk, thus the call was recorded and preserved. Ex. OE-016 (recording). Luskie knew it was against BP policy for a trader to have a conversation using a cell phone on the trading floor. Tr. 287:4-15.

⁶⁶ For 2008, BP had 200,000 MMBtus of firm daily capacity on the Houston Pipeline system (“HPL”) between HSC and Katy. This was by virtue of a transportation agreement between BP and HPL entered into in April 2006 through March 31, 2009. Ex. OE-001 at 31:5-7; Tr. 419:10-18. The HPL capacity gave the Texas team the ability to move gas from Katy points to the HSC market. BP paid HPL a daily fixed demand charge of \$0.03 per MMBtu for the firm capacity whether it shipped or not. Additionally, BP paid a variable charge based on the volume of gas it shipped on HPL. During 2008, the variable charge was approximately \$0.013 per MMBtu. Exs. OE-032 at 10-11; OE-085 at 28:6-14; OE-001 at 31:8-14. Luskie testified that the Texas team primarily used their HPL transport capacity for next-day (or “cash”) trading on a day-to-day basis. *See* Tr. 447:6; Ex. OE-001 at 33:13-34:2. He also testified that they used it to trade their next-day physical positions between Katy and HSC, and various delivered markets. Tr. 260:24-261:16. Pursuant to the agreement, the Texas team could only flow gas from Katy to HSC on HPL, or receive gas at HSC and move it elsewhere in the HSC region. BP was not contractually permitted to flow gas from HSC to Katy on HPL. Tr. 592:12-25.

index and help our paper position.” *Id.* Ta 3:14-15. Luskie used paper position and financial position interchangeably in 2008. Tr. 262:5-24. *See* Exs. OE-001 at 99:8, 101:3-14. At the time of this phone call the Texas team had a substantial short exposure.

101. Luskie asked Comfort “[s]o how would you explain our dealings on HPL and with our paper position⁶⁷ that don’t make it sound like we’re ---. Comfort tries to interrupt Luskie but Luskie continues “don’t make it sound like we’re ---[Comfort: “Clayton, Clayton”] – manipulating the index.” Ex. OE-162 at 3:18-23.

102. Comfort responded by saying that most of the time “we ship economically.” OE-162 at 4:4-5. Comfort interrupted Luskie three times and on Comfort’s side of the conversation there are multiple extended pauses between his statements to Luskie. *Id.* at 3-5. Luskie never got an answer⁶⁸ but there were two other calls between Luskie and Comfort that were not recorded.⁶⁹ Luskie’s phone records show he tried to call Comfort’s cell phone less than a minute after hanging up on the recorded line. Tr. 285:5-8 (Luskie). Ex. OE-019 at 5. Three minutes later Comfort called Luskie’s cell phone and the conversation lasted ten minutes. Ex. OE-019 at 5 (cell phone bill); Tr. 286:6-11 (Luskie). Comfort chewed Luskie out on this phone call. Tr. 1210:3-14. Luskie remembers that Comfort helped him “organize thoughts” and helped “get facts straight.” There was a second cell phone conversation with Comfort. Tr. 293:22-294:6, 296:22-297:19. Luskie spoke with two people including an individual from the Market Monitor staff, who recommended he contact BP compliance. Tr. 318:8-24; 289:2-291:2; 301:15-302:3 (Luskie). Luskie went back to Parker to assure him that he was incorrect concerning the Texas team’s trading. Tr. 309:17-310:1 (Luskie). Luskie testified that in

⁶⁷ A paper position is the same as a financial position which can consist of financial products and physical products. Tr. 262:5-15 (Luskie).

⁶⁸ Luskie agreed at the hearing that on this phone call Comfort never did give an answer to his key concerns and that Comfort was “was to some extent incoherent” as he was trying to explain the trading. Tr. 280:25-281:17. According to Luskie, Comfort had never been at a loss of words when asked about what he was doing as a trader or about the Texas team’s trading. Tr. 280:15-24. BP argues that this November 5 phone call lacks probative value. BP is not correct. The phone call is telling, Comfort never did give an answer to Luskie as to why what they were doing was not market manipulation. Ex. OE-162 (transcript).

⁶⁹ Luskie testified that he realized Comfort did not want to have the conversation on a recorded line. Tr. 283:18-284:7; 1206:1-9 (Comfort) (“I was most certainly not comfortable with Clayton’s call with me at that point in time, and yes, I wanted that to be off a recorded line.”).

this 30-60 second conversation, he told Parker that the Texas team didn't transport to influence the index and sometimes they have to ship uneconomically because of liquidity issues. Tr. 308:11-309:1. However, Parker was still concerned. Ex. OE-219 at 104:4-7; 123:14-17 (Parker Dep. Tr.). Luskie and Comfort cannot recall any discussion in which Comfort actually substantively answered Luskie's question and explain why the Texas team's trading at HSC and use of the HPL transport was not part of an attempt to manipulate the index. Tr. 1212:11-17; 1216:15-1217:8; 1227:20-24 (Comfort); Tr. 292:14-293:21 (Luskie).

103. As a result, the evidence in this case shows that Luskie disclosed that the Texas team had a specific strategy at HSC in the Investigative Period when he said what "we are doing at Ship Channel this month." Exs. OE-016; OE-162 at 3:5-7.⁷⁰ See 1. Conduct, *supra*. In addition, Luskie revealed that BP's capacity on HPL was a component of the strategy, stating "and strategy and what not. And I was telling him about our HPL transport." Exs. OE-016; OE-162:8-10. Luskie also revealed that the Texas team had a benefitting financial position at HSC when he stated that they trade based on "how we think it's going to affect the index and help our paper position." Exs. OE-016; OE-162 at 3:13-15.⁷¹

104. In addition, the evidence in this case shows Comfort had guilt. His responses to Luskie on the recorded call and the absence of a bona fide explanation for the trading during the Investigative Period are evidence of his guilt. Exs. OE-016 and OE-162. His tone was angry, he was pausing and non-responsive, interrupting Luskie and his lack of answers show his guilt. Enforcement Staff is correct that he wanted to prevent Luskie from revealing any further incriminating information on the recorded line. Enforcement Staff is also correct that his demeanor betrays his guilt. In addition, Enforcement Staff is correct that Comfort, an experienced trader, should have been able to explain his trading if he had not been guilty of the scheme. It is found that at a minimum he did not want to be having this conversation on a recorded line. Thus, it is found that this behavior warrants negative inference against BP on intent. As a matter of fact the recorded call itself is found to be an admission against interest. Moreover, 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 description of the Texas team's trading⁷² are not credible

⁷⁰ In his conversation with Parker he was describing "some kind of trading and transport behavior." Tr. 327:1-7. (Luskie).

⁷¹ Luskie testified he used interchangeably the terms "paper" and "financial position." Tr. 262:10-15.

⁷² Exs. BP-014 at 7:1-11 (Comfort Resp. Test.); BP-016 at 9:1-3 (Luskie Resp. Test); Tr. 272:24-273:6.

and are contrary to the record evidence in this case. Luskie at the time accurately described the scheme. *See* 1. Conduct, *supra*.

105. Comfort⁷³ has never provided an explanation of why the Texas team's trading and use of transport was not being used to affect the index to help their paper position. His explanations⁷⁴ are found not credible (even Luskie found them "vague" and "inadequate" and he was left with the impression that Comfort's attempts at an explanation were

⁷³ In terms of motive BP argues Enforcement Staff failed to prove motive. BP IB at 55-59. Enforcement Staff is correct that proof of motive is not needed for scienter. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 325 (2007) (motive can be a relevant consideration which can favor an inference of scienter, the absence of a motive allegation is not fatal to a fraud complaint). However, in this case the evidence shows that there is motive. Comfort's trading bonus was tied to his P&L, he cared about his status at BP and the amount of his compensation. Tr. 1156:8-25 (Comfort). He also testified that "it cost me money not having worked harder to gain Kevin's perspective of what was going on" in response to Barnhart having received a higher bonus than him (he believed they were equals). Tr. at 1187:21-23 and 1185:8. Comfort initially insisted that he had been and remained a higher status "value trader" at BP, even though BP documents identified him as a physical trader. Tr. 1165:13-18, 1166:6-12 (Comfort). Yet his job was a physical trader or asset optimizer. Tr. 1166:13-21; Ex. OE-028 at 3. He also testified that the largest money makers, were actually his contribution to the team. Tr. 1190:11-14. Comfort's desire for greater compensation is a motive for manipulation. Therefore, it is found that Comfort indeed had a motive to manipulate. *Tellabs*, 551 U.S. at 325 ("personal financial gain may weigh heavily in favor of a scienter inference . . ."). *Florida State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 661 (8th Cir. 2001) (magnitude and timing of executive's compensation package can show motive to commit fraud); *see Novak v. Kasks*, 216 F.3d 300, 307-08 (2d Cir. 2000) (adequate motive can arise from the desire to profit from extensive insider sales). Comfort had been fired from his previous job at BP and the Texas team was the only trading desk with whom he recalled interviewing. Tr. 1118:13-1119:22. Comfort's job on the Texas team as an asset optimizer was a regression in his natural gas trader career ladder. Tr. 190:20-193:9 (Lukefahr). The fact that Comfort remained working at BP contradicts BP's allegations that he was wealthy enough to retire and that he did not have a motive to manipulate.

⁷⁴ Comforts statements included generally we "shipped economically." There are times we can't unwind our positions. Ex. OE-162 at 4:2-5 and 14-16. He also references multiple factors that go into cash trading decisions. *Id.* at 4:20-24. These statements lack support in record evidence and when viewed in light of all the evidence in this case are not credible.

“incoherent”).⁷⁵ His attempt at exculpatory explanations are another indicia of guilt. 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). *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.”)).

106. Comfort’s additional calls (unrecorded) with Luskie are another indicia of his guilt. His purpose with these phone calls was to start a cover-up of the facts to make sure that Luskie got his facts “straight” before he got back to Parker. Tr. 297:15-19; 298:5-7 (Luskie). Luskie called Comfort back less than a minute after the end of the recorded call. Tr. 285:4-286:5. He did not answer but two minutes later, Comfort called Luskie back and engaged in two unrecorded phone calls. One lasted 10 minutes and the second lasted nine minutes. Tr. 287:11-14 (Luskie); Ex. OE-019 at 5, 6. Comfort and Luskie do not recall the details of these phone calls. Luskie recalls he was called “stupid and foolish,” for saying those things over a recorded line but Comfort did not give him any new information. Tr.292:1-13; Ex. OE-231 at 183:17-18. *See also* Tr. 292:14-294:3; 298:5-7. Comfort recalls he was angry during the first cell phone call and that in the second they agreed to inform Bass and BP Compliance of the recorded call. Tr. 1216:10-14; 1230:6-9 (Comfort); *see also* BP-016 at 10:16-18. Enforcement Staff is correct that these limited recollections are not credible.

107. Enforcement Staff is correct that BP’s scienter may be established by the conduct any of the traders. However, Comfort is the key since he was the “point owner” of HSC for the Texas team.⁷⁶ Tr. 197:9-15 (Lukefahr).⁷⁷ As a result, it is found that scienter for

⁷⁵ Tr. 278:8-12; 281:6-17. Luskie testified that he realized Comfort was uncomfortable during the recorded call. Tr. 283:22-23.

⁷⁶ At this point in time Comfort had been in the gas industry for 17 years. Ex. BP-014 at 4:9-5:11. During most of that time he traded physical gas. However, from 2005-2007 he moved up to become a financial trader on BP’s California desk, (Tr. 1083:10-16, Comfort) but he did not perform well in this role and in mid-2007 he was given two months to find a new job at BP. Ex. OE-029 (Comfort’s 2007 mid-year evaluation). In mid-December 2007 he started with the Texas team. By mid-2008, still executing some

the Texas team can be established solely through his intent and actions. Additionally, it is found that Barnhart knew, gave tacit consent or turned a blind eye to the scheme because she benefitted from it.

108. Enforcement Staff's theory is that Luskie was "guileless." EF IB at 51 n. 170. However, the evidence shows that Luskie knew the scheme since he revealed it to Parker⁷⁸ and on the November 5, 2008 phone call. As a matter of fact, this very intelligent and successful new trader was proud of the fact that they were making money from this scheme as demonstrated by his action to reveal the scheme to Parker. By November 5, 2008, Luskie had been on the Texas team for five months and had daily opportunities to watch Comfort and Barnhart trade. He testified he participated in discussions with Comfort and Barnhart every day about the Texas team's views, strategies and actual trading. Tr. 250:22-251:13 (Luskie).⁷⁹ Luskie testified he traded for Comfort on August 2008 when Comfort was absent. He traded his HSC-Katy position. Tr. 450:16-25. He also traded the same position for Comfort three days in October 2008. Tr. 488:18-22. He also participated in a conversation with Comfort and Barnhart on October 31, 2008 at the end of the trading day when they observed an unknown counterparty who had lifted a high volume of offers late in the trading day and increased

financial trades, his "primary responsibility was short-term physical trading and transport optimization in Texas." This included next-day physical trading at HSC and Katy and managing BP's daily firm transport capacity on HPL. Ex. OE-028 at 3; Tr. 328:11-16. Physical trading involving asset optimization generally generated more modest bonuses than financial trading. Ex. OE-028 ("Financial traders generally receive a higher percentage of the value they generate."); Tr. 663:20-665:5 (Luskie); Tr. 1157:1-1158:7 (Comfort); Tr. 831:6-22 (Ketcherside); Tr. 210:3-10 (Lukefahr). Keo Lukefahr testified there is a career path for natural gas traders, starting with physical trading and moving up to financial trading. Tr. 190:20-193:16. Physical trading results in "physical delivery of the actual gas," while financial trading involves a "derivative on that underlying physical molecule." Tr. 156:9-11.

⁷⁷ Comfort was accountable for marking the value of the HSC market, he estimated the basis and the physical premium and the cash balance of month values. Tr. at 197:16-23; 198:4-14; 198:20-22.

⁷⁸ In his pre-filed testimony Luskie claimed that he was "distracted" by a simulation game when talking to Parker. However, at the hearing he admitted that the conversation occurred "between data sets during a down period." Tr. 259:8-260:4.

⁷⁹ Luskie sat next to Comfort as he traded the HSC and Katy positions. Tr. 490:11-13. In a November 3, 2008 phone call, Luskie showed he had an understanding of the Texas team's positions and trading activities. Exs. OE-021; OE-163 (transcript).

the *Gas Daily* average for the day by approximately ten-cents. They recognized this as a possible manipulation of physical trading to affect a financial position and the team speculated that the counterparty might have an opposite financial position (a long position) that would benefit from an increase of the *Gas Daily* index. Tr. at 368:2-371:13. Luskie's contention that the tape is a mischaracterization is not credible.

109. At a minimum Enforcement Staff is correct that Luskie understood that the Texas team's use of the HPL transport capacity in this period was different from the typical use of pipeline capacity to arbitrage prices between two locations.⁸⁰ He was learning from watching his mentors Comfort and Barnhart. Further evidence of Luskie's understanding is his trading on behalf of Comfort on October 16 and 17, 2008 when Comfort was out of the office. He lost money on his transport from Katy to HSC and sold early at HSC. Ex. OE-239 (Luskie's Oct. 16, 2008 next-day fixed price trades on ICE); Ex. OE-236 (Luskie's Oct. 17, 2008 next-day fixed price trades on ICE); Tr. 566:22-567:12 (Luskie). This is in contrast to his trading in August 2008, when he also traded for Comfort. In August Luskie generated positive cash and transport P&L. Ex. OE-237 (Luskie's Aug.

⁸⁰ The evidence in this record shows that at this point in time Luskie had had limited training on trading practices which may constitute a physical for financial market manipulation. Before joining the Texas team he attended two BP market manipulation trainings which did not discuss FERC's anti-manipulation rule. Ex. BP-019 (Luskie's training log); Tr. 347:9-15; Ex. OE-047; Tr. 350:18-361:9 (Luskie) (no examples of physical for financial trading). The only example of market manipulation in a training involved the CFTC and it was on banging the close (artificial price based on end of day trading). Ex. OE-241; Tr. 657:16-662:14 (Luskie). At the ATC there was no compliance training about a physical for financial type of market manipulation. Ex. OE-235; Tr. 345:17-346:4 (Luskie). However, this does not negate the fact that he knew, at that point in time, how the trading was being conducted or the manipulative scheme. Whether he knew at that point in time that the trading violated Commission rules is only indicative of Comfort's intent to manipulate the market by making Luskie an accessory to his manipulative conduct. From this record one is left to wonder about Luskie's intent or motivation and whether he indeed was guileless. It is a close call. He was smart enough to figure it out and smart enough to leave doubt. Moreover, to conclude market manipulation in this case, it is sufficient to hold Comfort and Barnhart accountable. Luskie to a certain extent was a whistle blower (whether he knew it was manipulation or not), but for him, the manipulation would still be going on. It is found to be a stretch of the imagination to hire individuals to conduct such a serious enterprise and not adequately train them on market rule violations. At a minimum, it indicates negligence on the part of the hiring authority or lack of respect for the rules. See BP's compliance program below. Enforcement Staff avers Luskie prior to his conversation with Parker had not paused to question the legality of Comfort's physical trading. There is no evidence in this record to support this and Enforcement Staff does not cite any.

21, 2008 next-day fixed price trades on ICE); OE-238 (errata to Ex. OE-237); Tr. 476:10-16 (Luskie). This evidence corroborates that Luskie understood the scheme and helped execute it.

110. Parker's deposition testimony described what Luskie said as the "gist of what he said to me was that he could or would make a decision not to flow his transport if it would benefit his cash position." Ex. OE-219 at 53:16-18. Parker was concerned that what Luskie said about the HSC and HPL trading and transport activities "made it sound as if [they] traded physical position in order to affect [their] paper position"⁸¹ and could be perceived as market manipulation. Ex. OE-219 at 53:12-13 (Parker Dep. Tr.).⁸² Parker suggested that Luskie speak to his manager, Kevin Bass, to make sure that he was not doing anything wrong. Ex. BP-016 at 7:13-14 (Luskie).

111. BP's allegations that they did no wrong are not credible. For instance, right after the November 5, 2008 phone call, Kevin Bass⁸³ immediately indicated his support for Comfort and the BP defense that Luskie was young and inexperienced, and had misspoken about trading he knew next to nothing about. At the time he started making these allegations Bass had not reviewed any trading data and did not wait for compliance to conduct an internal inquiry. Bass told his superior, Calvin Schlenker, who in turn communicated it to Parker in a telephone call on November 7, 2008. Schlenker based on

⁸¹ Tr. 261:22-262:1; 330:14-18 (Luskie).

⁸² Parker recalled that Luskie "said something to the effect of something that we could do or do in - or is to not flow our transportation, depending on our cash position." Ex. OE-219 at 52:23-53:1. Parker said he was "really surprised that [Luskie] said what he did. And I - I 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." *Id.* at 54:15-19. *See* Tr. 263:4-6, 265:12-17 (Luskie).

⁸³ Kevin Bass died in June 2009 before he could be deposed for this case. BP argues in its IB that Parker refutes Enforcement Staff's theory of the case in a November 7, 2008 phone call to Calvin Schlenker (head of South Gas Trading in 2008) stating they were talking about cash optimization (helping the cash position by not flowing transport). IB at 55. BP's argument is not supported by the evidence. Parker's deposition states that "[t]he gist of what he said to me was that he could or would make a decision not to flow his transport if it would benefit his cash position." Referring to cash position, he stated he was "talking about a position that has exposure to the cash market." Ex-OE-219 at 53:16-22. Luskie testified that "cash positions" that generate daily P&L include any spread position between HSC and Henry Hub that settled based on the Gas Dailies. Tr. 612:1-6. These are the types of positions Bergin showed benefited from the Texas team's manipulation.

what Bass communicated to him, told Parker in a telephone call on November 7, 2008, that all the cash and asset optimization trading going on in the Texas team was compliant and that they had done nothing wrong. Ex. OE-164 (transcript of November 7, 2008 call) Tr. 1978:22-24; 1979:18-21; 1981:15-19; 1982:4-12 (Schlenker). Schlenker told Parker that Luskie was confused and that he had been speaking about something in which he was not involved. Tr. 1978:14-24; 1979:10-25; 1980:5-8; 1977:8012.

112. In *Barclays*,⁸⁴ the Commission considered the following evidence to reach its conclusion on intent. First, it considered the compelling evidence presented by OE Staff which demonstrated that the Individual Traders understood the impact their Dailies trading would have on the Index and that they executed those trades for precisely that reason, communicating freely about “trying to drive price,” “protect[ing] their positions, and “mov[ing]” or “affect[ing]” the Index. It went on to state that speaking documents as direct evidence of a violation are rare in fraud and manipulation cases. Additionally, the Commission noted that fraud and manipulation cases, do not require direct evidence of intent and instead typically rely on more indirect inferences of intent from circumstantial evidence. The Commission pointed out that in *Barclays* there were “speaking” documents and in addition in some instances OE Staff was actually able to tie the expressions of intent in such documents to contemporaneous (or near contemporaneous) trading in furtherance of the scheme. In addition, Respondents’ in the *Barclays* case were not able to rebut this evidence. The same is true in the case at bar.

