

173 FERC ¶ 61,239
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee and Richard Glick.

BP America Inc.	Docket Nos.	IN13-15-000
BP Corporation North America Inc.		IN13-15-001
BP America Production Company		IN13-15-002
BP Energy Company		

OPINION NO. 549-A

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued December 17, 2020)

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1. On August 10, 2016, BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company (collectively, BP) submitted a request for rehearing (Rehearing Request) of Opinion No. 549.¹ In Opinion No. 549, the Commission affirmed an Initial Decision² in which the Presiding Administrative Law Judge (Presiding Judge or ALJ) found that BP violated section 4A of the Natural Gas Act (NGA) and section 1c.1 of the Commission's regulations³ (Anti-Manipulation Rule) promulgated thereunder.⁴ Pursuant to *Allegheny Defense Project v. FERC*,⁵ the rehearing requests filed in this proceeding may be deemed denied by operation of law. As permitted by section 19(a) of the Natural Gas Act however, we are modifying the discussion in Opinion No. 549 and continue to reach the same result in this proceeding, as discussed below.⁶ In addition, on December 11, 2017, BP filed a motion seeking to dismiss this enforcement action as barred by the five-year statute of limitations set forth in 28 U.S.C. § 2462.⁷ As discussed herein, the Commission finds that BP waived any statute of limitations defense by failing to raise it earlier in this proceeding. The Commission, therefore, also denies BP's motion to dismiss this enforcement action as time barred.

I. Background

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

¹ *BP America Inc.*, Opinion No. 549, 156 FERC ¶ 61,031 (2016) (Opinion No. 549).

² *BP America Inc.*, 152 FERC ¶ 63,016 (2015) (Initial Decision).

³ 18 C.F.R. § 1c.1 (2020).

⁴ 15 U.S.C. § 717c-1.

⁵ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁶ *Allegheny Def. Project*, 964 F.3d at 16-17. In responding to BP's arguments raised on rehearing, the Commission is not changing the outcome of Opinion No. 549. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁷ 28 U.S.C. § 2462.

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.⁸

3. The Commission implemented section 4A of the NGA by adopting the Anti-Manipulation Rule in Order No. 670,⁹ which provides in relevant part:

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

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

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the 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.¹⁰

4. In this case, staff of the Commission's Office of Enforcement (Enforcement Staff) alleged that BP engaged in uneconomic trading of next-day, fixed-price natural gas at Houston Ship Channel, and in the transportation of natural gas from Katy, Texas to

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

⁹ *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (2006) (Order No. 670).

¹⁰ 18 C.F.R. § 1c.1.

Houston Ship Channel using the Houston Pipeline in a manner that was intended to manipulate market prices and benefit related financial positions in the aftermath of Hurricane Ike.¹¹ Specifically, when Hurricane Ike made landfall on September 13, 2008, BP held financial natural gas positions that combined to create a spread position which would benefit when the difference, or spread, between the Platts *Gas Daily* index prices at Houston Ship Channel and Henry Hub increased. In other words, BP's spread position would financially benefit from a lower Houston Ship Channel *Gas Daily* index price relative to the Henry Hub *Gas Daily* index price.¹²

5. BP had its Houston Ship Channel-Henry Hub spread position in place when Hurricane Ike made landfall on September 13, 2008, which interrupted the natural gas market and caused Houston Ship Channel *Gas Daily* index prices to decrease sharply relative to Henry Hub *Gas Daily* index prices. This resulted in a sizeable realized profit and unrealized (i.e., potential) profit for BP's Houston Ship Channel-Henry Hub financial spread position. The more slowly the Houston Ship Channel-Henry Hub *Gas Daily* spread narrowed each day until the end of September, the more money BP stood to make on its spread position.¹³ In particular, Enforcement Staff witness Patrick J. Bergin (Bergin) testified that the value of BP's spread position in late September would retain \$19,800 for every cent that BP could slow the narrowing of the Houston Ship Channel-Henry Hub spread.¹⁴ As a result, BP had a financial incentive to slow the shrinkage of the Houston Ship Channel-Henry Hub spread that Hurricane Ike had created.

6. Enforcement Staff alleged that the Texas trading team of BP's Southeast Gulf Texas desk (Texas Team) engaged in unprofitable next-day, fixed price natural gas trading and natural gas transportation that suppressed the *Gas Daily* index price at Houston Ship Channel, and thereby increased the spread between the Houston Ship Channel *Gas Daily* index price and the Henry Hub *Gas Daily* index price. This increased the value of BP's Houston Ship Channel-Henry Hub financial spread position.

¹¹ For an overview of the relevant natural gas markets, prices, products, and positions, see Opinion No. 549, 156 FERC ¶ 61,031 at PP 7-14.

¹² See, e.g., Ex. OE-001 at 53:9-12.

¹³ Initial Decision, 152 FERC ¶ 63,016 at PP 7, 36.

¹⁴ *Id.* P 37 (citing Ex. OE-001 at 110:13-16).

7. After an extensive hearing,¹⁵ the Presiding Judge determined that the evidence supported a finding that BP violated the Commission's Anti-Manipulation Rule and section 4A of the NGA. The Presiding Judge found that BP, through its Texas Team, engaged "in a scheme to manipulate the market . . . to suppress the *Gas Daily* index and benefit their financial positions,"¹⁶ with the requisite scienter and in connection with jurisdictional transactions.¹⁷ The Commission affirmed that decision on July 11, 2016, assessed a civil penalty in the amount of \$20,160,000, and required BP to disgorge unjust profits in the amount of \$207,169.¹⁸

8. On August 10, 2016, BP requested rehearing of Opinion No. 549. BP does not seek rehearing of the portions of Opinion No. 549 that addressed BP's prior request for rehearing of the order that established a hearing in this proceeding,¹⁹ which are now final.²⁰ The issues and determinations that BP does seek rehearing of are addressed below.

II. Opinion No. 549 and the ID Did Not Shift the Burden of Proof to BP

A. Opinion No. 549

9. Opinion No. 549 agreed with the ID that Enforcement Staff had the burden of proof—i.e., the burden of persuasion—on its manipulation claim at all times.²¹ Opinion No. 549 also found that the ID properly weighed the testimony and documentary

¹⁵ Opinion No. 549 provides a detailed procedural history of the proceeding. See Opinion No. 549, 156 FERC ¶ 61,031 at PP 24-36.

¹⁶ Initial Decision, 152 FERC ¶ 63,016 at P 82.

¹⁷ See *id.* PP 128, 146.

¹⁸ See Opinion No. 549, 156 FERC ¶ 61,031 at P 3. The Commission subsequently stayed the unjust profit disgorgement directive because BP represented that it was unable to send the disgorgement monies to the Texas Low Income Home Energy Assistance Program in the manner required by Opinion No. 549. See *BP America Inc.*, 156 FERC ¶ 61,174, at PP 4-5 (2016).

¹⁹ *BP America Inc.*, 147 FERC ¶ 61,130 (2014) (Hearing Order).

²⁰ See BP Rehearing Request at n.1.

²¹ Opinion No. 549, 156 FERC ¶ 61,031 at P 60 (summarizing evidentiary findings).

evidence supporting and opposing a finding of manipulative conduct and the requisite scienter. In addition, Opinion No. 549 considered whether BP provided evidence to rebut or defeat Enforcement Staff's evidence, including expert and fact witness testimony.²²

B. BP Rehearing Request

10. On rehearing, BP argues that Opinion No. 549 shifted the burden of proof to BP by applying the wrong legal framework and presuming BP's liability,²³ and by requiring BP to produce evidence that "outweigh[ed]" Enforcement Staff's evidence in order to "disprove" Enforcement Staff's case.²⁴

11. BP argues that the ID and Opinion No. 549 failed to apply properly the United States Supreme Court's so-called *McDonnell Douglas* three-step analytical framework for determining whether Enforcement Staff met its burden of proof. According to BP, this three-step analytical framework applies in all administrative proceedings, whereby: (1) the petitioner makes a *prima facie* case for the respondent's liability; (2) the respondent bears the burden to produce some evidence that, "taken as true," rebuts any element of the *prima facie* case; and (3) the rebuttal having been made, the presumption drops from the case and the ALJ weighs the competing evidence to determine whether the petitioner met its burden of proof.²⁵

C. Commission Determination

12. We disagree with BP's arguments requesting rehearing of Opinion No. 549's findings that Enforcement Staff met its burden of proof—i.e., burden of persuasion—by a preponderance of evidence on a claim of manipulation, including its finding that BP failed to rebut or defeat such claim with contrary evidence of at least equal probative weight. In addition, we clarify the language in Opinion No. 549, as discussed below.

²² *See id.* PP 60-61.

²³ BP Rehearing Request at 36.

²⁴ *Id.* at 36, 38-40 (citing Opinion No. 549, 156 FERC ¶ 61,031 at PP 52, 59, 71, 83, 91, 124, 131, 166, 171, 178, 179, and 180).

²⁵ *Id.* at 37 n.10 (citing *St. Mary Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 269-71 (1994)).

13. BP's arguments regarding shifting the burden of proof are based on its understanding of both Opinion No. 549 and Supreme Court case law addressing the burden of proof under various statutory regimes. As an initial matter, BP asserts that the Commission should have applied a three-part analytical framework with a rebuttable presumption of liability at the administrative hearing to determine whether Enforcement Staff met its burden of proof on a claim for manipulation.²⁶ BP also asserts that the Supreme Court's *McDonnell Douglas* framework²⁷—which was developed to address discriminatory-treatment claims under Title VII of the Civil Rights Act of 1964 and has been extended *arguendo* to similar statutory discrimination cases—applies automatically to all administrative hearings, including administrative actions under the NGA and the Commission's Anti-Manipulation Rule.²⁸

14. We disagree with BP's contention on rehearing and find that neither section 4A of the NGA nor the Commission's Anti-Manipulation Rule expressly provide for a rebuttable presumption of liability to automatically trigger the *McDonnell Douglas* framework for allocating the burden of production and order for the presentation of proof. We are also unaware of any judicial opinion extending the *McDonnell Douglas* framework to statutory claims for manipulation or other fraudulent activity. Nonetheless, we need not consider whether the *McDonnell Douglas* framework should be extended to

²⁶ *Id.* at 36.

²⁷ *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

²⁸ In *St. Mary's* on which BP relies, the Supreme Court considered an unlawful discriminatory-treatment case under Title VII of the Civil Rights Act of 1964. BP Rehearing Request at 37 n.10 (citing *St. Mary's*, 509 U.S. at 509). In this statutory context, the Supreme Court held that a petitioner must first establish a *prima facie* case of racial discrimination based on certain minimal requirements set forth in the prior *McDonnell Douglas* decision, which then creates a rebuttable presumption of discrimination and shifts the burden of production of a legitimate non-discriminatory reason for the action to the respondent. *St. Mary's*, 509 U.S. at 506-07 (requiring application of the *McDonnell Douglas* framework for the allocation of the burden of production and order for the presentation of proof in a Title VII case). In *Reeves*, also cited by BP (BP Rehearing Request at 37 n.10), the Supreme Court subsequently stated that it “has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under . . . Title VII of the Civil Rights Act of 1964 . . . also applies to [Age Discrimination in Employment Act of 1967] actions.” *Reeves*, 530 U.S. at 142. The Supreme Court opined that “[b]ecause the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here.” *Id.*

manipulation cases because the ALJ did not apply a presumption-shifting analysis but, rather, conducted a straight-forward determination of whether Enforcement Staff successfully carried its burden of proof based on a preponderance of the evidence.²⁹

15. In this regard, Opinion No. 549 cited section 7(c) of the APA, 5 U.S.C. § 556(d), directing that “the proponent of a rule or order has the burden of proof,” which the Supreme Court in *Greenwich Collieries* construed as the ultimate “burden of persuasion” on an issue.³⁰ Because Enforcement Staff sought an order enforcing section 4A of the NGA and the Commission’s Anti-Manipulation rule thereunder,³¹ we continue to find that Opinion No. 549 properly found that Enforcement Staff had the burden of proof and, therefore, the burden of persuasion requiring proof by a preponderance of the evidence of a claim of manipulation.³²

16. As discussed in Opinion No. 549, the ID found that Enforcement Staff produced evidence at the hearing to establish a *prima facie* case of manipulative conduct and scienter in connection with a jurisdictional transaction.³³ Once Enforcement Staff met its

²⁹ BP’s reliance on the Supreme Court’s decision in *Greenwich Collieries*, which did not apply a *McDonnell Douglas* framework, is similarly misplaced. The Supreme Court held there that absent specific statutory authorization, agencies may not informally create rules that supplant the Administrative Procedure Act’s (APA) requirement that “the proponent of a rule or order has the burden of proof.” *Greenwich Collieries*, 512 U.S. at 269-72 (invalidating the Department of Labor’s use of a “True doubt” rule, which essentially shifted the burden of persuasion to the party opposing a benefits claim, when the evidence is evenly balanced, under the Black Lung Benefits Act and the Longshore and Harbor Workers’ Compensation Act). In particular, the Supreme Court found that the “True doubt rule” conflicted with section 7(c) of the APA, 5 U.S.C. § 556(d), which requires that “the proponent of a rule or order has the burden of proof,” in administrative actions, which the Supreme Court construed as the ultimate “burden of persuasion” on an issue. *Id.* at 272, 276, 281. Contrary to BP’s assertions, Opinion No. 549 did not create or apply any informal rules or presumptions.

³⁰ See Opinion No. 549, 156 FERC ¶ 61,031 at P 59; *Greenwich Collieries*, 512 U.S. at 276 (“[W]e understand the APA’s unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.”).

³¹ 15 U.S.C. § 717c-1; 18 C.F.R. § 1c.1 (2020).

³² Opinion No. 549, 156 FERC ¶ 61,031 at PP 59-63.

³³ *Id.* PP 60; see Black’s Law Dictionary 1382 (10th ed. 2014) (defining “prima facie case” as “[a] party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor”). While BP cites to another definition in

burden of production of a *prima facie* case, BP could rebut Enforcement Staff's case or come forward with contrary evidence of at least equal weight in order to defeat Enforcement Staff's claim.³⁴ BP was given the opportunity to cross-examine Enforcement Staff's witnesses and to present testimonial and documentary evidence of its own at the hearing, which evidence the ALJ and, subsequently, the Commission in Opinion No. 549, considered and weighed.³⁵ Based on all the record evidence, we continue to find that Opinion No. 549 correctly concluded that the ID had properly found that Enforcement Staff met its ultimate burden of persuasion on a claim of manipulation under section 4A of the NGA and the Commission's Anti-Manipulation Rule, which BP had not rebutted or defeated with contrary evidence of at least equal weight.³⁶

17. BP objects to Opinion No. 549's statement that "when the party with the burden of proof establishes a *prima facie* case supported by credible and credited evidence—as the ALJ found the evidence Enforcement Staff proffered at the hearing—then the burden of producing evidence to rebut, defeat, or *otherwise outweigh* the evidence supporting a claim fall upon the opposing party."³⁷ We clarify that Opinion No. 549 did not require a respondent to produce evidence to *outweigh* the evidence of Enforcement Staff. Rather, a respondent must either "rebut"—i.e., refute, oppose, or counteract by evidence, argument or contrary proof, as in rebutting Enforcement's Staff expert's testimony—or "defeat" Enforcement Staff's claim by coming forward with contrary evidence of at least equal

Black's Law Dictionary of "prima facie case" as "[t]he establishment of a legally required rebuttable presumption," this definition does not apply here to section 4A of the NGA or to the Commission's Anti-Manipulation Rule because neither of these statutory provisions contains a "legally required rebuttable presumption."

³⁴ Opinion No. 549, 156 FERC ¶ 61,031 at P 61; *see* Black's Law Dictionary 1458 (10th ed. 2014) (defining "rebut" as "[t]o refute, oppose, or counteract (something) by evidence, argument, or contrary proof" and using as an example to "rebut the opponent's expert testimony"). "[R]ebuttal evidence" is defined as "[e]vidence offered to disprove or contradict the evidence presented by an opposing party." *Id.* at 677.

³⁵ *See* Opinion No. 549, 156 FERC ¶ 61,031 at P 61 ("The ID also considered whether BP provided evidence to rebut or defeat Enforcement Staff's evidence, including the expert and fact witness testimony: [citing ID findings].").

³⁶ *Id.* PP 62-63.

³⁷ BP Rehearing Request at 42 n.36 (citing Opinion No. 549, 156 FERC ¶ 61,031 at PP 52, 59) (emphasis added).

probative weight.³⁸ Opinion No. 549 expressly states in this regard that “[t]he ID also considered whether BP provided evidence to *rebut or defeat* Enforcement Staff’s evidence, including the expert and fact witness testimony.”³⁹ While a respondent need only produce contrary evidence of equal weight to defeat a claim, a respondent may “otherwise outweigh” the asserted claim with evidence of even greater probative force.

18. BP similarly takes issue with Opinion No. 549’s statement that “as discussed herein, the ID found no credible or convincing evidence to support [a] business justification to *outweigh* the inference of manipulation established by Enforcement Staff’s evidence.”⁴⁰ In fact, the ID found no credible or convincing evidence to support a business justification on the part of BP, either to defeat (i.e., to at least equal) or to outweigh the inference of manipulation established by Enforcement Staff’s evidence.⁴¹ We clarify Opinion No. 549’s description of the ALJ’s findings accordingly.

³⁸ In this regard, Opinion No. 549 cited to the D.C. Circuit’s decision in *National Mining Ass’n v. Dep’t of Labor*, 292 F.3d 849, 871-72 (D.C. Cir. 2002), which concisely stated: “*Greenwich Collieries* carefully distinguishes agency regulations that shift the burden of proof (prohibited by the APA ‘except as otherwise provided by statute,’ 5 U.S.C. § 556(d)) from regulations that shift the burden of production (which the APA does not prohibit, *see [Greenwich Collieries]*, 512 U.S. at 270-80, 114 S Ct. 2251 (distinguishing burden of proof from burden of production)).” On rehearing, BP misconstrues the D.C. Circuit’s ruling as “inapposite” based on purportedly distinguishable facts; but BP overlooks the key legal point that nothing in the Commission’s orders or rules on manipulation impermissibly shifted the burden of persuasion onto BP on any issue—as distinct from the burden of producing sufficient evidence to rebut or defeat Enforcement Staff’s compelling *prima facie* case of manipulation, which BP failed to do.

³⁹ Opinion No. 549, 156 FERC ¶ 61,031 at P 61 (quoting from ID findings) (emphasis added).

⁴⁰ BP Rehearing Request at 42 n.36 (citing Opinion No. 549, 156 FERC ¶ 61,031 at PP 52, 59) (emphasis added).

⁴¹ *See, e.g.*, Opinion No. 549, 156 FERC ¶ 61,031 at PP 60-61, quoting key findings by the ALJ in the ID.

19. BP also argues that Opinion No. 549 shifted the burden of proof to BP to “disprove” Enforcement Staff’s case.⁴² We disagree with BP’s arguments on rehearing and provide clarification. While Opinion No. 549 found that BP’s expert Mathew Evans (Evans) “failed to *disprove* Enforcement Staff’s allegations,”⁴³ the full context of Opinion No. 549 more accurately conveys that Evans failed to *rebut* the testimony of Enforcement Staff’s expert Dr. Rosa M. Abrantes-Metz (Abrantes-Metz). For example, Opinion No. 549 found that BP’s expert ignored the most fundamental change in the BP Texas Team’s trading behavior as demonstrated by Abrantes-Metz—i.e., the shift to net selling on 48 of the 49 days in the Investigative Period of September 18 through November 30, 2008.⁴⁴ We note that, BP also used the “disprove” language in its own Brief on Exceptions, to which the Commission was responding in Opinion No. 549.⁴⁵ We clarify that, where Opinion No. 549 stated that the testimony of BP’s expert did not “disprove” Enforcement Staff’s allegations or expert testimony,⁴⁶ we intended simply to find that Evans did not “rebut” such allegations or testimony.

20. In summary, once Enforcement Staff met its burden of production of a *prima facie* claim of manipulation, BP could rebut Enforcement Staff’s case or come forward with contrary evidence of at least equal probative weight in order to defeat Enforcement Staff’s claim. We conclude that BP did not do either. Therefore, we conclude that Opinion No. 549 properly found that the ID correctly concluded that Enforcement Staff met its ultimate burden of persuasion on a claim of manipulation.

⁴² BP Rehearing Request at 38 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 179).

⁴³ Opinion No. 549, 156 FERC ¶ 61,031 at P 179 (emphasis added).

⁴⁴ *Id.* Enforcement Staff framed the Investigative Period as September 18, 2008 through November 30, 2008 (Investigative Period), and the Pre-Investigative Period as January 2, 2008 through September 10, 2008 (Pre-Investigative Period). See Initial Decision, 152 FERC ¶ 63,016 at PP, 5, 10 n.6, 44 n.20.

⁴⁵ See Opinion No. 549, 156 FERC ¶ 61,031 at P 176 (quoting BP Br. on Exceptions at 55-56).

⁴⁶ See Opinion No. 549, 156 FERC ¶ 61,031 at PP 177, 178, 179, 180, and 185.

III. Manipulative Conduct

A. Opinion No. 549 Did Not Replace the Anti-Manipulation Rule with an Indecipherable “Confluence of Factors” Standard But Found That BP’s Texas Team Engaged in Manipulation Based on the Totality of Evidence

1. Opinion No. 549

21. Opinion No. 549 found that, after Hurricane Ike, BP changed its pattern of trading, whereby:

BP’s trading and transport of next-day fixed-price gas at Houston Ship Channel changed to almost entirely net selling, BP increased its percentage and volume of fixed-price sales at Houston Ship Channel, and BP became the seller with the largest market share in the next-day fixed-price market at Houston Ship Channel during the Investigative Period.⁴⁷

22. Opinion No. 549 also agreed with the ID’s findings that:

BP shifted to selling higher volumes at Houston Ship Channel early in the trading day, buying at Houston Ship Channel later in the day, and transporting substantially more gas to Houston Ship Channel from Katy using BP’s Houston Pipeline System transport. In addition, . . . the evidence demonstrated that BP shifted to posting aggressively lower offers compared to other sellers at Houston Ship Channel[,] . . . there was an increase in the frequency of BP’s sales made by hitting bids[*i.e.*, selling at the price bid by purchaser rather than offering to sell at a higher price] ,and] . . . the evidence showed that there was an increase in the percentage of sales at Houston Ship Channel that were uneconomic compared to contemporaneous prices at Katy.⁴⁸

23. Opinion No. 549 further noted the ID’s findings that “this unique confluence of changed trading patterns, which furthered the scheme to suppress the [Houston Ship Channel] *Gas Daily* index, sets apart the Texas [T]eam’s behavior in the Investigative

⁴⁷ *Id.* P 138 (citing Initial Decision, 152 FERC ¶ 63,016 at P 42).

⁴⁸ *Id.*

Period from their behavior in the Pre-[Investigative Period] and cannot be explained by any economic or profit rationale, by general market conditions, or by comparison to the behavior of the other two largest sellers at [Houston Ship Channel].”⁴⁹ Order No. 549 agreed with the ID that “the only reasonable conclusion is that early bid hitting was part of the attempt to push early prices down and mark the open.”⁵⁰

24. In this regard, Opinion No. 549 clarified that the use of the phrase “confluence” to describe the collective actions constituting the scheme on which Enforcement Staff based its claim of manipulation did not implicate legal doctrine relating to the reasonable suspicion and/or probable cause standard applied to detain a criminal defendant, as BP had argued. Opinion No. 549 thus rejected BP’s invitation to review the ID’s findings based on “reasonable suspicion” and “probable cause” doctrines of criminal law that have no apparent relevance here.⁵¹

25. Opinion No. 549 further found that BP did not rebut the evidence demonstrating BP’s change in trading patterns. Rather, Enforcement Staff proved by a preponderance of the evidence that the Texas Team’s conduct—which included the uneconomic use of transport (e.g., shipping gas from Katy to Houston Ship Channel for sale at less attractive prices after factoring in transportation costs) combined with early, volume-heavy selling at aggressively low prices at Houston Ship Channel during the Investigative Period—viewed together under the circumstances, constituted and furthered a scheme to artificially suppress the Houston Ship Channel *Gas Daily* index. Opinion No. 549 also agreed with the ID in distinguishing the separate and isolated activities of other market participants from the manipulative scheme that BP was shown to have engaged in during the Investigative Period.⁵²

⁴⁹ *Id.* (citing Initial Decision, 152 FERC ¶ 63,016 at P 42).

⁵⁰ *Id.* P 126 (quoting Initial Decision, 152 FERC ¶ 63,016 at P 46 n.24). As discussed separately herein, Opinion No. 549 also agreed with the ID’s conclusions that the Texas Team’s monthly positions and trading activity were intentional acts to further their manipulative scheme. *Id.* P 225 (citing Initial Decision, 152 FERC ¶ 63,016 at P 123). Opinion No. 549 indicated “support [for] Abrantes-Metz’s conclusions as to ‘the essential statistical impossibility’ that the confluence of the factors observed is due to anything else but manipulation.” *Id.* (citing Initial Decision, 152 FERC ¶ 63,016 at P 126).

⁵¹ *Id.* P 142.

⁵² *Id.* P 141.

26. In short, based on the totality of evidence, including evidence demonstrating BP's changed trading patterns during the Investigative Period, a lack of profitability associated with these new trading patterns, and no reasonable explanation for these changes, Opinion No. 549 agreed with the ID's findings that the overwhelming inference to be drawn was that BP engaged in a scheme to artificially suppress the Houston Ship Channel *Gas Daily* index for the benefit of its financial positions.⁵³

2. BP Rehearing Request

27. BP argues that Opinion No. 549 replaced the Commission's Anti-Manipulation Rule with an indecipherable "confluence of factors" standard.⁵⁴ According to BP, "application of the law in Opinion No. 549 results in an impossible-to-articulate 'confluence of factors' standard that operates to convert lawful conduct—where it occurs in some unspecified 'confluence'—into fraudulent conduct manipulative conduct that violates the Anti-Manipulation Rule."⁵⁵ BP asserts that that the "confluence of factors theory is an attempt to remove from section 4A of the NGA the requirement that the Commission plead and prove a specific attempt to defraud coupled with evidence of actual fraud."⁵⁶

28. Citing to the D.C. Circuit's opinion in *Select Specialty Hospital v. Burwell*,⁵⁷ BP argues that Opinion No. 549 adopted a similarly amorphous and overreaching "'confluence of factors' theory whereby otherwise lawful trading is converted to fraudulent manipulative trading that violates the Anti-Manipulation Rule because some unstated minimum combination of factors purportedly support[s] [sic] a conclusion that no explanation other than manipulative intent could explain the confluence."⁵⁸ BP asserts this amounts to an "amorphous 'we know manipulation when we see it' standard" that is arbitrary and capricious.⁵⁹

⁵³ *Id.* P 140.

⁵⁴ BP Rehearing Request at 46.

⁵⁵ *Id.* at 46-47.

⁵⁶ *Id.* at 47.

⁵⁷ 757 F.3d 308 (D.C. Cir. 2014) (*Burwell*).

⁵⁸ BP Rehearing Request at 48-49 & n.70 (citing *Burwell*, 757 F.3d at 312).

⁵⁹ *Id.* at 48.

29. BP criticizes the statement in Opinion No. 549 that “[t]rades undertaken solely for bona fide economic purposes are not violative of [the Anti-Manipulation Rule], but the very same trades, if intended to manipulate the market, are indeed prohibited,” as merely stating the obvious—that trades intended to manipulate the market are unlawful.⁶⁰

30. BP also complains that Opinion No. 549 refused to “meaningfully consider BP’s exceptions” regarding other market participants’ similar conduct and that “changes in BP trading patterns . . . were consistent with changes observed in the marketplace” and found that BP engaged in intentional manipulation “based on the totality of the evidence.”⁶¹ Instead, BP argues that under the confluence of factors test used to establish probable cause in criminal law, each factor must serve to eliminate innocent actors.⁶² BP claims Opinion No. 549 relies on the asserted “totality” of conduct and unsupported credibility determination to evade a meaningful analysis of each specific factor, leaving “unanswered what minimum set of lawful factors may constitute a ‘confluence’ that converts lawful trading into unlawful fraud.”⁶³ BP questions “how many factors must be rebutted before the house of cards upon which [Enforcement Staff] built its theory of manipulation topples?”⁶⁴

31. BP further claims that Opinion No. 549 relied on a flawed regression analysis for concluding that BP uneconomically transported natural gas from Katy to Houston Ship Channel; rejected evidence that BP’s bid-hitting rates during the Investigative Period were not unusual compared to “other market participants and a broader time period;” ignored evidence that the Texas Team’s trading at Houston Ship Channel during the Investigative Period aligned with how other market participants were trading; and, with respect to economic losses, shifted the emphasis by stating “what matters in this case is that the losses during the Investigative Period were accompanied by the change in trading patterns.”⁶⁵

⁶⁰ *Id.*

⁶¹ *Id.* at 49-50 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 32).

⁶² *Id.* at 50; *id.* at 51 (“If the confluence of factors does not differentiate the innocent from the alleged guilty, it has no logical relevance.”).

⁶³ *Id.* at 51.

⁶⁴ *Id.*

⁶⁵ *Id.* at 52-53 (citing Opinion No. 549, 156 FERC ¶ 61,031 at PP 47, 120, 126, 136 and 140).

3. Commission Determination

32. We disagree with BP's arguments requesting rehearing of Opinion No. 549's finding that changes in BP's next day fixed-price trading and transport behavior during the Investigative Period constituted and furthered a scheme to manipulate the *Gas Daily* index at Houston Ship Channel to benefit BP's short financial positions that settled off that index. We find that the weight of the evidence demonstrated that BP's simultaneous increases in net selling, sales volume, and fixed-price sales, including sales increasingly made by hitting bids, collectively had—and were intended to have—a suppressing effect on the Houston Ship Channel *Gas Daily* index.⁶⁶

33. We reject BP's argument that Opinion No. 549 replaced the Anti-Manipulation Rule with a "confluence of factors" standard that left incomprehensible what combination of lawful activity the Commission may deem fraudulent and a violation of the Anti-Manipulation Rule.⁶⁷ Opinion No. 549 found that the phrase "confluence of factors" describes the collective actions constituting the scheme on which Enforcement Staff based its claim of manipulation and does not implicate any legal doctrine relating to the reasonable suspicion and/or probable cause standard applied to detain a criminal defendant.⁶⁸ Opinion No. 549 considered the collection of acts such as bid-hitting, underpricing other market participants' offers, overall economics of trading, and the timing and size of BP's transactions in determining whether the evidence demonstrates a manipulative scheme. We find that it was appropriate to consider these acts or factors because they relate to whether the Texas Team was engaged in a type of cross-market manipulation that runs afoul of the Anti-Manipulation Rule.⁶⁹

⁶⁶ Opinion No. 549, 156 FERC ¶ 61,031 at P 126.

⁶⁷ BP Rehearing Request at 54.

⁶⁸ See Opinion No. 549, 156 FERC ¶ 61,031 at P 142.

⁶⁹ *Id.* P 16 ("In short, what Enforcement Staff has alleged is a cross-product or related-position manipulation, a type of scheme that the Commission has encountered in jurisdictional markets, in which an entity makes uneconomic trades or transport in the physical market in order to influence average prices at a particular location and thereby benefit derivative financial positions whose value is in some measure tied to those prices.") (citations omitted).

34. In this regard, the Commission correctly considered Abrantes-Metz's statement that "[i]n isolation, bid hitting is insignificant, but it's not when applied to the massive increase in volume."⁷⁰ Because the *Gas Daily* index at Houston Ship Channel is based on the *volume-weighted* average price of transactions during the day, we find that Opinion No. 549, like the underlying Initial Decision, properly looked at the incidences of bid-hitting together with the *volume* of such transactions during the Investigative Period.⁷¹ Considering bid-hitting and volume collectively is reasonable and proper when determining whether a market participant is manipulating the market for physical trading in order to affect a published volume-weighted index to benefit financial positions that settle off that index.⁷² In this regard, Opinion No. 549 was neither arbitrary nor capricious in agreeing with the ID that "the only reasonable conclusion is that early bid hitting was part of the attempt to push early prices down and mark the open."⁷³

35. We disagree with BP that Opinion No. 549 creates an indecipherable legal standard or an amorphous "know-it-when-we-see it analysis." To the contrary, Opinion No. 549 noted that Enforcement Staff alleged a type of cross-product or related-position manipulation scheme, "in which an entity makes uneconomic trades or transport in the physical market in order to influence average prices at a particular location and thereby benefit derivative financial positions whose value is in some measure tied to those prices."⁷⁴ Citing Commission as well as judicial precedent, Opinion No. 549 further

⁷⁰ BP Rehearing Request at 52 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 126). BP asserts that its bid-hitting rates during the Investigative Period "were not unusual in the context of other market participants and a broader time period." *Id.*

⁷¹ Opinion No. 549, 156 FERC ¶ 61,031 at P 41 & n.79. Opinion No. 549 found that "BP's simultaneous increase in net selling, sales volume, and fixed-price sales, including sales increasingly made by hitting bids, collectively had—and was intended to have [internal reference to scienter/intent discussion omitted]—a suppressing effect on the Houston Ship Channel *Gas Daily* index." *Id.* P 126.

⁷² A small volume transaction executed at a low price through bid-hitting would not have the same level of suppressing effect on a volume-weighted index as would a large volume transaction at the same bid-hitting price. Moreover, even if a market participant cannot know the price at which a volume-weighted index ultimately settles, bid-hitting with large-volume trades, and/or at wide bid-ask spreads, during the trading period will tend to depress that index price. *See, e.g., id.* P 50 & n.100.

⁷³ *Id.* P 126 (quoting Initial Decision, 152 FERC ¶ 63,016 at P 46 n.24).

⁷⁴ *See id.* P 16. As Opinion No. 549 noted, the Commission's prior "Hearing Order expressly found that '[Enforcement] Staff alleges a type of conduct that would violate the Anti-Manipulation Rule as a threshold legal matter,' and further specified

stated that “the Commission has not been alone in finding that acts undertaken to influence or affect market prices, rather than legitimate economic-based decisions to buy or sell (or to offer or withdraw supply), may constitute market manipulation outside the genuine interplay of supply and demand.”⁷⁵ Opinion No. 549 thus found that applying the Anti-Manipulation Rule to open market transactions that are intended to suppress prices and benefit financial positions settling off a volume-weighted index derived from those fixed-price transactions fell within the scope of the Anti-Manipulation Rule.⁷⁶ In this regard, Opinion No. 549 not only elaborated on the legal manipulation standard but also detailed its reasoning based on the record evidence, including the specific acts and changes in trading behavior that constituted the Texas Team’s manipulative scheme in violation of the Anti-Manipulation Rule.⁷⁷

36. We reject BP’s arguments that open market transactions that are not “fraudulent” or “illegal” by themselves cannot form the basis of a manipulation claim, while also acknowledging that trades intended to manipulate the market are unlawful.⁷⁸ Like the securities law on which it was modeled, the Commission’s Anti-Manipulation Rule is not simply a mirror image or facsimile of common law fraud but its prohibitions are *sui*

that “[t]he types of conduct prohibited in Order No. 670 include the physical trading and transport of natural gas with the intent to artificially affect prices and benefit financial positions, as [Enforcement] Staff alleged here.” *Id.* P 39 (citations omitted).

⁷⁵ *Id.* P 39 & n.76 (citing legal precedent).

⁷⁶ *Id.* PP 42-55; *see also* Hearing Order, 147 FERC ¶ 61,130 at PP 33-44 (discussing application of the Anti-Manipulation Rule to cross-product schemes and open market transactions).

⁷⁷ Opinion No. 549, 156 FERC ¶ 61,031 at PP 66-185. Opinion No. 549 also separately addressed evidence supporting a finding of scienter. *See id.* PP 186-277.

⁷⁸ *ATSI Communications, Inc. v. The Shaar Fund, Ltd*, 493 F.3d 87, 102 (2d Cir. 2007) (“[I]n some cases scienter is the only factor that distinguishes legitimate trading from improper manipulation.”); *Sharette v. Credit Suisse Int’l*, 127 F.Supp.3d 60, 82 (S.D.N.Y. 2015) (“Consistent with *ATSI*, other courts in this district have found that open-market transactions that are not, in and of themselves, manipulative or illegal, may constitute manipulative activity within the meaning of Section 10(b) when coupled with manipulative intent.”) (citing *S.E.C. v. Masri*, 523 F.Supp.2d 361, 372 (S.D.N.Y. 2007) (“The Court concludes . . . that if an investor conducts an open-market transaction with the intent of artificially affecting the price of the security, and not for any legitimate economic reason, it can constitute market manipulation.”)).

generis and, therefore, better suited for application to the evolving nature of complex energy markets and schemes occurring in those markets.⁷⁹

37. We find that BP's reliance on the D.C. Circuit's opinion in *Burwell* is misplaced.⁸⁰ In *Burwell*, the D.C. Circuit found that it was unclear how a decisional standard had been applied.⁸¹ In contrast, we find that Opinion No. 549, as well as the prior Hearing Order and the underlying Initial Decision, set forth in detail how the Commission's Anti-Manipulation Rule is applied on a case-by-case basis, after considering all the evidence giving rise to a claim of manipulative conduct. Here, Opinion No. 549 reasonably

⁷⁹ See Order No. 670, 114 FERC ¶ 61,047 at P 50 & n.103 (citing *Dennis v. United States*, 384 U.S. 855, 861 (1966) (noting that fraud within the meaning of a statute need not be confined to the common law definition of fraud: any false statement, misrepresentation or deceit)). See also *Basic Inc. v. Levinson*, 485 U.S. 224, 244 n.22 (1988) ("Actions under Rule 10b-5 are distinct from common-law deceit and misrepresentation claims, and are in part designed to add to the protections provided investors by the common law.") (internal citations omitted); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-90 (1983) ("[T]he antifraud provisions of the securities laws are not coextensive with common law doctrines of fraud. Indeed, an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common law protections by establishing higher standards of conduct in the securities industry."); see also, e.g., *In re Data Access Sec. Litig.*, 843 F.2d 1537, 1545 (3d Cir. 1988) ("It is therefore clear that, far from being a mirror image or a reasonable facsimile of common law fraud, actions brought under section 10(b) and Rule 10b-5 appear to be *sui generis*." (subsequently superseded by the Sarbanes-Oxley statute as to the time limitations on section 10(b) claims, as stated in *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 198 (3d Cir. 2007)); *Weinberger v. Kendrick*, 698 F.2d 61, 78 (2d Cir. 1982) ("[Securities law] Rule 10b-5 is typically regarded as better suited than common law fraud principles for application to novel theories of securities frauds . . ."). See generally Opinion No. 549, 156 FERC ¶ 61,031 at P 49 & nn.93-98 (discussing securities case law and Commission precedent).

⁸⁰ 757 F.3d at 312-14.

⁸¹ In *Burwell*, the D.C. Circuit faulted a governmental board for applying the Secretary of Health and Human Services definition of "new hospital" in a way such that the court could not determine the decisional standard being used—i.e., "how to discern the newness of a hospital" for an exemption to receive cost reimbursement for capital-related costs. *Id.* at 313 (emphasis in original) (not questioning the Secretary's authority to define a "new hospital," or the board's ability to adopt a decisional standard based on that definition, but unable to discern that standard or the correctness of its application).

concluded that BP engaged in physical next-day fixed-price trading at Houston Ship Channel with the intent to suppress the Houston Ship Channel *Gas Daily* index to benefit its related financial

spread positions that profited from a lower Houston Ship Channel *Gas Daily* index price relative to the Henry Hub *Gas Daily* index price. Similarly, we continue to find, as we did in Opinion No. 549, that the evidence developed at the hearing showed that BP's traders changed their trading and transportation patterns (including using transportation uneconomically and engaging in early, volume-heavy selling at aggressively low prices) to benefit those financial positions and incurred losses with "no reasonable explanation for these changes," which evidenced a cross-market manipulative scheme.⁸²

38. We disagree with BP's argument on rehearing that Opinion No. 549 erred by "[f]ailing to contend" with evidence of other market participants' allegedly similar behavior, when in fact Opinion No. 549 specifically addressed and found such "individual pieces of rebuttal evidence to be unpersuasive."⁸³ Moreover, as discussed below, we find that evidence that other market participants may have engaged in some of the same or similar trading conduct (e.g., early selling or bid hitting) at some point during (or outside) the Investigative Period or at the Katy location does not rebut the evidence that BP engaged in a scheme to depress prices at Houston Ship Channel for the purpose of benefitting its financial positions during the Investigative Period. For example, Opinion No. 549 concluded that "evidence that two other market participants had equal or even greater distance to their offer-initiated sales at Houston Ship Channel" does not "necessarily diminish an inference of manipulative conduct on the part of BP."⁸⁴ Thus, we reiterate Opinion No. 549's conclusion that "the ID reasonably found that the overall conduct of these other market participants was distinguishable based on a lack of

⁸² Opinion No. 549, 156 FERC ¶ 61,031 at PP 140-41.

⁸³ Compare BP Rehearing Request at 50 (asserting Opinion No. 549 failed to recognize that changes in BP's trading patterns were consistent with changes observed in the marketplace) with Opinion No. 549, 156 FERC ¶ 61,031 at P 166 ("[E]ven if BP could convincingly show—as it argues it did in its exceptions—that it engaged in some similar conduct at other locations or at other times, or that there was similar conduct by other market participants, this would not negate Enforcement Staff's proof of a scheme at Houston Ship Channel during the Investigative Period."). See also *id.* P 141 ("For reasons stated herein, we also find that the ID reasonably distinguished the separate and isolated activities of other market participants from the manipulative scheme that BP was shown to have engaged in during the Investigative Period.").

⁸⁴ BP Rehearing Request at 53 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 120).

sufficient early trading by one market participant and the timing of another market.”⁸⁵ We further note that BP does not dispute these distinguishing factors that underlie Opinion No. 549’s conclusions.

39. In sum, we continue to find that while BP was given the opportunity to rebut each aspect of the cross-product manipulation claim, based on sound reasoning and a careful weighing of the evidence, Opinion No. 549 properly concluded that the weight of the evidence supported Enforcement Staff’s claim, as discussed next.⁸⁶

B. Collective Acts that Evidence or Further a Scheme to Manipulate

40. Opinion No. 549 confirmed the ID’s findings that BP’s Texas Team changed its pattern of next day, fixed-price natural gas trading and Houston Pipeline transport during the Investigative Period (as compared to the Pre-Investigative Period) to artificially suppress the Houston Ship Channel *Gas Daily* index and benefit its financial positions in the following eight ways:

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

⁸⁵ Opinion No. 549, 156 FERC ¶ 61,031 at P 120 (quoting Initial Decision, 152 FERC ¶ 63,016 at P 45 n.23).

⁸⁶ See Opinion No. 549, 156 FERC ¶ 61,031 at P 139.

- g. a shift to posting aggressively lower offers compared to other sellers at Houston Ship Channel; and
- h. an increase in the frequency of sales made by hitting bids.

41. Opinion No. 549 found that BP did not challenge the first and fourth finding regarding the changes in BP's trading patterns—i.e., BP's shift to net selling at Houston Ship Channel, where it became the seller with the largest market share in the next-day, fixed-price market at Houston Ship Channel, and BP's shift to buying at Houston Ship Channel later in the day.⁸⁷ On rehearing, BP essentially argues that, while it may not have challenged the fact these changes in trading patterns occurred, it does contend those changes do not support a finding of manipulation.⁸⁸

42. On rehearing BP also argues that each of the other six material factors that Opinion No. 549 relied upon to determine manipulation was in error. We address BP's arguments below.

1. Next Day Fixed-Price Sales Analysis

a. Opinion No. 549

43. Opinion No. 549 determined that, after considering all the evidence, the ID reasonably concluded that BP became the seller with the largest market share of fixed-priced sales at Houston Ship Channel during the Investigative Period, and BP shifted its trading toward next day fixed-price sales, in terms of volume and proportionately, at Houston Ship Channel during the Investigative Period.⁸⁹

44. More specifically, the ID found that BP increased its market share by over five times relative to its Pre-Investigative Period market share, in part by shifting to net selling at Houston Ship Channel for 98% of the days in the Investigative Period, as opposed to 30% of the days in the Pre-Investigative Period.⁹⁰ The ID also found that BP increased its Houston Ship Channel fixed-price sales volume by 344% per flow day in the Investigative Period as compared to the Pre-Investigative Period.⁹¹ The ID found that

⁸⁷ *Id.* P 70.

⁸⁸ *See* BP Rehearing Request at 54-56.

⁸⁹ Opinion No. 549, 156 FERC ¶ 61,031 at PP 78-83.

⁹⁰ *Id.* P 72 (citing Initial Decision, 152 FERC ¶ 63,016 at PP 44, 52).

⁹¹ *Id.* P 73 (citing Initial Decision, 152 FERC ¶ 63,016 at P 44).

these changed trading patterns were consistent with an effort to place downward pressure on the Houston Ship Channel *Gas Daily* index.⁹²

b. BP Rehearing Request

45. BP argues that Opinion No. 549 erred in finding that BP did not dispute or rebut the findings that BP (1) became the seller with the largest market share of fixed-price sales at Houston Ship Channel; and (2) increased the percentage and volume of its fixed-price sales during the Investigative Period.

46. First, BP argues that whether the Texas Team was the seller with the largest market share is irrelevant because section 4A of the NGA and the Anti-Manipulation Rule “prohibit fraud, not size.”⁹³ Citing to the anti-monopolization section of the Sherman Act and to Commodity Futures Trading Commission (CFTC) position limits under the Dodd-Frank Act, BP argues “Congress knows how to prohibit size when it intends to do so.”⁹⁴ BP asserts that, to the extent that Opinion No. 549 was based on the size of BP’s market share at Houston Ship Channel it is without legal basis and, therefore, is arbitrary and capricious.⁹⁵

47. Second, BP argues that Opinion No. 549 ignored the testimony of BP’s expert Evans who “offered substantial evidence” that “the larger market share is a logical and expected result of a larger baseload position that BP had going into the Investigative Period” and the attendant need to sell the gas.⁹⁶ BP claims Opinion No. 549 rejected Evans’ testimony because he “couched his arguments in terms of the *proportion or percentage* of fixed-price trading historically, at Katy and by other market participants, but never analyzed the *volumes* of such fixed-price trading.”⁹⁷

48. Third, BP contends that Opinion No. 549 ignored evidence that BP’s next day fixed-price sales as a percentage of sales at Houston Ship Channel during the Investigative Period were consistent with its fixed-price sales as a percentage of sales (between 90-100%) during five months of the approximately eight month Pre-

⁹² *Id.* P 74 (citing Initial Decision, 152 FERC ¶ 63,016 at PP 45, 161).

⁹³ BP Rehearing Request at 55.

⁹⁴ *Id.* at 55 & n.96 (citing 15 U.S.C. § 2) & n.97 (citing 7 U.S.C. § 6a).

⁹⁵ *Id.* at 55.

⁹⁶ *Id.* at 56 (citing BP Br. on Exceptions at 31-32 and Ex. BP-037 at 15:14-16).

⁹⁷ *Id.* (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 79) (emphasis in original).

Investigative Period (January 2 to September 10, 2008), and was similarly high in other years.⁹⁸ Opinion No. 549 “focused instead on changes in volume in absolute terms, which . . . ignores BP’s larger baseload position and draws upon a Pre-[Investigative Period] that is not comparable because BP had no baseload positions in the Pre-[Investigative Period] period comparable to those in the Investigative Period.”⁹⁹

49. Fourth, BP faults Opinion No. 549 for not considering whether “BP’s increase in fixed-price sales was consistent with the market as a whole and the trading behavior of other large market participants.”¹⁰⁰

c. Commission Determination

50. As discussed below, we continue to find that BP (1) became the seller with the largest market share of fixed-price sales, and (2) increased the percentage and volume of its fixed-price sales during the Investigative Period.

51. We note that BP does not dispute that the Texas Team became the seller with the largest market share of fixed-priced sales at Houston Ship Channel during the Investigative Period. This fact is based on evidence of BP’s fixed-price sales as a percentage of total market sales. The record demonstrates that, during the Pre-Investigative Period, BP’s share of next-day fixed-price sales volume was five percent of the total next-day fixed-prices sales at Houston Ship Channel. During the Investigative Period, BP’s share increased to 26% of total next-day fixed-price sales, a five-fold increase.¹⁰¹ We further note that BP does not dispute that the Texas Team increased its fixed-priced sales during the Investigative Period, both in terms of volume and in proportion to the Pre-Investigative Period. Specifically, the Texas Team increased its Houston Ship Channel fixed-price sales volumes by 344% per flow day in the Investigative Period, as compared to the Pre-Investigative Period.¹⁰² The Texas Team

⁹⁸ *Id.* at 57.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Ex. OE-129 at 39 n.26.

¹⁰² *Id.* at 38.

also shifted to selling at Houston Ship Channel for 98% of the days of the Investigative period as opposed to 30% of the days in the Pre-Investigative Period.¹⁰³

52. We find that BP's contention that NGA section 4A contains no prohibition on the size of a seller's market share similar to federal anti-monopoly law and CFTC position limits is misplaced.¹⁰⁴ NGA section 4A prohibits the use of any manipulative or deceptive device or contrivance in connection with the purchase or sale of natural gas or transportation services and this prohibition is reflected in the Commission's Anti-Manipulation Rule. Contrary to BP's assertions, we find that position size can matter when a claim for manipulation is based on a market participant engaging in next day fixed-price sales trading in ways that are intended to systematically depress "a volume-weighted average of all the transactions reported to Platts that are used to calculate the index for each point," such as the Houston Ship Channel *Gas Daily* index.¹⁰⁵ Put simply, large volume transactions at aggressively low prices can be used as part of a manipulative scheme to suppress a volume weighted-index and to benefit financial positions that settle off that index. Accordingly, we find that Opinion No. 549's consideration of evidence that BP's Texas Team's fixed-price sales undeniably had such weight, both in terms of absolute volume and as a percentage of sales, in next day fixed-priced sales at Houston Ship Channel during the Investigative Period was neither arbitrary nor capricious.

53. We also disagree with BP's argument on rehearing that its expert witness rebutted Abrantes-Metz's analysis of BP's fixed-price sales by presenting evidence that its increase in fixed-price sales was based on legitimate factors. First, BP asserts that its expert Evans explained that BP's "larger market share is a logical and expected result of a larger baseload position that BP had *going into* the Investigative Period."¹⁰⁶ However,

¹⁰³ *Id.*

¹⁰⁴ Moreover, we note that courts have not construed federal anti-monopoly law as simply a prohibition on size. *See Merced Irrigation District v. Barclay's Bank*, 178 F. Supp.3d 181, 184 (S.D.N.Y. 2016), citing *PepsiCo, Inc. v. CocaCola Co.*, 315 F.3d 101, 108 (2d Cir. 2002) ("[T]he applicable test [for a claim of unlawful monopolization under Section 2 of the Sherman Act] is whether a defendant 'has engaged in improper conduct that has or is likely to have the effect of controlling prices.'").

¹⁰⁵ *See* BP Rehearing Request at 62-63 (quoting S&P Global Platts, *Methodology and Specification Guide North American Natural Gas* at 4 (June 2016), http://www.platts.com/IM.Platts.Content/MethodologyReferences/MethodologySpecs/na_gas_methodology.pdf) (emphasis added).

¹⁰⁶ *Id.* at 56 (emphasis added). "Baseload" refers to physical contracts that flow equal amounts of gas each day of the flow month. Ex. OE-129 at 40.

we note that BP's rehearing request does not cite any place in Evans' testimony where he stated that BP had a large baseload position *going into* the Investigative Period, i.e., when the Investigative Period began. Rather, Evans stated, "Abrantes-Metz's analyses support the proposition that BP altered its trading behaviors in the day-ahead market because it had a larger baseload gas position."¹⁰⁷ We find that this testimony supports Abrantes-Metz's assertion that BP's baseload position became larger *during* the Investigative Period, not simply that BP had a large baseload position *going into* the Investigative Period.

54. Specifically, Abrantes-Metz testified that during the Investigative Period BP increased its long baseload position at Katy (requiring the Texas Team to take delivery of more baseload gas at Katy), while reducing its short baseload position at Houston Ship Channel (reducing the amount of gas BP was required to deliver at Houston Ship Channel), thus creating a larger net long position between Katy and Houston Ship Channel. This increased the amount of baseload gas the Texas Team had available at Katy to transport to Houston Ship Channel and reduced the amount of baseload gas the Texas Team was required to buy at Houston Ship Channel. As a result, the Texas Team had more baseload Katy gas available to sell at a fixed price at Houston Ship Channel.¹⁰⁸

55. Therefore, contrary to BP's assertions on rehearing that BP's increased heavy sales (and bid-hitting, as discussed below) at Houston Ship Channel during the Investigative Period may have related to a baseload position BP "carried into" the Investigative Period, we find that Abrantes-Metz's testimony shows that BP increased its monthly net long base load position between Katy and Houston Ship Channel during the Investigative Period. BP's average monthly net long position between Katy and Houston Ship Channel was 4.7 contracts during the Pre-Investigative Period, but increased to 15.8 contracts during the Investigative Period.¹⁰⁹ Thus, we find that BP's actions increasing its net long baseload position between Katy and Houston Ship Channel during the Investigative Period enabled BP to increase its fixed price sales at Houston Ship Channel in order to depress prices at that location.

56. BP's witness Evans also suggested other possible explanations for the Texas Team's increased fixed price sales at Houston Ship Channel, including the fact that post-hurricane market conditions changed from pre-hurricane market conditions, that BP altered its trading to adapt to a collapsing natural gas market, and the emerging global

¹⁰⁷ Ex. BP-37 at 15:7-8.

¹⁰⁸ Ex. OE-129 at 42:7 to 43:3.

¹⁰⁹ *Id.* at 41:8-16. A contract represents 10,000 MMBtus.

financial crisis.¹¹⁰ However, we continue to find that both the ID and Opinion No. 549 reasonably rejected Evans testimony on these points as unsubstantiated.¹¹¹ Evans simply asserted these facts as possible causes of increased fixed-price sales, without providing any explanation why these conditions would have caused the Texas Team to increase its fixed-price sales at Houston Ship Channel. Thus, we find that Opinion No. 549's rejection of these assertions was neither arbitrary nor capricious but a well-considered decision based on the evidence.

57. BP contends that Opinion No. 549 ignored evidence that the Texas Team's fixed price sales as a percentage of its overall next-day sales during the Pre-Investigative Period and earlier was similar to that during the Investigative Period. For example, BP states that its witness Evans pointed to five months within the overall January 2, 2008 to September 10, 2008 Pre-Investigative Period in which BP's percentage of fixed-price sales at Houston Ship Channel was between 90% and 100% of its total next-day physical sales volume, similar to the 99.5% during the Investigative Period.¹¹²

58. We recognize that BP's average fixed price sales at Houston Ship Channel as a percentage of its total fixed next-day fixed price sales was only about 14% higher during the Investigative Period, than during the entire Pre-Investigative Period (99.5% during the Investigative Period, as compared to 85.2% during the Pre-Investigative Period).¹¹³ However, we are not persuaded by this argument on rehearing. While it may be that a relatively large percentage of whatever next day sales the Texas Team made during the Pre-Investigative and earlier period were fixed-price sales, Abrantes-Metz also showed that the Texas Team substantially increased its volume of fixed price sales from 31,599 MMBtu per day during the Pre-Investigative Period to 140,288 MMBtu during the September-November 2008 Investigative Period, an increase of over four times from the Pre-Investigative Period.¹¹⁴ By comparison, the volume of the Texas Team's fixed price sales during the corresponding period one year before the Investigative Period was only

¹¹⁰ Ex. BP-37 at 15.

¹¹¹ See Opinion No. 549, 156 FERC ¶ 61,031 at P 178 ("Evans offered only possible alternative explanations for the behavior of the Texas Team traders (e.g., seasonality, baseload position, hurricanes and the financial crisis) but 'did not test any of his alleged explanations against the data in this case.'") (citing Initial Decision, 152 FERC ¶ 63,016 at PP 62, 68 n.52).

¹¹² Ex. BP-037 at 18:12-17 and 19 (chart).

¹¹³ Ex. OE-129 at 43-44 (Table 1).

¹¹⁴ *Id.* at 43 (Table 1).

43,110 MMBtu per day. This increase in the volume of fixed price sales was accomplished in part by shifting from fixed-price buying at the Houston Ship Channel to fixed-price selling at that location. During the Pre-Investigative Period, only 30% of the Texas Team's total fixed price trades were sales, but in the Investigative Period 84% of the Texas Team's fixed price trades were sales.¹¹⁵ While a sudden and substantial increase in the *volume* of fixed-price sales may not necessarily beget manipulation, as BP contends, it certainly is one factor that enables manipulation of a *volume*-weighted index like the Houston Ship Channel *Gas Daily* index, and should not be ignored.

59. Similarly, we note that Opinion No. 549 did not ignore the broader “historical context” of BP’s trading, or other market participants’ behavior,¹¹⁶ but found such evidence did not rebut Enforcement Staff’s evidence.¹¹⁷ As noted above, Enforcement Staff showed that BP made on average 31,599 MMBtus of fixed-price sales per flow day in the Pre-Investigative Period, as compared to 140,288 MMBtus of fixed-price sales per flow day in the Investigative period.¹¹⁸ In 2007, during the same timeframe as the Investigative Period, BP made on average 43,110 MMBtus of fixed-price sales per flow day. In this “historical context,” we note that the evidence showed that BP substantially increased its fixed-price sales per flow day on average during the Investigative Period—from 43,110 MMBtus to 140,288 MMBtus on average.¹¹⁹

60. In short, we continue to find that Opinion No. 549 properly concluded that BP’s observed increase in market share of fixed-price sales and shift toward fixed-priced transactions at Houston Ship Channel during the Investigative Period was supported by the weight of the evidence, which BP did not successfully rebut or defeat. We further find that Opinion No. 549 considered the rebuttal evidence offered by BP but found it unpersuasive.

¹¹⁵ *Id.*

¹¹⁶ See BP Rehearing Request at 57.

¹¹⁷ Opinion No. 549, 156 FERC ¶ 61,031 at PP 91, 93.

¹¹⁸ Ex. OE-129 at 43 (Table 1).

¹¹⁹ Opinion No. 549, 156 FERC ¶ 61,031 at P 80.