113. Additionally, the Commission has found that evidence of “suspicious timing or repetition of transactions, execution of transactions benefiting derivative positions, and lack of legitimate economic motive or economically irrational conduct” are evidence of scienter sufficient to support a finding of manipulation.⁸⁵ All of these are present in this case.

114. Dr. Abrantes-Metz and Bergin confirmed the manipulative scheme by examining the trading data before and during the Investigative Period. As Dr. Abrantes Metz testified, the unique confluence of changed trading patterns by the Texas team in the Investigative Period do not make economic sense and cannot be explained by general market conditions. The changed trading patterns confirm the outline of the manipulative scheme set forth in the November 5 recorded call. Ex. OE-211 at 9:4-13; 18:3-19:3. The only explanation for the changed trading patterns is market manipulation. As the Commission has stated: “its approach to enforcement: will be based on a consideration of the facts and circumstances of the conduct at issue to determine its purpose and intended or foreseeable result. We recognize that manipulation of energy markets does not happen

⁸⁴ *Barclays*, 144 FERC ¶ 61,041 at PP 7, 75.

⁸⁵ *Barclays*, 144 FERC ¶ 61,041 at PP 62-64.

by accident. However, *we also recognize that intent must often be inferred from the facts and circumstances presented.*” *Barclays*, 144 FERC ¶ 61,041 at 75. The evidence of these coordinated trades confirms that the Texas team acted with scienter.

115. Their actions began in mid-September 2008 when Hurricane Ike caused prices at HSC to sharply decline relative to Henry Hub.⁸⁶ This resulted in the Texas Team pre-existing HSC-Henry Hub spread position⁸⁷ becoming very valuable.⁸⁸ On September 17, 2008 Barnhart did not pursue an opportunity to make substantial profit on at least 3 contracts of the spread, in a BLMO trade.⁸⁹ Later that day the BALMO offer prices reduced significantly.⁹⁰ Barnhart agreed that she lost opportunities by not buying back more of their short position and she lost the chance to immediately lock in a substantial portion of value created by the hurricane.⁹¹ Tr. 1034:25-1035:7; Ex. OE-001 at 70:9-71:5

⁸⁶ Ex. OE-001 at 68:13-19.

⁸⁷ Ex. OE-001 at 64:13-16 (the Texas team had a short September HSC to Henry Hub spread position of 17.5 contracts per day when Hurricane Ike hit.) (Bergin).

⁸⁸ The reduction in HSC prices resulted in sizeable realized and unrealized (potential) profit for the Texas team’s HSC-Henry Hub spread position). By the end of trading on September 16, the value of the position increased to \$3,499,425 where more than half (close to \$1.9 million) was unrealized profit. Ex. OE-001 at 69:1-14. The evidence in this case shows that traders viewed their short HSC to long Henry Hub spread financial position as a major position in their book. Traders also knew that they benefited when the HSC *Gas Daily* index price decreased relative to other points including but not limited to Henry Hub. Tr. 682:5-684:21 (Luskie) (when HSC prices weaken, the spread widens and the Texas team position is more valuable); *see also* Ex. OE-161 at 47:13-48:3 (Bergin Reb. Test.). The November 3, 2008 recorded call between Luskie, Barhart and Comfort focused on their short HSC *Gas Daily* exposure, and they expressed hope that the HSC prices would decline relative to other points. Ex. OE-021 (Nov. 3 call); Ex. OE-163 (transcript); Tr. 671:24-672:20.

⁸⁹ Barnhart testified that on September 17, 2008 she received an offer to close out four contracts of the spread position at \$1.50. If she had closed out these contracts she would monetize some of the unrealized profit. She only closed out one contract. Tr. 1033:20-1034:1; Exs. OE-001 at 70:9-71:5; OE-25 (IMs dealing with offer).

⁹⁰ Tr. 1034:10-21 (Barnhart) (the spread narrowed to \$1.08); Ex. OE-001 at 70:18-71:5.

⁹¹ The Texas team’s ability to realize the value on the rest of their spread that they had not locked in would be determined by whether the HSC-Henry Hub *Gas Daily* spread

(description of lost opportunity). The very next day is the beginning of the Investigative Period and the Texas team started their scheme selling heavy and early next-day gas at HSC.

116. Bergin testified that in evaluating the Texas team traders' intent, "it makes sense to think in terms of the probabilities of an upside versus a downside result. He said that this could be seen by examining market conditions in mid-September after Hurricane Ike. According to Bergin, the Texas team knew that as a result of the hurricane "their HSC-Henry Hub spread position had become very profitable" but much of that profit was unrealized. Bergin further testified that the Texas team would "have known that they would actualize more of their unrealized profit the slower the HSC-Henry Hub spread narrowed each day until the end of the month." Further, Bergin testified that the "Texas team's expected losses on physical trading, even with a new heavy and early sales pattern, were likely to be small." Ex. OE-001 at 110:4-12. Specifically, Bergin determined "that in late-September, for every cent that the Texas team could slow the narrowing of the HSC-Henry Hub spread, their spread value would retain \$19,800." *Id.* at 110:13-16.

117. According to Bergin, the spread was \$2.345 on September 18, and predicted by BP's own marks to narrow by more than a dollar over the twelve flow days left in the month, "it was reasonable for the Texas team to believe that their potential for gain on the spread, by slowing its decline a few pennies every day, far outweighed any losses from their physical trading. In contrast, the likelihood of losing \$19,800 per day on their physical trading was much lower because trading physical fixed-price against the physical *Gas Daily* is less risky." Bergin concluded that the Texas team traders believed at the outset of the Investigative Period that the additional profits on their spread position in September would likely outweigh any physical losses incurred from their physical trading behavior intended to suppress the HSC *Gas Daily* index.⁹² *Id.* at 110:16-111:3. He reached the same conclusion for October. *Id.* at 111:1-5. Bergin continued:

I conclude it was likely that the Texas team traders believed that their selling had contributed to the wider spread and to the greater profitability of their spread position for that month. Further, the Texas team's late October

widened or narrowed over the balance of September – a narrowing of the spread would reduce the amount of profits realized. Ex. OE-001 at 69:1-16; 71:12-16.

⁹² Before the Investigative Period, in 2008, the Texas team had not lost more than \$10,000. Ex. OE-001 at 103, Figure 12. Their largest one day loss was \$12,864. *Id.* at 103:9-11. The Texas team knew that trading physical fixed-price against the *Gas Daily* index is less risky in general. Tr. 677:19-25 (Luskie). *See also* Ex. OE-001 at 110-111; Tr. 210:7-21 (Lukefahr).

decisions to take even larger November physical and financial positions into the cash month also supports the conclusion that they believed their effort to suppress the October HSC index had produced an overall benefit to their bottom line.

Id. at 111:12-17. Bergin's testimony is given substantial weight. Consequently, it is concluded that the Texas team believed that their potential for gain on the HSC-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 HSC.⁹³

118. The trading data supports the findings regarding intent and manipulation or the fact that they used their physical trading to suppress the HSC *Gas Daily* index to benefit their financial positions. The Texas team's HSC-Henry Hub spread position made more than \$1.5 million in profit from September 18 to the end of the month. Ex. OE-001 at 72:14-18. They only lost around \$34,000 on the next-day physical trading. *Id.* at 78:14-20. During the first few days in October, Comfort increased the Texas team's HSC-Henry Hub swing spread by more than doubling the spread position Barnhart had put on before the month. Comfort continued the changed trading patterns throughout October. Ex. OE-277 (Comforts October 2008 BALMO swing swap trades from Entegrate data); Tr.1427:10-1432:2 (Comfort). The changed trading patterns resulted in consistent and heavier losses on the Texas team's next-day fixed-price selling. Exs. OE-001 at 85:2-88:2 (Bergin); OE-129 at 83:1-87 (Abrantes-Metz). Comfort did not dispute the testimony showing that his trading patterns in the Investigative Period, up to the November 5 call, resulted in physical losses. See Ex. BP-014; Tr. 1356:11-1357:19 (Comfort).

119. The evidence in this case shows that Comfort was the primary trader of the Texas team's 2008 next day trading at Katy and HSC. Tr. 1285:3-7 (Comfort); Ex. OE-211 at 29:7-14 (Abrantes-Metz). Comfort was aware of the losses as each cash trading session progressed. As Comfort testified, traders are generally aware of their physical cash P&L since they know the price they transacted at and they also have an idea where the *Gas Daily* indices will set throughout the trading session. Tr. 1419:8-15. The negative physical P&L was calculated on a daily basis and shown on the Katy Ship Sheets

⁹³ The Texas team had a net long baseload position at Katy in the second half of September due to force majeure events from Hurricane Ike (reduced baseload demand at HSC). Exs. OE-001 at 68:7-12; OE-161 at 23:12-25:2, Figure 1 (Bergin). The Texas team's paper position was tied to HSC *Gas Daily* index; thus, selling the additional volume at HSC would help suppress prices and help their paper position. Selling the additional volume at Katy would not have the same effect. Ex. OE-001 at 104:11-108:15.

completed each day.⁹⁴ Comfort used the Katy Ship Sheets during each cash session. Exs. OE-013 (Katy Ship Sheets); 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).

120. Enforcement Staff is correct that consistent, repeated losses on physical trading such as the ones in this case are a marker of an intent to manipulate in a cross-market manipulation. *Barclays*, 144 FERC ¶ 61,041 at P 43. Further, Comfort's manipulative intent in the Investigative Period is established by the fact that up until the Investigative Period he had a track record of being able to consistently generate physical profits on both his next day physical trading at HSC and his use of the HPL transport capacity. Ex. OE-001 at 102:16-22. Lukefahr testified that Comfort made a good living in his asset optimization position by consistently making a profit on his physical trading. Tr. 210:11-13. In October again the financial spread position was profitable (the trading to suppress the HSC *Gas Daily* index was successful). Ex. OE-001 at 87:2-88:2. Comfort knew that the HSC-Henry Hub spread position was making money since the HSC-Henry Hub price spread was wider during October than the average cost of the BALMO swing swaps he had used to increase the spread position in early October. *Id.*

121. The scheme was repeated in November by building a coordinated financial short position at HSC and a larger net long Katy baseload position. Also Comfort built and grew a HSC financial short position for November 2008 which resulted in a spread position larger than the Texas team had going into any other month in 2008 (except March). *Id.* at 92:11-93:9. In a November 3, 2008 recorded call the Texas team discussed this position's large effect on their November 2008 P&L and how heavily dependent their monthly profits were on HSC weakening against other locations. Exs. OE-021 (recorded call); OE-163 (transcript); Tr. 670:21-672:14.

122. Their November baseload physical gas positions were developed beginning in October as part of the coordinated scheme. They began October with small November baseload gas positions at Katy and HSC. Throughout the month Comfort built new November baseload positions at both places. At Katy, Comfort built the largest net long

⁹⁴ The Katy Ship Sheets separately tracked each day's estimated cash P&L (combined performance against the Katy and HSC indices) and the transport P&L (transport diff) and combined both for a total physical P&L number. Tr. 520:9-11 (Luskie). The total physical P&L was an estimate of whether the Texas team made or lost money at Katy, HSC and on transport in the next-day cash session for that day. Tr. 606:17-607:6 (Luskie). Luskie testified that the P&L formulas embedded in the Katy Ship Sheet 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. Tr. 606:17-24. Therefore, the use of the Katy Ship Sheets by Enforcement Staff's witnesses was correct.

physical position for the year by buying new November baseload contracts (from 3 contracts per day to more than 20 contracts per day). At HSC, he reduced the Texas team's November HSC short baseload position to close to zero (the November short HSC position was reduced to 2.7 contracts thus they started the month with a combined net long physical baseload position at Katy and HSC of 18.3 contracts per day). Ex. OE-001 at 88:9-89:12 (Bergin). The team's increased net long baseload positions were voluntary or based on transactions with marketers as opposed to obligations with producers or end users and were largely put on by Comfort consulting with Barnhart. Ex. OE-161 at 26:1-27:12 (Bergin); Tr. 1346:18-22 (Comfort). Enforcement Staff is correct that their losses in physical trading at HSC should have indicated a contrary result. Exs. OE-001 at 89:1-7 (Bergin); OE-129 at 133:7-134:8. Bergin testified he would not have expected a profit-maximizing trader to take a larger net long Katy baseload position due to the large September and October physical trading losses. Ex. OE-001 at 88:9-8. No new market information would have demanded this build up. Especially in light of the fact that prior to the Investigative Period in 2008 the Texas team held their long Katy and short HSC baseload positions generally equivalent. This baseload position strategy reflected a neutral view as to the direction of Katy and HSC prices relative to each other and had less of an obligation to trade in the next-day market to flatten the physical position. Ex. OE-001 at 57:2-58:10. The change in baseload strategy resulted in larger amounts of gas that they sold each day in the next-day market. Ex. OE-161 at 28:1-29:5. (Bergin). The negative P&L shows that this was in furtherance of their scheme. Ex. OE-001 at 102:16-104:10.

123. The evidence in this case shows that the only explanation for these monthly positions is that they were intentional acts to further the Texas team's scheme. Dr. Abrantes-Metz testified that a central feature of the manipulative scheme was the transport of excess volumes of gas to HSC that otherwise would not have been sold there. The advance set up of large net long baseload positions at Katy, prior to November, allowed the Texas team to obtain a large daily supply of gas that it could sell and transport daily to HSC in furtherance of the scheme. Ex. OE-161 at 28:1-29:5. Moreover, the traders were indifferent to their next-day physical P&L and this reinforces their manipulative intent. Tr. 678:15-18 (Luskie). On the November 3 recorded call no mention was made of the physical cash P&L at HSC on that day, even though cash had been strong and the Texas team had been a large fixed-price seller. Tr. 675:4-18 (Luskie); *see also* Exs. OE-021 (November 3 call); OE-163 (transcript). As noted by Dr. Abrantes-Metz and Bergin, the Texas team's P&L on their HSC trading and on HPL transport improved after the November 5 call was reported to Bass and BP Compliance. Exs. OE-001 at 90:6-91:21; OE-211 at 46:1-10. It is significant that the Texas team was able to reduce the consistent (and larger) losses once their trading came under scrutiny. It is found that this is further evidence that during the Investigative Period these losses would not have occurred had the Texas team not had a manipulative intent (had they not been intentionally using their next-day fixed price trading to suppress the HSC *Gas Daily* Index).

124. Moreover, the evidence in this case shows that Comfort knew that the way in which the Texas team kept their books and calculated their cash P&L made it unlikely that management or BP Compliance would detect his scheme. 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 HSC. However, in 2008 BP Compliance did not review the Texas team's P&L. Tr. 2121:13-2122:6 (Simmons). At the end of the trading session, the next-day cash trades were rolled up by the BP Entegrate system with all of the Texas team's other physical and cash month positions. The cash P&L reported to management did not break out the individual components of the Katy Ship Sheet trading in a way that would isolate Comfort's actions. Tr. 610:24-611:10 (Luskie) (Bass received a "high-level understanding" of the Texas team's P&L).⁹⁵ Moreover, as Luskie testified, relative to the daily P&L the HSC and Katy next-day P&L was a very small component. Tr. 678:15-18 (Luskie); Ex. OE-087 at 23:18-24:14. Further, Comfort continued trading next-day gas profitably at Katy, thus he knew that even larger losses on the HPL transport and against the HSC index were most likely going to be overlooked. This is particularly evident in light of the fact that the cash P&L cell on the Katy Ship Sheet combined the HSC and Katy trades against these indices. Tr. 430:14-23 (Luskie). As Enforcement Staff points out, it is common practice to hide losses in large books.⁹⁶

125. Enforcement Staff is correct that Comfort's non-persuasive explanations or his failure to offer legitimate economic motives for his trading evidences scienter. *Barclays*.⁹⁷ For instance, Comfort testified that during the Investigative Period, "[a]ll of my trades stand on their own, have merit in their own accord, and fall within compliance, regulatory, legal, and ethical guidelines . . ." Ex. BP-014 at 9:9-10. However, as Enforcement Staff points out, he never explained why he did not alter his trading strategy during the Investigative Period after consistently losing money on his trading. Additionally, he never explained why he always made money before but lost money

⁹⁵ The yearly P&L considered for evaluations and bonuses did not separately break out the Texas team's HPL transport-related P&L. The Texas team's evaluations were based on gross margins from trading activity around all of the Texas team's positions (and SEGT's). Tr. 1414:19-1416:4 (Comfort); Ex. OE 115 (Comfort's evaluation based on gross margins).

⁹⁶ See *U. S. Commodity Futures Trading Comm'n v. Brooks*, No. 13 CV 6879 KMW, 2014 WL 4443446, at 3 (S.D.N.Y. filed Aug. 1, 2014) (trader falsified profits to hide losses); cf. *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 677-78 (S.D. Tex. 2002) (discussing Arthur Andersen's awareness of Enron's use of hundreds of partnerships, many with the sole purpose of concealing debts and losses). Enforcement Staff is correct that in the case at bar, Comfort relied on the size of the overall book to disguise the intentional losses.

⁹⁷ *Barclays*, 144 FERC ¶ 61,041 at P 62.

during the Investigative Period. His testimony disagrees with Bergin's and Dr. Abrantes-Metz's conclusions but he does not contest their analyses of his trading. He also does not dispute Bergin and Dr. Abantes-Metz' calculations and conclusions that his trading patterns during the Investigative Period resulted in consistent physical losses and that the daily losses were of greater magnitude than in the previous eight and a half months. At the hearing Comfort for the first time and in a qualified way, admitted that his next-day trading patterns at HSC in the Investigative Period were different from his trading during the first eight and months of 2008. Tr. 1286:9-1293:4; 1293:5-15. His only explanation was that they made some incorrect trades. Tr. 1411:18-22. This testimony in light of all the evidence in this case is not believable. Comfort agreed there was positive net P&L prior to the Investigative Period and losses from September 18 until the November 5 recorded call. Tr. 1356:11-1357:19. Moreover, Comfort did not contest the shift to net selling at HSC during the Investigative Period or that they sold more heavily at HSC earlier in the trading day. Exs. OE-274 and 274A, 256 and 256A, 258 and 258A, 260 and 260A, 270 and 270A; Tr. 1337:2-8; 1405:10-15; 1406:16-21. Comfort acknowledged various changes in trading from the Pre-IP to the Investigative Period. Tr. 1404:3-1410:6.

126. On the other hand, Enforcement Staff experts have conclusively shown that Comfort's allegations (incorrect or uneconomic trades) are not credible. As Dr. Abrantes-Metz testified, the confluence of factors in this case shows that there was no legitimate reason to explain the trading and that there was manipulation. Tr. 1915:13-24. She testified to "the essential statistical impossibility that the confluence of factors that we observe are due to anything else but manipulation." Tr. 1911:3-5. See Ex. OE-211 at 20, 22-25 (Tables 1.A, 1.B, 2 and 3). Comfort's trading was intentional and executed to suppress the HSC *Gas Daily* prices. The following are evidence of this. First, the shift to heavy early selling at HSC. The record in this case establishes that selling at HSC without an active Katy market could not be considered an arbitrage strategy. For instance, Luskie testified that his pre-Katy sales at HSC was a speculative strategy, rather than arbitrage, because "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. Even though both Comfort and Luskie attempted to describe this as a speculative "view" about the direction of the market that day⁹⁸ they acknowledged that heavy early selling at HSC created more risk,⁹⁹ and as a result, produced heavier losses in the Investigative Period. Moreover, Evans tried to explain the early selling at HSC as a

⁹⁸ Tr. 544:5-14; 580:7-12 (Luskie); 1343:5-18 (Comfort).

⁹⁹ 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.).

result of an increased long baseload position that had a “physical risk” associated with flattening the increased physical position which outweighed the risk of losses on the cash P&L (“price risk”) created by selling disproportionately early.¹⁰⁰ Bergin testified that this testimony is incorrect. Ex. OE-161 at 58:6-59:14. Comfort conceded that he could not recall ever having a baseload position at Katy in 2008 that was too large to optimize the transport successfully. Tr. 1413:7-24. Luskie and Barnhart also contradict Evans’ assertions concerning trading in the Investigative Period to “manage risk.”¹⁰¹ Luskie testified that early selling increased price risk and Barnhart agreed that next-day fixed-price physical trading in the second half of September 2008 “was not a way to manage the fixed-price financial risk” or a way to manage¹⁰² the outright fixed-price risk. Tr. 547:9-12 (Luskie); Tr. 989:13-990:4 (Barnhart). As Dr. Abrantes-Metz testified, it was irrational for Comfort, a successful physical trader, to persist in a consistently losing strategy such as heavy early selling without a bad motive.¹⁰³ Ex. OE-129 at 83:2-87:22; OE-161 at 14:13-15:9, 49:12-51:2

¹⁰⁰ Ex. BP-037 at 28:3-29:5.

¹⁰¹ BP IB at 47; Tr. 2619:8-15 (Evans).