2. **Analysis of Timing of Sales and Purchases at Houston Ship Channel**

a. **Opinion No. 549**

61. Opinion No. 549 concluded that BP shifted to earlier, heavy selling and later purchases at Houston Ship Channel during the Investigative Period, as demonstrated by the analysis of Enforcement Staff's expert Abrantes-Metz.¹²⁰

62. Evidence showed that during the first five minutes of the trading day—which was the most heavily traded interval in the Houston Ship Channel (approximately 11% of daily volume) and, therefore, presented the greatest opportunity to influence prices—the Texas Team's share of overall fixed price sales increased from an average of 3 percent during the Pre-Investigative Period to 42 percent in the Investigative Period.¹²¹ More than half the time during the Investigative Period, the Texas Team either made a first sale or sold within 27 seconds of the first trade at Houston Ship Channel—as compared to a median time of 19.77 minutes during the Pre-Investigative Period.¹²² Enforcement Staff referred to such early, heavy selling by the Texas Team as “marking the open” or “framing the market.”

63. Opinion No. 549 agreed with the ID's finding that “the data is clear that the Texas [T]eam was almost exclusively selling in the first three trades at Houston Ship Channel and buying in the first three trades at Katy.”¹²³ Opinion No. 549 also found convincing Abrantes-Metz's analysis showing that BP's Houston Ship Channel sales shifted to earlier in the trading day during the Investigative Period relative to other time periods going back to 2007.¹²⁴ In contrast, Opinion No. 549 found Evans' rebuttal testimony unpersuasive, including his alternative “earliness ratio.”¹²⁵

¹²⁰ *Id.* P 90.

¹²¹ *Id.* P 85.

¹²² *Id.*

¹²³ *Id.* P 90 (citing Initial Decision, 152 FERC ¶ 63,016 at P 166).

¹²⁴ *Id.* P 91.

¹²⁵ *Id.* P 92.

64. Opinion No. 549 also rejected BP's claim that the Texas Team's early selling was similar to the early selling of the new two largest overall sellers in the Houston Ship Channel market during the Investigative Period—finding that this claim was based on a deceptive assertion of “the first 15 minutes” of trading when in fact BP's expert focused on the trading that occurred in the 15 minute interval between 6:50 am and 7:05 am regardless of when the first trades actually occurred on a given day.¹²⁶

65. Separate from its review of the evidence in this case, an earlier section of Opinion No. 549 denied BP's request for rehearing of the Commission's denial of BP's motion to dismiss for lack of notice and adequacy of Enforcement Staff's legal theory. In that section, the Commission stated that it does not understand Enforcement Staff's “framing the market” theory as requiring accepting that one market participant will “significantly dictate” another market participant's trading later in the day.¹²⁷ Opinion No. 549 explained that “Instead, Enforcement Staff's theory recognizes that large-volume trades will weigh heavily on a volume-weighted index, and that means that large-volume trades executed early in the relevant trading period will have an impact on the developing index, which in turn can influence the trading decisions that other market participants may decide to make later in the same trading period.”¹²⁸ In a footnote accompanying this section, Opinion No. 549 stated: “[A] volume-weighted average price-based index, like the Houston Ship Channel *Gas Daily* index, plausibly can be subject to manipulation by trading that takes place during the time period in which the volume weighted average of transactions forming the index is calculated, including by high volume early trades at deceptively low prices unrelated to the genuine economics of supply and demand that suppress the volume-weighted index.”¹²⁹ Also in a footnote, Opinion No. 549 used an “apple picking” analogy to illustrate the anchoring or framing effect that early, heavy volume transactions can have on the development of a daily volume-weighted index, even as subsequent trades vary significantly in price throughout the trading day.¹³⁰ Opinion No. 549 further noted: “The relevant point is whether prices—here, the Houston Ship Channel *Gas Daily* index based on a volume-weighted average price of transactions—during any such period are subject to manipulation.”¹³¹ Opinion No. 549

¹²⁶ *Id.* P 93.

¹²⁷ *Id.* P 48.

¹²⁸ *Id.*

¹²⁹ *Id.* P 49 n.98.

¹³⁰ *Id.* P 50 n.100.

¹³¹ *Id.* P 49.

concluded: “Early, volume-heavy trading at Houston Ship Channel can be part of a scheme or artifice to defraud when the intent and effect is to artificially suppress the volume-weighted Houston Ship Channel *Gas Daily* index to benefit financial positions that settle off that index.”¹³²

b. BP Rehearing Request

66. BP argues that Opinion No. 549 erred in affirming the ID’s findings “that BP shifted to earlier, heavy selling and later purchases at Houston Ship Channel during the Investigative Period, as demonstrated in the analysis from Abrantes-Metz’ as evidence of both an intent to manipulate and actual manipulation.”¹³³ BP asserts that this finding reflects the application of Enforcement Staff’s erroneous “marking” or “framing” the open theory in this case.¹³⁴

67. BP asserts that there is no evidence that earlier trades influence prices throughout the day or did influence prices in this case.¹³⁵ Citing from Opinion No. 549, BP argues that “[w]hether so-called ‘early trading’ ‘**can influence**’ the trading decisions that other participants ‘**may decide to make**’ or whether an index ‘**plausibly can be subject to manipulation**’ are nothing more than theoretical constructs and evidence nothing.”¹³⁶

¹³² *Id.* P 51. *See also id.* (“As the Commission previously stated: ‘Trades undertaken solely for bona fide economic purposes are not violative of [the Anti-Manipulation Rule], but the very same trades, if intended to manipulate the market, are indeed prohibited.’”). *Cf. ATSI*, 493 F.3d 87, 102 (“[I]n some cases scienter is the only factor that distinguishes legitimate trading from improper manipulation.”).

¹³³ BP Rehearing Request at 57-58.

¹³⁴ *Id.* at 58.

¹³⁵ *Id.* at 59.

¹³⁶ *Id.* at 59-60 (citing Opinion No. 549, 156 FERC ¶ 61,031 at PP 48-49 n.98) (emphasis in original). BP claims not to seek re-hearing (which it cannot procedurally do) of Opinion No. 549’s denial of BP’s motion to dismiss for inadequate notice and insufficient manipulation allegations, but on the “application of the ‘marking’ or ‘framing’ the open theory in affirming the findings of the ID.” *Id.* at 58 n.109 (emphasis in original).

BP says Enforcement Staff neither alleged nor proved that market participants “actually calculated” or “actually reacted” to a “developing index” throughout the day.¹³⁷

68. Also citing to the Commission’s denial of its motion to dismiss, BP asserts that “[b]y complaining of ‘early’ trades that allegedly suppressed the index unlawfully, Opinion No. 549 declared that trades conducted at the ‘opening’ of the market were not ‘genuine’ because they were at ‘deceptively low prices.’”¹³⁸ BP argues Opinion No. 549 adopted an arbitrary and capricious definition of “early” that provides no standard at all and could include all trades during the entire trading window in which volume-weighted index is calculated.¹³⁹

69. Addressing Opinion No. 549’s evidentiary findings, BP asserts that Opinion No. 549 erred in finding that Evans “improperly aggregates purchases and sales into ‘trades’ when analyzing the timing of BP’s fixed-price trading at Houston Ship Channel.”¹⁴⁰ According to BP, “if the object of the exercise is to attempt to determine whether ‘early’ trading had an impact on the H[ouston] S[hip] C[hannel] index, all trades—both purchases and sales—must be included.”¹⁴¹

70. BP also claims that Opinion No. 549 improperly rejected as “deceptive” the time frame Evans used to try to rebut Abrantes-Metz’s earliness analysis.¹⁴² In a market where there is no “open,” BP argues that Opinion No. 549 essentially used an undefined moving target to establish “earliness,” which was arbitrary and capricious.¹⁴³

71. BP further asserts that Opinion No. 549’s apple selling analogy 549’s is flawed “unless the early seller of the apples is clairvoyant and knows where the price will go throughout the day.”¹⁴⁴ BP offers its own analogy involving Bobby and his stepfather

¹³⁷ *Id.* at 60.

¹³⁸ *Id.* at 61 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 49 n.98).

¹³⁹ *Id.* at 61-63.

¹⁴⁰ *Id.* at 60 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 90).

¹⁴¹ *Id.* at 61.

¹⁴² *Id.* at 62 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 93).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 63 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 50 n.100).

Mr. Hindsight, who becomes upset when he learns his stepson sold some apples earlier in the day at lower prices than the prices at the end of the day.¹⁴⁵

c. Commission Determination

72. We continue to find, as the Commission did in Opinion No. 549, that BP shifted to earlier, heavy selling and later purchases at Houston Ship Channel during the Investigative Period.¹⁴⁶ BP does not dispute these facts but, instead, focuses its arguments on whether these facts support a finding of manipulation or manipulative intent. We find that these facts do support a finding of manipulation.

73. BP's significant change in trading patterns, involving uneconomic transport to Houston Ship Channel and increased early and heavy selling at artificially low prices at Houston Ship Channel, where BP became the largest net seller during the Investigative Period, demonstrate an intent to suppress the price of the Houston Ship Channel Gas Daily index to benefit certain financial positions. We reject BP's contention that there is no evidence showing "earlier trades influence prices throughout the day" or that BP's early, heavy sales "did influence prices in this case."¹⁴⁷ In fact, Abrantes-Metz testified to these very points.¹⁴⁸ She explained that heavy early trading has a greater influence on Houston Ship Channel price formation, because the early trading window is the period of greatest price formation and of greatest price volatility. Early in the day, the bid/offer spread is the largest, with the result that each trade has a higher chance to affect prices, because the executed price can be situated anywhere between the larger spread. Abrantes-Metz also stated that, quite early in the trading day, prices at the Houston Ship Channel converge at a point quite close to where the *Gas Daily* index price for the day will settle. She also explained that the early heavy trading has an informational impact because the earliest trades convey the first concrete information about price, price direction, and volume in that market on each day. As stated by Abrantes-Metz: "The informational component of early trading gets incorporated into the bids, offers, and prices of subsequent market participants and can persist."¹⁴⁹

¹⁴⁵ *Id.* at 63-64.

¹⁴⁶ Opinion No. 549, 156 FERC ¶ 61,031 at PP 90-93.

¹⁴⁷ BP Rehearing Request at 59.

¹⁴⁸ Ex. OE-129 at 64-73.

¹⁴⁹ *Id.* at 73.

74. Abrantes-Metz stated that the impact of the first five to ten minutes of trading on price formation at the Houston Ship Channel was a normal feature of the market.¹⁵⁰ However, she testified that the Texas Team changed its behavior during the Investigative Period to engage in consistent heavy selling during these early time periods. Because she observed this change in behavior, Abrantes-Metz concluded it is reasonable to infer that the Texas Team knew they had only about 10 to 15 minutes to effectively move prices and influence price discovery. Furthermore, she testified that sellers of assets trying to maximize profits from those sales would tend to avoid concentrating their sales during one time of day and especially avoid concentrating sales at the time of day when price is most sensitive.¹⁵¹ Accordingly, we continue to find that, based on record evidence, the Texas Team's early heavy selling at low prices during the most critical period of price discovery is more consistent with an economic actor seeking to intentionally put downward pressure on price, than the conduct of a profit maximizing seller.¹⁵²

75. Moreover, the Texas Team's early, heavy selling at low prices affected the developing price index visible to other traders throughout the trading day. Because the *Gas Daily* index "is the volume-weighted average of all the transactions reported to Platts that are used to calculate the index" at Houston Ship Channel,¹⁵³ each reported transaction affects the development of the volume weighted *Gas Daily* index regardless of whether other market participants "actually calculated" the developing index price.¹⁵⁴ Thus, once BP engaged in manipulative heavy-volume, early sales at aggressively low prices, the framing of the market occurred and the developing volume weighted average price (volume-weighted average price) index is impacted.¹⁵⁵ In fact, the evidence here shows

¹⁵⁰ *Id.* at 72.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Opinion No. 549, 156 FERC ¶ 61,031 at PP 9, 41 n.79; BP Rehearing Request at 61 n.118 (citing Platt's methodology).

¹⁵⁴ Opinion No. 549, 156 FERC ¶ 61,031 at P 48 n.92 ("[E]nforcement Staff argues that 'marking the open' sets the tone early and could have a large impact on the development of the daily volume-weighted average price.") (citing Hearing Order, 147 FERC ¶ 61,130 at P 41).

¹⁵⁵ "Clairvoyance" as BP argues—in the sense of knowing exactly where the *Gas Daily* index price will settle or where other market participants will subsequently transact—is not required for a market participant to manipulate a volume-weighted average index, only a common sense understanding of how index prices are cumulatively

that at least the Texas Team kept track of the volume-weighted average price of trades at Katy and Houston Ship Channel over the course of the trading day in their Katy Ship Sheets,¹⁵⁶ and that volume-weighted average price was used to compute the *Gas Daily* index, which in turn was used to measure their profit and loss associated with transport.¹⁵⁷

76. To illustrate the impact of early, heavy-selling on the development of a volume-weighted average price index, Opinion No. 549 used a simple “apple picking” example.¹⁵⁸ Three *large volume* (15 lbs. out of 31 lbs., or just under 50% of the total sales volume of the day) *early* sales of apples—at prices between \$2.00 and \$2.10 per pound—had the effect of weighing down the development of the volume-weighted average price of all apple transactions that day. Even though all subsequent sales by other market participants throughout the day were made at much higher market prices, ranging between \$3.00 and \$5.00 per pound, the daily volume-weighted average price characteristically lagged subsequent market prices and ended at only \$2.99 per pound.¹⁵⁹

calculated based on a volume-weighted average price of all reported transactions. Just like a dishonest shopkeeper who places a thumb on a scale does not need be able to guess the final weight of the produce being sold to engage in cheating, a market participant only has to act with the requisite scienter to suppress the price of an index to engage in manipulation and need not predict where the index will settle based on all other transactions.

¹⁵⁶ The Katy Ship Sheets are an excel spreadsheet, within which the Texas Team tracked daily physical transactions at Katy, Houston Ship Channel, and the amount of gas transported from Katy to Houston Ship Channel. In the “Transport Diff” cell of the spreadsheet, the Texas Team calculated net profit and loss from transporting natural gas from Katy to Houston Ship Channel.

¹⁵⁷ See Opinion No. 549, 156 FERC ¶ 61,031 at P 102 n.203 (citing Ex. OE-211 at 52:7-11); *id.* (citing Initial Decision, 152 FERC ¶ 63,016 at P 68 n.51 (citing Ex. OE-257 and Tr. 1736:15-1739:5 (Bergin))).

¹⁵⁸ *Id.* P 50 n.100.

¹⁵⁹ The effect of early, heavy volume trades on a developing volume-weighted average price index also can be seen in a graph provided by BP’s expert of ICE Day-Ahead Fixed Price physical trades at Katy and Houston Ship Channel on October 17, 2008. Even though Houston Ship Channel was trading at higher prices than Katy during most of the day, the volume-weighted average price for Houston Ship Channel ended approximately \$0.02 lower than the volume-weighted average price for Katy because

In contrast, BP's counter-hypothetical involving "Bobby and Mr. Hindsight" is inapposite: BP's example has Bobby selling only a *small* portion of his *own* apples (30 of 100) early on, is silent about the total overall market volume and does not include a volume-weighted average price index, thereby missing the point. Thus, Opinion No. 549 properly "recognized the potential influence of early, heavy-volume trades on the development of a volume-weighted average price, such as the *Gas Daily* Index,"¹⁶⁰ on which BP's financial positions settled.

77. We are also not persuaded by BP's other arguments relating to Opinion No. 549's findings concerning the Texas Team's early, heavy selling. In particular, Opinion No. 549 did not err in finding that BP's expert improperly aggregated purchases and sales into trades in attempting to rebut the overwhelming evidence that BP shifted to early, heavy *selling* at Houston Ship Channel During the Investigative Period.¹⁶¹ Distinguishing between purchases and sales is important because Enforcement Staff's manipulation claim was based on BP's transport to and *early selling* behavior at Houston Ship Channel to suppress the *Gas Daily* index, and increased *buying* at Katy to facilitate such *sales* at Houston Ship Channel. BP attempts to switch the focus of the analysis from early selling to early trading (i.e., aggregated purchases and sales) by asserting that "if the object of the [analysis] is to . . . determine whether 'early' *trading* had an impact on the [Houston Ship Channel] index, . . . both purchases and sales must be included."¹⁶² By analyzing evidence of early *selling*, we find that Opinion No. 549, like the underlying Initial Decision, properly considered the evidence on which the actual claim for manipulation was founded.

78. We further find that it was neither arbitrary nor capricious for Opinion No. 549 to reject Evans' early trading analysis of the next two largest overall sellers that was based on a trades that occurred during the interval between 6:50 am and 7:00 am each trading day of the Investigative Period rather than when the first trades *actually occurred* on a given day, which varied daily.¹⁶³ Because the market opens when trading begins on a

Houston Ship Channel's index was weighted down by few early morning trades at prices mostly below where Katy subsequently opened. *See* Ex. BP-037 at 43 Ex. 10.

¹⁶⁰ *Id.* P 40.

¹⁶¹ Opinion No. 549, 156 FERC ¶ 61,031 at PP 84-85, 90.

¹⁶² BP Rehearing Request at 61 (emphasis added).

¹⁶³ Opinion No. 549, 156 FERC ¶ 61,031 at P 93.

given day and not at a fixed interval, Opinion No. 549 reasonably and rationally based its analysis on evidence of actual market conditions.¹⁶⁴

3. Uneconomic Use of Houston Pipeline Transport

a. Opinion No. 549

79. Opinion No. 549 found credible Abrantes-Metz's testimony and supporting regression analysis showing that: the Texas Team substantially increased its usage of BP's daily firm capacity on Houston Pipeline in order to sell gas at Houston Ship Channel, that the increase in Houston Pipeline transport usage was not justified by the price spread between Katy and Houston Ship Channel, that the Texas Team's losses on transport were significant when compared with the time periods prior to the Investigative Period, and that these changes in trading behavior were consistent with an intentional effort to suppress the Houston Ship Channel *Gas Daily* index.¹⁶⁵

80. Using a regression analysis, Abrantes-Metz found that both prior to the Investigative Period and after the November 5, 2008 recorded phone call, BP shipped more volumes of gas when the price spread between Katy and Houston Ship Channel was greater than the cost of transport, consistent with rational, profit-seeking conduct.¹⁶⁶ However, during the Investigative Period, that statistically significant relationship between volume shipped and price spreads disappeared.¹⁶⁷ In fact, not only did BP transport gas from Katy to Houston Ship Channel without regard for economics in the

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* P 101 (citing Initial Decision, 152 FERC ¶ 63,016 at PP 57, 64). *See also id.* P 21 (citing Initial Decision, 152 FERC ¶ 63,016 at P 56) (BP shifted to transporting more gas to Houston Ship Channel using its Houston Pipeline capacity without regard to profit during the Investigative Period and incurred greater losses on transport during the Investigative Period as compared to outside the Investigative Period).

¹⁶⁶ Abrantes-Metz calculated the price spread between Katy and Houston Ship Channel by subtracting the *Gas Daily* price index at Katy published following the trading day from the corresponding *Gas Daily* daily price index at Houston Ship Channel. If this difference was greater than the variable cost of transporting natural gas from Katy to Houston Ship Channel, then selling Katy gas at Houston Ship Channel would be profitable. If this difference was less than the variable cost of transportation, then sales of Katy gas at Houston Ship Channel would incur a loss. Ex. OE-129 at 83-84.

¹⁶⁷ Opinion No. 549, 156 FERC ¶ 61,031 at P 94 (citing Initial Decision, 152 FERC ¶ 63,016 at PP 56-57).

Investigative Period, but it also transported a statistically significant larger quantity of gas despite the lack of a positive price spread.¹⁶⁸ Abrantes-Metz estimated that 35% of the total volume of gas sold at Houston Ship Channel during the Investigative Period could not be explained by the Houston Ship Channel-Katy spread, and that such excess transport was one of the strongest indicators of a manipulative scheme in this case.¹⁶⁹ The natural effect of increasing supply at Houston Ship Channel relative to demand was to reduce prices.¹⁷⁰

b. BP Rehearing Request

81. BP argues that Opinion No. 549 erred in approving Abrantes-Metz's transport regression analysis regarding the Texas Team's uneconomic use of transport on the Houston Pipeline, because her analysis: (1) incorrectly used *Gas Daily* end-of-day prices instead of intra-day prices; (2) failed to account for other criteria that influence transport volumes; and (3) failed to consider other time periods where BP had comparable baseload positions.¹⁷¹

82. According to BP, Opinion No. 549 approved Abrantes-Metz's use of *Gas Daily* end-of-day prices because "BP traders and compliance department also used *Gas Daily* prices which are an industry standard of daily benchmarks used in the settlement of financial and daily monthly physical contracts . . ." ¹⁷² BP says that *Gas Daily* prices are not relevant to analyzing transportation or pipeline utilization, because such end-of-day prices are not available to traders at the time they make decisions to flow.¹⁷³

83. BP criticizes Opinion No. 549 for arbitrarily "pick[ing] and choos[ing] when to accept a statistically significant result," as in the case of accepting Abrantes-Metz's transportation regression analysis, but not accepting Evan's re-run of her transportation analysis.¹⁷⁴ BP also contends that Opinion No. 549 was arbitrary and capricious in

¹⁶⁸ *Id.* P 95 (citing Ex. OE-129 at 88:4-12).

¹⁶⁹ Initial Decision, 152 FERC ¶ 63,016 at P 57.

¹⁷⁰ Opinion No. 549, 156 FERC ¶ 61,031 at P 21.

¹⁷¹ BP Rehearing Request at 64.

¹⁷² *Id.* at 65 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 102) (ellipses BP's).

¹⁷³ Opinion No. 549, 156 FERC ¶ 61,031 at PP 65-66.

¹⁷⁴ BP Rehearing Request at 68.

rejecting the “possible” alternative explanations proffered by Evans regarding the Texas Team’s transport utilization, such as seasonality.¹⁷⁵

84. BP further contends that Opinion No. 549 erred in approving Abrantes-Metz’s conclusions regarding uneconomic and unprofitable use of transport by the Texas Team, which BP asserts rested on two flawed assumptions: (1) that transportation was being used to move additional supplies of next-day, fixed-price gas to Houston Ship Channel “that was not already destined for Houston Ship Channel,” and (2) that the Katy Ship Sheets captured the transportation losses associated with transportation of incremental next-day, fixed-price gas to Houston Ship Channel.¹⁷⁶ During September and October (the two months in which heavy transportation losses allegedly occurred), BP transported substantial volumes of baseload gas (i.e., gas sold under physical contracts that flow equal amounts of gas each day of the flow month), which gas was already destined for Houston Ship Channel and did not have any impact on the Houston Ship Channel markets. According to BP, the inclusion of baseload gas transportation with transportation volumes of gas sold on a next-day, fixed-price basis was clearly erroneous; this systematically overstated both transportation and trading losses in September and October, as baseload volumes are sold for the month and not at *Gas Daily* prices.¹⁷⁷ Because transportation losses were materially overstated, BP asserts that Enforcement Staff’s claim that the magnitude of the losses warranted an inference of fraudulent intent has no evidentiary basis.¹⁷⁸

c. Commission Determination

85. We continue to find, as we did in Opinion No. 549, that the Texas Team engaged in uneconomic use of the Houston Pipeline transport during the Investigative Period. Contrary to BP’s assertions, Opinion No. 549 did not arbitrarily or capriciously rely on a flawed regression analysis, disregard evidence or fail to consider other relevant time periods.¹⁷⁹

¹⁷⁵ *Id.* at 69.

¹⁷⁶ *Id.* at 71.

¹⁷⁷ *Id.* at 73, 77.

¹⁷⁸ *Id.* at 77.

¹⁷⁹ See Opinion No. 549, 156 FERC ¶ 61,031 at PP 101-107 (rejecting same arguments).

86. BP argues that Opinion No. 549 accepted the use of *Gas Daily* prices in Abrantes-Metz's transportation regression analysis only because "BP's traders and compliance department also used *Gas Daily* prices, which are an industry standard of daily benchmarks used in the settlement of financial contracts and daily and monthly physical contracts...."¹⁸⁰ While this was one of the stated reasons, we note that Opinion No. 549 further stated that

(ii) such volume-weighted average prices tended to reflect prevailing intra-day price spreads; and (iii) daily transport volumes used in the regression analysis are determined by a sum of all transactions during a given flow day and thereby represent an aggregate daily figure and not an intraday one, making volume-weighted average price from *Gas Daily* a more appropriate measure of overall daily price level for estimating the relationship between daily Houston Pipeline System transport and daily price level.¹⁸¹

87. We also clarify that what BP refers to as "end-of-day" prices are actually the volume-weighted average of all transactions during a flow day, which the evidence showed tended to reflect (at least 60% of the time) prevailing intra-day price spreads.¹⁸² BP cites to no authority, nor are we aware of any, that requires rejection of *Gas Daily* price differentials that tend to be "in the same direction" as the intraday price differentials at least 60% of the time.¹⁸³ Moreover, Opinion No. 549 did not arbitrarily "pick and choose" Abrantes-Metz's regression analysis over Evans's purportedly corrected regression analysis; rather, Opinion No. 549 reasonably rejected the latter on the merits. For example, Opinion No. 549 found that Evans incorrectly used only bids during a

¹⁸⁰ BP Rehearing Request at 65 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 102).

¹⁸¹ Opinion No. 549, 156 FERC ¶ 61,031 at P 102.

¹⁸² *Id.* P 105; Ex. OE-211 at 58:5-10 & n.30 (rebuttal testimony of Abrantes-Metz). BP asserts, without any supporting authority, that Opinion No. 549 was "arbitrary and capricious in accepting Abrantes-Metz analysis based upon prices being on the correct side of zero 60 percent of the time." BP Rehearing Request at 67 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 105).

¹⁸³ *Id.* at 67 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 105).

limited two-hour timeframe (i.e., between 7:30 am and 9:30 am) for his intraday price estimates, rather than considering bids throughout the day.¹⁸⁴

88. By comparison, we find that Opinion No. 549 reasonably rejected as conjecture, based on “possible” but unsubstantiated alternative explanations, BP’s expert’s testimony regarding the Texas Team’s transport utilization.¹⁸⁵ At the hearing, Evans testified, without evidentiary substantiation, that a change to baseload position “is likely a driver of the amount of capacity that a shipper would transport,” and that “a variety of additional factors could also prompt changes to transportation capacity utilization,” including changes in volatility, liquidity and risk.¹⁸⁶

89. We similarly reject BP’s arguments on rehearing that Opinion No. 549 disregarded expert testimony of Bergin that “[a]n economic decision does not require a particular trade turn out to have been profitable at the end of the day – but it means that the trade was the most profitable option at the time of the decision.”. BP asserts that Bergin conceded in his testimony that traders make decisions throughout the trading day based on the data available to them. BP further asserts that this testimony demonstrated that Abrantes-Metz’s reliance on *Gas Daily* prices to judge BP’s transport decision was incorrect, because the *Gas Daily* prices were not published until after the flow day was over and thus were not available when BP personnel made their decisions. However, as discussed above, we note that the *Gas Daily* prices were the volume-weighted average of all transactions during the flow day. Thus, we find that while those particular average prices were not published during the flow day, they are representative of the actual transaction prices that were available to BP personnel during the flow day when they were making their decisions.

90. We find that Opinion No. 549 also reasonably rejected BP’s seasonality argument as unsupported by and contrary to the record evidence.¹⁸⁷ Specifically, the Commission was persuaded by both Enforcement Staff’s expert’s testimony that the mere presence of a particular season does not guide trading behavior or transport utilization, and BP’s

¹⁸⁴ Opinion No. 549, 156 FERC ¶ 61,031 at P 102 n.204.

¹⁸⁵ See, e.g., *McReynolds v. Sodexo Marriott Services, Inc.*, 349 F.Supp.2d 1, 8 (D.C. Cir. 2004) (“But ‘defendant cannot rebut statistical evidence by mere conjectures or assertions, without introducing evidence to support the contention’”) (quoting *Palmer v. Shultz*, 815 F.2d 84, 101 n.13 (D.C.Cir.1987) (citing *Bazemore v. Friday*, 478 U.S. 385, 400 (1986)) (Brennan, J, concurring in part, joined by all Justices)).

¹⁸⁶ See Opinion No. 549, 156 FERC ¶ 61,031 at P 106 (citing Tr. 2509 (Evans)).

¹⁸⁷ *Id.* PP 107, 151 & n.292.

trader Luskie's testimony that the real-time "spread is what dictates whether you flow or not flow."¹⁸⁸

91. BP's contention that transport losses were overstated and did not warrant an inference of fraudulent intent because substantial volumes of baseload gas were included that were already destined for the Houston Ship Channel market and not sold at *Gas Daily* prices, was raised and addressed in Opinion No.549. Specifically, Opinion No. 549 reasonably determined

the profit maximizing decision to flow gas between those two locations [i.e., Katy and Houston Ship Channel], be it baseload or next-day, should still be based on daily prices. The Texas Team always had the option to turn off transport, and sell baseload or next-day gas at Katy, thus removing baseload gas from transport volumes would be inappropriate when assessing whether the Texas Team transport decisions were economic.¹⁸⁹

92. Moreover, at the hearing, Bergin had explained that if Houston Ship Channel 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 Houston Ship Channel to more economically meet their Houston Ship Channel short baseload obligation.¹⁹⁰ Thus, we are not persuaded by BP's argument that all baseload gas was inexorably "destined for" Houston Ship Channel regardless of the Texas Team's actions.

4. Inter-Market Analysis

a. Opinion No. 549

93. Opinion No. 549 affirmed the findings in the ID regarding Abrantes-Metz's inter-market analysis which tested whether the Texas Team disregarded better arbitrage opportunities in the Investigative Period, and Opinion No. 549 rejected BP's exceptions. Abrantes-Metz stated that the Texas Team held capacity on the Houston Pipeline and a

¹⁸⁸ *Id.* P 151 n.292 (citing Initial Decision, 152 FERC ¶ 63,016 at P 63 (citing Ex. OE-161 at 39:14-18; Tr. 574:17-575:13; 584:7-25 (Luskie))).

¹⁸⁹ Opinion No. 549, 156 FERC ¶ 61,031 at P 158 (citing Initial Decision, 152 FERC ¶ 63,016 at P 62 n.46, citing *id.* P 127 n.104 (Bergin Testimony)).

¹⁹⁰ Initial Decision, 152 FERC ¶ 63,016 at P 127 n.104 (citing Ex. OE-161 at 29:9-14, 66:19-67:2).

net long position at Katy. This allowed the Texas Team to sell its beginning of the day position at either Katy or Houston Ship Channel. If the team sold gas at Houston Ship Channel, it could use the Houston Pipeline to transport gas from Katy to fulfill the delivery obligation. Because transportation on Houston Pipeline cost approximately \$0.013 per MMBtu, selling gas at the Houston Ship Channel was the more economic choice only when the price at Houston Ship Channel exceeded the Katy price by at least \$0.013 per MMBtu. Selling at Houston Ship Channel was the more economic choice when the price at Houston Ship Channel was more than the Katy price by at least \$0.013. Abrantes-Metz's intermarket analysis examined how often the Texas Team did the opposite of the more economic decision by selling at Houston Ship Channel when a profit maximizing shipper would have sold at Katy.¹⁹¹

94. Specifically, Enforcement Staff's expert compared the Texas Team's bid-based and offer-based sales at Houston Ship Channel with the Texas Team's bids and offers at Katy (adjusted for the cost of transport) at the same moment in time when both markets were active.¹⁹² If the Texas Team hit a bid at Houston Ship Channel, then Abrantes-Metz compared the Houston Ship Channel bid that the Texas Team hit to the best (highest) Katy bid. When the Houston Ship Channel bid was less than the Katy bid plus the \$0.013 variable cost of transport on the Houston Pipeline, the Texas Team would have received a higher return by hitting the Katy bid and avoiding the \$0.013 transportation cost.¹⁹³ Similarly, if a Texas Team sale was the result of a purchaser lifting the Texas Team's offer at Houston Ship Channel, Enforcement Staff's expert looked to see whether the Texas Team's best contemporaneous offer at Katy (i.e., its lowest offer) was greater than the Texas Team's Houston Ship Channel offer that was lifted (minus \$0.013).¹⁹⁴ She categorized as "uneconomic" the Texas Team's sales at Houston Ship Channel that involved lifted Texas Team offers at Houston Ship Channel that were not higher than the Texas Team's contemporaneous lowest offer at Katy minus the cost of transport (\$0.013), and similarly those bid-based sales at Houston Ship Channel that were not greater than the best Katy bid by at least \$0.013.¹⁹⁵

¹⁹¹ Ex. OE-129 at 105-06.

¹⁹² *Id.* at 105-24.

¹⁹³ Opinion No. 549, 156 FERC ¶ 61,031 at P 108 n.217 (citing Ex. OE-129 at 102:15-103-2).

¹⁹⁴ *Id.* (citing Ex. OE-129 at 103:4-7).

¹⁹⁵ Ex. OE-129 at 110-111.

95. Based on this bid-to-bid and offer-to-offer comparison, the inter-market analysis showed that BP's uneconomic trading on the offer side increased from 46% in the Pre-Investigative Period to 78% in the Investigative Period, while its uneconomic trading on the bid side remained relatively similar (35% in the Pre-Investigative Period versus 34% in the Investigative Period).¹⁹⁶

96. Opinion No. 549 agreed with the ID and Abrantes-Metz finding that BP's moment-to-moment trading decisions did not reflect a rational, profit-maximizing approach to arbitrating prices between Katy and Houston Ship Channel.¹⁹⁷

b. BP Rehearing Request

97. BP argues that Opinion No. 549 erroneously adopted Abrantes-Metz's inter-market analysis as a marker of a scheme because she did not compare the Texas Team's Houston Ship Channel sales to the price of a trade that could have been executed with certainty.¹⁹⁸ According to BP, almost 40% of her comparison points involved offers that were not reasonable substitutes or comparison points because not only were they not executed [at Katy] at the same moment of a comparable Houston Ship Channel trade but they were never executed.¹⁹⁹ Plus, BP's expert Evans testified that Abrantes-Metz's intraday model failed to account for the different changing market conditions between the trade that was executed at Houston Ship Channel and the trade that was later executed at Katy in connection with the offer-based analysis.²⁰⁰

98. BP argues Opinion No. 549 also erred by: (1) rejecting evidence showing that BP had a lower rate of bid-side "uneconomic" transactions in the Pre-Investigative Period than in the Investigative Period; (2) finding, without providing any reasoned explanation,

¹⁹⁶ Opinion No. 549, 156 FERC ¶ 61,031 at P 109 & n.218 (citing Initial Decision, 152 FERC ¶ 63,016 at P 60 (citing Ex. OE-211 at 116:6-8)).

¹⁹⁷ *Id.* P 109 n.220. As Abrantes-Metz testified, "[T]he Texas [T]eam could increase or lower their offer at either Katy or [Houston Ship Channel] at any time . . . if the Texas [T]eam was willing to sell via an offer at [Houston Ship Channel] . . . they should have been willing to post (or adjust) their offer at Katy such that their Katy offer would have been the equivalent of their [Houston Ship Channel] offer price minus the cost of transport." Ex. OE-211 at 112: 17-22.

¹⁹⁸ BP Rehearing Request at 78.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 78-79.

that “BP’s conclusions from a bid-to-bid comparison are less compelling from an offer-to-offer comparison as BP had control over its offer prices but could only hit bids at prices that other market participants posted”; (3) failing to recognize “massive inconsistencies in the results of Abrantes-Metz’s offer-to-offer analysis (78% uneconomic trading) and her bid-to-bid analysis (34%)”; (4) ignoring the propensity for her model to “manufacture” uneconomic trading signals when there could be no suspicion of uneconomic trading; and (5) finding uneconomic trading 41% of the time when there is no reason to believe that any uneconomic trades were conducted.²⁰¹

c. Commission Determination

99. We are not persuaded by BP’s arguments on rehearing and find that Opinion No. 549 reasonably accepted Abrantes-Metz’s inter-market analysis to test whether the Texas Team disregarded better arbitrage opportunities in the Investigative Period, after considering Evans’s rebuttal criticisms. We note that BP repeats on rehearing arguments it made on exceptions, which were properly considered and rejected by Opinion No. 549.

100. BP criticizes Abrantes-Metz for using an offer-to-offer analysis that compared lifted offers at Houston Ship Channel to offers at Katy that not only were not executed at the same moment but were never executed. We note, however, that the purpose of Abrantes-Metz’s inter-market analysis was to evaluate the comparability of BP’s simultaneous offers (adjusted for transport) to sell gas at Houston Ship Channel and at Katy, not the comparability of executed transactions at these two locations. Thus, we find that Opinion No. 549 reasonably determined that the compared offer at Katy was active at the time of the Houston Ship Channel trade and, thereby, represented a valid inter-market comparison point.²⁰² As Abrantes-Metz explained in her testimony, “[T]he Texas [T]eam could increase or lower their offer at either Katy or [Houston Ship Channel] at any time . . . if the Texas [T]eam was willing to sell via an offer at [Houston Ship Channel] . . . they should have been willing to post (or adjust) their offer at Katy such that their Katy offer would have been the equivalent of their [Houston Ship Channel] offer price minus the cost of transport.”²⁰³

101. We further find that Opinion No. 549 provided a reasoned explanation for giving greater weight to the evidence based on the offer-to-offer comparison than the bid-to-bid comparison. In this regard, Opinion No. 549 found that “BP’s conclusions from a bid-to-

²⁰¹ *Id.* at 79-80 (internal citations omitted).

²⁰² Opinion No. 549, 156 FERC ¶ 61,031 at P 112.

²⁰³ *Id.* P 111 (citing Ex. OE-211 at 112:17-22).

bid comparison are less compelling from an offer-to-offer comparison *as BP had control over its offer prices but could only hit bids at prices that other market participants posted.*²⁰⁴ Notably, BP does not dispute this reason. Similarly, Opinion No. 549 recognized that the inter-market analysis showed that BP's uneconomic trading on the offer side increased from 46% in the Pre-Investigative Period to 78% in the Investigative Period, while its uneconomic trading on the bid side remained relatively similar (35% in the Pre-Investigative Period versus 34% in the Investigative Period).²⁰⁵ Opinion No. 549 rationalized this difference on the basis that BP had more control over the offer side of its trading. BP fails to identify any "massive inconsistency" that needs further explanation in this regard. Moreover, we find that the fact that the inter-market analysis found some "uneconomic" trading during the Pre-Investigative Period does not invalidate its results but is to be expected with a retrospective evaluation of moment-to-moment trading decisions.

5. Distance Analysis

a. Opinion No. 549

102. Opinion No. 549 found that the evidence demonstrated that BP's consummated offer-initiated sales prices at Houston Ship Channel underpriced other market participants during the Investigative Period relative to the Pre-Investigative Period.²⁰⁶

103. In this regard, Enforcement Staff's expert Abrantes-Metz conducted a so-called "distance analysis," whereby she computed the difference (i.e., distance) between BP's offer-initiated sales and the best non-BP offer at Houston Ship Channel. Her distance analysis thus measured the degree to which the Texas Team's consummated trade prices underpriced other market participants during the Investigative Period.²⁰⁷ According to Abrantes-Metz, the "full day" difference between BP's offer-initiated sales price and the next best offer was \$0.008 in the Pre-Investigative Period and \$0.018 in the Investigative Period, for an increase of a penny (\$0.01). She also calculated that the pre-Katy (i.e., prior to trading at Katy) difference between BP's offer-initiated sales price at Houston Ship Channel and the next best offer was \$0.017 in the Pre-Investigative Period and

²⁰⁴ *Id.* P 113 (emphasis added).

²⁰⁵ *Id.* P 109 & n.218 (citing Initial Decision, 152 FERC ¶ 63,016 at P 60 (citing Ex. OE-211 at 116:6-8)); *see also* Ex. OE-211 at 116:12-13 (Table 11).

²⁰⁶ Opinion No. 549, 156 FERC ¶ 61,031 at P 121.

²⁰⁷ *Id.* P 114 (citing Initial Decision, 152 FERC ¶ 63,016 at P 58).

\$0.025 in the Investigative Period, for an increase just shy of a penny (\$0.008), as BP's expert Evans also found.²⁰⁸

104. Opinion No. 549 concurred in the ID's finding that the distance between BP's offer-initiated sales and the next best non-BP offer at Houston Ship Channel increased during the Investigative Period as compared to the Pre-Investigative Period.²⁰⁹ Opinion No. 549 concluded that regardless of whether BP's increase in distance was a penny or less, the undisputed evidence showed that "BP's distance increased from the Pre-[Investigative Period] to the Investigative Period," which was consistent with a manipulative scheme to suppress prices by underpricing the next best offer.²¹⁰

b. BP Rehearing Request

105. BP argues that Opinion No. 549 erred in rejecting evidence regarding deficiencies in Abrantes-Metz's distance analysis.²¹¹ Abrantes-Metz purported to conduct her distance analysis for the period of each day when trading at Houston Ship Channel had begun, but before Katy locations began trading; but BP asserts she did not restrict her analysis to transactions prior to the first Katy transaction.²¹² BP says that when her analysis was corrected to include only transactions at Houston Ship Channel consummated prior to the open of Katy, the difference—i.e., the distance between BP's offered initiated sales and the best non-BP offer at Houston Ship Channel—was less than a penny. While Opinion No. 549 found that whether a penny or less, the difference "is consistent with a manipulative scheme to suppress prices by underpricing the next best offer,"²¹³ BP argues that Opinion No. 549 cited no authority or offered any

²⁰⁸ *Id.* P 119 (comparing Ex. OE-211 at 95:3-13 (Abrantes-Metz rebuttal) with Ex. BP-037 at 60:11-61:3 (Evans)).

²⁰⁹ *Id.*

²¹⁰ *Id.* (quoting Initial Decision, 152 FERC ¶ 63,016 at P 45 n.23).

²¹¹ BP Rehearing Request at 80.

²¹² *Id.*

²¹³ *Id.* at 80-81 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 119).

logic for how underpricing the next-best offer is anything but rational economic behavior that occurs in competitive markets.²¹⁴

106. BP also argues that Opinion No. 549 erred in inferring manipulation on the part of BP when the “distance” of other market participants’ transactions was equal to or greater than \$0.018 in the Investigative Period.²¹⁵

c. Commission Determination

107. We continue to find, as the Commission did in Opinion No. 549, that the evidence showed that BP’s consummated offer-initiated sales prices at Houston Ship Channel underpriced other market participants during the Investigative Period relative to the Pre-Investigative Period and that the difference (i.e., the distance) increased during the Investigative Period relative to the Pre-Investigative Period. On rehearing, BP repeats the same arguments that Opinion No. 549 properly rejected.

108. We note that BP does not dispute Abrantes-Metz’s distance calculations except to say that the penny difference she initially found was not accurate because she included, contrary to her stated analysis, transactions that were consummated at Houston Ship Channel *after* the open of trading at Katy. But when adjusted to include only transactions prior to the open of trading at Katy, the distance between BP’s offer-initiated sales price at Houston Ship Channel and the next best non-BP offer was \$0.017 in the Pre-Investigative Period and \$0.025 in the Investigative Period, for an increase just shy of a penny (\$0.008), as BP’s expert Evans found.²¹⁶ Put simply, regardless of whether BP’s increase in distance was a penny or just shy of penny, the fact remains that the undisputed evidence showed that “BP’s distance [i.e., underpricing at Houston Ship Channel relative to the market] increased from the Pre-[Investigative Period] to the Investigative Period.” This fact is consistent with a manipulative scheme to suppress prices by underpricing the next best offer.²¹⁷

²¹⁴ *Id.* at 81.

²¹⁵ *Id.*

²¹⁶ Opinion No. 549, 156 FERC ¶ 61,031 at P 119 (*comparing* Ex. OE-211 at 95:3-13 (Abrantes-Metz rebuttal) *with* Ex. BP-037 at 60:11-61:3 (Evans)).

²¹⁷ *Id.*

109. We find that Opinion No. 549 properly relied on both logic and legal authority for assessing whether underpricing the next-best offer could be something other than rational economic behavior that occurs in competitive markets.²¹⁸ Here, the distance between BP's offer-initiated sales and the next best offer was evidence of underpricing offered to demonstrate a scheme to engage in heavy, volume weighted transactions to depress the *Gas Daily* index and benefit BP's leveraged financial short positions that settled off that index. By arguing "how can underpricing be anything but competitive?" BP begs the ultimate question: whether the Texas Team's pattern of underpricing was a sign of a competitive market or manipulative conduct to suppress the price of the *Gas Daily* index to benefit their short financial positions. Based on all the evidence, including the distance analysis, we continue to find, as the Commission did in Opinion No. 549, that the Texas Team was engaged in manipulative conduct.

110. We are not persuaded by BP's assertions that Opinion No. 549 disregarded evidence of other market participants' behavior. We find that Opinion No. 549 reasonably found, after considering the evidence, that other market participants' conduct was factually distinguishable.²¹⁹ Moreover, evidence that another market participant may have engaged in similar underpricing during some *other* time period does not rebut the evidence with respect to the Texas Team's conduct *during* the Investigative Period.

6. Bid-Hitting Analysis

a. Opinion No. 549

111. Opinion No. 549 noted that when selling next-day fixed-price gas at Houston Ship Channel, a market participant like BP either could hit the best active bid or post an offer to sell at a higher price.²²⁰ Relying upon a bid-hitting analysis prepared by Abrantes-Metz, Opinion No. 549 and the underlying ID found that the Texas Team sold

²¹⁸ See *id.* PP 39-40, 46-53 & nn.75, 76, 93, 104 (citing case law); see, e.g., *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). ("[M]arket manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone."); *S.E.C. v. Masri*, 523 F.Supp.2d 361, 372 ("The Court concludes . . . that if an investor conducts an open-market transaction with the intent of artificially affecting the price of the security, and not for any legitimate economic reason, it can constitute market manipulation.").

²¹⁹ Opinion No. 549, 156 FERC ¶ 61,031 at P 120 & n.236.

²²⁰ *Id.* P 122.

63% of the time by hitting bids in the Investigative Period, as compared to only 49.6% of the time in the Pre-Investigative Period. The Texas Team also hit bids more frequently than other sellers at Houston Ship Channel by four percent. Opinion No. 549 and the underlying ID found this evidence significant because “if a seller intends to move prices downward, making sales by hitting bids more frequently is an effective way of selling at the lowest price available. This is because the highest available bid is always lower-priced than the lowest available offer.”²²¹

112. Based on the evidence, Opinion No. 549 also rejected BP’s arguments that the Texas Team’s bid-hitting rates were not unusual as compared to a broader “historical” period, or compared to its trading at Katy, or given its larger baseload position, or in light of other market participants.²²²

b. BP Rehearing Request

113. BP argues that the Texas Team’s increased bid-hitting at Houston Ship Channel during the Investigative Period was not evidence of any scheme; rather, Opinion No. 549 arbitrarily adopted Abrantes-Metz’s conclusion that bid-hitting is “insignificant” except when considered in the context of BP’s increased volume during the Investigative Period.

114. In particular, BP argues that Opinion No. 549 rejected, ignored or disregarded evidence that: (1) BP’s bid-hitting rates were not unusual when compared to a broader time period, outside the Pre-Investigative Period; (2) BP’s rate of bid-hitting at Katy (which was not alleged to have been manipulated) increased even more than the increase in BP’s bid-hitting rate at Houston Ship Channel; (3) other market participants increased their bid hitting percentage by more than BP; and (4) the increase in BP’s bid-hitting was likely driven by its large baseload position, a position for which the Pre-Investigative Period offered no comparable data points.²²³

²²¹ *Id.* (citing Initial Decision, 152 FERC ¶ 63,016 at P 45 n.22, P 46 and Ex. OE-129 at 76:9-10). “Abrantes-Metz also 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.” *Id.* P 122 (citing Initial Decision, 152 FERC ¶ 63,016 at P 46 (citing Ex. OE-129 at 76:11-19)).

²²² *Id.* PP 124-27.

²²³ BP Rehearing Request at 81-82.

c. **Commission Determination**

115. We agree with the Commission's finding in Opinion No. 549 that the Texas Team increased its bid-hitting rates during the Investigative Period (63% of the time) as compared to the Pre-Investigative Period (49.6%).²²⁴ On rehearing, BP repeats its prior arguments from the Initial Decision, which were properly rejected by Opinion No. 549.

116. In this regard, Opinion No. 549 considered BP's argument that the Texas Team's bid-hitting rates during the Investigative Period were not unusual when compared to a broader historical time period—i.e., Evans's contention that "BP's bid-hitting rate of 63 [percent] in the [Investigative Period] is well within [its monthly average] historical rates" of bid-hitting between 2006 and 2011.²²⁵ But Evans's own chart showed that out of 72 months in question, only 22 months, or 30%, had bid-hitting rates that were higher than those observed during the Investigative Period.²²⁶ Thus, we find that Opinion No. 549 reasonably determined that "[t]hese statistics on their own show that a 63% rate is higher than normal or average rate of bid-hitting, which is consistent with the conclusions derived from Abrantes-Metz's testimony, which showed an increase in bid-hitting when comparing the Pre-Investigative Period to the Investigative Period."²²⁷

117. We find that Opinion No. 549 did not disregard evidence that the Texas Team increased its bid-hitting at Katy more than its bid-hitting rates at Houston Ship Channel or that other market participants engaged in bid-hitting at Houston Ship Channel during the Investigative Period—but instead, reasonably considered the increase in bid-hitting at Houston Ship Channel in the larger evidentiary context. Citing to Abrantes-Metz's testimony that "[i]n isolation, bid hitting is insignificant, but it's not when applied to the massive increase in volume" at Houston Ship Channel, Opinion No. 549 reasonably found that BP's simultaneous increases in net selling and heavy sales volume of fixed-

²²⁴ Opinion No. 549, 156 FERC ¶ 61,031 at PP 122, 124.

²²⁵ *Id.* P 125 (quoting Ex. BP-037 at 49:4-7).

²²⁶ *Id.* (citing Ex. BP-037 at 49:4-7).

²²⁷ *Id.* By arguing that the Texas Team's bid-hitting rates during the Investigative Period were similar to its bid-hitting rates during some months during the prior six years, BP does not rebut the fact the Texas Team's bid-hitting rates measurably increased during the Investigative Period as compared to the Pre-Investigative Period.

price sales, including sales increasingly made by hitting bids, collectively had—and was intended to have—a suppressing effect on the Houston Ship Channel *Gas Daily* index.²²⁸ Both Opinion No. 549 and the underlying ID found that “the only reasonable conclusion is that early bid hitting was part of the attempt to push early prices down and mark the open,” which finding was not arbitrary or capricious but grounded in un rebutted and compelling evidence.²²⁹ Moreover, evidence that other market participants also increased their bid-hitting rates at Houston Ship Channel during the Investigative Period does not rebut the fact that the Texas Team measurably increased its bid-hitting rates at Houston Ship Channel during the Investigative Period.

118. We disagree with BP that Opinion No. 549 ignored BP’s conjecture that bid-hitting rates by the Texas Team at both Houston Ship Channel and Katy locations were likely driven by larger baseload positions held during the Investigative Period. Rather, Opinion No. 549 found that BP provided no data or analysis to support this theory.²³⁰ Based on the lack of evidentiary support, we find that Opinion No. 549 reasonably concurred with the underlying ID that “the need to liquidate large baseload positions does not account for the increased bid hitting.”²³¹

C. Opinion No. 549 Did Not Err In Approving the Pre-Investigation Period and the Pre-Investigation Period Satisfies Requirements for Statistical Analysis

1. Opinion No. 549

119. Opinion No. 549 found that the record evidence supported Enforcement Staff’s selection of the Pre-Investigative Period—January 2, 2008 through September 10, 2008—with which to compare the Texas Team’s trading and transport during the Investigative Period—September 18, 2008 through November 30, 2008—for determining whether a change in trading patterns occurred during the Investigative Period.

²²⁸ *Id.* P 126. Bid-hitting alone, absent volume, may not be significant. But when increased bid-hitting is applied to a massive increase in volume of the Texas Team’s next day fixed-price sales at Houston Ship Channel during the Investigative Period, its ability to impact price and effect on the development of the volume-weighted *Gas Daily* index is undeniable.

²²⁹ *Id.*

²³⁰ *Id.* P 127.

²³¹ *Id.* P 127.

120. Opinion No. 549 acknowledged that “[t]o determine if a change in trading patterns occurred, a control period must be selected during which no known manipulation occurred, but which is similar to the suspect period.”²³² No known manipulation had occurred in the Pre-Investigative Period, which Opinion No. 549 also found to be similar to the Investigative Period. For example, Opinion No. 549 noted that in January 2008, at the start of the Pre-Investigative Period,²³³ Grdyn Comfort (Comfort) became the Texas Team’s primary Houston Ship Channel trader. Comfort executed 89% of the Texas Team’s fixed-price trades at Houston Ship Channel during the Investigative Period, as compared to 87% of the Texas Team’s trades at Katy and Houston Ship Channel during the Pre-Investigative Period.²³⁴ Opinion No. 549 further found that using a single time control period (i.e., the Pre-Investigative Period) for multiple analyses allows for more uniform and reliable comparisons of data and avoids the potential to cherry pick results.²³⁵

121. Opinion No. 549 also considered BP’s challenges to the appropriateness of the Pre-Investigative Period and responses thereto. For example, when challenged, Abrantes-Metz extended several of her analyses by using data from previous years and conducted “robustness checks” with data from other time periods to confirm her results, which evidence Opinion No. 549 considered.²³⁶

122. Opinion No. 549 also considered BP’s generalized claim of “seasonality,” but found there was insufficient evidence to warrant disregarding the use of the Pre-Investigative Period in favor of an alternative comparison period of September through November 2007 (i.e., the same months as the Investigative Period but in the prior year).²³⁷ Opinion No. 549 found convincing Enforcement Staff’s expert’s testimony that the mere presence of a particular season does not guide trading

²³² *Id.* P 149.

²³³ *Id.* P 150.

²³⁴ *Id.*

²³⁵ *Id.* P 149.

²³⁶ *Id.* P 150.

²³⁷ *Id.* P 151.

behavior or transport utilization and BP's trader Luskie's testimony that the real-time "spread is what dictates whether you flow or not flow."²³⁸

2. BP Rehearing Request

123. BP argues that the Pre-Investigative Period is not at all similar to the Investigative Period, with the only common factor being the presence of Comfort on the Texas Team, while September and October 2007 were the most recent seasonally comparable comparison months for the Investigative Period.²³⁹

124. BP asserts that the natural gas industry is seasonal and, therefore, Opinion No. 549 erred by affirming use of the Pre-Investigative Period that did not take into account seasonality.²⁴⁰ Citing to the Commission's *Energy Primer: A Handbook of Energy Market Basics*, BP asserts that the Commission has acknowledged seasonality is a significant factor in natural gas trading.²⁴¹ BP also cites to Evans's testimony and the fact Enforcement Staff's witness Dr. Ehud Ronn published an article in 2004 that evaluated the seasonality impact on natural gas prices.²⁴²

125. BP further argues that Table 1.A of Abrantes-Metz's rebuttal testimony showed that BP's trading at Houston Ship Channel during the Investigative Period was similar to its trading in 2007 with respect to numerous metrics on which the ID relied in finding liability for a manipulative scheme and, therefore, the "confluence of trading behaviors' theory has no basis in fact."²⁴³

²³⁸ *Id.* P 151 n.292 (citing Initial Decision, 152 FERC ¶ 63,016 at P 63 (citing Ex. OE-161 at 39:14-18; Tr. 574:17-575:13; 584:7-25 (Luskie))).

²³⁹ BP Rehearing Request at 83-84, 90

²⁴⁰ *Id.* at 85-86.

²⁴¹ *Id.* at 85 n.220.

²⁴² *Id.* at 86 nn. 225-26 (citing Tr. at 2483-2484 (Evans); Ex. OE-156; P. Jaillet, E. Ronn and S. Tompaidis, *Valuation of Commodity-Based Swing Options* (Management Science 2004), Part I Preliminary Draft (Energy & Power Risk Management, Vol. 3, No. 3, June 1998) at 14-16; Part II Preliminary Draft (Energy & Power Risk Management, Vol. 3, No. 3, July 1998) at 28-29).

²⁴³ *Id.* at 89-90.

126. BP claims to have demonstrated that the selective Pre-Investigative Period allowed Enforcement Staff to misrepresent BP's: (1) Houston Pipeline transport utilization during the Investigative Period because it relies upon information contained in the Katy Ship sheets rather than longer-term Houston Pipeline transport data; (2) fixed-price sales during the Investigative Period, which were entirely consistent with BP's fixed-price sales at various points in 2006, 2007, 2009, 2010 and 2011; (3) BP's bid-hitting rate (63%) during the Investigative Period, which was similar or higher in numerous other periods, and (4) the timing of trades at Houston Ship Channel (i.e., earliness) during the Investigative Period, which was comparable to its historic timing of early trading.²⁴⁴

3. Commission Determination

127. We are not persuaded by BP's arguments on rehearing. Recognizing that a control period must be selected that is similar to the Investigative Period and during which no known manipulation occurred, we find that Opinion No. 549 reasonably adopted the Pre-Investigative Period for comparing the Texas Team's trading patterns and behavior during the Investigative Period.

128. In accepting the Pre-Investigative Period, Opinion No. 549 relied on evidence not only that Comfort was leading the Texas Team beginning in January 2008, but also that Comfort executed 89% of the Texas Team's fixed-price trades at Houston Ship Channel during the Investigative Period, and similarly 87% of the Texas Team's trades at Katy and Houston Ship Channel during the Pre-Investigative Period.²⁴⁵ Based on such undisputed evidence, we find that Opinion No. 549 reasonably determined that the Pre-Investigative Period, in which no known manipulation had occurred, was similar to the Investigative Period for comparative purposes. Moreover, as Opinion No. 549 noted, Enforcement Staff's expert Abrantes-Metz also extended her analysis of BP's trading to other periods and conducted "robustness checks," to compare relative behavior which confirmed the suitability of the Pre-Investigative Period.²⁴⁶

129. We find that Opinion No. 549 also considered, and reasonably rejected, BP's attempts to rebut the appropriateness of the Pre-Investigative Period on the ground of "seasonality." In this regard, Opinion No. 549 considered persuasive testimony from

²⁴⁴ *Id.* at 87-88.

²⁴⁵ Opinion No. 549, 156 FERC ¶ 61,031 at P 150.