¹⁰² BP supports Evans testimony about “risks” with a quote from Luskie about “risk exposure buckets.” BP IB at 48 (citing Tr. 647:10-648:8 (Luskie)). Enforcement Staff is correct that this is misleading. Luskie testified that his reference to other “risk buckets” was only relevant to the remainder of the monthly position, and that risk could only be addressed by a balance of the month (BALMO) trade and not in the next-day market. He agreed the only consideration when trading a beginning of day position at fixed-price was how he would do against the *Gas Daily* indices and on transport. Tr. 648:13-651:19.

¹⁰³ In its IB, BP argues that early selling had a “risk perspective” component since the traders needed an “adequate ‘home’ for the long gas position,” and viewed the HPL transport less as an instrument for arbitrage between two locations and more as a valuable tool to increase selling alternatives. BP IB at 45. There is no record support for this proposition. Enforcement Staff is correct that this new theory is contradicted by evidence in this record. First, the Texas team’s repeated purchases of more next-day gas early at Katy. Ex. OE-161 at 64:1-13 (Bergin) (early purchases at Katy on October 13 increased their physical risk); Ex. OE-211 at 79:12-82:5 (Abrantes-Metz) (early HSC selling and Katy buying). Second, Comfort’s November 20, 2008 HPL Transport Memo which spells out an unqualified arbitrage strategy for the HPL transport capacity. Ex. OE-036 at 2. Luskie testified the memo was consistent with the Texas team’s arbitrage strategy during the Investigative Period. Tr. 447:25-450:15. Third, the traders’ testimony confirms that they viewed their increased net long baseload positions in the Investigative Period as consistent with their stated goals of optimizing the transport and seeking profit in the cash markets at Katy and HSC. Comfort could not recall ever having a baseload

127. 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 HSC by selling Katy gas and buying HSC gas.”¹⁰⁴ Ex OE-161 at 75:13-15. 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). As Bergin testified, during the Investigative Period the Texas team “turned off” their transportation on a single day (October 22) out of a total of 73 flow days. This is directly in contrast with the first eight and a half months of 2008, when they turned off transport on 70 percent of the days or 183 of 261 flow days. Their decision to routinely turn off transport when prices dictated resulted in an overall positive P&L before the Investigative Period. Ex. OE-161 at 77:7-78:2, Figure 12. Second, Comfort did not give any reason why the Texas team frequently failed to “unwind” or “turn off” the HPL transport during the Investigative Period when it was economic to do so. Further, he denied any specific memory of not turning off transport in the Investigative Period. Tr. 1278:8-14. As Bergin testified, the Texas team’s trading behavior during the Investigative Period was consistent with an intent to suppress the HSC *Gas Daily* index. Ex. OE-161 at 78:2-79:5. This testimony is in direct disagreement with Evans testimony on the use of the HPL transport in the Investigative Period, Evan asserted that it was fully responsive to HSC/Katy price differentials.¹⁰⁵

position at Katy in 2008 that he felt was too large to optimize the transport successfully. Tr. 1413:7-24. Additionally, Luskie testified that a net long baseload position of about 110,000 to 115,000 MMBtus was not unmanageably long, “it’s kind of what we do”. Tr. 507:10-18.

¹⁰⁴ Bergin testified that each day, the Texas team’s baseload gas deals appeared as a long or short beginning-of-day position on the Katy Ship Sheet. Ex. OE-001 at 49:15-50:4; OE-161 at 56:6-19; Tr. 1488:14-1489:16 (Bergin) (describes Texas team’s “must-sell” baseload setup). The Texas team had long Katy and short HSC baseloads during the Investigative Period which allowed them to flow some of their net long position from Katy to HSC, but prices should have been relevant and critical in the economic decision whether to flow gas or not. Bergin explained as follows: if HSC prices were below Katy prices, the Texas team could have sold their baseload positions at Katy, “turned off” their transport, and bought next-day gas at HSC to more economically meet their HSC short baseload obligation. Ex. OE-161 at 29:9-14, 66:19-67:2. Enforcement Staff is correct that their experts proved by various analyses that the Texas team’s choice to pass up opportunities to “turn off” some or all of their HPL transport in the Investigative Period when it was economic was additional proof that the Texas team was not responding to price signals at HSC. *Id.* at 74-79 (describing the Texas team’s failure to turn off transport); Ex. OE-129 at 89:18-101:4 (calculates excess volume the Texas team shipped to HSC) (Abrantes-Metz).

¹⁰⁵ As Luskie testified, purposely not unwinding transport when it makes

Bergin's testimony is given significant weight. On the other hand, Comfort's lack of memory of significant matters,¹⁰⁶ his testimony that he did nothing wrong and that trading during the Investigative Period was business as usual¹⁰⁷ are not credible¹⁰⁸ in light of the evidence in this case.¹⁰⁹

economic sense to do so would bring gas molecules to a market that did not need them. Tr. 385:12-18. He also acknowledge that flooding a market with additional molecules it does not need could be an aspect of a market manipulation. Tr. 382:18-23.

¹⁰⁶ Tr. 1217:14-1219:14.

¹⁰⁷ Tr. 1218:15.

¹⁰⁸ Kevin Bass's review of Comfort is also not credible. Ex. OE-115 at 3; Tr. 1441:3-1442:1 (Comfort). There is no record evidence to support his favorable comments and he did nothing to investigate the November 5 phone call, he did not even review the Team's trading data. Tr. 1443:17-1447:22 (Comfort).

¹⁰⁹ Likewise, Barnhart's written exculpatory testimony is not credible. As she testified at the hearing, her written testimony lacked support and relevance. Tr. 906:10-17, 965:1-4, 970:6-12, Tr. 907:8-11, 973:6-22. She was a member of the trading team at the time in question. Tr. 883:2-13. She was the one who primarily traded financially for the Texas team at HSC and Katy. Tr. 877:5-7. She and Comfort jointly developed their views and traded both physical baseload and financial positions in and around HSC during the Investigative Period. Ex. BP-020 at 6:15; Tr. 881:6-11, 882:12-14 (Barnhart); Tr. 1346:18-22 (Comfort). It is found that Barnhart most likely knew about the additional HSC to Henry Hub spread positions, that the Texas team benefited from lower HSC *Gas Daily* prices and that the next-day fixed-price trading was suppressing the index and increasing the team's P&L. Moreover, Bergin responded to all of the potential justifications Barnhart provided in her written testimony and found that there were macroeconomic impacts of the hurricanes and the financial crisis but these occurrences do not provide an explanation for the Texas team's uneconomic trading at HSC and the use of their HPL transport during the Investigative Period. Ex. OE-161 at 17-42. Bergin responded to BP's financial crisis excuse with his review of the creditworthiness of the Texas team's next-day fixed-price counterparties. *See* Ex. OE-161 at 30-38. He found a lack of material change in the number of counterparties and the Texas team was able to sell gas at Katy or HSC in the Investigative Period. *Id.* Moreover, Enforcement Staff is correct that BP's challenge to this testimony based on the lack of use of certain ICE data received from the CFTC fails. Because the data was unclear, and its probative value in question, the data was deemed inadmissible. BP IB at 42. *See* Tr. 1797:15-1802:18. Further, Bergin responded concerning the impact of the hurricane and stated that generally the impact of fundamentals, such as weather events, are reflected in prices. Ex. OE-001 at 67:15-68:12 (describing immediate effects of Hurricane Ike); *see also* Ex. OE-

128. Based on the evidence in this record it is found that BP through the Texas team, acted with intent to manipulate the HSC *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.

3. Jurisdiction

Parties Contentions

129. Enforcement Staff claims it proved that BP's conduct during the Investigative Period is subject to the Commission's jurisdiction. EF IB at 71. According to Enforcement Staff Section 4 of the NGA "in connection with" language applies to "situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction." Enforcement Staff contends NGA § 4A authority attaches if a manipulative scheme's conduct is intended to affect jurisdictional transactions. EF IB at 72. In this case, Enforcement Staff maintains it proved the Commission's jurisdiction in three ways. EF IB at 71.

130. First, the Texas team's effect on third-party jurisdictional sales of interstate gas for resale based off the lowered HSC *Gas Daily* index. EF IB at 71. Second, an interstate pipeline and its shippers made jurisdictional cash-out transactions priced off the manipulated HSC *Gas Daily* index. EF IB at 71. Third, BP made next-day, fixed price natural gas sales of interstate gas at HSC for resale. EF IB at 71. In every case, these transactions were jurisdictional. EF IB at 71. BP's manipulative conduct was "in connection with" and affected sales for resale and cash-out transactions based off the HSC *Gas Daily* index. EF IB at 71. BP's own sales for resale were part of their manipulative scheme, and are therefore jurisdictional sales "in connection with" BP's manipulation. EF IB at 71.

131. Enforcement Staff claims the 46 examples it submitted of third party physical natural gas transactions are jurisdictional and were priced off the HSC *Gas Daily* index. EF IB at 75. These transactions were sales of natural gas in interstate commerce, the sales were for resale, and they were not "first sales."¹¹⁰ EF IB at 75-76. Their

161 at 17:1-29:18, 33:1-7. Again, this Bergin testimony is given significant weight.

¹¹⁰ "First sale" is a sale from producer to consumer, unless and until the gas is purchased by an interstate pipeline, intrastate pipeline, or local distribution company or affiliate thereof. 15 U.S.C. § 3301 (2) (21) (A) (2000), cited by EF IB at 64, n. 284. The NGPA, 15 U.S.C. §§ 3301 *et seq.* (2000) and the Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989) exclude all "first sales" from the Commission's NGA jurisdiction. EF IB at 75, n. 284.

characteristics qualify them as Commission jurisdictional transactions. EF IB at 75. These jurisdictional sales were priced off of the HSC *Gas Daily* index. EF IB at 76.

132. For example, Enforcement Staff states that the record establishes Northern Natural Gas Company (NNG) priced imbalances using the HSC *Gas Daily* index during the Investigative Period. EF IB at 78. NNG did this as part of its FERC Gas Tariff cash-out transaction process. EF IB at 78. Cash-out transactions are used by both shippers and pipelines in accounting for receipt and delivery imbalances. EF IB at 78. A cash-out transaction between shippers and an interstate pipeline falls under the Commission's jurisdiction. EF IB at 78. NNG, during the Investigative Period, billed its shippers for imbalances using the Average Gulf Coast Monthly Index Price, which incorporated the HSC *Gas Daily* index. EF IB at 78. The HSC *Gas Daily* index therefore affected these transactions. EF IB at 78.

133. Furthermore, Enforcement Staff contends it proved that the Texas team's own next-day, fixed-price sales of physical gas at HSC during the Investigative Period included interstate sellers of physical natural gas for resale, which falls under the Commission's NGA § 1(b) jurisdiction. EF IB at 78. The sales were part of the Texas team's scheme to suppress HSC *Gas Daily* index through next-day fixed-price sales at HSC. EF IB at 67. Enforcement Staff provided 52 examples¹¹¹ of the Texas team's jurisdictional, next-day fixed-price sales for resale of physical natural gas during the Investigative Period. EF IB at 68. These sales were jurisdictional because they constituted (i) sales of interstate gas in interstate commerce; (ii) sales for resale; and (iii) not first sales. EF IB at 79.

134. Enforcement Staff avers BP's slippery slope argument that any entity reporting to any index would fall under Commission authority omits the requirement for the link between manipulation and Commission jurisdictional transactions as described in Order No. 670. EF RB at 26. The Commission's mandate, according to Enforcement Staff, is to protect its jurisdictional markets from manipulation. EF RB at 19. This mandate includes an entity intentionally manipulating an index that sets prices for Commission jurisdictional transactions. EF RB at 26.

135. Additionally, Enforcement Staff asserts that BP's testimony fails to rebut the evidence that BP's sales were made pursuant to the Commission's jurisdiction. EF IB at 73. Smead did not address third party jurisdictional sales priced off the HSC *Gas Daily* index. EF IB at 84. Nor did he address specifically whether BP's next-day, fixed-price physical natural gas sales were jurisdictional. EF IB at 85. Though Smead did testify

¹¹¹ Enforcement Staff states that Bergin set forth all facts and supporting evidence of these 52 examples in Appendix A of his rebuttal testimony, OE-161 at 110-174. EF IB at 79, n. 303.

about the volume of BP's HSC transactions, volume is irrelevant when determining the Commission's authority over manipulative conduct. EF IB at 85. Enforcement Staff claims it established the nexus between the fraudulent conduct and jurisdictional transaction here, in accordance with Order No. 670. EF RB at 33.

136. Enforcement Staff further challenges BP's claim that intracompany sales negate Commission jurisdiction. EF RB at 36. Specifically, BP claims 18 examples¹¹² fall under this category. EF RB at 36. Enforcement Staff states intracompany sales are not a factor in determining jurisdiction. EF RB at 36.

137. BP claims Enforcement Staff has failed to prove the Commission has jurisdiction in this proceeding. BP IB at 59. BP states it made no jurisdictional natural gas sales at HSC for resale relating to the alleged manipulative practices during the Investigative Period. BP IB at 59. Additionally, BP argues Enforcement Staff failed to allege or prove that the Commission possesses NGA jurisdiction over any transportation services in this case. BP IB at 59.

138. BP notes that section 1(b) of the NGA does not give the Commission jurisdiction over intrastate transportation, intrastate sales, direct sales, or first sales of natural gas. BP IB at 60. The Tape has been Enforcement Staff's "cornerstone" of this case, but that recorded call relates only to HPL, an intrastate pipeline outside Commission jurisdiction. BP IB at 60. Enforcement Staff also fails to connect BP's trading and alleged manipulative behavior to transportation in interstate commerce or sales for resale in interstate commerce, as required under NGA section 4A. BP IB at 60. Instead, Enforcement Staff presents flawed jurisdiction arguments, including arguing BP's alleged behavior affected prices generally and by providing examples of BP sales that at one point travelled over interstate pipelines. BP IB at 60-61. While Enforcement Staff relies on Order No. 670 in stating the Commission's anti-manipulation authority under NGA § 4 is not limited by NGA § 1, that order is inapplicable. BP RB at 32-33. That order predates multiple federal appellate decisions. BP RB at 32-33. Enforcement Staff's reliance on the Hearing Order is inapplicable here; it is also pending rehearing. BP RB at 33.

139. BP states that intrastate transactions affecting an index do not fall under the Commission's jurisdiction. BP IB at 61. Enforcement Staff's argument in this respect fails because it would extend the Commission's jurisdiction to transactions it otherwise would not reach, i.e., intrastate transactions. BP IB at 61. All intrastate and interstate transactions that are reported to *NGI* or *Platts* contribute to the index. BP IB at 61. BP asserts market participants are not required to report transactions to the publishers of *NGI* and *Platts*. BP IB at 61-62. If the Commission asserted jurisdiction over transactions

¹¹² Examples 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 33, 34, 36, 39, 44, and 46, in Appendix A to Ex. OE-161. EF RB at 38, n. 160.

contributing to the index, it would subject all parties reporting to those publishers to its jurisdiction, including those making non-jurisdictional intrastate transactions. BP IB at 62. This goes against both the section 1(b) of the NGA and the Court's holding in *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 519 (1947). BP IB at 62. Enforcement Staff's argument also conflicts with the NGA's plain language and purpose. BP IB at 55. Section 4A of the NGA's "in connection with" language must be read together with the limiting language of section 1(b). BP IB at 63.

140. Moreover, BP contends that cash-out transactions affecting the HSC *Gas Daily* index fall outside Commission jurisdiction. BP IB at 63. Though the HSC *Gas Daily* index is a component of a cash-out calculation, it does not follow that the Commission has jurisdiction over all sales that contribute to an index. BP IB at 64. This could lead to the Commission asserting "in connection with" jurisdiction over futures transactions or physical gas sales for resale that incorporate the NYMEX price as a component. BP IB at 64.

141. In addition, the Commission does not have jurisdiction over BP's direct sales in this case. BP IB at 65. BP contends all of its sales in this proceeding constitute intrastate sales. BP RB at 34. Enforcement Staff tries to demonstrate that some of the Texas team's transactions constitute "direct sales," where the Texas team sold interstate natural gas, not produced by BP, for resale at a fixed price at HSC. BP IB at 65. But BP contends none of these examples are connected to manipulative conduct. BP IB at 65. Even if they were in connection with the alleged manipulative conduct, these were all non-jurisdictional transactions. BP IB at 65-66.

142. BP asserts Enforcement Staff failed to make specific allegations that the BP sales Bergin identifies are subject to the NGA and tied to the alleged manipulation. BP IB at 66. Because the natural gas was transported on HPL either under an intrastate contract or non-jurisdictional Section 311 contract, the Commission cannot have jurisdiction over these transactions. BP IB at 67.

Discussion

143. The NGA provides for the Commission's jurisdiction generally over interstate natural gas. The NGA states, in part,

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . . and to natural-gas companies engaged in such transportation or sale . . . but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas

15 U.S.C. § 717(b) (2012). The NGA defines "interstate commerce" as "commerce

between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as commerce takes place within the United States.” 15 U.S.C. § 717a(7) (2012).

144. The NGA also provides for the Commission’s jurisdiction in natural gas market manipulation. The NGA § 4A states, in part,

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 . . . 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 rate payers.

15 U.S.C. § 717c-1 (2012) (emphasis added).

145. “[T]he Commission views the ‘in connection with’ element . . . as encompassing situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction.” Order No. 670 at P 22. In addition, when “committing fraud, the entity must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction.” *Id.* The Commission clarifies, providing the following example:

[A]ny entity engaging in a non-jurisdictional transaction through a Commission-regulated RTO/ISO market, that acts with intent or recklessness to affect the single price auction clearing price (which sets the price of both non-jurisdictional and jurisdictional transactions), would be engaging in fraudulent conduct in connection with a jurisdictional transaction and, therefore, would be in violation of the Final Rule.

Id.

146. Enforcement Staff proved Commission jurisdiction in this proceeding through third party transactions priced off of the HSC *Gas Daily* index, cash-out transactions priced off the HSC *Gas Daily* index, and BP’s own next-day, fixed-price sales of gas at HSC made to suppress the HSC *Gas Daily* index.

Third Party Transaction that Affected the HSC *Gas Daily* Index

147. Third party sales for resale, priced off of the manipulated HSC *Gas Daily* index, provide the Commission with jurisdiction in this proceeding. To make a showing of jurisdiction, these sales must have been made in interstate commerce,¹¹³ must have been

¹¹³ The sales must be made in interstate commerce for Commission jurisdiction, as provided under the NGA. *See* 15 U.S.C. § 717(b) (2012). Additionally, natural gas sold

for resale,¹¹⁴ cannot be first sales,¹¹⁵ and must have been priced off of the HSC *Gas Daily* index.¹¹⁶ Enforcement Staff's 46 examples of third party sales for resale priced off of the HSC *Gas Daily* index are sufficient in proving Commission jurisdiction.

148. Example 1, from Bergin's rebuttal testimony, provides one such example. This sale involved [CONFIDENTIAL] selling physical natural gas to [CONFIDENTIAL]. Ex. OE-161 at 176. The [CONFIDENTIAL], which fall within the Investigative Period. OE-161 at 176. This gas was sold "at an interconnect with Trunkline Gas Company, LLC, an interstate pipeline", making this a sale in interstate commerce. OE-172 at 3, P 6c. [CONFIDENTIAL] purchased this natural gas for the purpose of resale. Ex. OE-171 at 2, P 8. Moreover, this sale is not a "first sale." [CONFIDENTIAL] is a natural gas pipeline. Ex. OE-172 at 3, P 6b. Additionally, the natural gas did not come from [CONFIDENTIAL] own production, nor from any of [CONFIDENTIAL] affiliate's production. Ex. OE-172 at 3-4, P 6c. Finally, the sale was priced off of the HSC *Gas Daily* index, because "purchases of natural gas by [CONFIDENTIAL]"¹¹⁷ for flow dates in November 2008 were priced off the HSC *Gas Daily* index. Ex. OE-171 at 2, P 7. *See also* OE-172 at 3, P 6c. This example, along with 45 other examples of jurisdictional sales for resale of natural gas in this proceeding, is explained in depth in Ex. OE-161 at 175-191.

at an interstate meter becomes interstate natural gas. *See* Tr. 1709:14-15. *See also* *Energy Transfer Partners, L.P., et al.*, 120 FERC ¶ 61,086 at P 173 (2007).

¹¹⁴ Sales for resale of natural gas in interstate commerce are jurisdictional. *See* 15 U.S.C. § 717(b) (2012).

¹¹⁵ First sales of natural gas are outside the Commission's jurisdiction. *See* 15 U.S.C. § 3431 (a)(1)(A) (2012) ("For purposes of section 1(b) of the Natural Gas Act...the jurisdiction of the Commission under such Act shall not apply to any gas solely by reason of any first sale of such natural gas.") *See also* *Amendments to Blanket Sales Certificates*, Order No. 644, FERC Stats. & Regs. ¶ 31,153 at P 14 (2003), *reh'g denied*, 107 FERC ¶ 61,174 (2004) ("Under the NGPA, first sales of natural gas are defined as any sale to an interstate or intrastate pipeline, LDC or retail customer, or any sale in the chain of transactions *prior* to a sale to an interstate or intrastate pipeline or LDC or retail customer.").