²⁴⁶ *Id.* For instance, Abrantes-Metz reviewed the Texas team's increased use of its Houston Ship Channel capacity and transport of gas on Houston Ship Channel during extended pre-investigative and post-investigative periods to confirm that her analysis would reach the same conclusion.

Bergen that “the mere presence of a particular season does *not* guide *trading behavior* or *transport utilization*” [emphasis added], while Luskie confirmed that “the spread is what dictates whether you flow or not flow, the real-time spread.”²⁴⁷ While BP now asserts that Bergen also acknowledged that “traders and particularly marketers like BP are simply trading *in response to pricing incentives that may be the result of that particular season*,”²⁴⁸ the point remains that traders respond to pricing incentives, such as the real-time spread, regardless of whether such pricing incentives are seasonally related. BP erroneously relies on statements in the Commission’s *Energy Primer* regarding the seasonal nature of “demand” and an article concerning “the seasonality impact on natural gas prices” to claim—erroneously—that Opinion No. 549 disregarded evidence of the seasonal nature of “natural gas trading,”²⁴⁹ which is a different point.

130. We find that BP’s assertion that Table 1.A of Abrantes-Metz’s rebuttal testimony shows that her “confluence of trading behaviors” theory has no factual basis is similarly unpersuasive. Based on Table 1.A in Abrantes-Metz’s rebuttal testimony, BP purports to draw eight bullet point comparisons between the Texas Team’s conduct in the Investigative Period (i.e., September 18 through November 30, 2008) with its conduct in the prior year 2007 and in some months in 2008.²⁵⁰ On their own terms, we find that BP’s eight bullet points fail to show a consistent pattern of trading during the prior September, October and November 2007 timeframe that is comparable to the change in trading behavior identified during the Investigative Period.²⁵¹ The bullet points are

²⁴⁷ *Id.* P 151 n.292.

²⁴⁸ BP Rehearing Request at 86 (citing Ex. OE-161 at 39:17-18) (emphasis in original).

²⁴⁹ The Ronn co-authored article—which apparently was part of the hearing “record” only insofar as its title was listed on the resume accompanying the pre-filed testimony and exhibits of the Enforcement Staff expert, with respect to whom BP waived all cross-examination, *see* Opinion No. 549, 156 FERC ¶ 61,031 at P 31—discusses how to “extract market information from forward prices and volatilities and build a pricing framework for swing options based on a one-factor mean-reverting stochastic process for energy prices that explicitly incorporates seasonal effects.” *See* <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=538D02E8C1A447A14967754B981DA723?doi=10.1.1.367.1021&rep=rep1&type=pdf>.

²⁵⁰ BP Rehearing Request at 89-90 (eight bullet points).

²⁵¹ Notably, only six of BP’s bullet points (i.e., the second through sixth bullets and eighth bullet) make comparative findings between BP’s conduct during the Investigative Period and the prior September 2007, while only two bullet points (the third and eighth bullets) make comparative findings to the prior October 2007, and only

limited to comparing various measures of sales and transportation volumes, market share, and timing of sales for the two September to November periods. We note that none of the bullet points address the level of uneconomic sales at the Houston Ship Channel as compared to contemporaneous prices at Katy, the frequency of sales made by hitting bids, or the posting of lower offers to sell than other sellers at the Houston Ship Channel. We find that BP's assertions that September and October 2007 were the most seasonally-comparable comparison months for the Investigative Period months of September and October 2008, and evidence of trading during those months in 2007 rebuts Enforcement Staff's claim of manipulation thus rings hollow.²⁵² In short, such disparate evidence of trading in dispersed months in 2007 and 2008 does not rebut Enforcement's Staff's claim of manipulation during the Investigative Period—i.e., a claim that is based on specific evidence that BP engaged in a changed pattern of high-volume, early sales designed to suppress the *Gas Daily* price at Houston Ship Channel by increased bid-hitting, consummating transactions at comparatively low inter-market offers and through uneconomic use of Houston Pipeline transport.

131. In this regard, we find that Opinion No. 549 reasonably rejected this same argument based on the following reasoning: “We disagree with BP that its trading at Houston Ship Channel during the Investigative Period was similar to its trading in 2007

one bullet point (first bullet) makes a comparative finding to November 2007. BP Rehearing Request at 89-90.

²⁵² Even in September and October 2007, which BP asserts to be the most comparable points, the asserted similar trading behavior does not give rise to the same pattern of manipulative conduct identified during the Investigative Period. For example, BP only cites to disparate evidence of the following: the difference in the Texas Team's average daily volume of sales at Houston Ship Channel and Katy was comparable to September 2007 (second bullet); the Texas Team's market share at Houston Ship Channel during the first five minutes of trading was less than its market share in September and October (third bullet) 2007; the Texas Team's sales market share at Houston Ship Channel during the first five minutes of trading was comparable to or less than its sales market share in September 2007 (fourth bullet); the percentage of days in which the Texas Team made one of the first three sales at Houston Ship Channel was comparable to or less than the percentage of days in September 2007 (fifth bullet); the average number of minutes that elapsed between the first trade at Houston Ship Channel and when the Texas Team made its first sale at Houston Ship Channel was comparable or more than the average number of minutes in September 2007 (sixth bullet); and the average daily transport volume that the Texas Team utilized on Houston Pipeline was comparable to or less than the average daily volume in September and October 2007 (eighth bullet). BP Rehearing Request at 89-90.

with respect to seven metrics used by Abrantes-Metz. These metrics, as visually displayed in Table 1.A of Abrantes-Metz's rebuttal analysis, do not point to a consistent pattern in trading behavior that occurred simultaneously at any one timeframe in 2007, unlike what is demonstrated during the Investigative Period."²⁵³

132. As discussed above, we find that Opinion No. 549 also reasonably rejected BP's assertions that the selection of the Pre-Investigative Period allowed Enforcement Staff to misrepresent the changes in transport utilization and increased earliness of heavy volume fixed-price sales, including by bid hitting, during the Investigative Period.²⁵⁴ For example, BP asserts that testimony from Enforcement Staff's expert that "a pattern of early and heavy fixed-price *selling* at H[ouston] S[hip C[hannel] is [apparent] when reviewing the first three trades of the day" was rebutted by BP's expert Evans, who testified that "[i]n 53 of the 72 months in the period from January 2006 to December 2011, the percentage of days during which BP was among the *first three trades* at H[ouston] S[hip C[hannel] was greater than 50 [percent], and the rate was 90 [percent] or higher in eight of those months."²⁵⁵ However, we find that Opinion No. 549 reasonably rejected this purported rebuttal evidence of the unsuitability of the Pre-Investigative Period on the ground that BP's expert did not separate sales from purchases in his historical analysis of the first three trades of the day.²⁵⁶

D. Opinion No. 549 Correctly Rejected As Insufficient BP's Non-Manipulative Explanations

1. Opinion No. 549

133. Opinion No. 549 found that the ID reasonably rejected BP's evidence regarding the effects of the 2008 financial crisis and two hurricanes as insufficient to explain the Texas Team's change in trading behavior during the Investigative Period.²⁵⁷ While BP made general assertions that these events affected the Texas Team's trading, Opinion

²⁵³ Opinion No. 549, 156 FERC ¶ 61,031 at P 166 n.312 (citing Ex. OE-211 at 17-20).

²⁵⁴ See *supra* section III.C.

²⁵⁵ BP Rehearing Request at 89 n.240 (citing Ex. BP-037 at 23:1-23:4) (emphasis added).

²⁵⁶ See Opinion No. 549, 156 FERC ¶ 61,031 at PP 87, 90.

²⁵⁷ *Id.* P 171.

No. 549 found that BP failed to substantiate the alleged impact of these events to the changes in trading behavior at issue.

134. In particular, Opinion No. 549 found that BP did not substantiate how the 2008 financial crisis caused the Texas Team to become the seller with the largest market share of next day, fixed-price sales at Houston Ship Channel, or to shift to selling higher volumes at Houston Ship Channel earlier in the trading day.²⁵⁸ BP merely cited to a Platts *Gas Daily* article describing the financial crisis and general reduction in creditworthiness of counterparties, but offered no evidence of any actual impact of the financial/credit crisis on the Texas Team's next day physical trading.²⁵⁹

135. Opinion No. 549 agreed with the ID that there was no evidence to support BP's assertions that hurricanes "materially impact[ed] the Texas Team's trading in the [Investigative Period], or their [Houston Ship Channel] and Katy physical baseload positions through October and November 2008."²⁶⁰

2. BP Rehearing Request

136. BP asserts that the record evidence shows that: (1) the 2008 financial crisis and subsequent credit issues affected the creditworthiness of potential counterparties; (2) Hurricane Ike and Gustav materially affected natural gas markets in and around Houston Ship Channel; and (3) both of these events affected the Texas Team's trading during the Investigative Period.²⁶¹

137. For financial crisis evidence, BP points to: (1) a September 9, 2008 *Gas Daily* article noting that "[t]he nation's worsening financial crisis spooked North American gas traders Thursday as some began cutting off investment banks as counterparties"; (2) internal BP communications concerning certain counterparty credit limits and review requirements; (3) testimony about companies canceling contracts and counterparties unable to meet credit standards.²⁶²

²⁵⁸ *Id.*

²⁵⁹ *Id.* P 172.

²⁶⁰ *Id.* (quoting Initial Decision, 152 FERC ¶ 63,016 at P 63).

²⁶¹ BP Rehearing Request at 90.

²⁶² *Id.* at 91 (citing Ex. BP-056 at 11 (Public Version), Ex. BP-023, Ex. BP-020 at 10:21-11:3).

138. For evidence that Hurricanes Ike and Gustav affected the natural gas markets around Houston Ship Channel and the Texas Team's trading, BP points to: (1) a September 19, 2008 report that "Ike, which plowed through the Gulf of Mexico before hitting Galveston Friday night, shut in an estimated 5.7 Bcf of gas production in the six days since it came ashore and temporarily destroyed even more demand as evidenced by a 67-Bcf build to storage";²⁶³ (2) daily situation reports from the Department of Energy describing, for example, on October 9 that 38.6% of pre-event natural gas production remained shut-in almost three weeks after Hurricanes Gustav and Ike;²⁶⁴ (3) a September 29, 2008 internal BP communication explaining that during the week following Hurricane Ike approximately 305,000 MMBtus were offline and only a fraction were cut due to force majeure, as confirmed by Bergin's hearing testimony;²⁶⁵ (iv) Barnhart's testimony that the impact of Hurricane Ike prompted BP to "deal with numerous cuts, outages, and parties invoking the force majeure provisions of their contracts," which affected her trading and caused the Texas Team's portfolio to become longer;²⁶⁶ and (v) Bergin's expert testimony concerning "demand destruction" in the aftermath of Hurricane Ike, from September 18 to the end of the month, in and around Houston Ship Channel.²⁶⁷

139. BP asserts that Enforcement Staff's experts failed to consider the impact that the hurricanes and the financial crisis had on BP's trading activity. According to BP, Abrantes-Metz admitted that she did not "examine the behaviors of natural gas traders and changes to those behaviors under various different risk positions and market conditions," while Bergin did not conduct any specific analysis of the impact of Hurricane Ike on production facilities in Texas.²⁶⁸

3. Commission Determination

140. We continue to find, as we did in Opinion No. 549, that BP's evidence regarding the effects of the 2008 financial crisis and Hurricanes Ike and Gustav were insufficient to

²⁶³ *Id.* (citing Ex. BP-056 at 19 (Public Version)).

²⁶⁴ *Id.* at 92 (citing Ex. BP-058 at 313).

²⁶⁵ *Id.* (citing Ex. BP-064 (Public Version) and Tr. at 1656:2-1656:12 (Bergin)).

²⁶⁶ *Id.* (citing Ex. BP-020 at 10:6-10:7, Ex. OE-192, Tr. at 905:1-905:4 (Barnhart), Ex. BP-020 at 16:9-16:10, Tr. at 912:23-913:6 (Barnhart)).

²⁶⁷ *Id.* at 92-94.

²⁶⁸ *Id.* at 94-95 (citing Tr. at 1869:7-11 (Abrantes-Metz) Tr. at 1641:19-1642:14 (Bergin)).

explain the Texas Team's change in trading behavior during the Investigative Period. On rehearing, we find that BP makes general assertions about the financial crisis and its impact on the creditworthiness of potential counterparties and the impact of the hurricanes on the markets, but fails to connect the impact of these events to the changes in trading behavior of the Texas Team.

141. In this regard, BP reiterates the same arguments, which were properly rejected by Opinion No. 549. For example, while BP points to "demand destruction" in the wake of Hurricanes Ike and Gustav and changes to counterparty credit-worthiness during the financial crisis, BP fails to explain how such evidence relates to the Texas Team's becoming the seller with the largest market share of next day, fixed-price sales at Houston Ship Channel, or why the Texas Team shifted to selling higher volumes at Houston Ship Channel earlier in the day, or why it increased its bid-hitting. Thus, we find that BP's non-manipulative evidence does not explain the Texas Team's behavior and, therefore, was properly rejected by Opinion No. 549 as insufficient to rebut Enforcement Staff's overwhelming evidence of manipulation.²⁶⁹

IV. Weight Given to Witness Testimony

A. Opinion No. 549

142. In Opinion No. 549, the Commission affirmed the ID's determinations regarding witness credibility and the weight given to witness testimony.²⁷⁰ Specifically, the ID gave weight to the testimony of Abrantes-Metz and Bergin, and declined to give weight to Evans' testimony.²⁷¹ In Opinion No. 549, the Commission explained the deference afforded to a fact finder like the ALJ in determining the credibility of witnesses and evidence, and the amount of weight to be accorded to particular testimony or evidence, and found that the record supported the ALJ's findings on these issues.²⁷²

B. BP Rehearing Request

143. BP argues that Opinion No. 549's affirmation of the ID's determinations regarding witness credibility is in plain error, constituted unreasoned decisionmaking, is arbitrary

²⁶⁹ Opinion No. 549, 156 FERC ¶ 61,031 at P 172 (quoting Initial Decision, 152 FERC ¶ 63,016 at PP 171-72).

²⁷⁰ See *id.* PP 175-185.

²⁷¹ See, e.g., *id.* P 173.

²⁷² See *id.* PP 175-185.

and capricious, is not supported by substantial evidence, and is otherwise contrary to law.²⁷³ BP asserts that the Commission was required to establish a “logical bridge” between its acceptance of the ID’s credibility determinations and its rejection of BP’s expert testimony and that this logical bridge must be supported by substantial evidence. BP contends that the Commission failed to establish this required logical bridge. BP further argues that Opinion No. 549 errs in giving weight to Enforcement Staff expert testimony on the subjective intent of BP traders, which is contrary to federal precedent.²⁷⁴

144. In particular, BP asserts that “Opinion No. 549 incorrectly said that BP ‘does not take issue with’ the ID’s determination not to afford Evans’ testimony any weight because Evans’ testimony contradicted other BP witnesses.”²⁷⁵ BP also argues that Evans’ testimony was not actually contradicted by the testimony of other BP witnesses, as the ID stated, and that Opinion No. 549 wrongly considered these contradictions in deciding to affirm the Presiding Judge’s witness credibility and testimony weight findings.²⁷⁶ In addition, BP provides new arguments as to why the relevant testimony is not contradictory.²⁷⁷

145. BP further contends that Opinion No. 549 erred in accepting Abrantes-Metz’s and Bergin’s testimonies regarding BP’s and its traders’ motives and intent. BP argues that courts routinely exclude testimony regarding third party intent or motive as impermissibly speculative and therefore, giving such testimony any weight at all is material error.²⁷⁸ BP also asserts that Opinion No. 549 failed to meaningfully address BP’s arguments on exceptions that the ID erred in overlooking Evans’ significant experience in physical natural gas markets and Abrantes-Metz’s and Bergin’s inadequate experience in those same markets.²⁷⁹

²⁷³ BP Rehearing Request at 2-3, 11-12, 26-27.

²⁷⁴ *Id.* at 3, 27.

²⁷⁵ *Id.* at 95.

²⁷⁶ *Id.* at 96.

²⁷⁷ *See id.* at 96-101.

²⁷⁸ *Id.* at 101-102.

²⁷⁹ *Id.* at 95.

C. Commission Determination

146. We continue to find as we did in Opinion No. 549 that, based on the totality of the record evidence, the Presiding Judge's determinations regarding witness credibility and the weight given to witness testimony.

147. BP argues that "Opinion No. 549 incorrectly said that BP 'does not take issue with' the ID's determination not to afford Evans' testimony any weight because Evans' testimony contradicted other BP witnesses that he 'did not disprove' Enforcement Staff's allegations."²⁸⁰ We disagree with BP's characterization of Opinion No. 549. Specifically, in Opinion No. 549, the Commission found that BP did not take issue with two of the bases for the ID's determination – the instances where the ID found Evans and other witnesses were not in full agreement and the determination that Evans did not rebut Enforcement Staff's allegations.²⁸¹ We note that BP did not dispute these bases for the ID's determination to not give Evan's testimony any weight. Opinion No. 549 noted that these bases for the determination, to which BP did not take exception, supported the ID's decision to not give Evans' testimony any weight. BP asserts that "it raised the issues in its Brief on Exceptions"²⁸² but does not cite to any portion of its Brief on Exceptions in which it did in fact raise issues with or dispute these two bases for the ID's credibility determinations.

148. On rehearing, BP raises new arguments that Evans's testimony was not actually contradicted by the testimony of other BP witnesses, as the ID stated, and that Opinion No. 549 wrongly considered these contradictions in deciding to affirm the Presiding Judge's witness credibility and testimony weight findings.²⁸³ We need not consider these new arguments because parties are prohibited from raising new issues and arguments on rehearing that could have been previously presented.²⁸⁴ As noted above, BP's Brief on

²⁸⁰ *Id.* at 95.

²⁸¹ *See* Opinion No. 549, 156 FERC ¶ 61,031 at PP 176-177.

²⁸² BP Rehearing Request at 95.

²⁸³ *Id.* at 96-101.

²⁸⁴ *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,203, at P 12 (2016) ("The Commission has long held that it will reject new arguments on rehearing that could have been but were not advanced originally."); *Alabama Power Co.*, 157 FERC ¶ 61,100, at P 55 (2016) ("The Commission rejects requests for rehearing that raise new issues that could have been previously presented."); *San Diego Gas & Electric*

Exceptions noted the instances where the ID found Evans and other witnesses to not be in full agreement and explained that they were a basis for the ID's decision to not give Evans' testimony any weight, but did not dispute the contradictions. However, now BP, despite its previous acknowledgement of the contradictions described in the Initial Decision, provides new arguments as to why the relevant testimony is not contradictory. We find no reason that these arguments could not have been raised prior to the issuance of Opinion No. 549. Accordingly, we dismiss these arguments on rehearing.

149. Even if we consider BP's new arguments, they are not sufficient to change the Commission's decision in Opinion No. 549 to uphold the ID's determinations regarding witness credibility and the weight given to witness testimony. BP asserts that Luskie did not disagree with Evans' claim that a trader would consider a market with a wide bid/offer spread to be a viable comparison to a market with a narrow spread.²⁸⁵ BP contends that Evans and Luskie were presented with different hypotheticals when they provided the relevant testimony. While this is true, it does not change the fact that, when asked "you would be comparing an [Houston Ship Channel] sale against a Katy bid price when the bid/offer spread at Katy was 30 cents and there had not yet been a Katy trade; correct?" Evans responded "that's correct,"²⁸⁶ and then stated that "assuming the [Houston Ship Channel] market was tighter, there's very good reason why you would go to the [Houston Ship Channel] market and not go and try to sell in the Katy market."²⁸⁷ These statements show that Evans took the position that a market with a 30 cents wide bid/offer spread was a viable comparison to a market with a narrow spread. Luskie, while being questioned in the context of a different hypothetical, nevertheless explained that, if the "current [Houston Ship Channel] bid/offer spread is \$5.99 @ 6.01" and the "current Katy bid/offer spread is 5.90 @ 6.10"²⁸⁸ then "Katy is too wide to tell, but right now, it looks like it's going to be pretty close to [Houston Ship Channel]. But I would really highlight that it's too wide to tell on Katy."²⁸⁹ These statements show that Luskie took the position that a Katy market with a 20 cents wide bid/offer spread was not a viable comparison to a market with a narrow spread because it was too wide. While the

Co. v. Sellers of Energy and Ancillary Services, 136 FERC ¶ 61,200, at P 4 (2011) ("Parties are not permitted to raise new issues on rehearing.").

²⁸⁵ BP Rehearing Request at 96-97.

²⁸⁶ Tr. at 2622:18-21 (Evans).

²⁸⁷ Tr. at 2622:3-5 (Evans).

²⁸⁸ Tr. at 706:1-5 (Luskie).

²⁸⁹ Tr. at 706:21-25 (Luskie).

questions Evans and Luskie responded to may not have been identical, their answers nonetheless demonstrate that Evans thought it was viable to compare a market with a 30 cents wide bid/offer spread to a narrower market, but Luskie thought it was not viable to compare a market with a *smaller* 20 cents wide bid/offer spread to a narrower market because the 20 cents wide spread was too wide. Moreover, Luskie indicated elsewhere in his testimony that one would not be able to assess the market price at a location where the bid/offer spread is too wide for purposes of comparing two markets.²⁹⁰ Accordingly, we find that Luskie's testimony does contradict Evans's testimony on this point.

150. BP also argues that Opinion No. 549 misconstrued the alleged contradiction between Evans's and Luskie's testimonies regarding the relevancy of measuring profit and loss (P&L) against the *Gas Daily* index price.²⁹¹ BP asserts that Opinion No. 549 omitted Evans's elaboration that "[i]f you have any other aspect of your book that's driven by fixed price transportation, these are places where the P&L against the index would be grossly insufficient to accurately describe P&L."²⁹² While it is true that the Commission did not include this exact quote in Opinion No. 549, it considered this portion of Evans's testimony, including by citing to the paragraph of the ID discussing this portion of the testimony²⁹³ and paraphrasing it.²⁹⁴ Moreover, this portion of Evans's testimony is the portion that demonstrates the contradiction with Luskie's testimony. In Evans's testimony, he is asked if Mr. Bergin's P&L process of using "P&L against the

²⁹⁰ See Tr. at 583:10-14 (Luskie) ("the Katy market, prior to the first trade, if you saw a two-way, that is, a bid and offer, of 15 cents, you would generally not consider Katy to be a liquid market; correct? A: That's correct."); Tr. at 584:1-6 (Luskie) ("when you said earlier today that when the Katy spread was at a wide spread, that you would not consider that to be an active market, in this context, you're sort of using 'liquidity' and 'active' in similar ways; correct? A: I think that's fair."); Tr. at 585:2-5 (Luskie) ("We've talked about arbitrage before. To do what we call pure arbitrage, you need both markets to be active; correct? A: Correct. Q: And if trading has begun, that is, both markets are active, Katy and [Houston Ship Channel], if you're thinking about selling immediately, it makes sense to compare the Katy bid to the [Houston Ship Channel] bid; correct? A: Yes.").

²⁹¹ BP Rehearing Request at 98.

²⁹² *Id.* (citing Tr. at 2538:8-11 (Evans)).

²⁹³ Opinion No. 549, 156 FERC ¶ 61,031 at P 177 n.335.

²⁹⁴ *Id.* P 177.

index” is “relevant to the real profit and loss of the Texas [T]eam” and, in response, Evans responds that

it’s only relevant to a trader . . . who has a position that they’ve purchased or gas, let’s say, from the buy side, purchased gas at a price, at a contract that settles against the *Gas Daily* index price, and then attempts to sell that gas in the marketplace and realizes the price on a very specific sale . . . If you have any other aspect of your book that’s driven by fixed price transportation, these are places where the P&L against the index would be grossly insufficient to accurately describe P&L.²⁹⁵

In contrast, Luskie’s testimony stated that the Texas Team measured its next-day, fixed-price P&L at Houston Ship Channel and Katy against each location’s estimated *Gas Daily* index price in the Katy Ship Sheets.²⁹⁶ Accordingly, we find that the elaboration in Evans’s testimony that is cited by BP merely illustrates that Evans’s testimony stated that measuring P&L against the *Gas Daily* index was “only relevant” when a trader sells gas that was purchased at an index price, and is otherwise “grossly insufficient” for “any other aspect of your book that’s driven by fixed-price transportation.” In contrast, Luskie’s testimony states that the Texas Team measured its next-day, fixed-price P&L – i.e., trades that were not priced at the *Gas Daily* index price – against the estimated *Gas Daily* index price in the Katy Ship Sheets. Therefore, Luskie’s testimony demonstrates that the Texas Team measured P&L for fixed-price trades against the *Gas Daily* index and did not, as Evans testified, believe that that measuring P&L against the *Gas Daily* index for those trades was grossly insufficient. As a result, we are not persuaded that this elaboration cited by BP demonstrates that these portions of testimony are not contradictory.

151. In addition, BP argues that Opinion No. 549 mischaracterized Evans’s testimony because it explained that he claimed that offers at Katy were irrelevant when he criticized Abrantes-Metz’s inter-market comparison of the Texas Team’s Houston Ship Channel sales with contemporaneous bids and offers at Katy.²⁹⁷ BP states that Evan’s agreed that “it is reasonable to examine pricing alternatives in the instant, and compare the price of a sale BP made at [Houston Ship Channel] against the contemporaneous price that could have been achieved at the same moment at a Katy location to effectuate price risk

²⁹⁵ Tr. at 2537:17-2538:11 (Evans).

²⁹⁶ Tr. at 486:8-16 (Luskie).

²⁹⁷ BP Rehearing Request at 98-99.

transfer.”²⁹⁸ BP further asserts that, contrary to Opinion No. 549’s characterization of the testimony, Evans critiqued Abrantes-Metz’s error in comparing Houston Ship Channel prices “that were *actually* acted upon” to Katy market prices “upon which *no one* was acting” because “no simultaneous price risk transfer would have occurred” if no Katy buyers were willing to pay a higher price for natural gas at Katy at the same time that they purchased gas at Houston Ship Channel.²⁹⁹

152. We are not persuaded by BP’s argument and find no reason to set aside Opinion No. 549 based on this argument. As BP notes, Evans criticized Abrantes-Metz because her approach compared Houston Ship Channel prices that were actually acted upon to Katy offer prices upon which no one had necessarily acted yet. However, when asked “if you’re sitting there, you’re looking at your screen, right, and you’re thinking I want to sell immediately, you look at the Katy bid and you look at the [Houston Ship Channel] bid and decide which is better” Luskie responded “Correct,” and when asked “If you’re thinking about maybe I prefer to sell via an offer, right, then you’re going to look at the offers at [Houston Ship Channel] and Katy,” Luskie responded “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 the other.”³⁰⁰ Luskie’s responses contained no qualification that he would only compare bids and offers that were “actually” acted upon. Rather, he stated that “It’s *never* a case I’m only looking at one or the other.”³⁰¹ This testimony about actual trader behavior contradicts Evans’s testimony that Abrantes-Metz’s inter-market comparison was inappropriate because it compared prices that were actually acted upon to prices upon which no one was acting. Given the contradiction that appears on the face of the testimony, and the fact that the Presiding Judge was in the best position to evaluate Luskie’s testimony and the relevant context³⁰² for purposes of determining if there was

²⁹⁸ *Id.* at 98 (citing Ex. BP-037 at 51:19-22).

²⁹⁹ *Id.* at 98 (citing Ex. BP-037 at 52:5-7) (emphasis in original).

³⁰⁰ Tr. at 586:14-24 (Luskie).

³⁰¹ Tr. at 586:23-24 (Luskie) (emphasis added).

³⁰² See, e.g., *Williams Natural Gas Co.*, 41 FERC ¶ 61,037, at 61,095 (1987) (“the trier of fact is in the best position to evaluate such elusive factors as motive or intent,” which “hinge[] entirely upon the degree of credibility to be accorded the testimony of interested witnesses.”) (quoting *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5th Cir. 1986)). See also *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1078-79 (9th Cir. 1977) (“Weight is given the administrative law judge’s determinations of credibility for the obvious reason that he or she sees the witnesses and hears them testify . . . All aspects of the witnesses’ demeanor . . . may convince the observing trial judge that the witness is

in fact a contradiction, we are not persuaded by BP's argument that Opinion No. 549 was in error because it cited this contradiction as one of a number of reasons supporting the Presiding Judge's credibility determinations.

153. BP then argues that, even if Evans's testimony had been contradictory, rejecting one portion of testimony as not credible does not support wholesale rejection of the rest of the testimony.³⁰³ We agree that simply because a portion of testimony is contradicted does not, by itself, necessarily mean that the rest of the testimony must be given no weight. Opinion No. 549 did not make such a finding. Rather, the fact that BP's expert testimony was contradicted by other BP testimony was merely noted as one of a number of reasons that supported the Presiding Judge's decision to not give Evans's testimony any weight.³⁰⁴ Accordingly, we find that Commission did not affirm the Presiding Judge's determination regarding the weight to be given Evans's testimony solely based on the fact that a portion of it was contradicted. As a result, we reject BP's argument that the Opinion No. 549 constituted unreasoned decisionmaking for this reason or that the entirety of Bergin's and Abrantes-Metz's testimonies must also be given no weight because portions of those testimonies were contradicted by opposing testimony from BP witnesses.

154. BP also asserts that Opinion No. 549 erred in rejecting BP's arguments on exceptions that the Presiding Judge failed to consider Evans' experience and in disregarding that Abrantes-Metz and Bergin lacked sufficient experience in natural gas markets to qualify as experts.³⁰⁵ In Opinion No. 549, the Commission considered these arguments and affirmed the Presiding Judge's determinations. As evidenced in the Initial Decision, the Presiding Judge extensively considered the relevant experience and qualifications of Bergin,³⁰⁶ Abrantes-Metz³⁰⁷ and Evans,³⁰⁸ and concluded that, on balance, the testimony of Bergin and Abrantes-Metz should be given more weight than

testifying truthfully or falsely. These same very important factors, however, are entirely unavailable to a reader of the transcript.") (internal quotations omitted).

³⁰³ BP Rehearing Request at 99-101.

³⁰⁴ See Opinion No. 549, 156 FERC ¶ 61,031 at PP 175-185.

³⁰⁵ BP Rehearing Request at 102-104.

³⁰⁶ See, e.g., Initial Decision, 152 FERC ¶ 63,016 at P 35 n.13.

³⁰⁷ See, e.g., *id.* P 42 n.19.

³⁰⁸ See, e.g., *id.* P 68 n.52.

Evans's testimony. Where the Presiding Judge "is entitled to deference with regard to the credibility of witnesses and evidence, and the amount of weight to be accorded to particular testimony or evidence"³⁰⁹ and "the trier of fact is in the best position to evaluate such elusive factors as motive or intent," which "hinge[] entirely upon the degree of credibility to be accorded the testimony of interested witnesses,"³¹⁰ we find no basis on which to overturn the Presiding Judge's determination regarding credibility of witnesses and the weight to be given to their testimony.

V. Scienter

155. In Opinion No. 549, the Commission affirmed the finding in the ID that BP and the Texas Team acted with intent to manipulate the market.³¹¹ The Commission agreed with the Presiding Judge that the evidence showed that following the effects of Hurricane Ike, which resulted in significant gains to BP's pre-existing financial positions that settled against Houston Ship Channel *Gas Daily* index prices, BP acted with intent to manipulate the Houston Ship Channel *Gas Daily* index to continue benefitting their financial positions. Opinion No. 549 upheld the determination that BP's manipulative intent was manifested on the November 5 recorded call, and inferable from the totality of the evidence, including the actions taken by Comfort and Luskie following that call and the distinctive trading strategy deployed by the Texas Team during the Investigative Period.³¹²

³⁰⁹ *Entergy Services, Inc.*, 130 FERC ¶ 61,023, at P 53 n.66 (2010). *See also El Paso Natural Gas Co.*, 67 FERC ¶ 61,327, at 62,156 (1994).

³¹⁰ *Williams Natural Gas Co.*, 41 FERC ¶ 61,037, at 61,095 (1987) (quoting *Pennzoil Co. v. FERC*, 789 F.2d at 1135). *See also Penasquitos Village, Inc. v. NLRB*, 565 F.2d at 1078-79 ("Weight is given the administrative law judge's determinations of credibility for the obvious reason that he or she sees the witnesses and hears them testify . . . All aspects of the witnesses' demeanor . . . may convince the observing trial judge that the witness is testifying truthfully or falsely. These same very important factors, however, are entirely unavailable to a reader of the transcript.") (internal quotations omitted).

³¹¹ Opinion No. 549, 156 FERC ¶ 61,031 at P 92 (citing Initial Decision, 152 FERC ¶ 63,016 at P 99).

³¹² *Id.* PP 191-194.

156. BP contends that Opinion No. 549 and the ID erred by concluding that BP intended to engage in a manipulative scheme, claiming that the intent findings were based on unwarranted inferences and incorrect data.³¹³ BP argues that the evidence relied on, the November 5 recorded phone call and two unrecorded calls later that same day, do not support Opinion No. 549's finding of manipulative intent.

A. Phone Calls

1. Recorded Calls

a. Opinion No. 549

157. Opinion No. 549 affirmed the ID's determination that the November 5 recorded call, including the context and the circumstances surrounding the conversation, supports a finding of manipulative intent and guilt on the part of Comfort and the Texas Team.³¹⁴ The call exposed the existence and key components of a trading strategy deployed by the Texas Team.³¹⁵ Opinion No. 549 supported the ID's finding that Comfort's reaction to Luskie's statements and his failure to provide a satisfactory answer regarding the propriety of the Texas Team's trading strategy on the call, or elsewhere in record evidence, is probative of Comfort's guilt.³¹⁶ Opinion No. 549 also affirmed the ID's finding that the two unrecorded phone calls between Comfort and Luskie on November 5 that followed the recorded call were an attempt to start a cover-up after Luskie inadvertently exposed the Texas Team's manipulative trading strategy to senior BP official James Parker on the recorded call.³¹⁷

158. Opinion No. 549 also adopted the ID's grant of substantial weight to Abrantes-Metz's and Bergin's testimonies and trading analysis, and rejected BP's argument that the ID erred in its intent findings because it relied on Enforcement Staff's "flawed" trading analysis.³¹⁸ Based on the experts' trading analysis and testimony, Opinion No. 549 supported the ID's determination that the intended purpose of the team's physical

³¹³ BP Rehearing Request at 104.

³¹⁴ Opinion No. 549, 156 FERC ¶ 61,031 at P 205.

³¹⁵ *Id.*

³¹⁶ *Id.* PP 205, 227.

³¹⁷ *Id.* PP 272-275.

³¹⁸ *Id.* P 212.

trading behavior during the relevant period was to suppress the Houston Ship Channel *Gas Daily* index in order to benefit the Texas Team's Houston Ship Channel-Henry Hub spread positions.³¹⁹

b. BP Rehearing Request

159. BP claims on rehearing that Opinion No. 549 and the ID erred in adopting Enforcement Staff's alleged theory that one recorded telephone call establishes the Texas Team's manipulative intent.³²⁰ BP maintains that in adopting that theory, Opinion No. 549 and the ID ignored relevant contemporaneous communications, ignored testimony by the Texas Team denying manipulative intent, and ignored Luskie's statement on the recorded call that his description of the Texas Team's trading strategy to Parker, which made it seem like the Texas Team was executing physical-for-financial trades, was a mistake.³²¹ Further, BP argues that even while acknowledging that neither Comfort nor Luskie could recall details of their two unrecorded phone calls on November 5, Opinion No. 549 and the ID drew unwarranted conclusions that the calls were the start of a cover-up.³²²

160. According to BP, Luskie called Comfort on November 5 to recount his discussion with Parker. BP asserts that on that call Luskie told Comfort that he had inaccurately described the Texas Team's strategy to Parker in a way that made it sound like the trades of a third-party that the Texas Team had witnessed on October 31, and which the Texas Team speculated were attempts to manipulate the market. Thus, BP claims, the transcript of the call established that in explaining the Texas Team's trading strategy to Parker, Luskie immediately realized that he had misattributed that third-party's trading strategy to the Texas Team.³²³ BP also argues that Luskie did not actually describe the alleged manipulative scheme on the recorded call because he did not reference elements of Enforcement Staff's claim, such as hitting bids, net selling, increasing offer distance, and early trading.³²⁴ In addition, BP argues that it is not clear what Luskie actually

³¹⁹ *Id.* PP 213-226.

³²⁰ BP Rehearing Request at 105.

³²¹ *Id.*

³²² *Id.*

³²³ *Id.* at 106.

³²⁴ *Id.*

told Parker. According to BP, in a contemporaneous call, Parker said that Luskie told him about turning off transport, not using transport, to benefit a cash-settled financial position.³²⁵

161. On rehearing BP maintains that Opinion No. 549 and the ID disregarded Luskie's immediate realization on the recorded call that he had misattributed the third party's trading scheme to the Texas Team, Luskie's testimony reiterating that he had misattributed the third party's trades, and Comfort's testimony that Luskie had mischaracterized the Texas Team's trading strategy.³²⁶ BP also argues that Opinion No. 549 and the ID incorrectly based their evidence of intent on Enforcement Staff's experts' flawed trading analysis.³²⁷

162. On rehearing BP also argues that any finding that Barnhart must have known of Comfort's manipulative trading or turned a blind eye because she benefitted from the scheme is contrary to the record evidence. According to BP, Barnhart was not personally responsible for trading Houston Pipeline transport and was not primarily responsible for trading next-day fixed price gas at Houston Ship Channel or Katy. BP asserts that Barnhart had no responsibility to calculate daily profits and losses, no responsibility in 2008 for formulating a view with respect to next-day fixed-price physical gas at Houston Ship Channel or Katy, did not know in 2008 whether Comfort sold at Houston Ship Channel before Katy was open, and would not have known whether Comfort made a series of fixed-priced trades at Houston Ship Channel at any given day in 2008 and calculate those trades made or lost money.

c. Commission Determination

163. We find, as the Commission did in Opinion No. 549, that based on the totality of the evidence, that the November 5 recorded call between Comfort and Luskie supports a finding of intent to manipulate the market and that the two unrecorded calls were attempts to start a cover-up. We find that Opinion No. 549 and the ID drew reasonable inferences from the both the recorded call and the unrecorded calls, and took into account the context and circumstances, related contemporaneous communications, and the credibility of the witnesses.

³²⁵ *Id.* at 106-107.

³²⁶ *Id.*

³²⁷ *Id.* at 107.

164. We disagree with BP that Opinion No. 549 and the ID ignored Luskie's statement on the recorded call that he had inaccurately described the Texas Team's strategy in a way that made it sound like the manipulative trades of a third party. Opinion No. 549 and the ID considered Luskie's statement as well as the events of October 31, 2008, but concluded that Luskie's contention that he had mischaracterized the Texas Team's strategy was not credible.³²⁸ On October 31, the Texas Team, including Luskie, witnessed the third party trades. The Texas Team recognized that the third party may be engaged in manipulation of the physical market and speculated that it may have an opposite financial position that benefitted from an increase in the *Gas Daily* Index. Luskie was part of that conversation. Thus, we find that it was reasonable for Opinion No. 549 and the ID to infer from Luskie's participation in the conversation that he was able to recognize the components of a physical-for-financial market manipulation scheme.³²⁹

165. Moreover, Luskie helped execute trades for Comfort when Comfort was out of the office in August and for three days in October 2008. In August, Luskie executed trades that generated positive cash and transport P&L, while in October, he replicated the Texas Team's manipulative scheme by losing money on his transport from Katy to Houston Ship Channel and selling early at Houston Ship Channel.³³⁰ Also, despite Luskie's statement that he had misattributed the third party's trade to the Texas Team, the Commission agrees with Opinion No. 549 that it is not clear from the November 5 recorded call or the record evidence whether Luskie actually believed he had incorrectly described the Texas Team's trading to Parker or was merely trying to provide cover for himself on a call he knew was being recorded. Further, we note that as the ID and Opinion No. 549 concluded, the record evidence indicates that Luskie was an intelligent and competent trader with relevant experience working with the Texas Team and knew that the use of the Houston Pipeline capacity during the Investigative Period departed from the typical use to arbitrage prices between Katy and Houston Ship Channel.³³¹

166. BP also argues that Luskie did not actually describe the Texas Team's manipulative scheme on the November 5 recorded call because he did not reference the elements of Enforcement Staff's claim such as hitting bids, net selling, increasing offer

³²⁸ Opinion No. 549, 156 FERC ¶ 61,031 at PP 208-210.

³²⁹ *Id.* P 208.

³³⁰ *Id.* P 210.

³³¹ *Id.* P 209.

distance, and early trading.³³² We disagree. As Opinion No. 549 and the ID state, Luskie did not have to reference each element of the manipulative scheme alleged by Enforcement Staff; it was sufficient that he provided the broad contours and key elements of the scheme by exposing the existence of the Houston Ship Channel strategy, use of the Houston Pipeline transport based on how it affects the *Gas Daily* index, and the existence of a benefitting financial position.³³³

167. We also reject BP's argument that Opinion No. 549 and the ID ignored Parker's statement that Luskie told him about turning off his transport, not increasing the use of transport, to benefit a cash position. We agree with Opinion No. 549 and the ID that what Luskie specifically told Parker is irrelevant to the question of whether BP engaged in market manipulation.³³⁴ Regardless, the record evidence contradicts BP's assertion. As Parker testified, what Luskie told him sounded as if the Texas Team was trading their physical positions for the benefit of their financial positions and that he was alarmed enough to advise Luskie to speak to his manager to make sure he was not doing anything wrong.³³⁵

168. We agree with Opinion No. 549's and the ID's determination that the inference of BP's manipulative intent from the November 5 recorded call rests on Comfort's end of the conversation and not with what Luskie specifically said or did not say to Comfort or Parker.³³⁶ As the record evidence indicates, Comfort was aware that the call was being recorded and was noticeably uncomfortable. He was anxious and his conversation was marked by long awkward pauses and repeated attempts to interrupt Luskie's line of inquiry. Luskie testified that he terminated the recorded call because he realized that Comfort did not want to have the conversation on a recorded line. Comfort's testimony confirmed that he was not comfortable with Luskie's call and he wanted to get off the recorded line. Thus, we find that it was reasonable to infer that Comfort was trying to stop Luskie from revealing any further incriminating information on a recorded line.

³³² BP Rehearing Request at 106.

³³³ Opinion No. 549, 156 FERC ¶ 61,031 at P 206.

³³⁴ *Id.* P 211.

³³⁵ *Id.*

³³⁶ *Id.* P 207.

Further, the record evidence indicates that Comfort never provided a non-manipulative rational explanation for the Texas Team's trades.³³⁷

2. The Unrecorded November 5 Calls

169. In Opinion No. 549, the Commission determined that the November 5 unrecorded call supports an inference of manipulative intent.³³⁸ BP claims that Opinion No. 549 and the ID drew unwarranted inferences from the two unrecorded calls on November 5 despite acknowledging that neither Comfort nor Luskie could recall details of the conversations.³³⁹ BP maintains that Enforcement Staff's assertion that the calls were part of a cover-up is a "derivative inference" from its "flawed trading analysis" and thus, entitled to no deference.³⁴⁰

170. We continue to find, as the Commission did in Opinion No. 549 and the Presiding Judge did in the Initial Decision, that the November 5 unrecorded calls were part of a cover-up and that it is not credible that neither Luskie nor Comfort could recall the details of two important phone conversations.³⁴¹ Opinion No. 549 and the ID drew reasonable inferences from the context and circumstance of the unrecorded calls and from the participants' testimonies. Luskie ended the November 5 recorded call saying that he "had to run" but tried to call Comfort on his cell phone less than a minute later and three minutes later, and was still available to engage in a ten minute conversation with Comfort.³⁴² According to Comfort, one purpose of the cell phone call was to help Luskie 'get his facts straight before he got back to Parker.'³⁴³

³³⁷ *Id.* P 207.

³³⁸ *Id.* P 192.

³³⁹ BP Rehearing Request at 108.

³⁴⁰ *Id.*

³⁴¹ Opinion No. 549, 156 FERC ¶ 61,031 at PP 272-274.

³⁴² *Id.* P 273.

³⁴³ *Id.* PP 274-275 (citing Enforcement Staff Br. Opposing Exceptions at 37).

B. Motive**1. Opinion No. 549**

171. Opinion No. 549 affirmed the determination in the ID that Comfort had motive to manipulate the market.³⁴⁴ The Commission found that BP's Texas Team structure provided Comfort with a heightened incentive, motive, and opportunity to engage in physical-for-financial manipulation. The Commission also found Comfort's hybrid trader status gave him authority to trade next day physical gas at locations where he was permitted to put on potentially benefitting financial positions. That structure gave a greater percentage of profits to "speculative financial traders" than to those trading physical assets. Thus, Comfort was structurally incentivized to make more money on his financial than his physical book. The Commission agreed with the Presiding Judge that incentive structure in turn gave Comfort the motive to make uneconomic physical trades (which contributed less to his personal compensation) in order to boost his profits from his financial trades (which contributed more to his personal compensation).³⁴⁵

2. BP Rehearing Request

172. On rehearing, BP argues that the Commission ignored substantial record evidence showing that Comfort did not have a motive to engage in a manipulative scheme.³⁴⁶ First, BP claims that the ID's finding, upholding Enforcement Staff's theory that Comfort had motive because he was in imminent risk of losing his job, disregarded evidence showing that Comfort allegedly had substantial savings and could have retired with full medical benefits before the Investigative Period. According to BP, Comfort's testimony establishes that he had substantial net worth following 2007, and that the reason he continued to work at BP was to "trigger retiree medical benefits", which BP asserts vested prior to August 2008.³⁴⁷

173. Second, BP argues the claim that Comfort wanted to keep his job to earn and retain a bonus is groundless. According to BP, Opinion No. 549 relied on the industry standard compensation scheme whereby a trader's bonus may reflect in part that trader's financial performance for the company, to conclude that Comfort had a motive to manipulate. BP argues that under that theory any industry trader whose bonus relies

³⁴⁴ *Id.* P 236.

³⁴⁵ *Id.* P 228

³⁴⁶ BP Rehearing Request at 110-113.

³⁴⁷ *Id.* at 112.

at all on financial performance would have the requisite motive to manipulate the market. BP thus concludes that it was error for the Commission to uphold these findings in the ID. BP also contends that the record shows the Comfort lacked a meaningful opportunity or incentive to manipulate the market.³⁴⁸

3. Commission Determination

174. We continue to find, as the Commission did in Opinion No. 549, that Comfort had motive to manipulate the market. As we noted in Opinion No. 549, the record evidence demonstrates that Comfort had motive to engage in a manipulative scheme, and BP's arguments that Comfort did not have motive are contrary to that evidence.

175. As found in the ID and supported by the record, Comfort had a profit motive, caring both about increasing the amount of his compensation and his status at BP.³⁴⁹ The evidence shows that Comfort's trading bonus was tied to his profits and losses and he expressed regret at not having worked harder to impress his bosses and thus earn a higher bonus than his colleagues.³⁵⁰ Additionally, Comfort continually insisted that he had been, and remained, a higher status value trader at BP, even though BP's internal documents identified him as a physical trader or asset optimizer.³⁵¹ We continue to find that Opinion No. 549 appropriately relied on these pieces of record evidence to uphold the finding in the ID that Comfort had a desire for increased compensation, and an accompanying motive to manipulate to achieve that desire.

176. That evidence also belies BP's claims that Comfort did not need to retain his job and had substantial savings. As noted in the Initial Decision, 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.³⁵² Comfort had in fact lost his prior position and according to his own testimony, the Texas Team was the only one with which he could recall interviewing. The record shows that Comfort cared about

³⁴⁸ *Id.* (citing Tr. at 2541:21-2543:2 (Evans)).

³⁴⁹ Initial Decision, 152 FERC ¶ 63,016 at P 105 & n.73

³⁵⁰ For example, Comfort 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. Tr. at 1187:21-23 and 1185:8 (Comfort).

³⁵¹ *See* Tr. 1165:13-18, 1166:6-12 (Comfort); Tr. 1166:13-21 (Comfort); Ex. OE-028 at 3.

³⁵² Initial Decision, 152 FERC ¶ 63,016 at P 105 & n.73.

his status at BP, and was concerned that his position on the Texas Team as asset optimizer was a regression in his career.³⁵³ Thus, we continue to find, as the Commission did in Opinion No. 549 and the Presiding Judge did in the Initial Decision, that Comfort had a motive to manipulate was grounded not only on a generic conclusion that his compensation was tied to his performance but was based on substantial record evidence.

177. Further, contrary to BP's claims, Opinion No. 549 did not rely solely on the industry standard compensation scheme to find motive and intent on Comfort's part. Opinion No. 549 noted that that BP's Texas Team structure provided Comfort the motive and opportunity to engage in physical-for-financial manipulation, and that Comfort's hybrid trader status gave him authority to trade next day physical gas at locations where he was permitted to put on potentially benefitting financial positions. This compensation structure also gave a greater percentage of profits to "speculative financial traders" than to those trading physical assets. Thus, we continue to find, as the Presiding Judge did in the ID, that as specifically related to Comfort's situation, Comfort was structurally incentivized to focus and make more money on his financial than his physical book, which in turn gave him the motive to trade uneconomically physically to boost his financial profits.³⁵⁴

178. BP's argument that its expert Evans' testimony shows that Comfort lacked a meaningful opportunity or incentive to manipulate also fails.³⁵⁵ BP's contentions rely on Evans' "baseload position" theory, which he presented as one alternative explanation for the behavior of the Texas Team as determined in the Initial Decision, however, Enforcement Staff and Dr. Abrantes-Metz completely refuted and discredited this theory, which even Evans admitted was offered only as a "plausible explanation" and one for which he provided no data or analytical support.³⁵⁶ Based on Evans' testimony that he had no analysis to support his baseload position theory as even a "logical explanation" for the Texas Team's trading during the Investigative Period,³⁵⁷ and the fact that the Texas Team traders themselves contradicted Evans' testimony, the ALJ concluded that Evans'

³⁵³ *Id.* (citing Tr. 190:20-193:9 (Lukefahr)).

³⁵⁴ *Id.*

³⁵⁵ *See* BP Rehearing Request at 112-113.

³⁵⁶ *See, e.g.,* Ex. BP-037 at 20-21; *see also* Tr. 2636:10-21 (Evans); Tr. 2634:1-4 (Evans).

³⁵⁷ Tr. 2636:10-21; 2634:1-4 (Evans) (plausible explanation); 2635:11-16 (possible . . . potential reason) (Evans).

testimony should be accorded “no weight.”³⁵⁸ We are thus not persuaded by BP’s arguments on rehearing that Evans’ testimony shows Comfort had no incentive to manipulate.

C. Consciousness of Guilt

1. Opinion No. 549

179. Opinion No. 549 found that the ID properly applied the consciousness of guilt theory in this proceeding, and that the record supported a finding of Comfort’s guilt. The Commission agreed with the ALJ’s finding that Comfort’s demeanor on the recorded call, coupled with Luskie and Comfort’s inability to provide a legitimate and credible explanation for his trading strategy during the Investigative Period, are evidence of his guilt.³⁵⁹

180. With respect to the November 5 recorded phone calls, the Commission agreed with the ALJ that Comfort’s angry tone and his non-responsive answers and lengthy pauses all show his consciousness of guilt. The Commission found that Comfort’s demeanor on the call indicated that he wanted to prevent Luskie from revealing any further incriminating information on the recorded line, and thus it was reasonable for the Commission to conclude that based on this evidence, Comfort had guilt.³⁶⁰

181. Opinion No. 549 also found that Comfort’s inability to explain his trading on the recorded call is strong evidence that he was guilty of a manipulative scheme.³⁶¹ The Commission reasoned that as an experienced trader, Comfort should have been able to provide legitimate explanations for his trading strategy. Instead, his tone and demeanor on the call show that he did not want to discuss the trading on the recorded line. Moreover, Opinion No. 549 affirmed the finding in the ID that Comfort’s and Luskie’s allegation that the reason Comfort was unable to give an explanation on the recorded call was due to Luskie’s inaccurate description of the Texas Team’s trading is not credible, and is contrary to record evidence showing that Luskie accurately described the scheme at the time.

³⁵⁸ Initial Decision, 152 FERC ¶ 63,016 at P 68 & n.52.

³⁵⁹ Opinion No. 549, 156 FERC ¶ 61,031 at P 268.

³⁶⁰ *Id.*

³⁶¹ *Id.* at P 270.

182. Opinion No. 549 also affirmed the finding in the ID that Comfort made false non-credible exculpatory statements on the recorded phone call. As justifications for his trading strategy, Comfort claimed that the Texas Team “shipped economically” most of the time, that there were times they could not “unwind” their position, and that multiple factors go into cash trading decisions.³⁶² However, as the Commission found in Opinion No. 549, the record shows that the Texas Team did not ship economically on Houston Pipeline most of the time during the Investigative Period, and to the contrary, they failed to “unwind” their positions or “turn off” the transport numerous times during the Investigative Period, even when it would have been economic to do so.³⁶³ Additionally, Opinion No. 549 notes that Comfort testified that he could not recall a time when he was unable to unwind his Houston Ship Channel and or Katy positions³⁶⁴ The Commission thus found it was reasonable for the ALJ to conclude that these false and non-credible statements were strong evidence of Comfort’s guilt.³⁶⁵

183. Opinion No. 549 also affirmed the ALJ’s determination that Comfort’s additional (unrecorded) phone calls are further indicia of Comfort’s guilt.³⁶⁶ The Commission found the ALJ was reasonable to conclude, based on record evidence, that the purpose of Comfort’s unrecorded “calls was to start a cover-up of the facts to make sure Luskie got his facts ‘straight’ before he got back to Parker.”³⁶⁷ Relying on the record evidence that (1) Luskie called Comfort back less than a minute after the recorded call ended, and Comfort returned his call two minutes later; (2) Luskie and Comfort had two phone conversations lasting ten and nine minutes each, Opinion No. 549 concluded, as did the ALJ, that that Comfort’s and Luskie’s limited recollections about those calls are not credible.

³⁶² Initial Decison, 152 FERC ¶ 63,016 at P 105 & n.74.

³⁶³ Opinion No. 549, 156 FERC ¶ 61,031 at P 271 n.612 (citing Ex. OE-161 at 74-78).

³⁶⁴ *Id.* P 271 (citing Tr. 1413:7-24 (Comfort)).

³⁶⁵ *Id.* (citing *Al Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010) (Federal Courts have found that it is a “well settled principle that false exculpatory statements are evidence – often strong evidence – of guilt.”).

³⁶⁶ *Id.* P 272.

³⁶⁷ *Id.* (citing Tr. 285:4-286:5 (Luskie)).

2. BP Request for Rehearing

184. On rehearing BP challenges the finding that Comfort's demeanor on the phone calls supports a consciousness of guilt finding. BP contends that the Commission erred in applying the consciousness of guilt theory in this civil case, arguing that the cases in support of this position are inapposite because in those cases there was a finding of untruthfulness to support application of the theory that is lacking here.³⁶⁸ It argues that Comfort's denial of misconduct is not a false exculpatory statement. BP also argues that Opinion No. 549 improperly ignored Comfort's explanations for his trading behavior and instead adopted Enforcement Staff's allegedly flawed analysis, including ignoring evidence of the legitimate factors that purportedly went into Comfort's trading decisions, and ignoring the non-manipulative explanations of the Texas Team's trading strategy. Finally, BP contends that the generalized finding that it is "not credible that neither Comfort nor Luskie can recall the details of what would have been two critical telephone calls" is based on speculation and conjecture and thus is insufficient evidence to support the consciousness of guilt finding in Opinion No. 549.³⁶⁹

3. Commission Determination

185. We are not persuaded by the arguments raised on rehearing. As noted in Opinion No. 549, courts have relied on the consciousness of guilt theory concept in several civil contexts such as trademark infringement and employment discrimination cases.³⁷⁰ We disagree with BP's claims raised on rehearing and find that the record evidence demonstrates that Comfort made false and non-credible exculpatory statements. Thus, to the extent that BP is correct that the cited cases relied on a "finding of untruthfulness," such a condition is met in the instant proceeding.³⁷¹

³⁶⁸ BP Rehearing Request at 115-116.

³⁶⁹ *Id.* at 116-117.

³⁷⁰ See Opinion No. 549, 156 FERC ¶ 61,031 at P 276 & n.623 (citing *Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1293 (D.C. Cir. 1998); *Alberto-Culver co. v. Andrea Dumon, Inc.*, 466 F.2d 705,709-10 (7th Cir. 1972)).

³⁷¹ Further the cases cited by BP to show "that the consciousness of guilt theory is not applicable to BP's case" do not support its position but instead emphasize that exculpatory statements later found to be false can be considered for determining consciousness of guilt. See BP Rehearing Request at 115 & n.342 (citing *United States v. Marfo*, 572 Fed. Appx. 215, *cert. denied*, 574 U.S. 986 (2014); *Maldonado v. Olander*, 108 Fed. Appx. 708, 712 (3d. Cir. 2004), *cert. denied*, 544 U.S. 908 (2005); *United States v. Littlefield*, 840 F.2d 143,148 (1st Cir. 1988), *cert. denied*, 488 U.S. 860 (1988)).

186. Further, we find that Opinion No. 549 does not “improperly ignore” Comfort’s explanations for trading behavior or his allegedly non-manipulative explanations of the Texas Team’s trading strategy. Rather, in Opinion No. 549 the Commission agreed with the ID that such explanations were not credible.³⁷² We continue to find that it is not credible that neither Comfort nor Luskie can recall the details of what would have been two critical telephone calls. Comfort testified that the purpose of the unrecorded calls was to help Luskie “organize his thoughts” and “get his facts straight” before getting back to Parker to assure him that the Texas Team’s trading strategy was compliant.³⁷³ Based on this testimony, the Commission agreed with the ALJ that the unrecorded calls were part of an effort to conceal the manipulative scheme.

187. We disagree with BP’s assertion on rehearing that Opinion No. 549 and the ID improperly ignore “significant evidence” showing the “multiple legitimate factors that went into each trading decision and the non-manipulative reasons explaining the Texas Team’s trading”.³⁷⁴ BP refers to its claims that its baseload position, Hurricanes Ike and Gustav, and the fall 2008 financial and credit crises affected its trading during the Investigative Period, and provide non-manipulative reasons for the Texas Team’s trading behavior. As noted in detail in the ID and addressed in Opinion No. 549, however, Enforcement Staff witness Bergin thoroughly refutes and discredits these claims.³⁷⁵ With respect to BP’s proffered financial crisis excuse, Bergin’s analysis showed that contrary to BP’s claims, there was no material difference in the number of counterparties with which BP traded during the Investigative Period as compared to the prior months of 2008, and thus there was no diminution of the Texas Team’s ability to sell gas at Houston Ship Channel or Katy during the Investigative Period. The record also demonstrates that the Texas Team chose to take large baseload positions at Katy for October and November 2008, thereby obligating them to sell large quantities of gas in the next day market to get

The record here demonstrates that that Comfort made false and non-credible exculpatory statements, and pursuant to the cases cited by BP, it is appropriate to consider those statements as evidence of consciousness of guilt.