¹¹⁶ The sale must have been priced off the HSC *Gas Daily* index because that would prove that third parties relied on the HSC *Gas Daily* index for pricing a natural gas trade and thus relied on a manipulated price in making the transaction. BP's conduct that affected this index is "in connection with" the third parties' purchase or sale of natural gas, subject to the Commission's jurisdiction. *See* 15 U.S.C. § 717c-1 (2012).

¹¹⁷ Both Enforcement Staff and BP protected a lot of material in this portion of their briefs which is deemed unnecessary and abuse of confidentiality rules.

149. BP argues that the Commission cannot assert its jurisdiction over sales that contribute to an index because this would necessarily include intrastate transactions. BP IB at 61. BP states that all natural gas transactions, be they interstate or intrastate, are reported to *NGI* or *Platts* and contribute to the index. BP IB at 61. Extending jurisdiction to intrastate sales that affect an index would be at odds with NGA § 1(b), according to BP. BP IB at 62. However, the Hearing Order has already addressed these arguments. NGA § 4A's "in connection with" language gives the Commission jurisdiction over otherwise "non-jurisdictional" transactions. Hearing Order at P 23. BP's assertion "that the Commission may not exercise section 4A jurisdiction over any transaction that is covered by [NGA] section 1(b)...is incorrect as a matter of law." Hearing Order at PP 22-23.

150. BP's argument that accepting jurisdiction over sales for resale affecting an index would be a case of "the exception swallowing the rule" is not persuasive. It is BP's contention that if the Commission asserted jurisdiction over transactions that contribute to the index, it would subject all parties reporting transactions to its jurisdiction (which would necessarily include parties not otherwise subject to Commission jurisdiction). BP IB at 62. However, a nexus must exist between manipulation and Commission jurisdictional transactions in order for the Commission to properly have jurisdiction. Order 670 at P 22. Therefore, not every transaction reported would be subject to Commission jurisdiction; only those transactions where there exists a connection between manipulative behavior and jurisdictional transactions.

151. BP's reliance on cases to support its NGA § 4A interpretation also fail. BP cites *Texas Pipeline Ass'n v. FERC*, which dealt with the Commission obtaining natural gas information from "any market participant," including owners and operators of intrastate pipelines. 661 F.3d 258, 260-261 (5th Cir. 2011). The court there held the Commission had no jurisdiction to gather information from any market participant. *Id.* at 263. But that case interpreted NGA § 23 in the context of NGA § 1(b). *Id.* at 259-260. This proceeding is dealing with § 4A, which "closely track[s] the prohibited conduct language in section 10(b) of the Securities Exchange Act of 1934" Order No. 670 at P 6. Order No. 670 also noted that "[s]ection 10(b)'s 'in connection with' requirement has been construed broadly...to encompass many circumstances where securities transactions 'coincide' with the overall scheme to defraud." Order No. 670, P 22 (citations omitted). Similarly, NGA § 4A includes transactions affected by the HSC *Gas Daily* index.

152. BP also submits that NGA § 4A's jurisdictional scope must be interpreted with the understanding that states continue to regulate intrastate transactions. BP IB at 62, 62 n. 189. But its citation to *ONEOK, Inc. v. Learjet Inc.*, 135 S. Ct. 1591 (2015) is misplaced. *ONEOK* held that state antitrust lawsuits directed at practices effecting retail rates are not pre-empted by the NGA. *Id.* at 1599-1600. But here, manipulative conduct affecting Commission-jurisdictional transactions is at issue. State-regulated action is not restricted by this reading of NGA § 4A. BP also cites *Conoco Inc. v. FERC*, 90 F.3d 536, 552

(D.C. Cir. 1996) for the proposition that the “in connection with” language found in NGA § 4A must be read within the context of the limiting language of NGA § 1(b). BP IB at 55. However, as the Commission noted in its hearing order, *Conoco* also found that the Commission has jurisdiction over non-jurisdictional matters “intertwined with jurisdictional activity.” Hearing Order at P 24 (citing *Conoco*, 90 F.3d at 549). In this proceeding, jurisdictional sales for resale, influenced by the combined effect of intrastate and interstate sales on the HSC *Gas Daily* index, fall under the Commission’s jurisdiction. These jurisdictional sales were priced off of that manipulated index, and therefore fall under Commission’s jurisdiction.

Cash-Out Transactions Priced Off of the Manipulated HSC *Gas Daily* Index

153. In addition to jurisdictional sales for resale priced off the HSC *Gas Daily* index, Enforcement Staff proved that certain cash-out transactions were priced off the manipulated HSC *Gas Daily* index. “[C]ash-out transactions...are subject to the Commission’s jurisdiction under sections 4 and 7 of the Natural Gas Act.” *Transcontinental Gas Pipe Line Corp.*, 55 FERC ¶ 61,446 at P 62,370 (1991). Cash-out transactions are also considered sales for resale in interstate commerce. *Id.* In September, October, and November 2008, the three months of the Investigative Period, NNG priced its imbalance charges off of the Average Gulf Coast Monthly Index Price, which used the HSC *Gas Daily* index. Ex. OE-173 at 2-3, P 7. *See also* Ex. OE 161 at 93:8–94:2. Because these transactions, subject to NGA § 4, were made in reliance on the manipulated HSC *Gas Daily* index, these transactions were made “in connection with” BP’s manipulative behavior. The Commission therefore has jurisdiction over these NNG’s cash-out transactions.

154. BP argues that proving the HSC *Gas Daily* index is a component in calculating a cash-out transaction is insufficient to establish Commission jurisdiction in this case. BP IB at 62. BP argues this could lead to the Commission establishing “in connection with” jurisdiction over futures transactions where cash-out prices incorporate the NYMEX price as a component. BP IB at 62. However, this proceeding is not addressing NYMEX prices on jurisdictional transactions, nor is it addressing futures subject to CFTC’s jurisdiction. Cash-out transactions based on NYMEX and CFTC regulated futures would remain unaffected by this proceeding.

155. BP’s argument that *Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) (*EPSA*) should restrict Commission jurisdiction over cash-out transactions is invalid. BP contends that “without boundaries” extending NGA § 4A’s jurisdiction here could arguably extend jurisdiction over any factor affecting cash-out prices. *EPSA* at 221, cited by BP RB at 37. However, *EPSA* dealt with Commission jurisdiction under Sections 205 and 206 of the Federal Power Act, not the Commission’s anti-manipulation authority under NGA § 4A. *Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216, 221 (D.C. Cir. 2014). *Barclays* is a more appropriate comparison. The Commission in *Barclays*

held that the respondents “traded ‘to affect’ an index ‘which sets the price of both non-jurisdictional and jurisdictional transactions’ and therefore, they are subject to Commission jurisdiction under both Section 222 of the FPA and the Commission’s Anti-Manipulation Rule.” *Barclays*, 144 FERC ¶ 61,041 at P 115. This finding has since been supported in federal district court, where the court denied Barclays’ Motion to Dismiss, the court held that where

[t]he markets in which Defendants traded were relied on by other market participants combined with the allegations of manipulation adequately establishes FERC’s jurisdiction to pursue anti-manipulation penalties under the FPA §§ 201 and 222.

FERC v. Barclays, et al., No. 2:13-cv-2093-TLN-DAD, 2015 WL 2455538, at *15 (E.D. Cal. filed May 20, 2015). Similar to the Commission’s order in *Barclays*, Enforcement Staff has proved here that other market participants traded off of the manipulated HSC *Gas Daily* index. It therefore follows the Commission has jurisdiction in this proceeding of NNG’s cash-out transactions affected by the manipulated HSC *Gas Daily* index.

BP Texas Team’s Next-Day, Fixed-Price Sales for Resale of Natural Gas

156. Furthermore, Enforcement Staff proved 52 examples¹¹⁸ of the Texas team’s next-day fixed-price sales for resale of physical natural gas during the Investigative Period to be jurisdictional. As noted in Paragraph 147, *supra*, sales for resale of natural gas in interstate commerce are subject to the Commission’s jurisdiction.¹¹⁹ These examples are all subject to the Commission’s jurisdiction because they all were made in interstate commerce, the sales were sales for resale, and none were first sales.

157. Bergin proved these examples were made in interstate commerce through pathing the natural gas. Bergin testified that the gas industry uses pathing as a proxy to follow natural gas transportation routes flowing through contracts. Ex. OE-161 at 95:17-19. Pathing traces a contractual route, according to Bergin, which is “determined by matching upstream receipts of gas that flows by contract number to associated downstream delivery contract numbers.” Ex. OE-161 at 94:12-15. Bergin also testified that pathing documents serve as “a paper trail that is referenced for purposes of invoicing, confirmations, balancing, and scheduling.” Ex. OE-161 at 98:13-14. Bergin further testified that pathing is common within the natural gas industry, as tracing physical

¹¹⁸ These 52 examples are outlined in Appendix A of Bergin’s rebuttal testimony, Ex. OE-161 at 110-174.

¹¹⁹ See 15 U.S.C. § 717(b) (2012) (“The provisions of this chapter shall apply to . . . the sale in interstate commerce of natural gas for resale . . .”).

natural gas molecules is impossible. Ex. OE-161 at 94:18-20; at 95:16-17. Pathing is done on a daily basis. Ex. OE-161 at 98:10-12.

158. Through Bergin's contractual pathing, he was able to path Commission jurisdictional sales for resale of natural gas made by BP in the Investigative Period. As Smead testified, gas transported from an interstate pipeline to an intrastate pipeline remains interstate natural gas. Tr. 2380:22-25. Bergin testified there are 52 examples he identified during the Investigative Period of BP's sales traced upstream to an interstate pipeline. Ex. OE-161 at 92:8-12. In each of these examples, the natural gas came off interstate pipelines [CONFIDENTIAL]. Ex. OE-161 at 110-174. BP also subsequently shipped the gas on HPL, an intrastate pipeline. Ex. OE-161 at 110-174; Ex. OE-161 at 101: 6-13. But this does not transform the interstate gas into intrastate gas. *See Westar Transmission Co.*, 43 FERC ¶ 61,050, at 61,141 n. 12 (1988) ("Gas in interstate commerce is considered to remain in interstate commerce all the way to the burner tip."). Thus, these examples all include interstate natural gas.

159. These 52 transactions also all qualified as sales for resale. Bergin testified that he used the same documents he used in pathing to determine that these qualified for sales for resale. Ex. OE-161 at 102:9-13. These documents included nomination sheets, Entegrate data, Keo reports, Katy Ship Sheets, Oasis Transport sheets, and pipeline invoices. OE-161 at 102:2-4. Using these documents, Bergin was able to determine these qualified as sales for resale. Ex. OE-161 at 110-174.

160. Finally, these sales were also not first sales. "Under the NGPA, first sales of natural gas are defined as any sale to an interstate or intrastate pipeline, LDC or retail customer, or any sale in the chain of transactions prior to a sale to an interstate or intrastate pipeline or LDC or retail customer." *Amendments to Blanket Sales Certificates*, Order No. 644, FERC Stats. & Regs. ¶ 31,153 at P 14 (2003), *reh'g denied*, 107 FERC ¶ 61,174 (2004). Here, none of the 52 sales Bergin identified came directly from BP's production. This is evidenced in Ex. OE-188, where in a data request BP stated that "BP . . . would not have had any equity gas produced and or delivered in the Katy area." Ex. OE-188 at 6. During the hearing, Clynes agreed that the term "equity gas" refers to natural gas produced by either a BP entity or BP affiliate. Tr. 2357:1-4. As no equity gas was produced by BP or a BP affiliate that was in the Katy area, these 52 transactions cannot be classified as "first sales." As these transactions were sales of natural gas in interstate commerce, constituted sales for resale, and were not first sales, they all are jurisdictional.

161. BP further claims that the two examples of BP's sales for resale Bergin presented in his direct testimony are not linked to the manipulative trading. BP IB at 67. BP points out both trades occurred after trading began at HSC and Katy, both were economic as defined by Dr. Abrantes-Metz, and both were traded after 15 percent of the HSC market had already been traded on that day. BP IB at 67. But this allegation is contradicted by

Dr. Abrantes-Metz. As Dr. Abrantes-Metz testified, during the Investigative Period, the Texas team changed its trading patterns. OE-129 at 31:1-6. These changes were “consistent with an effort to influence other market participants and to reinforce artificial downward pressure on the HSC *Gas Daily* index.” OE-129 at 31:15-17. Therefore, the two examples BP focuses on were part of a BP’s larger scheme to manipulate the HSC *Gas Daily* index, and are connected to the manipulation.

162. BP claims that because the Commission does not have jurisdiction over HPL in this proceeding, none of these transactions that eventually flowed on the HPL pipeline are jurisdictional. BP IB at 66. However, as noted in Paragraph 158, *supra*, once gas becomes subject to the Commission’s jurisdiction, transport on an intrastate pipeline does not change it into non-jurisdictional gas. Therefore, because the gas was transported upstream on interstate pipelines, this gas remains interstate gas, subject to the Commission’s jurisdiction.

163. BP also tries to say that Bergin’s pathing is inappropriate, and that it is impossible to trace gas through a pool. BP IB at 69, 70, 73, 74. Though Clynes does testify that the HSC Pool “has a lot of gas coming in, a lot of gas going out. Not the same gas, but the same volume,” Bergin agreed physical molecules cannot be traced. Tr. 2341:10-12; Ex. OE-161 at 89:20-21. Instead, as Bergin explained, the industry uses pathing as a proxy for tracing physical natural gas molecules. Ex. OE-161 at 95:17-19. But Bergin noted that there is no distinction between a pool meter and physical meter, in terms of pathing gas. Tr. 1706:11-14. It therefore follows pathing natural gas through a pool is possible.

164. BP attempts to cast doubt on the accuracy of Bergin’s pathing. More specifically, BP tries to discount Bergin’s use of pathing through balancing sheets. BP IB at 69-71, 73. It is undisputed that Bergin used balancing sheets when making his pathing calculations, as he testified. Tr. 1705:5-7, 16-18. Bergin testified that using balancing sheets, one can see where BP sold natural gas, and “the different downstream contracts...where [BP] sent the gas to.” Tr. 1705:22-25. It is found that balancing sheets can be used to path natural gas, as they show where gas is sold and where gas was shipped to. Moreover, BP ignores that Bergin also relied on nomination sheets, in addition to balancing sheets, in making his pathing determinations. Tr. 1705:6-7, 16-18. Bergin testified that a nomination sheet “lists all the upstream contracts from where gas is coming from. It also shows where the gas is being taken to, what meter, and one of those meters is the meter for the HPL pool.” Tr. 1705:9-12. As noted in Paragraph 159, *supra*, 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. Bergin’s testimony is given significant weight.

165. BP further argues that certain intracompany sales are exempt from Commission jurisdiction. BP IB at 72, 73. These examples, from Bergin’s Appendix A, include: 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 33, 34, 36, 39, 44, and 46. BP IB at 64, 65. BP cites

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) (*Utah Power*), stating “intra-company transactions by and between the two divisions would no longer be ‘sales for resale’ and therefore will not be subject to a rate schedule or tariff on file with this Commission.” BP IB at 72, n. 242 (citation omitted). BP further notes that that case deals with an FPA provision analogous to the NGA. BP IB at 72, n. 242.

166. However, *Utah Power* is distinguishable. *Utah Power* specifically prohibited intracompany transactions from being considered sales for resale under the FPA. *Utah Power* at 61,296. But *Utah Power* did not address downstream transactions, made subsequent to an intracompany sale, involving third parties. It is true that all the examples (2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 33, 34, 36, 39, 44, and 46) in the “BP’s Sales in Interstate Commerce” column, involved sales from [CONFIDENTIAL] or intracompany sales. OE-161, Appendix A, at 111-122, 126-129, 132, and 133. However, BP’s subsequent sales for resale to third parties downstream from the intracompany transactions are jurisdictional. *Id.*

167. With respect to Examples 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 38, 41, 42, 43, 45, and 47 (Ex. OE-161 at 110-121, 129-133) BP alleges that these transactions are non-jurisdictional first sales. BP IB at 72. First sales involve sales from a party’s own production. *See* Paragraph 147, *supra*. First sales are outside the Commission’s jurisdiction. 15 U.S.C. § 3431 (a)(1)(A) (2012). In all the cited examples BP did not sell natural gas from its own production. *See* Exs. OE-161, at 110-121, 129-133. Bergin’s testimony supports this. Ex. OE-161 at 110-121, 129-133. Therefore, it is found that these examples do not constitute non-jurisdictional first sales.

168. BP also claims that these sales are non-jurisdictional because they did not ship on an NGA transportation contract. BP IB at 69. BP cites *Westar Transmission Co.*, 43 FERC ¶ 61,050 (1998) stating that these examples are not jurisdictional. BP IB at 69. BP contends *Westar* held “since the intent of sections 601(a)(1)(D) and 601(a)(2)(B) is to prevent any person from becoming subject to NGA jurisdiction by reason of exempt transactions...those sections...remove the downstream transactions from NGA jurisdiction.” *Westar*, 43 FERC at 61,140. This removes from jurisdiction “sales [of first sale gas] to [] intrastate customers, those customers’ sales for resale, and the transportation involved in those transactions.” *Id.* at 61,141. However, the examples in the case at bar were shipped upstream on the interstate pipeline of [CONFIDENTIAL]. Ex. OE-053 at 9, OE-167 at 173-175. The upstream transportation contract, therefore, was not a section 311 transportation contract, but an NGA transportation contract. As noted in Paragraph 158, *supra*, jurisdiction over natural gas, from a previous upstream transaction, makes these transactions jurisdictional.

169. Enforcement Staff is correct that this proceeding is analogous to *Delhi Gas Pipeline Corporation*, 19 FERC ¶ 61,189 (1982). There, the Commission stated “[a]lthough the proposed Section 311(a)(a) transaction is clearly non-jurisdictional [t]he sale of Oklahoma gas to HPL in Texas is clearly a sale in interstate commerce for resale.” *Delhi*, 19 FERC at 61,336. The Commission continued: “Upon receiving gas . . . transported or sold under Natural Gas Act jurisdiction, HPL’s subsequent transportation and sale of that gas would be ‘in interstate commerce.’” *Id.* As the Commission noted in *Westar*, specifying the difference between *Westar* and *Delhi*, 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.” *Westar*, 43 FERC at 61,142. The main difference being the exempt transactions. *Westar* at 61,142. Moreover, unlike *Westar*, BP is not a Hinshaw Pipeline and thus its transactions are not exempt under the NGA. *Westar* at 61,139 n.1. Here, as noted *supra*, the gas was transported in interstate commerce by [CONFIDENTIAL]. Exs. OE-053 at 9, OE-167 at 173-175. The case at hand is clearly distinguished from *Westar* because the upstream transportation was done pursuant to a Commission jurisdictional, NGA transportation contract thus placing the gas in interstate commerce and Commission jurisdiction.¹²⁰

170. BP further claims that the two examples of Bergin presents in his direct testimony involve small percentages of volumes. BP IB at 68. It is not stated, but implied, that this small amount of natural gas would somehow constitute the trades as being non-jurisdictional. This cannot be the case. NGA § 4A does not require a minimum volume of natural gas in order for the Commission to asserts its jurisdiction over market manipulation. Regardless of the how small the total volume in relation to the larger market, as long as the Commission has jurisdiction, the jurisdiction must stand. *See Union Transmission, Inc.*, 41 FPC 810, 818 (1969) (“The fact that the quantity of gas System transports to South Coffeyville is minimal (1/4 of 1%) in relation to its total volumes, and would be its only sale outside the State of Kansas, has no relevance to the issue of whether System at this point is engaged in interstate commerce by reason of such deliveries since Commission jurisdiction would attach regardless of the *de minimis* aspect of the situation.”).

¹²⁰ *Westar* is not only differentiated by the facts in this case but in addition, the natural gas industry and the Commission’s overview of natural gas markets evolved. Since the issuance of *Westar*, the Commission embraced its duty and obligation to protect the sanctity of natural gas markets from abuses and manipulation. Order No. 670, *supra*. Indeed the market self-regulating principles adopted by the agency are tantamount to the success of open-access and workably competitive market place for sales, transportation services, and trading of natural gas in today’s energy industry’s dynamic environment. Obviously, the Commission’s duty is to eliminate, as much as practical, abuses and manipulative schemes which alter the natural market dynamics.

171. BP's arguments against Enforcement Staff's using the September 2007 baseload contract also fall flat. The September 2007 baseload contract includes Examples 25-32, 35, 37, and 40 which flowed October 17-21, 2008. BP IB at 74. BP attempts to characterize Bergin's testimony as stating that these examples should not have been included, as the Investigative Period only runs from September 18, 2008 through November 30, 2008. BP IB at 74-75. This is, however, a mischaracterization. The quote BP relies on is the following:

Q: Mr. Bergin, one quick question about the [CONFIDENTIAL] contract that you reference. Do you contend that the manipulative scheme in this case began in September 2007?

A: September 2007?

Q: Yes.

A: No. We talked about this investigative period being September 18, 2008, through November 30th, 2008.

Tr. 1609:6-12. This exchange, however, does not suggest Bergin believed he made a mistake in including a baseload contract executed in 2007 with his examples. This exchange only involves him stating dates included within the Investigative Period. Additionally, regardless of when BP purchased this natural gas, the natural gas was sold during the Investigative Period, therefore affecting the HSC *Gas Daily* index. Ex. OE-161 at 122-128, 130. Bergin confirmed this at hearing. Tr. 1703:20-25. The fact that it was bought in 2007, outside the Investigative Period, does not mean it should be excluded from Bergin's examples.

172. BP's claims that Bergin fails to account for volumes of gas are unsupported. As an example, BP states that Bergin failed to account for BP shipping 10,000 MMBtu of natural gas to the HSC, with 49,000 MMBtu being shipped to a downstream party. BP IB at 69. This was example 38 in Appendix A of Bergin's rebuttal testimony. See Ex. OE-161 at 129. However, these numbers do not suggest that a "mismatch in volumes" existed. The 10,000 MMBtu was shipped from Katy Oasis to HPL. Ex. OE-071 [CONFIDENTIAL]. This natural gas was purchased from [CONFIDENTIAL]. Ex. OE-073 [CONFIDENTIAL], Ex. OE-071 [CONFIDENTIAL]. The natural gas was subsequently sold to [CONFIDENTIAL] for flowdate [CONFIDENTIAL]. Ex. OE-072 [CONFIDENTIAL]. This natural gas, shipped from Katy-Oasis on [CONFIDENTIAL] was later shipped on HPL [CONFIDENTIAL], then was part of the natural gas sold to [CONFIDENTIAL]. See Exs. OE-071 [CONFIDENTIAL], OE-073 [CONFIDENTIAL], OE-072 [CONFIDENTIAL]. This 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 case.¹²¹

173. BP also contends that of the 52 sales for resale of interstate gas BP made during the Investigative Period, Bergin made no allegation of market manipulation on 39 of the 73 days. Tr. 1595:8 – 1599:9, cited by BP IB at 71. However, when taking into account the end of the month cash-out transactions that relied on the manipulated HSC *Gas Daily* index in September, October, and November 2008, it is clear that all days during the Investigative Period contributed to BP Texas team's manipulative scheme.

174. Finally, BP reiterates its objection to the introduction of Bergin's 50 examples he first referenced in his rebuttal testimony. BP IB at 71. BP states that it constitutes sandbagging, as they could have been included in Bergin's direct testimony and should therefore be struck as improper rebuttal testimony. BP IB at 71. BP provided no additional argument regarding its objection to Bergin's examples. At hearing, the Presiding Administrative Law Judge admitted the examples into evidence, over BP's objection. Tr. 1780:14-1783:4, 1785:23-1787:5 (BP's objection), Tr.1787:9-17 (admission into evidence). No additional reasons being provided, there are no reasons to reconsider the ruling. BP had ample time to prepare to cross examine this witness.

B. Issue 2: Penalty Factors

1. Number of Violations

Parties Contentions

175. Enforcement Staff claims BP committed hundreds of NGA violations during the Investigative Period's 49 trading days, and at a minimum committed 48 violations. EF IB at 86.

176. For example, Enforcement Staff identifies four affirmative acts the Texas team committed in its manipulative scheme. EF IB at 88. These acts included (i) shifting HSC trades to almost entirely net selling; (ii) increasing the volume and percentage of fixed-price sales at HSC; (iii) selling higher volumes earlier in the trading day at an amount that made the Texas team the largest seller during the first five minutes of the HSC trading session; and (iv) conducting more offer-initiated sales at HSC even when it was more economic to sell at Katy. EF IB at 88. These changes in trading patterns created downward pressure on the HSC *Gas Daily* price, allowing the Texas team to actualize profits on financial positions with exposure to the HSC *Gas Daily* index. EF IB at 88.

¹²¹ BP provides what it alleges as other volume mismatch examples. *See, e.g.*, BP IB at 74, citing Bergin's examples 28-32. As noted *supra*, Bergin's testimony is given significant weight and BP's arguments are not valid.

177. Enforcement Staff states that during the Investigative Period, the Texas team made 680 fixed-price HSC sales, 101 bid-initiated sales at HSC when a more economic bid existed at Katy, and 129 offer-initiated sales when the team could have sold more economically by adjusting the offer price at Katy. EF IB at 88, n. 358. But at a minimum, BP made no fewer than 48 violations, equaling the number of days of net selling by the Texas team during the Investigative Period. EF IB at 86, 88-89; EF RB at 41, n. 177.

178. According to Enforcement Staff, BP seeks a higher standard of proof than necessary in determining penalties. EF RB at 41. BP asserts that Enforcement Staff must prove that each “violation” had every indicia of the confluence of acts comprising the scheme.” EF RB at 41 (citation omitted). However, the Commission has previously rejected this approach in *Barclays*, 144 FERC ¶ 61,041 at PP 7, 32, 120. EF RB at 41. Enforcement Staff further contends BP has not rebutted evidence it committed hundreds of NGA violations. EF RB at 41.

179. In addition, jurisdictional transactions need not “link” with trading transactions meeting Dr. Abrantes-Metz’s definition of manipulative trading. EF RB at 42. The Commission treats each purchase, sale, or transaction of a larger scheme as separate violations. EF RB at 42. Taking this step is unnecessary, as Enforcement Staff has proved the Commission’s anti-manipulation authority over BP’s manipulative scheme during the Investigative Period. EF RB at 42.

180. BP maintains that it committed no violations during the Investigative Period. BP IB at 75. However, assuming *arguendo* that BP did commit violations, the number of days is fewer than the Investigative Period’s 73 days. BP IB at 75.

181. BP contends that individually, not one Dr. Abrantes-Metz factors (number of days BP was a net seller; number of fixed-price sales at HSC; number of times sales were made by hitting bids when Katy bid was within cost of transport and number of times sales at HSC were made by lifted offers when Katy sold more economically) constitute a violation of the Commission’s anti-market manipulation rule. BP IB at 75-76. Additionally, Enforcement Staff’s own witness, Bergin, undermines Dr. Abrantes-Metz’s testimony. BP IB at 76. Bergin’s 52 examples of jurisdictional transactions cover only 24 trade days and 34 flow days during the Investigative Period. BP IB at 76.

182. Moreover, Dr. Abrantes-Metz’s testimony failed to identify any day when the alleged manipulative acts occurred. BP IB at 76. Because Dr. Abrantes-Metz identified no dates, Enforcement Staff did not link Bergin’s examples of sale for re-sale with transactions meeting the manipulative characteristics in Dr. Abrantes-Metz’s testimony. Additionally, of the 24 trade days Bergin alleged BP made a jurisdictional transaction,

few (if any) of those days contained the manipulative characteristics Dr. Abrantes-Metz identified. BP IB at 77.

183. BP disputes Enforcement Staff's claim it proved BP committed hundreds of NGA violations, with the minimum number of violations being 48. BP RB at 40. To support this claim, Enforcement Staff cited prefiled testimony that fails to identify specific trades as violations. BP RB at 40. Enforcement Staff urges the Presiding ALJ to ignore the Commission's charge to determine the number of violations by stating the Texas team engaged in "affirmative acts." BP RB at 40. Affirmative acts, however, do not qualify as violations. BP RB at 40. The Commission charged the presiding ALJ to determine violations, not affirmative acts. BP RB at 40.

184. Additionally, the "affirmative acts" that Enforcement Staff included BP's net selling at HSC, BP engaging in fixed-price sales at HSC, BP selling at the beginning of a trading session, and BP selling through offer-initiated transactions are not violations of the Commission's rules or the NGA. BP RB at 41.

Discussion

185. In the hearing order the Commission directed that findings be made: (i) on the number of violations, if any, committed by BP and the number of days on which any such violations occurred; (ii) regarding loss, the amount of natural gas involved (separately calculating financial and physical natural gas positions) and duration; (iii) whether BP "committed any part of the [alleged] instant violation less than five years after a prior Commission adjudication of any violation or less than five years after an adjudication of similar misconduct by any other enforcement agency"; (iv) whether "the commission of the [alleged] instant violation violated a judicial or Commission order or injunction directed at [BP] by the Commission or other Federal and state enforcement agencies that adjudicate similar types of matters as the Commission"; (v) respecting BP's compliance program on each of the factors specified in § 1B 2.1 of the Penalty Guidelines; and (vi) the amount of profits obtained by BP for its alleged manipulative 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. Hearing Order at P 49.

186. The evidence in this case establishes that the Texas team engaged in a manipulative scheme during the Investigative Period. The scheme involved suppressing the HSC *Gas Daily* index through a series of coordinated affirmative acts. Exs. OE-129 at 2-3, 31:1-32:16; OE-211 at 18:3-20 (Abrantes-Metz); OE-001 at 76:5-10, 85:2-9, 87:2-8, 89:13-90:15 (Bergin). The affirmative acts were: (1) the shift to almost exclusively net selling at HSC, Exs. OE-129 at 43:7-13, OE-211 at 9:15-17, OE-161 at 12:12-14 (Bergin); (2) increasing the percentage and volume of their fixed-price sales at HSC, Ex. OE-129 at 44:6-46:13; (3) selling heavier volumes early in the trading day, they became

the largest seller in the first five minutes of the HSC trading session, Ex. OE-129 at 52:12-13, OE-211 at 123-26; (4) making more offer-initiated sales at HSC when they had a contemporaneous opportunity to sell more economically at Katy, Exs. OE-129 at 105:7-16; 113:5-116:2; OE-211 at 123:8-126:13. The shift to net selling in the Investigative Period, and other changes in the trading patterns facilitated the manipulative scheme since they were successful in creating downward pressure on the HSC *Gas Daily* price. Ex. OE-129 at 44:1-4; Tr. 1818:18-1819:8 (Abrantes-Metz); *see, e.g.*, Tr. 382:18-23, 622:9-23 (Luskie). This allowed them to profit on their financial positions (the ones with exposure to the HSC *Gas Daily* index) as the artificially depressed HSC *Gas Daily* price settled on each flow day of the Investigative Period. Ex. OE-001 at 45:3-46:3, 75:10-13.

187. Further, the evidence in this case shows that the Texas team had hundreds of affirmative acts in furtherance of the manipulative scheme during the Investigative Period (49 trading days covering a period of 73 flow days). They made 680 fixed-price sales at HSC, 101 bid-initiated sales at HSC 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 offer price at Katy. Ex. OE-129 at 149:9-150:5. If each individual trade is treated as a separate violation the facts support a high number of violations.¹²² However, Enforcement Staff recommends a minimum number of 48. This is because the Texas team pursued its manipulative scheme throughout each of the 48 days in the Investigative Period in which they were net sellers at HSC. This means that all transactions on a given day are treated as a single violation. Commission rules allow counting each act as a violation. Therefore, the record supports the finding that BP committed at a minimum, 48 violations.¹²³ Ex. OE-129 at 150:4, Tr. 1818:12-17 (Abrantes-Metz). At a rate of one

¹²² The Commission counts each purchase, sale, or transaction by the alleged manipulator as a separate violation. *See, e.g., Brian Hunter*, 135 FERC ¶ 61,054 at P 135; *Barclays*, 144 FERC ¶ 61,041 at P 120 & n. 347; *SEC v. Pentagon Capital Mgmt, PLC*, 725 F.3d 279, 288 n. 7 (2d Cir. 2013) (district court methodology of counting each trade as a separate violation upheld); *SEC v. Robinson*, No. 00 Civ. 7452 RMB AJP, 2002 WL 1552049, at *12 (S.D. N.Y. July 16, 2002) (“[e]ach sale in this case could be deemed a violation”); *Otto v. Variable Annuity Life Ins. Co.*, 816 F. Supp. 458, 464 (N.D. Ill. 1992) (each ‘purchase’ supports a separate and independent cause of action); *United States v. Reader’s Digest Ass’n, Inc.*, 494 F. Supp. 770, 774 (D. Del. 1980) (each individual distribution of nearly 18 million travel checks in violation of cease and desist order constituted that many separate violations of Federal Trade Commission Act).

¹²³ BP is incorrect, Enforcement Staff did not have to prove that each “violation” had every indicia of the confluence of acts comprising the scheme. The Commission rejected this approach in *Barclays*. *Barclays* is on point since it also involved a scheme with multiple indicia of manipulation. *Barclays*, 144 FERC ¶ 61,041 at PP 7, 32, 120 & n. 347. *See Houlian Chen*, 151 FERC ¶ 61,179, at P 150 (2015). Contrary to BP’s assertion *Barclays* is still good law.

violation per day this would support a penalty of \$48 million under the NGA. *Barclays*, 144 FERC ¶ 61,041 at P 120 & n. 347.

2. Estimate of Loss

Parties Contentions

188. Enforcement Staff claims that BP's market manipulation artificially depressed the HSC *Gas Daily* index. EF IB at 89. This is relevant to civil penalty factors on which the Commission ordered factual findings. EF IB at 89. BP's manipulative scheme resulted in financial impact of \$1,375,482 to \$1,927,728 on next-day natural gas markets at HSC and Katy during the Investigative Period. EF IB at 90. Bergin concluded that the amount of natural gas involved in BP's next-day, fixed-price physical gas sales at HSC during the Investigative Period was 10,632,400 MMBtus. EF IB at 91. Bergin also found the total amount of natural gas involved in BP's HSC financial positions was 25,310,000 MMBtus. EF IB at 91. The losses occurred on each of the 49 trading days of the Investigative Period. EF IB at 91.

189. BP contends no financial impact exists, as the Texas team did not commit any violations or engage in any manipulative transactions. BP IB at 77. BP further states that the estimate Enforcement Staff provides of harm to the market is unreliable. BP IB at 77. These estimates are faulty because they (i) incorporate Dr. Abrantes-Metz's flawed price impact analysis; (ii) reflect the financial impact of points that are not subject to this proceeding; and (iii) reflect the financial impact of trades on which Enforcement Staff has not alleged any manipulative activity. BP IB at 78. Dr. Abrantes-Metz's price impact analysis is flawed because her estimates are small, ranging from \$0.005 to \$0.022. BP IB at 78. She fails to control for price changes at the related Texas/Gulf area or other fundamental control variables. BP IB at 78.

190. Additionally, BP contends Dr. Ronn erred by including Katy trades for the price impact for trades. BP IB at 78-79. Enforcement Staff never alleged BP engaged in manipulation at Katy. BP IB at 79. Also, Dr. Abrantes-Metz never found evidence of manipulative activity at Katy. BP IB at 79. BP asserts that including any of BP's Katy trades in Dr. Ronn's calculations was improper. BP IB at 79. Additionally, BP maintains that Dr. Ronn's computations are inconsistent with Bergin's computations. BP IB at 79. Bergin did not take into account additional alleged losses to BP's Katy sales and financial exposures in calculating alleged net profits. BP IB at 79. But Dr. Ronn included the Katy-priced trades in his calculations, artificially inflating the purported market harm computations. BP IB at 79. Dr. Ronn's harm calculation is also inaccurate because it

included trades on days on which there was no alleged manipulative activity.¹²⁴ BP IB at 79.

191. BP asserts Enforcement Staff's conclusions of the amount of natural gas involved in the alleged violations are either unsupported or contradicted by Enforcement Staff's witnesses. BP IB at 80. Bergin states 10,632,400 MMBtu of natural gas sales were in BP's physical natural gas trading, along with 25,310,000 MMBtu of natural gas involved in BP's financial natural gas positions. BP IB at 72. But BP states that these calculations are flawed because they ignore both the limited number of days Dr. Abrantes-Metz asserts the acts occurred and the limited number of days Bergin asserts involved jurisdictional transactions. BP IB at 80. Bergin's calculations include transactions from all 73 days in the Investigative Period incorrectly. BP IB at 80. He includes volumes from at least 49 trade days not alleged to be jurisdictional. BP IB at 80.

Discussion

192. Commission precedent establishes that proof of an artificial price is not required to find violations of the Anti-Manipulation Rule. *Barclays*, 144 FERC ¶ 61,041 at P 59 & n. 191. However, the amount by which the HSC *Gas Daily* index was suppressed by the Texas team's manipulation is relevant to (1) the determination of the financial impact of the manipulation on the next-day fixed price markets at HSC and Katy; and (2) the amount of gross profits BP obtained as a result of the manipulation. Hearing Order at P 49 (ii) and (vi). There is substantial evidence in this case to make a reasonable estimate of losses. Penalty Guidelines § 2B1.1, Commentary Note 2 (C) (a reasonable estimate of loss does not violate the requirement that sanctions be based on substantial evidence).¹²⁵

193. Dr. Abrantes-Metz used four metrics to quantify the Texas team's suppression of prices at HSC. Ex. OE-129 at 138:3-18, 139:1-12. First, in the Investigative Period, the Texas team sold Katy gas at HSC that could have been sold at better prices at Katy. This "effectively flooded" the HSC market with "excess volume" of fixed price gas. This excess volume artificially increased the "supply" of fixed-price gas at HSC, creating a "lower per unit sale price at HSC than the price that would have been but for the Texas team's conduct." Ex. OE-129 at 138:1-18; 140:1-17. Second, the Texas team also

¹²⁴ BP contends these dates were November 6 through November 25, 2008. BP IB at 79.

¹²⁵ Federal Courts have made reasonable loss calculations under the U.S. Sentencing Guidelines without an exacting level of precision. *See United States v. Uddin*, 551 F.3d 176, 180-81 (2d Cir. 2009) (estimate of loss even if not based on precise data, was reasonably based on "known" data such as the average dollar amount of food stamp redemptions); *United States v. Bryant*, 128 F.3d 74, 76 (2d Cir. 1997) (per curiam) (affirming district court's loss calculation based on extrapolation from average loss amounts).

suppressed prices in the next-day fixed-price market at HSC during the Investigative Period by selling more volume earlier in the day in absolute terms and as a proportion of their overall sales for each day. According to Dr. Abrantes-Metz, this practice increased their share of the earliest sales (in the period of greatest price discovery), further suppressing the HSC *Gas Daily* index. *Id.* at 141:3-142:7. Third, the Texas team sold at artificially low prices at HSC by offering at prices that were lower than the contemporaneous offers of other market participants. *Id.* at 143:1-144:2. Fourth, the Texas team increased the proportion of their sales by hitting bids. *Id.* at 144:5-145:16.

194. As Dr. Abrantes-Metz concluded, all four of these trading behaviors contributed to the overall suppression of HSC prices and artificiality of the HSC *Gas Daily* index. *Id.* at 138:16-18. Conservatively, Dr. Abrantes-Metz estimated that the Texas team's manipulation of the next-day fixed-price market at HSC in the Investigative Period suppressed the HSC *Gas Daily* index by a range of \$0.015-\$0.022 from September 19 to the end of that month; by \$0.012-\$0.015 in October, and by \$0.005-\$0.007 in November. Ex. OE-129 at 146:9-147:1. According to Dr. Abrantes-Metz, Evans simply restates each of his critiques of her testimony. She responded to each of his critiques and concluded that her estimates are valid. Evans did not challenge her methodology. Accordingly, Dr. Abrantes-Metz testimony is given significant weight.

195. Dr. Ronn calculated the manipulations' financial impact on next-day physical gas transactions at HSC and Katy by multiplying the sum of open interest in MMBtus of next-day physical gas at both locations by Dr. Abrantes-Metz's estimates of the price artificiality caused by the manipulation. Ex. OE-155 at 11:7-16, 14:1-15:3. He also calculated the impact of the Texas team's trading in financial index swaps at HSC by multiplying the open interest of financial index swaps at HSC against the price artificiality estimates. *Id.* at 16-17. Dr. Ronn derived the total financial impact of the manipulation by summing the impact of the next-day physical gas trading at HSC and Katy with the impact of the HSC index swaps trading. *Id.* at 18:1-9. BP's manipulation resulted in financial impact of \$1,375,482 to \$1,927,728 on the next-day natural gas markets at HSC and Katy during the Investigative Period. *Id.* at 18:6-9. This is a conservative estimate of the losses because the market harm caused by the manipulation extends to a broad range of transactions and market participants within and potentially beyond the natural gas markets. However, Dr. Ronn limited his calculations to only the transactions directly affected by the Texas team's behavior. He eliminated transactions in which counterparties partially or wholly netted out their transaction through offsetting trades for the same flow day, and excluded BP's next-day fixed price sales and *Gas Daily* sales. Dr. Ronn testified that such sales depressed prices but would not have harmed the buyers paying artificially-low prices. *Id.* at 18:10-20. BP's arguments are without merit. Dr. Ronn explained his methodology and his testimony is given significant weight. The losses were during 49 trading days of the Investigative Period. Ex. OE-129 at 150:4.