³⁷² Opinion No. 549, 156 FERC ¶ 61,031 at PP 273-274.

³⁷³ *Id.* at P 273; Initial Decision, 152 FERC ¶ 63,016 at P 106.

³⁷⁴ BP Rehearing Request at 116.

³⁷⁵ Opinion No. 549, 156 FERC ¶ 61,031 at PP 254-256; Initial Decision, 152 FERC ¶ 63,016 at PP 126-128. *See also* Ex. OE-161 at 5-21.

flat.³⁷⁶ As Bergin points out, such action is inconsistent with how reasonable traders would operate if they could not find creditworthy buyers.³⁷⁷

188. The ID rejected BP's claims that its change in trading behavior during the Investigative Period was a result of two hurricanes, Ike and Gustav, upon finding that the record evidence showed that "the hurricanes did not materially impact the Texas Team's trading in the Investigative Period, or their Houston Ship Channel and Katy physical baseload positions through October and November 2008."³⁷⁸ Opinion No. 549 found that the ALJ was reasonable in rejecting as insufficient BP's purported evidence that the financial crisis and hurricanes explain the Texas Team's change in trading behavior during the Investigative Period.³⁷⁹ This determination was based on Bergin's refutation of BP's claims,³⁸⁰ and the fact that BP failed to make a compelling argument to connect the referenced events to changes in trading behavior because BP did not explain how a change in counterparties led the Texas Team to become the largest seller of next day, fixed price sales at Houston Ship Channel. Additionally, the ID relied on record evidence that BP's baseload positions were not the results of the hurricanes but were established by Comfort and Barnhart via new transactions with marketers.³⁸¹

³⁷⁶ As Enforcement Staff witness Bergin explained, the Texas Team was required to sell more in the next day market to "get flat" physically because its long net baseload position at Katy was not related to an increased short physical position at Houston Ship Channel, but "instead was a voluntary choice made by the team." Opinion No. 549, 156 FERC ¶ 61,031 at P 258.

³⁷⁷ Ex. OE-161 at 20.

³⁷⁸ Initial Decision, 152 FERC ¶ 63,016 at P 63.

³⁷⁹ Opinion No. 549, 156 FERC ¶ 61,031 at PP 171-172.

³⁸⁰ See Bergin testimony making clear 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-161 at 17:5-29:18, 33:1-7. Moreover, BP presented no specific evidence that Hurricane Ike prevented the Texas Team from adjusting their next-day trading and transport based on changing price spread incentives in the Investigative Period. See, e.g., Tr. 905:1-23 (Barnhart) (Ike had no impact on Barnhart's trading in October or November 2008, and she did not know whether it had any impact on Comfort's trading in those months); Tr. 901:21-902:16, 903:25-904:15 (Barnhart) (no material impact from Hurricane Gustav).

³⁸¹ Initial Decision, 152 FERC ¶ 63,016 at P 39 (citing OE Ex. 161 at 26-27).

189. Accordingly, we disagree with BP's assertion on rehearing that the ID and Opinion No. 549, "improperly disregarded" BP's alleged explanations and legitimate non-manipulative reasons for the Texas Team's trading. To the contrary, we find that the determination that such explanations were not credible was reasoned decision making based on a thorough analysis of the record evidence.

190. Additionally, in Opinion No. 549 the Commission noted certain inconsistencies and falsehoods in Comfort's purported justifications for his trading strategy. For example, while Comfort had claimed that the Texas Team "shipped economically" most of the time, that there were times they could not "unwind" their position, and that multiple factors go into cash trading decisions,³⁸² the record evidence demonstrated that the Texas Team did not ship economically on Houston Pipeline most of the time during the Investigative Period, and to the contrary they failed to "unwind" their positions or "turn off" the transport numerous times during the Investigative Period even when it would have been economic to do so.³⁸³ However, Comfort also inconsistently testified that he could not recall a time when he was unable to unwind his Houston Ship Channel and or Katy positions.³⁸⁴ Thus, we continue to find, as we did in Opinion No. 549, that the determination that it was reasonable for the ALJ to conclude that these false and non-credible statements were strong evidence of Comfort's guilt.³⁸⁵

191. As noted in Opinion No. 549, we continue to find it significant that following the call, Luskie made additional inquiries and then went back to Parker to assure him that he was incorrect about the Texas Team's trading, that the team did not transport to influence the *Gas Daily* index and that sometimes they had to ship uneconomically due to liquidity issues.³⁸⁶ Although he failed to convince Parker that nothing was amiss, we continue to find that Luskie's conduct reinforces the finding in the ID that his unrecorded calls with Comfort on November 5 were part of an effort to conceal the Texas Team's scheme.

³⁸² *Id.* P 105 & n.74.

³⁸³ Ex. OE-161 at 74-78.

³⁸⁴ Tr. 1413:7-24 (Comfort).

³⁸⁵ 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).

³⁸⁶ Opinion No. 549, 156 FERC ¶ 61,031 at P275; Initial Decision, 152 FERC ¶ 63,016 at P 102 (citing OE Ex. 161 at 26-27).

VI. Jurisdiction

192. The third element of establishing a violation of NGA section 4A and the Anti-Manipulation Rule is determining whether the conduct in question was “in connection with” a transaction “subject to the jurisdiction of the Commission.” As relevant to this proceeding, NGA section 1(b) provides that the Commission’s NGA jurisdiction extends to (1) transportation of natural gas in interstate commerce, (2) sales for resale of natural gas in interstate commerce, and (3) “natural gas companies engaged in such transportation or sale.” NGA section 1(b) also provides that the Commission’s NGA jurisdiction does not apply to any other transportation or sale of natural gas.

193. The Commission’s NGA jurisdiction has been narrowed by the Natural Gas Policy Act of 1978 (NGPA), as amended by the Wellhead Decontrol Act of 1989. Specifically, NGPA section 601(a)(1)(A) and (2)(A)(ii) provides that “the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to any natural gas solely by reason of” (1) any first sale of natural gas as defined in NGPA section 2(21), or (2) any transportation authorized by the Commission under NGPA section 311(a).³⁸⁷ As explained in more detail below, the “first sales” exempted from our NGA jurisdiction generally include all sales by entities that occur upstream of sales by interstate pipelines, intrastate pipelines, local distribution companies (LDC), and their affiliates. However, sales by those pipelines, LDCs and their affiliates are not exempt first sales, unless the volume of natural gas sold is attributable to their own production.

194. In Opinion No. 549, the Commission affirmed the ALJ’s finding that BP’s manipulative scheme was in connection with sales and transportation of natural gas subject to the Commission’s jurisdiction. The Commission found two bases for claiming jurisdiction. First, the Commission held that, regardless of the jurisdictional status of the transactions BP used to manipulate the Houston Ship Channel *Gas Daily* index price, BP’s manipulative conduct directly affected two sets of jurisdictional transactions during the Investigative Period. These transactions were: (1) 46 jurisdictional sales for resale by third parties whose prices were pegged to the manipulated Houston Ship Channel *Gas Daily* index price, and (2) cash-out transactions performed by Northern Natural Gas Pipeline (Northern) using the Houston Ship Channel *Gas Daily* index price.³⁸⁸

³⁸⁷ NGPA section 601(a) contains certain other exemptions not here relevant.

³⁸⁸ Cash-outs are Commission-jurisdictional transactions used by pipelines to correct imbalances in the transportation system

195. Second, the Commission found that BP's manipulative conduct during the Investigative Period included at least 52 Commission-jurisdictional natural gas sales for resale by the Texas Team.³⁸⁹

196. Opinion No. 549 rejected BP's contention that the Commission does not have jurisdiction over BP's conduct. The Commission rejected BP's contention that the Commission may not pursue anti-manipulation enforcement against fraudulent conduct occurring outside of Commission-jurisdictional markets even if such conduct directly affects jurisdictional markets. Opinion No. 549 also rejected BP's contention that the 52 transactions at issue were not sales for resale subject to the Commission's NGA jurisdiction and therefore, beyond the scope of section 4A.

197. On rehearing, BP raises generally the same arguments it raised in its brief on exceptions, i.e., the Commission erred in finding that the Commission has jurisdiction over BP's conduct by virtue of third party sales and pipeline cash-out transactions that were priced in reference to the Houston Ship Channel *Gas Daily* index and in finding that the 52-identified sales transactions supported a finding of jurisdiction or market manipulation. As discussed below, we are not persuaded by BP's request for rehearing on these grounds.

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

1. Opinion No. 549

198. In Opinion No. 549, the Commission interpreted NGA section 4A to allow it to employ its anti-manipulation authority to reach fraudulent conduct involving non-jurisdictional transactions so long as the conduct is "in connection with" a jurisdictional transaction. The Commission stated that, consistent with Congress' intent to adopt a "broad prohibition on market manipulation,"³⁹⁰ NGA section 4A provides that it shall be unlawful "for *any entity*, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas . . . subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers." The

³⁸⁹ Opinion No. 549, 156 FERC ¶ 61,031 at PP 293-307, 313-16, 321-22, 345-57.

³⁹⁰ The Commission noted that, in considering the proposed EAct 2005, Senator Bingaman remarked that "[t]he conference report has perhaps some of the strongest provisions in the area of protection of energy consumers. Both the electricity and natural gas provisions of the conference report contain broad new provisions to ensure market transparency and to prohibit market manipulation." 151 Cong. Rec. S9255-01, 151 Cong. Rec. S9255-01, 2005 WL 1795006.

Commission explained that Congress' use of the phrase "any entity" in section 4A of the NGA extended the prohibition on manipulative conduct beyond jurisdictional transactions and the persons engaged in such transactions. The Commission explained that NGA section 2(6) defines any "person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale," as a "natural-gas company." If Congress intended to apply the prohibition on manipulative conduct solely to persons engaged in jurisdictional transportation and sales, the Commission explained, Congress would have applied the prohibition to any "natural gas company," consistent with its use of that term in NGA sections 4 and 5. But Congress did not do that. To the contrary, it applied the prohibition to "any entity," thereby extending the prohibition on manipulative conduct beyond the transactions whose rates terms and conditions the Commission regulates under NGA sections 4 and 5.³⁹¹

199. Opinion No. 549 also found that the "in connection with" provision of section 4A encompasses "situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction" and that such a nexus exists when an entity "acts with intent or with recklessness to affect" the price in jurisdictional transactions.³⁹²

200. The Commission affirmed the ALJ's finding that BP's manipulative scheme directly and intentionally affected jurisdictional third-party sales and cash-out transactions and thus, BP's manipulative scheme was "in connection with" matters within the Commission's jurisdiction. The Commission affirmed the ALJ's finding that BP's scheme was designed to manipulate the Houston Ship Channel *Gas Daily* index, which reflects the volume-weighted average prices of relevant physical trades that were reported to the index publisher. The purpose of this scheme was to profit from related financial trades whose value was tied to the manipulated index. The purpose and necessary consequence of manipulating the index price was to affect the value of everyone's positions – physical and financial- whose value was tied to the index. And, as Enforcement Staff proved, there were 46 instances in which third parties made jurisdictional sales and three months of jurisdictional cash-out transactions whose value was tied to the Houston Ship Channel Gas Daily index BP manipulated. Thus, the Commission concluded that BP's manipulative scheme directly and intentionally affected

³⁹¹ This interpretation is consistent with Order No. 670, which interpreted "any entity" to include any person or form of organization, regardless of its legal status, function or activities. Order No. 670 explained that "[a]ny entity" is a deliberately inclusive term. Congress could have used the existing defined terms in the NGA ... of 'person,' 'natural-gas company,' . . . but instead chose to use a broader term without providing a specific definition." Order No. 670, 114 FERC ¶ 61,047 at P 18.

³⁹² Opinion No. 549, 156 FERC ¶ 61,031 at PP 293-95 (citing Order No. 670, 114 FERC ¶ 61,047 at P 22).

jurisdictional third-party sales and cash-out transactions and thus, BP's manipulative scheme was "in connection with" matters within the Commission's jurisdiction.³⁹³

201. Opinion No. 549 rejected BP's contention that the Commission's anti-manipulation authority only reaches conduct that occurs entirely within jurisdictional markets. The Commission stated that, under BP's theory, an entity could manipulate jurisdictional markets and yet avoid the Commission's section 4A penalty authority by the simple expedient of employing non-jurisdictional activities as the instrument of fraud. The Commission stated that "[s]uch a result would leave jurisdictional markets exposed and vulnerable to market manipulation despite Congress' intent to adopt a 'broad prohibition on market manipulation' and provide 'enhanced consumer protection against the kind of market manipulation we experienced in the west coast electricity market 4 years ago.'"³⁹⁴ The Commission added that, in instances when non-jurisdictional activities serve as the instrument of the fraud, the Commission's authority to sanction such activities is merely incidental and does not reflect an attempt or intent by the Commission to regulate such activity generally.³⁹⁵

202. The Commission found that its interpretation of section 4A was also consistent with two recent Supreme Court decisions, *ONEOK, Inc. v. Learjet, Inc.*, 575 U.S. 373 (2015) (*ONEOK*) and *FERC v. Energy Power Supply Ass'n*, 136 S. Ct. 760 (2016) (*EPSA*). Opinion No. 549 also found that the various court cases relied on by BP did not require a different result, including *Tex. Pipeline Ass'n v. FERC*, 661 F.3d 258 (5th Cir. 2011), *Conoco Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996) (*Conoco*), *Williams Gas Processing, L.P. v. FERC*, 373 F.3d 1335 (D.C. Cir. 2004), and *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013) (*Hunter*).³⁹⁶

2. BP Rehearing Request

203. On rehearing, BP maintains that the Commission does not have jurisdiction over BP's intrastate and other non-jurisdictional activity on the basis that such sales contributed to the construction of the *Gas Daily* Houston Ship Channel index, which

³⁹³ *Id.* PP 313-16, 321-22

³⁹⁴ *Id.* P 296 (citing 151 Cong. Rec. H6943-01, 151 Cong. Rec. H6943-01, 2005 WL 1788533) (footnotes omitted)).

³⁹⁵ *Id.* P 298.

³⁹⁶ *Id.* PP 293-307.

was used by others to price jurisdictional sales transactions.³⁹⁷ BP does not challenge the findings in Opinion No. 549 that third parties utilized the Houston Ship Channel *Gas Daily* index to price out some jurisdictional sales for resale or cash-out transactions, or that BP made trades that affected the Houston Ship Channel *Gas Daily* index. Rather, BP's contention is that the Commission may not, as a matter of law, use its anti-manipulation authority to reach non-jurisdictional natural gas transactions even if those transactions directly affect price indexes used in sales of natural gas subject to the NGA's jurisdiction. BP contends that "[t]he plain language of Section 4A limits activity that the Commission may regulate to that in connection with sales and transportation 'subject to the jurisdiction of the Commission,' which is set forth in Section 1(b) and 'while Section 4A refers to the jurisdiction of the Commission, nothing in Section 4A explicitly expands that jurisdiction.'"³⁹⁸

204. In support, BP states that the D.C. Circuit's decision in *Hunter* rejected similar reasoning. BP contends that *Hunter* applies in any instance where the Commission's interpretation of a statutory provision effectively repeals or modifies a conflicting statutory provision (in this case, section 4A repealing or modifying section 1(b)). BP argues that, contrary to Opinion No. 549, the *Hunter* decision is not limited to situations in which two federal agencies assert conflicting jurisdiction.³⁹⁹ BP asserts that the holding in Opinion No. 549 depends on finding that Congress, in the EPCA 2005, expressed a clear and manifest intent to repeal section 1(b) of the NGA, which "the Commission cannot do."⁴⁰⁰

205. Next, BP argues that the Supreme Court's holding in *EPSA* does not support the Commission's position. BP describes the court's holding in that case as permitting "the Commission to regulate under the Federal Power Act (FPA) wholesale rates for demand response programs even though there was an incidental effect on retail rates, over which the States have exclusive jurisdiction."⁴⁰¹ BP states that the *EPSA* Court "applied a two-part test to determine if the Commission exceeded its jurisdiction under the plain language of the statute: (1) Does the practice at issue in the rule directly affect the wholesale rate, and (2) In addressing these practices, has the Commission regulated

³⁹⁷ BP Rehearing Request at 118.

³⁹⁸ *Id.* at 122.

³⁹⁹ *Id.* at 122-124.

⁴⁰⁰ *Id.* at 124.

⁴⁰¹ *Id.* at 124.

retailed activity?”⁴⁰² BP contends that Opinion No. 549 wholly failed to address the second prong of the test.

206. BP states that the *EPSA* Court stated that the section 201(b) of the FPA establishes the limit on the Commission’s jurisdiction, and that “[the Federal Energy Regulatory Commission (FERC)] cannot take an action transgressing that limit no matter how direct, or dramatic, its impact on wholesale rates.”⁴⁰³ BP states that the *EPSA* Court determined that, by regulating demand response, the Commission’s rule directly affected wholesale rates, and the Commission did not exceed its jurisdiction. BP contends that applying the Anti-Manipulation Rule here would mean that “[the Commission] has not implemented a rule in the interstate or wholesale markets that incidentally affects the intrastate or retail markets” but “[r]ather, it is directly regulating BP’s intrastate or otherwise non-jurisdictional sales because they contributed to an index.”⁴⁰⁴ BP concludes that “[t]his is exactly the type of expansive Commission action the Court warned against in *EPSA* that crosses the jurisdictional line.”⁴⁰⁵

207. BP further contends that applying the Anti-Manipulation Rule here also transgresses the reasoning that the Fifth Circuit applied in *Texas Pipeline*. BP states that, in that case, the Fifth Circuit held that section 23 of the NGA reaches only conduct that is otherwise jurisdictional under section 1(b) of the NGA, holding in part that section 23 “does not ‘silently expand FERC’s jurisdiction beyond the limits of § 1(b).”⁴⁰⁶ BP states that, as in *Texas Pipeline*, the reach of section 4A of the NGA is still subject to the limits imposed by section 1(b), and Opinion No. 549 transgresses those limits.⁴⁰⁷

208. BP also argues that Opinion No. 549’s finding that Congress’ use of the phrase of “any entity” in section 4A evidences Congress’ intent to apply the prohibition on manipulative conduct to more than just jurisdictional transactions and the persons engaged in such transactions fails under *Texas Pipeline*. BP states that the Fifth Circuit rejected a similar argument in *Texas Pipeline* stating that “even if ‘any market participant’ has a greater scope than does ‘natural gas company,’ that does not free the

⁴⁰² *Id.* at 125-26 (citing *EPSA*, 136 S. Ct. at 773).

⁴⁰³ *Id.* at 126 (quoting *EPSA*, 136 S. Ct. at 775).

⁴⁰⁴ *Id.* at 126-27.

⁴⁰⁵ *Id.* at 127.

⁴⁰⁶ *Id.* (quoting *Tex. Pipeline Ass’n v. FERC*, 661 F.3d at 262).

⁴⁰⁷ *Id.*

term from the limitations imposed by § 1(b), nor would applying § 1(b) render the two terms synonymous.”⁴⁰⁸ Relying on *Texas Pipeline*, BP states that “[w]here Congress has decided to expand FERC’s jurisdiction, it has done so explicitly and unambiguously, as it did with the inclusion, within FERC’s purview, [of] the foreign importation and exportation of natural gas in the EPAct 2005—the very law that created § 23—by modifying § 1(b).”⁴⁰⁹ BP argues that, as in *Texas Pipeline*, section 4A is still subject to the limitation imposed by section 1(b).

209. BP further argues that Opinion No. 549 is inconsistent with the D.C. Circuit’s decision in *Conoco*.⁴¹⁰ BP asserts that *Conoco*, “as it applies to this case, stands for the proposition that Section 1(b) ‘forecloses ... that the phrase ‘in connection with’ in § 4 permits it to regulate facilities that it has expressly found are not within its § 1(b) jurisdiction” because “‘the ‘in connection with’ language of §§ 4 and 5, neither expand the Commission’s jurisdiction nor override § 1(b)’s gathering exemption.”⁴¹¹ BP states that, under the court’s reasoning, section 1(b) precludes the Commission from asserting jurisdiction over BP’s intrastate transactions under section 4A because the latter section cannot expand or override the former.

210. Finally, BP states that the Supreme Court’s decision in *ONEOK* stands for the proposition that “the Natural Gas Act ‘was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.’”⁴¹² BP contends that, under *ONEOK*, the Commission may not seek to redefine that balance of power between the Commission and the States, and that the Commission acknowledged in Order No. 670 that the Anti-Manipulation Rule does not expand the Commission’s jurisdiction.⁴¹³ Accordingly, BP states that the Commission may not, consistent with the limits of section 1(b) of the NGA, apply the Anti-Manipulation Rule to BP’s non-jurisdictional conduct here, even if it affected matters within the Commission’s jurisdiction.

⁴⁰⁸ *Id.* at 128 (quoting *Tex. Pipeline Ass’n v. FERC*, 661 F.3d at 263).

⁴⁰⁹ *Id.* (quoting *Tex. Pipeline Ass’n v. FERC*, 661 F.3d at 263-64).

⁴¹⁰ *Id.* at 129.

⁴¹¹ *Id.* (quoting *Conoco*, 90 F.3d at 553).

⁴¹² *Id.* at 129 (quoting *ONEOK*, 575 U.S. at 384-385 at 1599 (internal citations omitted)).

⁴¹³ *Id.* (citing Order No. 670, 114 FERC ¶ 61,047 at P 20).

3. Commission Determination

211. BP generally raises the same arguments it raised in its request for rehearing of the Hearing Order and on exception to the Initial Decision, i.e., the Commission's anti-manipulation authority only reaches manipulative conduct that occurs entirely within jurisdictional markets, and no further. As discussed below, we are not persuaded by the arguments that BP raises on rehearing.

212. In considering the proposed EAct 2005, Senator Bingaman, one of the lead designers of the legislation and then-ranking member of the Energy and Natural Resources Committee, remarked that "[t]he conference report has perhaps some of the strongest provisions in the area of protection of energy consumers. Both the electricity and natural gas provisions of the conference report contain broad new provisions to ensure market transparency and to prohibit market manipulation." Other members of Congress echoed Senator Bingaman's observations, stating that the EAct 2005 "puts in place the first ever broad prohibition on manipulation of ... natural gas markets"⁴¹⁴ and provides "enhanced consumer protection against the kind of market manipulation we experienced in the west coast electricity market 4 years ago."⁴¹⁵

213. Consistent with Congress' intent to adopt a "broad prohibition on market manipulation," NGA section 4A provides that it shall be unlawful "for *any entity*, directly or indirectly, to use or employ, *in connection with* the purchase or sale of natural gas . . . subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers." In Order No. 670, the Commission addressed the scope of the Anti-Manipulation Rule with respect to fraud and manipulation involving non-jurisdictional transactions, stating

[i]f any entity engages in manipulation and the conduct is found to be "in connection with" a jurisdictional transaction, the entity is subject to the Commission's anti-manipulation authority. Absent such nexus to a jurisdictional transaction, however, fraud and manipulation in a non-jurisdictional

⁴¹⁴ 151 Cong. Rec. S9335-01, 151 Cong. Rec. S9335-01, 2005 WL 1797575 (Senator Cantwell remarks).

⁴¹⁵ 151 Cong. Rec. H6943-01, 151 Cong. Rec. H6943-01, 2005 WL 1788533 (Representative Hastings remarks).

transaction (such as a first or retail sale) is not subject to the new regulations.⁴¹⁶

214. Consistent with Order No. 670, the Commission found in Opinion No. 549 that Congress' use of the phrase "any entity" extended the prohibition on manipulative conduct beyond jurisdictional transactions and the persons engaged in such transactions. The Commission explained that NGA section 2(6) defines any "person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale," as a "natural-gas company."⁴¹⁷ The Commission also found that the conduct made unlawful by NGA section 4A must have the effect of manipulating the price or terms of sales or transportation transactions that are subject to our NGA jurisdiction. Accordingly, and consistent with Order No. 670, Opinion No. 549 interpreted the "in connection with" provision of section 4A "as encompassing situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction."⁴¹⁸ Such a nexus exists when an entity "acts with intent or with recklessness to affect" the price in jurisdictional transactions.⁴¹⁹

215. We are not persuaded by BP's assertions on rehearing that the Commission does not have jurisdiction in this case because the manipulative scheme involved non-jurisdictional transactions. BP maintains that the Commission's interpretation of section 4A is inconsistent with multiple federal court cases, including *EPSA* and *ONEOK*, wherein that the courts have repeatedly rejected the Commission's attempts to expand its jurisdiction beyond what is permitted under section 1(b) of the NGA. As discussed below, we continue to find BP's arguments unpersuasive.

216. As an initial matter, we found in Opinion No. 549, and confirmed in this order for the reasons explained above, that BP's manipulative scheme included the use of non-jurisdictional fixed price sales to directly affect the Houston Ship Channel *Gas Daily* index price. Price indices play a well-known and important role in price formation

⁴¹⁶ Order No. 670, 114 FERC ¶ 61,047 at P 16.

⁴¹⁷ This interpretation is consistent with Order No. 670, which interpreted "any entity" to include any person or form of organization, regardless of its legal status, function or activities. Order No. 670 explained that "'[a]ny entity' is a deliberately inclusive term. Congress could have used the existing defined terms in the NGA . . . of 'person,' 'natural-gas company,' . . . but instead chose to use a broader term without providing a specific definition." Order No. 670, 114 FERC 61,047 at P 18.

⁴¹⁸ *Id.* P 2.

⁴¹⁹ *Id.* P 22.

in the natural gas industry, for both jurisdictional and non-jurisdictional natural gas sales transactions. For this reason, the Commission has a longstanding policy of ensuring the integrity of such indices.⁴²⁰ Manipulation of such indices that affects the price formation of jurisdictional natural gas sales transactions therefore satisfies the requirement in NGA section 4A that such manipulation be “in connection with” jurisdictional natural gas sales transactions.

217. BP does not contest the Commission’s finding in Opinion No. 549 that during the Investigative Period, the Houston Ship Channel index price was used to price at least 46 jurisdictional sales for resale. BP’s use of non-jurisdictional fixed price sales to manipulate the Houston Ship Channel *Gas Daily* index price therefore affected price formation for at least 46 natural gas sales transactions subject to our jurisdiction under the NGA. BP’s conduct had a direct effect on an index price that is fundamental to price formation of these natural gas sales subject to our jurisdiction, thereby bringing BP’s scheme within our enforcement authority under NGA section 4A.

218. Our actions in this proceeding do not directly regulate any intrastate transactions outside our NGA section 4 and section 5 jurisdiction. We are not seeking to regulate the rates of BP’s non-jurisdictional fixed price sales during or after the Investigative Period under either of these NGA provisions. Opinion No. 549 does not change the rates BP charged its sales customers in any of those transactions. Opinion No. 549 imposes civil penalties on BP only for its conduct in manipulating a price index used to price interstate sales transactions subject to our NGA jurisdiction.

219. As noted above, Opinion No. 549 interpreted the phrase “in connection with” as requiring a “nexus between the fraudulent conduct of an entity and a jurisdictional transaction.”⁴²¹ In Order No. 670, the Commission stated that it “did not intend to construe the Final Rule so broadly as to convert every common-law fraud that happens to touch a jurisdictional transaction into a violation of the Final Rule.⁴²² Rather, the Commission addressed its anti-manipulation authority solely in terms of protecting jurisdictional markets, expressly disclaiming any attempt to expand its jurisdiction,⁴²³ and defined its scope as encompassing situations in which there is a “nexus between the

⁴²⁰ See, e.g. *Policy Statement on Natural Gas and Electric Price Indices*, 104 FERC ¶ 61,121 (2003); *Price Discovery in Natural Gas and Electric Markets*, 109 FERC ¶ 61,184 (2004).

⁴²¹ Order No. 670, 114 FERC ¶ 61,047 at P 22.

⁴²² *Id.* P 22.

⁴²³ *Id.* PP 16, 25.

fraudulent conduct of an entity and a jurisdictional transaction,” that is “the entity must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction.”⁴²⁴ The Anti-Manipulation Rule may reach conduct that is itself non-jurisdictional to the Commission if that conduct directly affected matters within the Commission’s jurisdiction; however, this does not reflect an attempt to regulate the non-jurisdictional conduct.⁴²⁵ Put differently, when the Anti-Manipulation Rule reaches non-jurisdictional conduct that directly affects jurisdictional matters, it does so only as an incidental effect of our regulation of matters within our jurisdiction. Further, as we noted in Opinion No. 549, “[n]exus’ is just another way of saying ‘directly affects,’ which is how EPSA interpreted phrases such as ‘in connection with,’ and—not incidentally—it is how the Commission itself defined the phrase in the Hearing Order.”⁴²⁶

220. Here, the Commission’s interpretation of the “in connection with” provision of NGA section 4A as applicable to the manipulation of natural gas price indices used to set prices of jurisdictional natural gas purchase and sales transactions is based on the important and fundamental role that such price indices play in the formation of natural gas prices. The Commission does not interpret the “in connection with” requirement of NGA section 4A as giving the Commission jurisdiction over the use of non-jurisdictional transactions in a manipulative scheme that does not have the necessary nexus to jurisdictional transactions or other matters within our jurisdiction.