196. In terms of volume Bergin concluded that the amount of natural gas involved in BP's sales of next-day, fixed-price physical gas at HSC in the Investigative Period was 10,632,400 MMBtus. This is the sum of the Texas team's next-day, fixed-price sales at HSC during the Investigative Period. Ex. OE-001 at 117:11-18. The amount of natural gas involved in the financial natural gas positions at HSC in the Investigative Period was 25,310,000 MMBtus. This is the sum of the Texas team's HSC *Gas Daily* index exposure in the Investigative Period. *Id.* at 117:19-118:5.

197. *Barclays* supports the methodology followed in this case to estimate losses. *Barclays*, 144 FERC ¶ 61,041 at P 122 n. 353 (OE Staff reached the estimate by measuring the total open interest of financial and physical instruments settling against the indices and then multiplying that figure by Barclays' cash trading price distortion). Dr. Ronn followed this approach. Ex. OE-155 at 11:7-16. As Enforcement Staff avers, its loss estimate is conservative since it is limited to ICE transactions directly affected by the Texas team's behavior and excludes those in which BP was a seller.¹²⁶ The use of ICE data minimizes market harm because it does not take into account off-ICE transactions affected by the manipulation. The loss estimate is conservative since it excludes counterparty transactions netted out through offsetting trades. *Id.* at 18. Moreover, Dr. Ronn included the open interest of next-day physical gas at both HSC and Katy because Dr. Abrantes-Metz' empirical findings demonstrate that price discovery by market participants happens primarily at HSC (even though the prices are tightly related to each other, Ex. OE-129 at 203:2-205:4) and to the extent the Texas team's trading affected prices at HSC, then Katy prices were affected as well.¹²⁷ Exs. OE-155 at 11:17-12.

3. Within 5 years from a Prior Commission Adjudication or Adjudication of Similar Misconduct by Any Other Enforcement Agency

Parties Contentions

198. Enforcement Staff claims that BP's manipulative trading during the Investigative Period violated three relevant settlements and are therefore subject to enhanced penalties under the Penalty Guidelines. EF IB at 92. These settlements include one self-reported

¹²⁶ BP's argument that Dr. Ronn included the financial impact of BP's Katy-priced trades is incorrect. BP IB at 79. Dr. Ronn testified that he did not include BP's next-day fixed price sales and *Gas Daily* sales in his loss calculation. Ex. OE-155 at 13:18-21, 18:16-19.

¹²⁷ Enforcement Staff calculates physical losses at Katy in the Investigative Period to be in the range of \$13,798 to \$17,723. This is done by applying Dr. Abrantes-Metz ranges of price artificiality to the volume of the Texas team's next-day (bench) deals at Katy (Ex. OE-013) during the Investigative Period. This is a reasonable approach.

capacity release violation (*In re BP Energy Co.*, 121 FERC ¶ 61,088 (2007)) and two separate actions alleging propane market manipulation with the U.S. Commodities Futures Trading Commission (CFTC) and the U.S. Department of Justice (DOJ). EF IB at 92.

199. BP's conduct in this matter also violates the permanent injunction in its CFTC settlement, constituting a violation of a prior injunction under the Penalty Guidelines. EF IB at 93. The injunction prohibited BP from "[m]anipulating or attempting to manipulate the price of any commodity in interstate commerce or for future delivery on or subject to the rules of a registered entity." EF IB at 93. Here, BP's manipulative natural gas trading practices constitute manipulation of a commodity in interstate commerce. EF IB at 93. Therefore, for purposes of Penalty Guidelines calculations only, the Presiding ALJ should find that BP's conduct violates this injunction. EF IB at 93.

200. Additionally, Enforcement Staff disagrees with BP's argument that the Penalty Guidelines are non-binding policy statements. EF RB at 45. BP's argument ignores that in this proceeding, the Commission set for hearing the issue of whether BP had prior adjudications. EF RB at 45. The Commission routinely uses the Penalty Guidelines to evaluate whether corporations should be assessed a civil penalty. EF RB at 45. The Commission does this by considering the two NGA § 22 factors: (i) the nature and seriousness of a violation and (ii) efforts to remedy a violation. EF RB at 45. Even without the Penalty Guidelines, the Commission can consider prior settlements under those two factors. EF RB at 45. Both cases BP cites on policy statements (*Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33 (D.C. Cir. 1974) and *Panhandle E. Pipe Line Co. v. FERC*, 198 F.3d 266 (D.C. Cir. 1999)) make clear that federal agencies may release policy statements. EF RB at 45, n. 197.

201. Enforcement Staff further contends that in arguing settlements are not adjudications, BP ignores multiples factors regarding Commission-approved settlements. EF RB at 45. First, settlements only come before the Commission upon Enforcement Staff's recommendation and the Commission's independent conclusion that there is sufficient evidence of a violation. EF RB at 45. Furthermore, settlements only go into effect following a Commission order approving its terms. EF RB at 45-46. Enforcement Staff seeks neither precedent nor approval of any of BP's prior settlements. EF RB at 46, n. 202.

202. Additionally, BP's argument that the 2007 settlement with the CFTC and DOJ is inapplicable because it was with BP Products North America Inc. (BPPNA) falls flat. EF RB at 46. Permitting BP to avoid penalties because of corporate structures would prevent the Commission from enforcing its rules against complex corporate entities. EF RB at 46. Even had BP provided evidence to support this contention, it is still subject to an enhanced penalty due to BP Energy Company's (a named respondent in this proceeding) settlement with the Commission. EF RB at 46-47.

203. BP cites certain pre-Penalty Guidelines settlements to argue the Commission would have included language in a settlement if it sought to use the settlement against a party in a future proceeding. EF RB at 47. According to Enforcement Staff, Commission practice in this area was not uniform. EF RB at 47. A settlement failing to have “prior violations” language cannot bar the Commission from treating BP’s settlement as an adjudication. EF RB at 47.

204. BP contends that Enforcement Staff did not meet its burden of proving BP committed any part of the alleged violations in this case within five years of a prior Commission adjudication or within five years of an adjudication of similar misconduct by another other enforcement agency. BP IB at 81.

205. Regarding the settlement BP Energy Company entered into with the Commission (*In re BP Energy Co.*, 121 FERC ¶ 61,088 (2007)), no respondent in this proceeding was a party to that settlement. BP IB at 81. Moreover, the consent agreement in that case resolved issues unrelated to the alleged market manipulation here. BP IB at 81.

206. Two other agreements BP entered into with the federal government were not adjudications; instead, the agreements were agreed to in an attempt to avoid adjudication. BP IB at 81-82. In 2007, BPPNA entered into a propane trading-based consent order. BP IB at 81. *See CFTC v. BP Prods. North America, Inc.*, Civil Action No. 06-C-3503 (N.D. Ill. Oct. 25, 2007). BP IB at 81. In a related propane case, BP and certain affiliates entered into a DPA. BP IB at 81-82. *See United States v. BP America Inc.*, No. 07-CR-683 (N.D. Ill. Oct. 25, 2007). BP IB at 82. The record evidence in the latter case demonstrates that DOJ moved to dismiss the DPA in 2011. BP IB at 82.

207. Moreover, BP states that prior settlements are not adjudications. BP IB at 82. Settlements preceding the Commission’s Penalty Guidelines’ issuance should not be treated as adjudications. BP IB at 83. The Commission’s Penalty Guidelines included “settlement” in its definition for “Prior adjudication.” BP IB at 83. This Policy Statement on Penalty Guidelines was released on March 18, 2010 and revised on September 17, 2010 (Penalty Guidelines). BP IB at 83. The three settlements Enforcement Staff contends constitute “prior adjudications” all preceded the Penalty Guidelines’ release. BP IB at 83. If the Commission had wanted to consider any settlement as “prior history,” such an agreement would have included language to that effect. BP IB at 83-84.

208. Additionally, Commission policy statements are not precedential. BP IB at 84. According to *Panhandle E. Pipe Line Co. v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999), an agency’s policy statement does not carry the force of law. BP IB at 84. To that point, a policy statement constitutes a “press release,” as it provides notice of the agency’s views, allowing the public “a chance to contemplate an agency’s views before those views are applied to particular factual circumstances.” *Panhandle E. Pipe Line Co. v.*

FERC, 198 F.3d 266, 269 (D.C. Cir. 1999), cited by BP IB at 85. The Commission has not engaged in a rulemaking to establish a rule of general applicability nor established this policy through individual adjudications. BP IB at 85. This Commission policy statement merely indicates it is the Commission's view that settlements be treated as adjudications. BP RB at 43. Therefore, the Presiding ALJ can only determine that BP was the subject of a prior adjudication if the Presiding ALJ gives the policy statement the force of law. BP IB at 85. As this is barred by federal precedent, the ALJ and Commission must determine that the facts here warrant treating prior settlements as adjudications. BP IB at 85.

209. Enforcement Staff has failed to provide sufficient evidence to treat the settlements with the CFTC or the Commission as adjudications for the purposes of applying the Penalty Guidelines here. BP IB at 85-86. To treat settlements as adjudications for the purposes of applying the Penalty Guidelines, the record must contain evidence for the Presiding ALJ and Commission to rely upon. BP IB at 86. The record here contains no such evidence. BP IB at 86. Furthermore, when the Settling Parties entered into these agreements, no party anticipated that future investigations or proceedings could rely on those agreements. BP IB at 86.

210. BP further states that the Consent Order with BP Products North America Inc. (BPPNA) cannot be used against BP in this proceeding, as BPPNA is not a named respondent here. BP IB at 86. Additionally, the DPA should not be treated as an adjudication. BP IB at 86. That complaint was dismissed upon motion by DOJ for three reasons: (i) BP fully satisfied its relevant financial obligations; (ii) BP met its obligations to improve compliance policies and procedures for its commodity trading operations; and (iii) BP did not materially violate the terms of the DPA. BP IB at 86-87.

211. While Enforcement Staff continually refers to BP's misconduct, any "misconduct" is irrelevant to this issue. BP RB at 43. Allegations of misconduct or settlements dealing with such allegations are not adjudications. BP RB at 43.

Discussion

212. The Penalty Guidelines provide that an organization's culpability score may be enhanced if it committed the current violation less than five years after a prior Commission adjudication of any violation or an adjudication of similar misconduct by any other enforcement agency. Penalty Guidelines § 1C2.3 (c)(2).

213. BP entered into three settlements which constitute prior history of adjudications under the Guidelines. Penalty Guidelines ¶ 162-164 (prior settlements are treated as "adjudications"). BP entered a settlement with the Commission regarding a 2007 self-reported capacity release violation (paid a \$7 million penalty). *In re BP Energy Co.*, 121 FERC ¶ 61,088 (2007) (Stipulation & Consent Agreement). In 2007 it also entered a

consent agreement with the CFTC and DOJ for alleged manipulative actions in the propane market in 2003 and 2004 (paid \$125 million and \$100 million penalty plus \$53.5 million in restitution, respectively). *Commodity Futures Trading Comm'n v. BP Prods. N. Am., Inc.*, Consent Order for Permanent Injunction and Other Relief, Civil Action No. 06-cv-03503, ¶¶ 14-15, 38-43 (N.D. Ill. Oct 25, 2007) (CFTC Consent Order); *United States v. BP America Inc.*, Deferred Prosecution Agreement, No. 07 CR 683, ¶¶ 7-9 (N.D. Ill. Oct. 25, 2007). The CFTC Consent Order states that “BP unlawfully attempted to manipulate and did manipulate the price of February 2004 TET physical propane by cornering the market for February 2004 TET physical propane. Further, BP also attempted to manipulate the price of April 2003 TET physical propane, again by seeking to corner the April 2003 TET physical propane market.” Consent Order at P 2. The Deferred Prosecution Agreement, in Attachment A, listed evidence of manipulation by BP that “[s]hould this matter proceed to trial, the United States is prepared to prove beyond a reasonable doubt.” The Stipulation & Consent Agreement stated that “Enforcement confirmed violations by BP on 14 interstate pipeline or storage facilities, involving the transportation or storage of 49.3 Bcf of natural gas in 2005 and 2006. The violations, which arose under 23 separate asset management arrangements, include thousands of discrete transactions occurring over the two year period.” Stipulation & Consent Agreement at P 6.

214. Enforcement Staff is correct that all three settlements constitute relevant prior history. The settlement with the Commission is relevant prior history since the current violation occurred within five years of the prior adjudication. Penalty Guidelines § 1C2.3 (c)(2). The settlements with the CFTC and DOJ are again prior history since they fall within the language of the guidelines “less than 5 years after an adjudication of similar misconduct by any other enforcement agency” *Id.*; *see also id.* ¶ 166. Therefore, BP’s manipulation in this case warrants an increase of 2 points in its culpability score.¹²⁸

215. BP’s argument that the Penalty Guidelines are a non-binding policy statement is not persuasive. The Commission routinely uses its Penalty Guidelines in penalty assessment orders. *See, e.g., Houlian Chen*, 151 FERC ¶ 61, 179 at PP 151-55 (2015); *Maxim Power Corp.*, 151 FERC ¶ 61,094 at PP 105-08 (2015); *Lincoln Paper & Tissue, LLC*, 144 FERC ¶ 61,162 at PP 53-55 (2013); *Barclays*, 144 FERC ¶ 61,041 at 119-21. The Penalty Guidelines follow Congress’ intent in the Energy Policy Act of 2005 enforcement framework. *See* Penalty Guidelines at P 212; *see also Lincoln Paper & Tissue, LLC*, 144 FERC ¶ 61,162 at PP 8, 54 (although the PG are not mandatory, the Commission uses them and its policy statements on enforcement to guide its penalty analysis).

¹²⁸ *Barclays*, 144 FERC ¶ 61,041 at P 123 & n. 355 (prior DOJ settlement on LIBOR rate manipulation warranted culpability score enhancement); *see also* Penalty Guidelines at P 19 (Commission has broad discretion to determine appropriate penalty).

216. Moreover, federal agencies routinely speak through policy statements and the pronouncements are not invalidated if they are subsequently followed. The cases cited by BP do not support its contention. To wit, those cases support the proposition that federal agencies may speak through policy statements, even if they “must be prepared to support the policy as if the policy statement had never been issued. *See, e.g., Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (the court noted beneficial functions of agency statements of policy); *Panhandle E. Pipe Line Co. v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999) (significant informational benefits of policy statements).

217. BP also argues that the PGs were not in effect at the time of the alleged violations and therefore the PG cannot be used against it. However, suffice it to say that the Commission mandated findings based on the PG in the Hearing Order in this case. *See* Hearing Order at P 49. Additionally, the Commission has determined that prior settlements constitute adjudications. *See* Penalty Guidelines at 162. In the settlements at issue in this case, each agency independently determined prior to settling that BP had engaged in serious violations of federal law. *See* Paragraph 213, *supra*.

218. Further, in response to BP’s allegations that the CFTC and DOJ settlements are with corporate entities that are not part of this proceeding [BP Products North America Inc. (BPPNA)] Enforcement Staff is correct that the Commission can disregard corporate forms when necessary to fulfill its statutory obligations. *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy & Ancillary Services*, 127 FERC ¶ 61,269, at P 221 (2009). *See, e.g., Capital Tel. Co. Inc. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974) ([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.”

4. Violation of Judicial or Commission Order or Injunction of Federal and State Enforcement Agencies

Parties Contentions

219. Enforcement Staff posits it is not required to prove a Commodity Exchange Act violation to use the consent order from the *CFTC v. BP Prods. North America, Inc.*, Civil Action No. 06-C-3503 (N.D. Ill. Oct. 25, 2007) in enhancing penalties here. EF RB at 47-48. That consent order lists manipulation of a commodity’s price in interstate commerce as a prohibited activity. EF RB at 41. Here, BP committed manipulation of a commodity price, and the Commission has broad discretion to treat BP’s behavior here as a violation of that injunction. EF RB at 48. Additionally, BP incorrectly asserts there must be action by the U.S. District Court for the Northern District of Illinois or the CFTC. EF RB at 48, n. 212. The Penalty Guidelines contain no requirement of an

injunction violation by a court before the Commission can apply a penalty enhancement. EF RB at 48.

220. BP asserts that Enforcement Staff failed to prove that any alleged market manipulative practices violated a judicial order, Commission order, or injunction directed at BP. BP IB at 87. Not the Commission, nor any other federal or state agency vested with jurisdiction in relation to similar matters, has issued an order or injunction that BP has since violated related to this proceeding. BP IB at 87.

221. Specifically, Enforcement Staff's contention that BP violated a consent order issued in *CFTC v. BP Prods. North America, Inc.*, Civil Action No. 06-C-3503 (N.D. Ill. October 25, 2007) is misplaced. BP IB at 87. That consent order defines "BP" to be "BPPNA," but in this case, the BP respondents are not subsidiaries of BPPNA, nor did they provide services to BPPNA at any time relevant to this complaint. BP IB at 87-88. BP Energy Company's compliance enhancements were voluntarily made and implemented to be consistent with the *CFTC v. BP Prods. North America, Inc.* consent order. BP IB at 88. It was not required to do so as a BPPNA subsidiary or service provider. BP IB at 88.

222. BP contends the consent order's language applies to Commodity Exchange Act violations only, not Section 4A of the NGA or 18 C.F.R. § 1c.1. BP IB at 88. Enforcement Staff has not attempted to prove, nor has it proved, a Commodity Exchange Act violation. BP IB at 88. Here, the record also does not show that the U.S. District Court for the Northern District of Illinois found its consent order violated. BP IB at 88. The consent order's language states: "[t]he [District] Court shall retain jurisdiction of this cause to assure compliance with this Order and for all other purposes related to this action." BP IB at 89. Without such a finding from the District Court, neither the Presiding ALJ nor the Commission can find that BP violated the consent order's injunction. BP IB at 89.

223. BP also argues that Enforcement Staff's position on this issue must be considered waived, as Enforcement Staff's Second Revised Brief groups this issue and the preceding issue together. BP RB at 45.

Discussion

224. The Penalty Guidelines provide that an organization's culpability score may be enhanced if the instant conduct violated a judicial or Commission order or injunction by Federal and state enforcement agencies that adjudicate similar types of matters as the Commission. Penalty Guidelines § 1C2.3(d).

225. BP's conduct here also contravenes the terms of the permanent injunction of the 2007 settlement with the CFTC. This is clearly within the Penalty Guidelines § 1C2.3

(d). The injunction prohibited BP from “[m]anipulating or attempting to manipulate the price of any commodity in interstate commerce or for future delivery on or subject to the rules of a registered entity. . . .” CFTC Consent Order at ¶ 83(a)(i). The conduct at issue in this case is a manipulation of a commodity in interstate commerce and violates the 2007 permanent injunction. Enforcement Staff is correct that Section 1C2.3(d) does not require a finding by the court that issued the order that the conduct in this case violated the Consent Order. Therefore, BP’s manipulation in this case warrants an increase of 2 points in its culpability score.

5. Compliance Program

Parties Contentions

226. Enforcement Staff submits that BP has an ineffective compliance program (BP Compliance) for three reasons. EF IB at 93-94. First, BP Compliance failed to prevent or detect the Texas team’s manipulative scheme during the Investigative Period. EF IB at 94. Second, BP Compliance’s internal inquiry was a “whitewash” of the team’s manipulative actions. EF IB at 94, 97. Third, in moving to discredit Luskie’s concerns, BP revealed itself more concerned with self-protection than uncovering the truth. EF IB at 94.

227. Enforcement Staff asserts that BP Compliance’s ineffectiveness is evident in its poor oversight of the Texas team. EF IB at 94. Though BP Compliance created daily reports tracking the Texas team’s trading activity, these reports failed to include the team’s overall physical and financial positions, excluded its daily P&L, and did not isolate the team’s next-day fixed-price trading by location. EF IB at 94. BP Compliance thus was unable to track suspicious trades as they occurred. EF IB at 94-95. Additionally, BP’s bonus system incentivized the Texas team’s manipulative scheme. EF IB at 95. Speculative traders at BP typically received a greater percentage of profits generated than did physical traders did. EF IB at 95. A “hybrid” trader working with both financial and physical positions, like Comfort, therefore had an incentive to shift their profits from physical to financial books to generate more personal income. EF IB at 95. Additionally, BP Compliance failed to properly follow its oversight protocols dealing with the Texas team’s trades. EF IB at 96. When Hurricane Ike forced the Texas team to temporarily relocate to Austin, Texas in September 2008, neither Stephen Simmons (the primary compliance analyst for the Texas team) nor Mark Galicia (Simmons’ supervisor) was present in Austin that week. EF IB at 96. Additionally, even after BP Compliance flagged one day of Comfort’s trading during the Investigative Period, BP Compliance never made a documented follow up, though it was required to do so. EF IB at 96.

228. Moreover, Enforcement Staff contends BP Compliance’s internal review was a “whitewash” of the scheme. EF IB at 97. Though Calvin Schlenker (then BP’s Senior Vice President for South Trading) and Michael Berry (then the new head of Compliance

for NAGP trading) took initial steps to investigate the November 5 call, BP Compliance and BP Legal conducted only “cursory interviews” of members of the Texas team. EF IB at 97. BP Compliance also did not confront the Texas team members with the trading data its analysts had already recovered. EF IB at 97-98. As the inquiry progressed into a report, draft reports removed certain analyses and relevant data. EF IB at 98. These drafts also omitted visually apparent changes in the Texas team’s next-day physical natural gas trading patterns. EF IB at 98. During the same time period when these items were being removed from drafts, an unknown BP Compliance employee inserted a section clearing the Texas team of manipulative behavior. EF IB at 98.

229. Enforcement Staff further states that management’s efforts to discredit Luskie while simultaneously defending Comfort and Barnhart reveal BP lacked a culture of compliance. EF IB at 99. Following the November 5 recorded call with Comfort, Luskie was never willing to discuss his understanding of how the Texas team traded during November 2008. EF IB at 99. Additionally, Bass, Comfort’s supervisor, immediately supported Comfort in his contention he was not doing anything wrong. EF IB at 99-100. Bass then notified his supervisor, Schlenker, that he believed Luskie’s allegations lacked merit. EF IB at 100. BP management chose to ignore Luskie’s manipulation allegations, “spin[ning]” it as Luskie “being ill-informed and mistaken”. EF IB at 100. Schlenker called Parker, and relayed the same, even knowing Parker would likely be a factual witness. EF IB at 100. Moreover, Simmons clearly pre-judged Luskie’s credibility when he wrote in an e-mail he wanted “to take Luskie outside ‘to run sprints and do push-ups until he pukes!’” Ex. OE-041, cited by EF IB at 100.

230. According to Enforcement Staff, BP’s witness Thomas Nuelle’s weak arguments that BP should be given credit for its compliance program can be dismissed. EF IB at 101. Though Nuelle claims BP should receive compliance credit for quickly contacting the Independent Monitor about the November 5 call, Luskie had already alerted the Independent Monitor of the call. EF IB at 101. Additionally, the Commission’s and the CFTC’s inquiry did not prevent and should not have interfered with BP from conducting its own investigation. EF IB at 102. Finally, though BP claims that it instituted a proper compliance program as a result of its 2007 propane market manipulation issues, this argument fails because its program still allowed Comfort’s manipulative trading to go undetected. EF IB at 102. Berry acknowledged in 2009 that BP Compliance still had “major problems.” EF IB at 102-103.

231. Problems existed within BP Compliance, generally. EF RB at 48. In April 2009, the Independent Monitor was concerned with BP Compliance’s inadequacy to the point of observing that if serious changes were not made, BP could violate its Deferred Prosecution Agreement (DPA) with the U.S. Department of Justice. EF RB at 48.

232. On the other hand, BP argues it had an effective compliance program during and

following the Investigative Period, pursuant to the factors set forth in § 1B2.1 of the Penalty Guidelines. BP IB at 90.

233. BP first submits that Enforcement Staff failed to introduce any evidence into the record addressing the effectiveness of BP Compliance during the Investigative Period. BP IB at 90-91. Enforcement Staff alternatively focused on attempting to discredit the program while disregarding the contrary evidence BP introduced into the record. BP IB at 91. Though Enforcement Staff states that BP Compliance did not detect or prevent the alleged manipulative trading at issue in this proceeding, the Penalty Guidelines state that [t]he failure to prevent or detect the instant violation does not necessarily mean that the program is not generally effective in preventing violations.” Penalty Guidelines at § 1B2.1(a), cited by BP IB at 91. Additionally, BP claims that it acted appropriately in addressing alleged market manipulation allegations. BP IB at 91. Enforcement Staff relies on Bergin, whom BP contends is an unqualified compliance witness. BP IB at 92.

234. According to BP, Enforcement Staff also misrepresents how BP implemented its compliance program. BP RB at 47. Specifically, Enforcement Staff suggests that while in Austin, the Texas team had no compliance oversight. BP RB at 47. This was not the case. BP RB at 42-43. Simmons also testified he remembered no problems with the Texas team while it was in Austin. BP RB at 48.

235. BP also states that the record shows BP Compliance’s effectiveness. BP IB at 93. Enforcement Staff, in a 2010 preliminary findings letter and its Staff Report and Recommendation, endorsed BP’s compliance program. BP IB at 93. Additionally, the Independent Monitor’s support for BP Compliance led the federal government to file an unopposed motion to dismiss the case that had been pending in the Northern District of Illinois. *CFTC v. BP Products North America, Inc.*, Civil Action No. 06-cv-3503/*United States v. BP America Inc.*, Case No. 07-CR-18-683 (Dec. 15, 2010), cited by BP IB at 93. Dismissal of the case against BP eliminated the requirement to have an Independent Monitor. BP IB at 93. BP also established its current compliance program in 2006, has increased its training program, and implemented its Passport to Work program. BP IB at 93-94.

236. Enforcement Staff’s contention that BP Compliance committed a “whitewash” is false. BP RB at 49. Schlenker’s comment to Parker that he thought the Texas team was compliant was nothing more than that – not that BP was trying to cover up questionable trading behavior. BP RB at 50. Enforcement Staff also ignores Berry’s testimony that BP Compliance had made dramatic improvements from the time he joined BP to the time of the Investigative Period. BP RB at 50. Moreover, the draft report was only a draft, with Berry testifying how changes were made to the draft as time went on. BP RB at 50-51. When the Commission and CFTC became involved in investigating the Texas team, BP’s internal review was not completed. BP RB at 51. BP stopped its internal review and focused its resources on responding to Commission and CFTC data requests. BP RB at 51.

Discussion

237. In the Hearing Order, the Commission ordered the Presiding Administrative Law Judge to “make finding respecting BP’s compliance program on each of the factors specified in § 1B2.1 of the Penalty Guidelines.” Hearing Order at P 49(v).

238. The Penalty Guidelines require:

- (a) To have an effective compliance program...an organization shall-
 - (1) exercise due diligence to prevent and detect violations; and
 - (2) otherwise promote an organizational culture that encourages a commitment to compliance with the law.

Such compliance program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations. The failure to prevent or detect the instant violation does not necessarily mean that the program is not generally effective in preventing and detecting violations.

Penalty Guidelines § 1B2.1.

239. The Penalty Guidelines establish the following minimum factors of an effective compliance program:

- (b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:
 - (1) The organization shall establish standards and procedures to prevent and detect violations.
 - (2) (A) The organization’s governing authority shall be knowledgeable about the content and operation of the compliance program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance program.
 - (B) High-level personnel of the organization shall ensure that the organization has an effective compliance program, as described in this guideline. Specific individual(s) within high-level personnel shall be

assigned overall responsibility for the compliance program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in violations or other conduct inconsistent with an effective compliance program.

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's compliance program is followed, including monitoring and auditing to detect violations;

- (B) to evaluate periodically the effectiveness of the organization's compliance program; and
 - (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations without fear of retaliation.
- (6) The organization's compliance program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance program; and (B) appropriate disciplinary measures for engaging in violations and for failing to take reasonable steps to prevent or detect violations.
- (7) After a violation has been detected, the organization shall take reasonable steps to respond appropriately to the violations and to prevent further similar violations, including making any necessary modifications to the organization's compliance program.
- (c) In implementing subsection (b), the organization shall periodically assess the risk of violations and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of violations identified through this process.

Penalty Guidelines § 1B2.1. To be effective a compliance program must minimally meet these seven factors. Penalty Guidelines § 1B2.1(b). In this case, BP failed to meet these seven factors.

240. Preliminarily, BP argues that Enforcement Staff previously supported its compliance program in documents in the investigatory phase of this proceeding.¹²⁹ Further, the government supported its compliance program in the unopposed motion to dismiss the *CFTC v. BP Products North America, Inc.*, Civil Action No. 06-cv-3503/*United States v. BP America Inc.*, Case No. 07-CR-18-683 (Dec. 15, 2010). BP IB at 93. However, these documents are not determinative in evaluating BP's compliance

¹²⁹ See, e.g., Ex. BP-003 at 29 (“Staff preliminarily finds that . . . BP had in place at the time a compliance program that reflected applicable industry practices”); Ex. BP-004 at 77, n. 212 (“BP did have a significant compliance program”); Ex. BP-005 at 5 (“[BP] met its obligations regarding improving its compliance policies and procedures for its commodity trading operations as certified by the Monitor”).

program. As Enforcement Staff's points out, its previous documents in the investigatory phase were not based on the information that Enforcement Staff has presented in this case. Enforcement Staff is correct that its previous investigatory positions are not admissions of a party opponent as BP claims. During the course of discovery in this proceeding Enforcement Staff has discovered facts not known to it in the investigatory phase. Additionally, the motion to dismiss filed in the district court in the CFTC proceeding does not bind Enforcement Staff in this proceeding. The unsupported allegation with regard to BP's compliance program in that proceeding is unpersuasive. The evidence developed in this case is given significant weight.

Factor 1: Internal Standards and Procedures to Prevent and Detect Violations

241. BP failed to have strong internal standards that would prevent and detect violations. It is true that BP generated a variety of different reports designed to prevent and detect violations. Nuelle testified that BP created four such reports. Ex. BP-001 at 13:15 – 14:11. Dashboard reports were made for each of BP's regional teams, aggregating the previous day's reports, the trades' tenor, whether the transactions were purchases or sales, and activity by location. Ex. BP-001 at 13:18-20. Anomaly reports highlighted when a trader's activity deviated one or two standard deviations from their activity the previous 365 days. Ex. BP-001 at 14:1-5. Spade reports were done to detect the possibility of wash trades. Ex. BP-001 at 14:8-9. Finally, large transaction reports included natural gas trades involving a volume exceeding 3 Bcf. Ex. BP-001 at 14:10-11. BP also recorded and retained all communications of its traders. Ex. BP-001 at 14: 12-14. Nuelle testified that phone calls flagged through a "hot word search" were reviewed, and emails and instant messages were reviewed on an as-needed basis. Ex. BP-001 at 14:14-16.

242. But although BP took these steps in creating standards and procedures to detect manipulation, the reports excluded certain markers of manipulation. None of the four reports in 2008 showed positions—they only showed transactions, according to Simmons. Tr. 2111:16-19. Additionally, Simmons testified that none of the compliance reports tracked traders' P&L. Tr. 2122:4-6. He continued, agreeing that the anomaly reports failed to "look at next-day fixed-price trading by location" Tr. 2145:23-2146:1. While BP took steps to identify manipulative trading through its reports, the reports could have been improved by including additional data.

243. Additionally, even when the reports flagged questionable trading behavior, BP Compliance did not always follow up. In a trader anomaly report on October 21, 2008, Comfort's activity was flagged in yellow. Ex. OE-293 at 1. *See also* Tr. 2148:1-5 (identifying OE-293 as a trader anomaly report for October 21, 2008). Simmons testified that Comfort was flagged yellow because his number of trades was "pretty close to being two standard deviations" higher than his previous year's average number of transactions per day. Tr. 2149:20 – Tr. 2150:9. But Simmons testified he has never seen

documentation stating he followed up on the flagged anomaly of the Texas team during the Investigative Period. Tr. 2150 :10-14. No evidence suggests that Simmons ever followed up on this flagged report. Simmons did testify that follow ups occurred when BP Compliance determined it was necessary to, but there is still no evidence of following up on Comfort's flagged trading. Tr. 2113:18-25. In failing to follow up on a flagged report, BP was ineffective in detecting violations. Therefore, BP's internal standards and procedures were defective and did not prevent violations.

Factor 2: High-level Management Knowledge and Oversight of Internal Compliance Programs

244. BP's management's actions following the November 5 call show minimal oversight. This is evidenced by Schlenker's actions following the call. Schlenker, according to his testimony, was responsible for NAGP South, a division within BP that included the Texas team. Ex. BP-027 at 4:12-13. Schlenker had a conversation with Parker on November 7, 2008, two days after Luskie and Parker's ATC conversation and Luskie's recorded call with Comfort. Schlenker told Parker that during Luskie's ATC conversation with Parker, Luskie "got confused in the conversation and I think he was trying to, you know, impress a senior person with his knowledge." Ex. OE-164 at 9:14-17. Schlenker continued, saying "[a]nd then he [Luskie] panicked and he went to Grady [Comfort] and then he went to the monitor." Ex. OE-164 at 9:19-20. But these were not Schlenker's own opinions. At hearing, Schlenker testified these were Bass's opinions. Tr. 1981:15-19; Tr. 1982: 4-8. Schlenker was relaying Bass's opinions to Parker "before knowing the facts of any investigation." Tr. 1982: 22-1983:2. Schlenker also testified he did not recall telling Parker that these were Bass's opinions. Tr. 1983:3-7. Schlenker also testified that he told Parker that he did not think the Texas team had done anything wrong. Tr. 1987:13-15. Though Schlenker also testified he was not prejudging the conduct on this call, to suggest the team did nothing wrong "before knowing the facts" suggests he did prejudge the matter. Tr. 1977:1-3; Tr. 1982:22—Tr. 1983:2. Schlenker's decision to speak to Parker about Luskie was inappropriate at that time. Through impeachment testimony at the hearing, Schlenker noted "it may not have been wholly appropriate" to have the conversation with Parker before Parker had been interviewed by the CFTC, the Independent Monitor, or BP Compliance. Tr. 1991:16-21.

245. Furthermore, Simmons' actions following the call suggest BP Compliance did not take the Texas team's alleged manipulative behavior seriously. For instance, in a November 18, 2008 e-mail, Simmons wrote to Berry that he would be "taking Luskie outside after lunch to run sprints and do push-ups until he pukes!:)". OE-040 at 1. At hearing, Simmons testified that at the time that email was written, he did not believe Luskie to be a whistleblower. Tr. 2158:20-25. Simmons also stated he thought this to be "a bad joke made in poor taste" and "just a banter between my boss and me that we exchanged rather often." Tr. 2159:5-9. However, his email and testimony suggest

Simmons did not take this issue seriously, suggesting he had predetermined the outcome before the full investigation was complete.

246. Galicia agreed that following Berry's departure from BP in early 2009, a void existed in BP Compliance. Tr. 2239:22-24. Berry departed relatively soon after the November 5 call. Moreover, as a result of the turnover within Compliance, the inquiry into Luskie's recorded call became delayed. Tr. 2239:25-2240:3. The inquiry was later effectively dropped. See Paragraph 263, *infra*.

247. In 2008, BP did have a compliance program in place. Ex. OE-005 at 4 outlines the "Reporting Lines" for BP Compliance in 2008, which details various high level BP Compliance managers and who they reported to. The document includes multiple IST Compliance Advisors reporting to two Managers, Rick Schell and Mike Berry. Ex. OE-005 at 4. Nuelle noted that IST E&CC¹³⁰ meets quarterly, and that Regional Compliance directors meet several times a year with the Global Head of E&C IST. Ex. BP-001 at 12:19-22. Nuelle also testified that in accordance with a Consent Order entered into with the CFTC and the Deferred Prosecution Agreement (DPA) agreed to with the U.S. Department of Justice, BP engaged Bart Schwartz as its Independent Monitor. Ex. BP-001 at 10:11-16. Schwartz and his staff had trading floor access, observed business activities, reviewed relevant documents, presentations, and emails, in addition to attending BP employee meetings. Ex. BP-001 at 10:17-20.

248. Although BP had a hierarchy of high-level officials reporting directly to other high-level officials and hired an Independent Monitor, Luskie's supervisors acted inappropriately following the call. Schlenker, responsible for NAGP South, discussed someone else's favorable opinion concerning the Texas team trading with a possible future witness (Parker). Simmons, a compliance analyst, appeared to not be taking the allegations of market manipulation seriously, as evidenced in his November 8, 2008 e-mail. Berry's departure led to delays in BP's internal investigation. For these reasons, BP did not effectively have high-level management oversight of internal compliance. As a matter of fact, the record in this case indicates a total lack of oversight.

Factor 3: Reasonable (Due Diligence) Efforts to Screen Out "Bad Actors"

249. BP failed to make reasonable efforts to screen out "bad actors." As Nuelle testified:

BP's compliance program trains, advises, and monitors. The compliance program in place during the Investigative Period involved multiple components. Those components included: (i) reports that were reviewed to

¹³⁰ IST is the Integrated Supply and Trading. Ex. BP-001 at 5:5-6. E&CC is the Ethics and Compliance Committee. Ex. BP-001 at 12:15-16.

analyze trading activity and trader behavior; (ii) recording and monitoring trader communications; (iii) regular consultations among trading personnel, risk personnel, and product control personnel; and (iv) direct access between and among compliance and trading personnel.

Ex. BP-001 at 13:9-14. In terms of attempting to screen out bad actors, BP, as noted *supra*, generated four different kinds of reports and monitored trader communications. *Id.* at 13:15 – 14:11. BP Compliance also required employees to report any violation of any law or any unethical conduct. Ex. OE-241 at 38. But these actions could not effectively screen a “bad actor,” as no evidence suggested there was a follow up to Comfort’s flagged October 21, 2008 trading. *See* Paragraph 243, *supra*. Therefore, BP failed to make reasonable efforts to screen out “bad actors.”

Factor 4: Reasonable Communications and Training Efforts

250. BP Compliance frequently attended manager meetings. As Nuelle testified, “BP compliance personnel participated in weekly meetings with the trading managers.” Ex. BP-001 at 14:18-19. But while these meetings took place, the evidence indicates that the compliance personnel did not use this as an opportunity to review compliance procedures with other employees. Nuelle testified that BP Compliance employees attended the meetings to listen to discussions, monitor the prior week’s positions, and ask questions. Ex. BP-001 at 14:22 – 15:2. While this may qualify generally as communication with BP Compliance, no evidence exists that BP Compliance took an active role in these meetings. Instead, compliance personnel made observations and asked questions, suggesting they were passive attendees. They were not engaged participants in the meetings, and did not instruct employees about how to comply with anti-manipulation laws and regulations.

251. Additionally, although there is evidence that traders attended anti-manipulation training, no evidence exists that that training addressed physical for financial manipulation. BP refers to a slide show presentation used in its compliance training that partially deals with manipulation. At hearing, counsel confirmed that Luskie “sort of received this” training presentation in two instances. Tr. 347:9-15. This slide show presentation “Trading Guidelines 2006, Avoiding Market Abuse and Price Manipulation” is Ex. OE-047. Tr. 346:22 – Tr. 347:1-15. Additionally, Comfort (Ex. BP-014 at 8:7-12), Luskie (Ex. BP-016 at 11:9-14), and Barnhart (Ex. BP-020 at 7:1-6) all testified they received anti-manipulation training while working at BP. Their internal training summary reports confirm this. *See* Exs. BP-015 (Comfort); BP-019 (Luskie); and BP-022 (Barnhart). While all received anti-manipulation training, no evidence suggests that they went through training involving physical for financial manipulation. Nothing in the slide show (Ex. OE-047) suggests otherwise. Luskie agreed that these slides do not address traders’ behavior regarding “giv[ing] the appearance that they are diverting supply to a market to affect an index...” Tr. 361:4-8. The record evidence in this case

shows that the Texas team traders received limited anti-manipulation training; therefore, it is found that BP's training efforts were deficient.

Factor 5: Reasonable Steps to Evaluate Program Effectiveness, Including Confidential Avenues for Employees to Report Noncompliance

252. There is no evidence in this record that BP took any steps to evaluate the effectiveness of its program. Further, there is no evidence that it regularly reviewed its compliance program.

253. Actions by BP Compliance members suggest a lack of support for employees to report violations. Schlenker and Simmons, as noted before, both had prematurely formed their opinions about the manipulation inquiry before the investigation had finished. *See* Paragraphs 244, 245, *supra*. Neither Schlenker nor Simmons, two members of BP Compliance, took Luskie's concerns seriously. This suggests that the culture was not conducive to employees reporting compliance violations.

254. It is true that a "Helpline" existed for individuals, directors, officers, employees, agents, and consultants to report suspected CFTC violations or criminal conduct. Ex. OE-005 at 22. The "Helpline" permitted individuals to make reports anonymously if they wished. Ex. OE-005 at 22. Counsel from Enforcement Staff and BP agreed that OE-005 was a part of a training Luskie attended in July 2008. Tr. 362:1-10. Additionally, Luskie testified that both the CFTC's consent order and BP policy required him "to report any violation of law or unethical conduct." Tr. 727:2-8. BP Compliance required employees to report any violation of any law or any unethical conduct. OE-241 at 38. But after speaking to Parker, Luskie's first call (the recorded November 5 call) was to Comfort. Comfort was not Luskie's supervisor. Tr. 279:11-13. He did not go "directly to IST compliance, to the monitor, to [his] supervisor, legal, or BP OpenTalk," as he testified he was required to do. Tr. 727:2-14. Instead, he went to a co-worker who was directly involved in the trading behavior Luskie was concerned about. The Helpline and reporting requirements do not outweigh the reporting problems, as evidenced by Luskie and other BP employees. This record is devoid of any evidence indicative of adherence to protocols to comply with this factor. The evidence shows there were avenues for employees to report but this is not enough to meet Commission requirements for this factor.

Factor 6: Compliance Incentives and Noncompliance Sanctions

255. BP lacked incentives for its employees to comply with anti-manipulation rules. Indeed, for an employee like Comfort, there existed an incentive to not comply. According to a data response BP provided to Enforcement Staff in this case, financial traders generally receive a higher percentage of the value they generate, versus physical traders. Ex. OE-028 at 3. Luskie's hearing testimony confirmed this, stating that in

2008, speculative traders were paid much more than asset optimization traders. Tr. 663:24 – Tr. 664:6. As Lukefahr testified, Comfort was a trader in both physical and financial natural gas. Tr. 193:10-13. Comfort agreed, stating he was a value trader who primarily dealt with asset optimization on the Texas team.¹³¹ Tr. 1166:6-17. Because financial gas traders made more than physical gas traders, it would benefit a hybrid trader to do well in financial trading. And while Nuelle testified BP currently creates reports to detect a potential physical for financial manipulation, those types of reports were not generated during the Investigative Period. Tr. 2441:19-22; 2442:16-24. It therefore follows that a hybrid trader like Comfort could manipulate the natural gas market, using physical for financial trades, and could go undetected within BP in 2008. Not complying with the relevant rules could provide a trader like Comfort more money than he normally would have received. Because “[f]inancial traders generally receive a higher percentage of the value they generate,” Comfort had incentive to make more money on his financial than physical book. Ex. OE-028 at 3.

256. BP contends its Passport to Work was an incentive to comply with anti-manipulation laws. BP IB at 97. According to Nuelle, Passport to Work was a program that monitored employees’ completion of training courses. Ex. BP-001 at 12: 4-6. BP states, without a citation, that completing the Passport to Work program was a requirement for all employees. BP IB at 97. Therefore, the record in this case fails to establish that BP had compliance incentives or noncompliance sanctions in place.

Factor 7: Reasonable Responsive Steps After a Violation has been Detected

257. BP failed to take reasonable steps after a violation is detected. This is evident in the employees’ actions immediately following the November 5 call, the changing draft reports, and the failure to complete the internal inquiry.

258. Nuelle testified that Comfort, following the November 5, 2008 phone call with Luskie, discussed the call with Bass. Ex. BP-001 at 19:3-4. Nuelle continued, stating Bass requested Comfort provide BP Compliance with the recording of the call. Ex. BP-001 at 19:4-5. On November 6, 2008 at 5:39 a.m., Comfort notified ISTC analyst Steve Simmons about the call and requested that Simmons review it. Ex. BP-001 at 19:5-7. Simmons responded soon after, telling Comfort that BP Compliance would review the call. Ex. BP-001 at 19:7-9. On November 6, 2008, BP Compliance reviewed the recorded call and started an investigation. Ex. BP-001 at 19:9-11.

259. Additionally, BP notified the Independent Monitor of the call on November 5,

¹³¹ See also Ex. OE-028 at 3 (“Mr. Comfort was primarily a financial trader for the first five months of 2008 and then moved to being primarily a physical trader. Although he still executed some financial transactions during the second half of 2008, his primary responsibility was short-term physical trading and transport in Texas.”).

2008. Ex. BP-001 at 19:13-14. Nuelle testified that Luskie reported the conversation to the monitor on November 5, 2008. Tr. 2424:21-2425:1. Luskie confirmed this, stating he spoke to David Stephan, with the Independent Monitor's office, on November 5, 2008. Ex. BP-016 at 10:19-21. Nuelle testified that on November 6, 2008, BP gave a copy of the November 5 call to the Independent Monitor. Ex. BP-001 at 19:14-15. Nuelle also testified that on or about November 17, 2008, the Independent Monitor provided the CFTC with a copy of the call, and on that same day the CFTC provided Enforcement Staff with a copy. Ex. BP-001 at 19:15-18.

260. Although the above cited steps were minimal actions conducive to complying with its own protocols, BP's subsequent steps fail to reach reasonable standards. BP's actions regarding its draft report suggest it failed to take reasonable steps. At the time of the call, Berry determined that a written report on the investigation on the November 5 call would be created and shared with BP executives, the CFTC, FERC, DOJ. Tr. 2027:12-22. This report would also be shared with the Independent Monitor. Tr. 2028:19-21. The first draft report on the inquiry following Luskie and Comfort's November 5 recorded call was created in November 2008. Ex. OE-110 at 8. As Bergin testified, this was the most complete version of a workplan, and it was attached to a November 23, 2008 email sent to relevant BP Compliance personnel. Ex. OE-001 at 122:16-18. Bergin further testified that the November 23, 2008 workplan included an analysis of relevant trading data. Ex. OE-001 at 122:19-20. This data would include "pre-bidweek positions, bidweek activities, cash activities, transportation spreads (including variable costs), and receipt and delivery volumes." Ex. OE-001 at 122:19-123:1. The plan also contemplated a review of BP's physical and financial positions (HPL transport in and out of the money) an analysis requested by Berry. Ex. OE-106; Tr. 2043:23-2045:2.

261. But in later drafts, this data would be removed. Bergin further testified that a later draft of this workplan dated January 31, 2009 either filled in previously incomplete sections or eliminated placeholders from prior drafts. Ex. OE-001 at 124:20-22. Simmons noted this draft was OE-112 at the hearing. Tr. 2176: 13-21. Simmons testified that the placeholders for the "Pre-bid week positions" and "positions going into the month," were removed from earlier drafts. Tr. 2178:16-19; Tr. 2178:24-2179:1-4. Simmons also admitted at the hearing that if transport was being used to affect the HSC index, higher HPL utilization rates would be relevant. Tr. 2184: 21-24. However, this was not discussed in the report. Tr. 2184: 9-11; 15-20.

262. Importantly, while sections relevant to an internal investigation were being removed or otherwise omitted, the conclusions section of Ex. OE-112 states "[i]n summary, ISTC found no regulatory breaches or violations of internal BP policies." Ex. OE-112 at 2. Even without a full analysis, this language was inserted into the draft report. Bergin testified that the last version of the draft was sent in an email to Rick Cape on April 7, 2009, which Bergin identified as Ex. OE-114. Ex. OE-001 at 125:16-126:1.

Ex. OE-114 shows the conclusion section remained unchanged, as it identically states “[i]n summary, ISTC found no regulatory breaches or violations of internal BP policies.” Ex. OE-114 at 3.¹³² Berry did testify that these were ongoing revisions, because “when you get more information, facts change.” Tr. 2080:5-6. But to remove or omit relevant data, while adding an unsupported conclusion, suggests BP failed to take reasonable steps to reach an unbiased conclusion to the inquiry.

263. Finally, BP unreasonably (and inexplicably) ended its internal inquiry into the November 5 call before it was completed. Nuelle testified that BP Compliance prepared to conduct a review into the substance of the call internally, but that review was never finalized. Ex. BP-001 at 19: 9-11; 19-20. Schlenker testified he understood BP Compliance and the Independent Monitor would investigate the call, in addition to informing regulatory agencies about the internal investigation. Tr. 1984: 25-1985:7. This contradicts Nuelle’s prefiled direct testimony, where Nuelle stated that the internal inquiry ended once the CFTC and Enforcement Staff investigations began, as responding to agency requests for data and narrative responses required significant amounts of BP Compliance resources. Ex. BP-001 at 22:16-23:4. But the beginning of federal investigations is not an adequate reason to the end the inquiry. BP could have continued its internal investigation while the CFTC and Enforcement Staff conducted their own investigations. Continuing its internal investigation would have been a reasonable step in light of the alleged manipulation, and BP failed to do so. The record in this case shows that BP failed to take responsive steps after a violation has been detected.

264. Accordingly, it is found that BP is not entitled to a compliance credit since it failed to prevent or detect the manipulation; its purported investigation of the traders behavior was ineffective, biased and reflective of a culture not geared towards compliance with Commission rules. Further, the compliance program does not meet the Commission’s seven factors.

6. Gross Profits

Parties Contentions

265. Enforcement Staff contends BP gained between \$233,330 and \$316,170 in gross profits as a result of its market manipulation. EF IB at 103. Enforcement Staff states that its profit calculations are reasonable. EF RB at 53. Additionally, Enforcement Staff

¹³² This conclusion was inserted after Berry had left BP. Berry also testified that his employment with BP ended on May 30, 2009, but his last day in the office was January 9, 2009. Tr. 2001: 21-25; Tr. 2002 :1-3. Berry agreed at hearing that when he left BP in January 9, 2009, he had not reached an “unequivocal conclusion that there was no wrongdoing” Tr. 2076:20-23. His reasons for leaving BP are unrelated to this case. Tr. 2002: 4-6.

avers that BP's alternate P&L analyses are flawed. EF RB at 54-55. No inconsistency exists in using BP's total HSC *Gas Daily* exposure in Enforcement Staff's disgorgement calculation and using BP's HSC-Henry Hub exposure in determining intent. EF RB at 55.

266. BP states that Enforcement Staff failed to demonstrate that BP violated the NGA or any Commission regulations. BP IB at 98. BP claims its analyses show BP's transactions had no market-wide financial impact during the Investigative Period. BP IB at 98. BP additionally did not profit from any alleged market misconduct. BP IB at 98.

267. BP asserts that Enforcement Staff's witnesses do not provide a basis for the Presiding Administrative Law Judge or the Commission to quantify BP's profits from alleged manipulative trading. BP IB at 99. Both of Bergin's P&L computational analyses-the "historical" P&L analysis and the "but-for" P&L analysis-are flawed. BP IB at 99-100.

268. Alternatively, BP presented three other analyses that could accurately calculate BP's trading profits. BP IB at 105. The first example modifies Bergin's historical analysis to reflect incremental P&L of HSC compared to Katy rather than including actual P&L. BP IB at 105. This approach would be better as it removes broader market price movements. BP IB at 105. It would adjust Bergin's P&L analysis to account for (i) the relative value difference between HSC and Katy and (ii) saved transport costs had BP sold its gas at Katy rather than HSC. BP IB at 105. Using this modified analysis, the generated historical P&L then can be compared to the actual historical P&L. BP IB at 105. This difference is relevant because this analysis challenges Enforcement Staff's position by showing whether the Texas team's decision to make sales at HSC resulted in incremental profit or loss, regardless of the impact of other unrelated factors on actual profits or loss. BP IB at 106. Evans explains this form of analysis shows that had BP sold physical volumes at Katy instead of HSC (which, according to Enforcement Staff, BP should have done), BP would have suffered a net loss of about \$50,000 (including accounting for transport cost savings). BP IB at 106.

269. Another alternative analysis would include the Texas team's actual trading transactions. BP IB at 106. This so-called "P&L against-the-index" method would have been consistent with both the Hearing Order and Bergin's approach of using actual losses. BP IB at 106. This analysis calculates a price impact by taking the difference between a recalculated benchmark HSC price and the actual HSC *Gas Daily* price. BP IB at 106. Using this model, the physical P&L results in a "but-for" loss of \$84,032. BP IB at 106. Financial P&L "but-for" gains would have been \$35,785. BP IB at 106. Under this analysis, BP would have incurred a net loss of \$48,247 during the Investigative Period. BP IB at 106-107.

270. A third alternate analysis would modify Bergin's actual P&L to use Dr. Abrantes-Metz's hypothetical "but-for" artificialities in showing the financial position's impact. BP IB at 107. This method would show net profits between \$47,000 to \$74,000. BP IB at 107. These figures are different from Bergin's gross profit calculations of \$225,000 to \$304,000. BP IB at 107.

Discussion

271. The Texas team's gross profits from the manipulation were between \$233,330 and \$316,170. Bergin calculated the gross profit figures using Dr. Abrantes-Metz's "analysis regarding but-for pricing." Bergin applied her ranges of price impact in each month to the Texas team's HSC *Gas Daily* index exposure in each month. Ex. OE-001 at 118:8-119:2; Table 1. From the gross profits he deducted the losses from their physical trading which resulted in net profits between \$165,749 and \$248,589. Ex. OE-001 at 119:7-10.

272. The Commission requires the disgorgement of unjust profits for the full amount of the gain plus interest. Penalty Guidelines at § 1B1.1(a); *Houlian Chen, et al.*, 151 FERC ¶ 61,179 at P 188. Additionally, the Commission has stated that "disgorgement need only be a reasonable approximation of profits casually connected to the violation" because "separating legal from illegal profits exactly may at times be a near impossible task." *Barclays*, 144 FERC ¶ 61,041 at P 148 (citation omitted); *see also SEC v. Whittemore*, 659 F.3d 1, 8 (D.C. Cir. 2011); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D. C. Cir. 1989); *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir 1995); *SEC v. Bilzerian (Bilzerian)*, 814 F. Supp. 116, 121 (D. D. C. 1993). Enforcement Staff is correct that it only needed to "offer a *prima facie* reasonable approximation" to shift the burden to BP. *Bilzerian*, 814 F. Supp at 121; *see also First City Fin.*, 890 F.2d 1232 ("the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty"). The Hearing Order mandated findings of fact on BP's profits (entertaining any reasonable method for calculating this amount) and required both a gross number of profits and a net amount (deducts BP's losses from its physical trading). Hearing Order at P 49(vi). Enforcement Staff is correct in that it showed that BP profited from the manipulation and reasonably calculated the profits.

273. Bergin calculated the Texas team's gross profits using their total HSC *Gas Daily* exposure each month since all of this short exposure benefited from the index price manipulation. Ex. OE-161 at 51:9-11. BP did not dispute the use of the total HSC *Gas Daily* exposure to derive gross profits. In addition, Enforcement Staff used Dr. Abrantes-Metz price artificiality estimates to calculate BP's gross profits. This witness testified explaining her conservative price artificiality analysis to isolate the price effects of BP's manipulation. Ex. OE-129 at 138:1-39:20, 147:6-48:5.¹³³ BP argued that this was

¹³³ *Barclays*, 144 FERC ¶ 61,041 at P 148; *First City Fin.*, 890 F.2d at 1231 (disgorgement must "distinguish between legally and illegally obtained profits" but "need only be a reasonable approximation of profits causally connected to the violation.").

hypothetical. BP cannot prevail on this matter since the Commission has upheld disgorgement amounts calculated using such methods.¹³⁴ BP did not offer any evidence disputing Dr. Abrantes-Metz's methodology.¹³⁵ Additionally, Enforcement Staff reasonably approximated BP's net profits by subtracting its next-day fixed-price losses at HSC. Ex. OE-161 at 51:12-13 (Bergin).¹³⁶

274. The alternatives offered by BP to rebut Enforcement Staff's profit calculations are not supported by the record. Evans offered a hypothetical P&L of \$50,000 based on the assumption that the Texas team sold all of its physical volumes at Katy instead of HSC. Evans admitted that Enforcement Staff never suggested BP should always have sold at Katy instead of at HSC. Exs. BP-037: 17-19; OE-161 at 50:16-51:2 (Bergin) (listing the options the Texas team had to the extent they had additional baseload gas at Katy); OE-129 at 131:11-132:2 (Abrantes-Metz). Evans also offered his P&L against-the-index or benchmark for what the index might have been absent BP's sales. However, this approach ignores the informational impact on other market participants due to BP's early and aggressive selling. Exs. OE-129 at 65:5-67:2; OE-211 at 75:11-76:2. Further, it also ignores the volumetric impact of BP's increased sales on the overall supply at HSC. Ex. OE-161 at 52:14-18. Evans' third alternative, the counterfactual P&L, is unreliable since it double-counts BP's losses¹³⁷ and it is also inconsistent with his P&L against-the-index.¹³⁸

¹³⁴ *Barclays*, 144 FERC ¶ 61,041 at P 150 (Staff's disgorgement amount reasonably approximated profits by multiplying the affected positions by an "estimate of price difference - that is, the amount by which Barclays' manipulative trading affected the Index" from "OE Staff's preliminary econometric modeling of Barclays' cash trading."). This is what Enforcement Staff did in the case at bar. They took the exposure and multiplied that by the estimate of price difference.

¹³⁵ Ex. OE-211 at 130:2-9 (Abrantes-Metz).

¹³⁶ BP claims that Bergin's use of the traders' physical P&L to determine BP's physical trading losses is undermined by Dr. Abrantes-Metz's price artificiality analysis. But Enforcement Staff is correct that Dr. Abrantes-Metz analysis focused solely on isolating the effect of BP's manipulation on the HSC *Gas Daily* price and did not measure "incremental P&L."

¹³⁷ Evans calculated the losses separately using Dr. Abrantes-Metz estimates of the price effects of BP's shift to earlier sales and BP's transport of excess volume to HSC, and lumped them together, thus double counting them. BP-037 at 89 (A3); 90 (A4); 92(A7). *See also* Ex. OE-129 at 214:6-216:4.

¹³⁸ Evans' counterfactual estimate of physical losses ranges from \$151,008 to

275. Precedent supports defendants when they have shown that the government's disgorgement figure was not reasonable due to a "clear break in or considerable attenuation of the causal connection between the illegality and the ultimate profits." *First City Fin.*, 890 F.2d at 1232. BP did not establish this in the case at bar. Finally, Enforcement Staff is correct that BP conflates Enforcement Staff's disgorgement calculation of unjust profits with Enforcement Staff's exposure analysis. As Enforcement Staff avers, using two methodologies is not inconsistent. One methodology was to calculate disgorgement (BP's total HSC *Gas Daily* exposure) and HSC-Henry Hub exposure was used to determine intent.¹³⁹

IV. CONCLUSIONS

276. It is concluded that BP engaged in market manipulation. This is a classic case of physical for financial benefits. During the Investigative Period (two and a half months in 2008) BP intentionally sold large volumes of next-day physical gas at HSC in a way designed to benefit their corresponding short financial positions. Starting on September 18, 2008 through the end of that month Comfort began to manipulate the HSC *Gas Daily* index to slow the shrinkage of the very valuable spread position in the Texas team's book. After a successful September the Texas team extended the manipulation through October and November 2008. The Texas team trading during the Investigative Period was markedly different than their trading before the Investigative Period. There is no economic or other justification for their changed and unprofitable trading patterns.

277. Accordingly, it is concluded that BP violated Section 4 of the NGA and the Commission's Anti-Manipulation Rule. BP participated in an unlawful scheme to manipulate the HSC *Gas Daily* index to benefit their financial positions. Further, it is concluded that they did so with the requisite scienter and in connection with jurisdictional transactions. Enforcement Staff proved jurisdiction through third party transactions

\$256,785. Ex. BP-037 at 92. His P&L against-the-index estimates losses are \$84,032. *Id.* at 76.

¹³⁹ The Texas team's HSC-Henry Hub spread position benefitted from their suppression of the HSC *Gas Daily* index, regardless of other positions BP had in its portfolio in the Gulf area. Ex. OE-161 at 45:14-46:20. The evidence also supports comparing the Texas team's HSC-Henry Hub spread P&L to examine their intent. The traders were focused on their short HSC *Gas Daily* exposure, and the Texas team P&L was calculated separately from the other SEGT desks and was a factor in determining their bonuses. Ex. OE-161 at 46:21-48:8; OE-021; OE-163; OE-195 at 10:25-11:8; 12:19-13:4; Tr. 672:15-673:1 (Luskie) (November 3 phone call confirmed the Texas team's P&L would be affected by HSC's prices relative to other points including Henry Hub).

priced off the HSC *Gas Daily* index, cash-out transactions priced off the same index and BP's own next-day, fixed-price sales of gas at HSC made to suppress the HSC *Gas Daily* index.

278. The evidence in this case shows that the Texas team had hundreds of affirmative acts in furtherance of the manipulative scheme during the Investigative Period (49 trading days covering a period of 73 flow days). They made 680 fixed-price sales at HSC, 101 bid-initiated sales at HSC 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 offer price at Katy. If each individual trade is treated as a separate violation the facts support a high number of violations. However, Staff recommends a minimum number of 48. Accordingly, it is concluded that there were at least 48 violations during a period of 49 days. BP's manipulation resulted in financial losses of \$1,375,482 to \$1,927,728 on the next-day natural gas markets at HSC and Katy during the Investigative Period. The amount of natural gas involved in BP's sales of next-day, fixed-price physical gas at HSC in the Investigative Period was 10,632,400 MMBtus. The amount of natural gas involved in the financial natural gas positions at HSC in the Investigative Period was 25,310,000 MMBtus. The losses were during 49 trading days of the Investigative Period.

279. The current violation is less than five years after a prior Commission adjudication and adjudications of similar misconduct by the CFTC and DOJ. As a result, BP's conduct warrants an increase of 2 points in their culpability score. BP's conduct here also contravenes the terms of a permanent injunction with the CFTC which warrants a 2 point increase in their culpability score. It is concluded that BP did not have an effective compliance program since it failed to prevent or detect the manipulation; its purported investigation of the traders' behavior was ineffective and biased, reflective of a culture not geared towards compliance with Commission rules. In essence, its compliance program did not comply with the Commission's seven factors. Finally, the Texas team's gross profits from the manipulation were between \$233,330 and \$316,170 and net profits between \$165,749 and \$248,589.

V. ORDERING CLAUSE

280. This order is subject to review by the Commission on exceptions or on its own motion, as provided by the Commission's rules of practice and procedure.

Carmen A. Cintron
Presiding Administrative Law Judge