221. For example, manipulation that an entity intends to affect the price of steel could indirectly affect jurisdictional transportation rates because it could affect the cost of the pipelines used to provide such service. However, such manipulation would not be “in connection with” jurisdictional transportation service and therefore subject to our NGA section 4A jurisdiction because such manipulation would have only an indirect effect on the rates for jurisdictional transportation service and therefore would not satisfy the requirement in Order No. 670 that there be a nexus between the manipulation and the jurisdictional transportation service. Similarly, depending on the specific facts, we do not have section 4A jurisdiction over other types of non-jurisdictional conduct that does not have a direct effect, and therefore does not have the necessary nexus, on jurisdictional rates or other matters within our jurisdiction.

⁴²⁴ Order No. 670, 114 FERC ¶ 61,047 at P 22.

⁴²⁵ See, e.g., Opinion No. 549, 156 FERC ¶ 61,031 at PP 299.

⁴²⁶ *Id.* P 300.

222. BP contends that Opinion No. 549 misreads *EPSA*. BP contends that Opinion No. 549 failed to address the second prong of the test laid out in *EPSA*, i.e., has the Commission regulated retail activity. BP contends that, unlike the case in *EPSA*, here the Commission “crosses the jurisdictional line” in directly regulating BP’s intrastate or otherwise non-jurisdictional sales because they contributed to an index. BP contends that the Commission “cannot take an action transgressing” the statute’s proscribed limits “no matter how direct, or dramatic, its impact on wholesale rates.”⁴²⁷

223. As explained below, we continue to find that our interpretation of the “in connection with” provision of section 4A is entirely consistent with *EPSA*. We recognize that, in upholding the Commission’s demand response rule, the *EPSA* Court explained that statutory terms such as “in connection with” require “a non-hyperliteral reading . . . to prevent the statute from assuming near-infinite breadth.”⁴²⁸ Accordingly, the Court approved applying “a common-sense construction” interpreting such terms to limit the Commission’s jurisdiction to “rules or practices that ‘directly affect the [wholesale] rate.’”⁴²⁹ While the Court acknowledged that the Commission “cannot take an action transgressing” the statute’s proscribed limits “no matter how direct, or dramatic, its impact on wholesale rates,” the Court also stated that a Commission “regulation does not run afoul of [section 201(b) of the FPA’s] proscription just because it affects—even substantially—the quantity or terms of retail sales.”⁴³⁰ The Court noted that it is inevitable that the Commission’s authority would have some effect on non-jurisdictional markets because “[i]t is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other” and thus, “transactions that occur on the wholesale market have natural consequences at the retail level.”⁴³¹ Thus, it “is of no legal consequence” that “when [the Commission] takes virtually any action respecting wholesale transactions—it has some effect, in either the short or the long term, on retail rates.”⁴³² Put slightly differently, “[w]hen [the Commission] regulates what takes place on the wholesale market, as part of carrying out

⁴²⁷ BP Request for Rehearing at 126 (quoting *EPSA*, 136 S. Ct. at 775).

⁴²⁸ *EPSA*, 136 S. Ct. at 774.

⁴²⁹ *Id.* (emphasis and alterations in original).

⁴³⁰ *Id.* at 775-76.

⁴³¹ *Id.* at 776.

⁴³² *Id.*

its charge to improve how that market runs, then no matter the effect on retail rates, [Section 201(b) of the FPA] imposes no bar.”⁴³³

224. In finding that the Commission’s demand response rule did not regulate retail electricity sales, in violation of section 201(b) of the FPA, the Court pointed out that the rule “addresses—and addresses only—transactions occurring on the wholesale market” and the “justifications for regulating demand response are all about, and only about, improving the wholesale market.”⁴³⁴ The Court noted its decision in *ONEOK* wherein it considered “the *target* at which [a] law *aims*” in determining whether a State is properly regulating retail or, instead, improperly regulating wholesale sales.⁴³⁵ In that case, the Court recognized that the “Platonic ideal” of a “clear division between the areas of state and federal authority in natural-gas regulation” does “not describe the natural gas regulatory world.”⁴³⁶

225. We also continue to find that the Opinion No. 549’s interpretation is consistent with the Supreme Court’s decision in *ONEOK*. In that case, a group of manufacturers, hospitals, and other institutions that bought natural gas directly from interstate pipelines sued certain interstate pipelines, claiming that they violated state antitrust laws by, among other things, manipulating price indices. The question before the Court was whether the NGA preempted the lawsuits given the pipelines’ manipulation of price indexes affected both wholesale and retail natural prices. The *ONEOK* Court held that state laws that target or are “directed at” matters within the Commission’s jurisdiction are subject to field preemption, while those that are directed at “all businesses in the marketplace” and as such, have “broad applicability” (such as the state antitrust laws at issue in *ONEOK*) are not.⁴³⁷ That is, since the state antitrust lawsuits were “directed at practices affecting *retail* rates—which are firmly on the States’ side of that dividing line”—the Court found that that field preemption did not apply.⁴³⁸ *ONEOK* enunciates a symmetrical principle

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.* at 776-777 (citing *Oneok*, 575 U.S. at 385.)

⁴³⁶ *Oneok*, 575 U.S. at 387.

⁴³⁷ *ONEOK*, 575 U.S. at 385 (“Those precedents emphasize the importance of considering the *target* at which the state law *aims* in determining whether that law is preempted.”).

⁴³⁸ *Id.* at 386 (internal quotation omitted). The Court did not specifically address whether the state antitrust laws were barred by conflict preemption.

that (with relatively minor modifications) the Court applied shortly thereafter in *EPSA*: because the nature of today’s energy marketplace is such that the old “Platonic” ideal of a “clear division between areas of state and federal authority in natural-gas regulation” does “not describe the natural gas regulatory world,”⁴³⁹ courts will uphold state and federal regulations that target matters within their respective federal and state realms even if enforcing the regulation has an incidental effect on the other.

226. Like the antitrust laws in *ONEOK*, the Anti-Manipulation Rule is not aimed at non-jurisdictional entities or transactions. Rather, it is aimed broadly at “any entity” and specifically “designed to prohibit manipulation and fraud *in the markets the Commission is charged with regulating.*”⁴⁴⁰ We do not assert any general regulatory authority to regulate the rates, terms, or conditions of any such non-jurisdictional natural gas sales or transportation. Applying the Anti-Manipulation Rule to reach fraudulent transactions may have at times a merely incidental and possibly unavoidable effect on non-jurisdictional natural gas, but the purpose of doing so is solely to protect jurisdictional markets from manipulation. As explained above, that is precisely the situation in this case. While BP’s manipulative scheme included the use of non-jurisdictional fixed price natural gas sales to affect the Houston Ship Channel index price, that scheme directly affected natural gas sales subject to our NGA jurisdiction. It is this fact that is central to our concern and gave rise to our investigation and our continued finding here that BP should be penalized for its manipulative conduct.

227. We disagree with BP’s arguments on rehearing that the Commission’s interpretation of section 4A in Opinion No. 549 is inconsistent with the Fifth Circuit’s holding in *Texas Pipeline*. That case concerned section 23 of the NGA, which was added as part of the EAct 2005. Section 23 of the NGA authorized the Commission to obtain and disseminate information about “the availability and prices of natural gas sold at wholesale and in interstate commerce” from “any market participant.”⁴⁴¹ Pursuant to that authority, the Commission issued Order No. 720, which required major non-interstate pipelines that perform no interstate service to post scheduled flow and other information. The Fifth Circuit stated that the central question before it was whether NGA section 23 permitted the Commission to compel the owners of intrastate pipelines to post information concerning *purely* intrastate flow, capacity and scheduling information on the internet.⁴⁴² Finding no support for the Commission’s position in the text or legislative history, the Fifth Circuit held that the jurisdictional provisions of NGA section 1(b) limit

⁴³⁹ *Id.* at 387.

⁴⁴⁰ Order No. 670, 114 FERC ¶ 61,047 at P 5.

⁴⁴¹ *Texas Pipeline v. FERC*, 661 F.3d at 260.

⁴⁴² *Id.* at 260-261.

the scope of NGA section 23 and thus, preclude the Commission from requiring wholly intrastate pipelines to disclose capacity and scheduling information.

228. BP argues that, like section 23 of the NGA, section 4A is subject to the limitations imposed by NGA section 1(b). We are not persuaded by BP's arguments on rehearing and note that as stated in Opinion No. 549, however, the Fifth Circuit's decision in *Texas Pipeline* does not address NGA section 4A and its authorization for the Commission to prescribe rules prohibiting "any entity, directly or indirectly" from engaging in manipulative conduct "in connection with" any jurisdictional transaction. Unlike BP's manipulative conduct, which directly impacted jurisdictional transactions priced off an affected index, Order No. 720 in *Texas Pipeline* involved capacity and scheduling information that were "wholly intrastate."⁴⁴³ The Commission has not interpreted NGA section 4A as permitting the Commission to adopt any ongoing regulatory requirement applicable to the ordinary business activities of non-jurisdictional entities, such as was at issue in *Texas Pipeline*, where we required intrastate pipelines to post daily information about purely intrastate transactions not in interstate commerce. Rather, Opinion No. 549 interpreted, and we continue to find, NGA section 4A as allowing the Commission only to reach non-jurisdictional transactions in which an entity intended to affect or acted recklessly to affect the price of a jurisdictional transaction.

229. Moreover, unlike NGA section 23, the legislative history of NGA section 4A highlights Congress' intent to adopt a "broad prohibition on market manipulation"⁴⁴⁴ and provide "enhanced consumer protection against the kind of market manipulation we experienced in the west coast electricity market."⁴⁴⁵ As mentioned in Opinion No. 549, if BP were correct that Congress intended to apply the prohibition on manipulative conduct solely to persons engaged in jurisdictional transportation and sales, Congress could have applied the prohibition to any "natural gas company," consistent with its use of that term in NGA sections 4 and 5. Or, consistent with section 23 of the NGA, and *Texas Pipeline*, Congress would have applied the prohibition to any "market participant." Congress chose neither and instead chose a very broad term in order to prevent a repeat of the western energy crisis where certain of the market manipulation occurred outside of jurisdictional markets.⁴⁴⁶

⁴⁴³ *Id.* at 264.

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

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

⁴⁴⁶ For instance, the fictitious trades that some entities reported to the index publishers for the purpose of manipulating index prices that affected jurisdictional transactions would not appear to be jurisdictional (after all, because they were not real,

230. We disagree with BP's arguments on rehearing that that Opinion No. 549 is inconsistent with the D.C. Circuit's interpretation of similar "in connection with" language in NGA sections 4 and 5 in *Conoco*. BP asserts that *Conoco*, "as it applies to this case, stands for the proposition that Section 1(b) 'forecloses ... that the phrase 'in connection with' in § 4 permits it to regulate facilities that it has expressly found are not within its § 1(b) jurisdiction.'"⁴⁴⁷ In *Conoco*, the Commission granted abandonment of certain gathering services on the ground that the facilities in question were exempt under section 1(b) as gathering facilities. However, the Commission then found that the "in connection with" language in NGA sections 4 and 5 permitted the Commission to require the pipeline to provide continued gathering service for two years at the existing rate.⁴⁴⁸ The D.C. Circuit held that if the facilities were exempt under section 1(b), then the Commission could not regulate them under the "in connection with" language in NGA sections 4 and 5.⁴⁴⁹ Here, by contrast, we are not asserting general regulatory authority over BP's sales of non-jurisdictional natural gas under section 4.⁴⁵⁰ We are not modifying the rates BP charged in any non-jurisdictional fixed price sale or otherwise affecting the rates, terms, and conditions of those transactions. Instead, we find that BP's manipulative conduct directly affected natural gas transactions that are, in fact, subject to our jurisdiction, and that BP had *scienter* when it manipulated the price of natural gas subject to our jurisdiction. Accordingly, BP's manipulative conduct violates NGA section 4A.

the fictitious trades did not involve the sale or transport of interstate natural gas subject to the Commission's jurisdiction), and thus BP would appear to contend that NGA section 4A does not allow the Commission to take measures against that sort of fraud. BP's position chooses form over substance.

⁴⁴⁷ *Id.* (quoting in part *Conoco*, 90 F.3d at 553).

⁴⁴⁸ *Conoco*, 90 F.3d at 553.

⁴⁴⁹ *Id.* However, the D.C. Circuit stated that, "as an abstract matter," it had "no reason to doubt the Commission's conclusion that a non-jurisdictional entity could act in a manner that would change its status by enabling an affiliated interstate to manipulate access and costs of gathering." *Id.* at 549.

⁴⁵⁰ Order No. 670, 114 FERC ¶ 61,047 at P 16 (stating that the Anti-Manipulation Rule "does not, and is not intended to, expand the types of transactions subject to the Commission's jurisdiction under the FPA, NGA, NGPA, or [Interstate Commerce Act]," however, if any entity engages in manipulation and the conduct is found to be "in connection with" a jurisdictional transaction, the entity is subject to the Commission's anti-manipulation authority.).

231. We also disagree with BP's arguments on rehearing that Opinion No. 549 is inconsistent with the D.C. Circuit's decision in *Hunter v. FERC*." In that case, the D.C. Circuit held that the Commission had no jurisdiction with respect to a manipulative scheme carried out in the futures market, because section 2(a)(1)(A) of the Commodities Exchange Act (CEA) gives the CFTC "exclusive jurisdiction" over the manipulation of natural gas futures contracts.⁴⁵¹ BP again seeks to analogize NGA section 1(b) to Commodity Exchange Act section 2(a)(1)(A), arguing that section 1(b) similarly provides exclusive jurisdiction to the states to regulate intrastate natural gas sales, including any use of those sales to manipulate interstate sales for resale, and, as in *Hunter*, the Commission cannot show that Congress expressed a clear and manifest intent to repeal such exclusive jurisdiction. We continue to find here, as stated in Opinion No. 549, that in *EPSA*, the Supreme Court has rejected such an interpretation of the FPA jurisdictional provision that corresponds to NGA section 1(b).

232. As explained in Opinion No. 549, BP proposes that the Commission's anti-manipulation authority only reaches conduct that occurs entirely within jurisdictional markets, and no further. Put differently, BP suggests that Congress intended to deter manipulation *by* jurisdictional sales or transport, not *of* them. However, because jurisdictional and non-jurisdictional markets have become so intertwined over the past few decades, under BP's theory an entity could manipulate jurisdictional markets and yet avoid our section 4A penalty authority by the simple expedient of employing non-jurisdictional activities as the instrument of fraud. Such a result would leave jurisdictional markets exposed and vulnerable to market manipulation despite Congress' intent to adopt a "broad prohibition on market manipulation"⁴⁵² and provide "enhanced consumer protection against the kind of market manipulation we experienced in the west coast electricity market 4 years ago."⁴⁵³ For the reasons described above, we are not persuaded by BP's request for rehearing on these grounds.

B. BP Fixed Price Sales for Resale

233. Opinion No. 549 affirmed the ALJ's finding that BP's manipulative scheme included at least 52 fixed price sales for resale subject to the Commission's NGA

⁴⁵¹ See *Hunter*, 711 F.3d at 157 ("Stated simply, Congress crafted CEA section 2(a)(1)(A) to give the CFTC exclusive jurisdiction over transactions conducted on futures markets like the [New York Mercantile Exchange].")

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

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

jurisdiction.⁴⁵⁴ The Commission found that, in each of the 52 transactions, a third party transported natural gas over an interstate pipeline and one or more NGPA section 311 pipelines to an interconnection with the Houston Pipeline.⁴⁵⁵ The third party then sold the natural gas to BP at that interconnect, and BP transported that gas on the Houston Pipeline under an NGPA section 311 contract to the Houston Ship Channel pool, where BP sold the natural gas.

234. Opinion No. 549 denied BP's exceptions to the ALJ's procedural and substantive rulings on this issue. First, the Commission rejected BP's contention that the ALJ erred in allowing Enforcement Staff to present evidence concerning 50 of the 52 transactions in its rebuttal testimony. Second, the Commission rejected BP's contentions that the transactions were not subject to the Commission's NGA jurisdiction. BP requests rehearing of these holdings. We are not persuaded by BP's arguments on this point, for the reasons discussed below.

1. Evidentiary Issue

235. Enforcement Staff's witness Bergin provided in his September 22, 2014 direct testimony a detailed explanation of the documentary support for two examples of BP's next-day, fixed price sales for resale of interstate gas at the Houston Ship Channel.⁴⁵⁶ In addition, Bergin stated in his direct testimony that he had reviewed additional BP sales for resale of interstate gas at Houston Ship Channel on other specified days during the Investigative Period.⁴⁵⁷ Bergin stated that Enforcement Staff was still conducting discovery to obtain information about those other sales. In his February 11, 2015 rebuttal testimony, Bergin provided a detailed explanation of the additional 50 examples following the same template he used for the two examples detailed in his direct testimony. The ALJ admitted Bergin's rebuttal evidence concerning the 50 additional example over BP's objection.

a. Opinion No. 549

236. In Opinion No. 549, the Commission examined BP's argument that it had been "sandbagged" by the ALJ's inclusion of an additional 50 examples of sales contained in

⁴⁵⁴ Opinion No. 549, 156 FERC ¶ 61,031 at PP 345-357.

⁴⁵⁵ *Id.* P 347. The details of each example are set forth in Ex. OE-161 at 111-191. Testimony reveals some 52 examples of sales during the Investigative Period traced upstream to an interstate pipeline. Ex. OE-161 at 92:8-12

⁴⁵⁶ Ex. OE-001 at 139-155.

⁴⁵⁷ *Id.* at 156.

witness Bergin's February 11, 2015 rebuttal testimony. The Commission found that the ALJ acted reasonably in allowing this rebuttal testimony into evidence for several reasons.⁴⁵⁸ First, the Commission found that the subject evidence was relevant, that Bergin had previously referred to the examples in his direct testimony, and that the additional examples in this rebuttal testimony were cumulative in nature.⁴⁵⁹ In addition, the Commission also specifically found, as did the ALJ, that following the February 11, 2014 submission of the rebuttal testimony, BP had time to prepare to cross examine Witness Bergin on the additional examples at the late March-early April hearing.⁴⁶⁰

b. BP Rehearing Request

237. On rehearing, BP again argues that it was improper to permit the additional 50 examples of sales of next-day natural gas into the record. BP asserts that the ID and Opinion No. 549 justified their findings by stating that BP had ample time to cross-examine Witness Bergin on the examples, that Witness Bergin's direct testimony referred to additional examples, and that the additional examples were "cumulative."⁴⁶¹ BP argues that this misses the mark because Commission precedent requires OE to present its case in direct testimony, and to rebut BP's arguments in rebuttal testimony. BP asserts that it was not enough that it knew about the additional examples; it was not provided the opportunity to address those examples in testimony and the additional examples were not merely cumulative.

c. Commission Determination

238. We continue to find that the ALJ reasonably allowed Enforcement Staff to include the 50 additional examples in witness Bergin's February 11, 2015 rebuttal testimony. Mr. Bergin's inclusion of these examples in his rebuttal testimony did not present a new theory of the case not set forth in his direct testimony. In fact, Mr. Bergin stated in his September 22, 2014 direct testimony that there were potentially additional examples of fixed price sales for resale by BP beyond the two specific examples described in that testimony. Mr. Bergin explained, "Discovery in this case is still ongoing. And staff had requested additional documents from third parties to 'trace' additional sales for resale of interstate sales priced off the [Houston Ship channel] Gas Daily index during the

⁴⁵⁸ Opinion No. 549, 156 FERC ¶ 61,031 at P 346.

⁴⁵⁹ *Id.* (citing Tr. 1780:18-1787:8; Tr. 1787:9-17 (Bergin)).

⁴⁶⁰ *Id.*

⁴⁶¹ BP Rehearing Request at 148 (citing Initial Decision, 152 FERC ¶ 63,016 at P 174; Opinion No. 549, 156 FERC ¶ 61,031 at P 346).

Investigative Period.”⁴⁶² Mr. Bergin further stated in his direct testimony, “I have reviewed additional BP sales for resale of interstate gas at Houston Ship Channel that flowed on the following days of the Investigative Period: September 19-30, October 8-9, 11-13, 18-21, 22-24, 31, and November 1-3, and 5.”⁴⁶³ Thus, Mr. Bergin gave notice in his direct testimony that he might be presenting evidence of additional examples of BP jurisdictional fixed price sales for resale in his rebuttal testimony.

239. The record reveals that BP had ample time to prepare to cross examine Bergin who was offering these examples. Discovery did not close until March 10, 2015, nearly four weeks after Bergin’s rebuttal testimony was filed on February 11, 2015, and the hearing did not begin until March 30, 2015. BP could also have requested that the ALJ permit it to present at hearing testimony of its own witnesses contesting Bergin’s testimony concerning the additional 50 examples. Thus, we disagree with BP’s arguments on rehearing and find that in these circumstances, the trial judge reasonably exercised her discretion to admit or exclude evidence, including rebuttal testimony.⁴⁶⁴

2. Whether NGPA section 601(a), as interpreted by *Westar*, exempts the 52 Transactions from NGA Jurisdiction

240. It is undisputed that the natural gas which BP sold in the 52 fixed price transactions that Enforcement Staff contends were part of its manipulative scheme was in interstate commerce. That is because the third parties from which BP purchased the natural gas had transported the natural gas on upstream interstate natural gas pipelines.⁴⁶⁵ However, at the hearing, BP nevertheless contended that the sales were not subject to the Commission’s NGA jurisdiction, because (1) NGPA section 601(a) exempted those sales from NGA jurisdiction and (2) Enforcement Staff has not shown that the sales were sales for resale, as required by NGA section 1(b). In this section, we address BP’s contentions concerning NGPA section 601(a). In the next section, we address BP’s sales for resale contention.

⁴⁶² Ex. OE-1 at 138.

⁴⁶³ *Id.* at 156.

⁴⁶⁴ Both the Commission’s regulations and the Courts envision granting trial judges the discretion to admit or exclude evidence, including rebuttal testimony. 18 C.F.R. § 385.504 (2020); see *Brough v. Imperial Sterling Ltd.*, 297 F.3d 1172, 1181 n.7 (11th Cir. 2002).

⁴⁶⁵ See Opinion No. 549, 156 FERC ¶ 61,031 at P 347.

241. NGPA section 601(a), as amended by the Wellhead Decontrol Act of 1989, imposes three types of limits on the Commission's NGA jurisdiction. First, NGPA section 601(a)(1)(A) provides that the Commission's NGA jurisdiction "shall not apply to any natural gas solely by reason of any first sale of natural gas." Second, NGPA section 601(a)(2)(A) provides that the Commission's NGA jurisdiction "shall not apply to any transportation in interstate commerce of natural gas if such transportation is . . . authorized by the Commission under section 311(a) of" the NGPA. Third, NGPA sections 601(a)(1)(C) and 601(a)(2)(B) provide that, for purposes of the NGA, the term "natural gas company"⁴⁶⁶ shall not include "any person by reason of, or with respect to" any sale or transportation of natural gas if section 601(a) exempts that sale or transportation from NGA jurisdiction.⁴⁶⁷

242. In this proceeding, BP concedes that its own sales at the Houston Ship Channel were not "first sales," because BP is an affiliate of a pipeline and its sales were not from its own production or that of an affiliate.⁴⁶⁸ Therefore, NGPA section 601(a)(1)(A) does not, by itself, exempt the 52 sales from the Commission's jurisdiction.

243. However, BP relies on *Westar Transmission Co.*⁴⁶⁹ to contend that other provisions of section 601(a) of the NGPA, particularly sections 601(a)(1)(C) and (a)(2)(B) concerning "natural gas company" status, exempt all 52 sales from NGA jurisdiction. In Opinion No. 549, the Commission described *Westar* as follows:

[i]n *Westar*, a Hinshaw pipeline located in Texas purchased natural gas from a producer in Oklahoma in a first sale

⁴⁶⁶ NGA section 2(6) defines a "natural gas company" subject to the Commission's NGA jurisdiction as "a person engaged in the transportation of natural gas interstate commerce, or the sale in interstate commerce of such gas for resale."

⁴⁶⁷ Specifically, NGPA section 601(a)(1)(C) provides that the term natural gas company "shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such sale solely by reason of" an exempt first sale of natural gas." NGPA section 601(a)(2)(B) correspondingly provides that the term natural gas company "shall not include any person by reason of, or with respect to, any transportation of natural gas if the provisions of the Natural Gas Act and jurisdiction of the Commission under the Natural Gas Act do not apply to such transportation by reason of" transportation authorized under NGPA section 311(a).

⁴⁶⁸ Opinion No. 549, 156 FERC ¶ 61,031 at P 347 n.793.

⁴⁶⁹ 43 FERC ¶ 61,050 (1988) (*Westar*).

exempted from the Commission's NGA jurisdiction by NGPA section 601(a)(1). The Hinshaw pipeline transported that gas to its system on an interstate pipeline pursuant to an NGPA section 311(a) contract[]exempted from the Commission's NGA jurisdiction by NGPA section 601(a)(2). The Commission held that the Hinshaw pipeline's resales of that natural gas as part of its intrastate sales business would not subject either it or its downstream intrastate customers to NGA jurisdiction. The Commission explained that the only reason the downstream transactions were in interstate commerce and thus potentially subject to NGA jurisdiction was because of the two exempt upstream transactions. As a result, the Commission found that NGPA section 601(a)(1)(D)[] and 601(a)(2)(B) exempted all the downstream transactions from NGA jurisdiction, because that section exempts "any person" from becoming a "natural gas company" solely by reason of exempt transactions.⁴⁷⁰

244. BP asserts that, as in *Westar*, section 601(a) exempted from the Commission's NGA jurisdiction all the transportation and sales transactions upstream of its 52 sales that placed the subject natural gas in interstate commerce and brought the gas to BP. While a third party had shipped the gas on an upstream interstate pipeline, BP asserted that in each case the interstate pipeline transported the natural gas pursuant to an NGPA section 311(a) contract exempted from the Commission's NGA jurisdiction by NGPA section 601(a)(2), and each third party's sales to BP were first sales exempt from NGA jurisdiction pursuant to NGPA section 601(a)(1)(A). BP accordingly argued that its 52 sales were exempt from NGA jurisdiction for the same reasons as the Commission found that the transactions at issue in *Westar* were exempt from NGA jurisdiction.

245. Opinion No. 549 affirmed the ALJ's rejection of this contention, finding that *Westar* did not apply because, unlike in *Westar*, the upstream interstate pipeline transportation in this case took place under NGA jurisdictional contracts.⁴⁷¹ In reaching this conclusion, Opinion No. 549 first addressed a group of 18 sales of natural gas that BP had purchased from a particular third party from the Commission's NGA jurisdiction,

⁴⁷⁰ Opinion No. 549, 156 FERC ¶ 61,031 at P 348 (footnotes omitted) (emphasis added).

⁴⁷¹ *Id.* PP 347-351.

which in this order we will refer to as BP's Group A sales.⁴⁷² Opinion No. 549 then addressed a second group of 18 sales that BP obtained in intra-company transfers.⁴⁷³ We shall refer to this latter group of sales, together with the remainder of BP's 52 sales not in Group A, as BP's Group B sales. As discussed below, the essential difference between the Group A sales and the Group B sales for purposes of our decision in this case is that the record contains the contract under which the upstream interstate pipeline transportation of the gas in the Group A sales took place, while the record does not contain the corresponding upstream interstate pipeline contracts for the gas in the Group B sales.

246. For the reasons discussed in the first section below, we continue to find, as we did in Opinion No. 549, that the upstream interstate pipeline transportation of the natural gas in the Group A sales took place pursuant to an NGA jurisdictional contract, not a contract authorized under NGPA section 311(a), and thus the Group A sales are not exempt from NGA jurisdiction under *Westar*. In the second section below, we also disagree with BP's arguments raised on rehearing, however, based on modified reasoning than in Opinion No. 549. We find that, while Enforcement Staff have not shown that the upstream interstate pipeline transportation of the natural gas in the Group B sales took place pursuant to NGA jurisdictional contracts, those sales are nevertheless subject NGA jurisdiction. That is because BP's Group A sales render it a natural gas company, and thus NGPA section 601(a), as interpreted by *Westar*, cannot exempt any of BP's Group B sales from NGA jurisdiction.

a. Group A Sales

247. In Opinion No. 549, the Commission held that NGPA section 601(a), as interpreted by *Westar*, did not exempt BP's Group A sales from the Commission's NGA jurisdiction. The Commission found that:

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

⁴⁷² *Id.* P 348 n.794 (citing BP Br. on Exceptions at 78 n.369). BP Request for Rehearing at 134 n.120 (stating that the 18 relevant sales are Example Nos. 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 38, 41, 42, 43, 45, and 47. The details of each example are set forth in Ex. OE-161 at 111-191).

⁴⁷³ *Id.* P 351 (citing BP Br. on Exceptions at 79 n.372). These particular sales are Example Nos. 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 33, 34, 36, 39, 44, and 46. BP Rehearing Request at 139 n.445 (citing Ex. OE-161 at 111-122, 126-129, 132-133).

pipeline pursuant to an NGA contract, rather than an NGPA section 311(a) contract.⁴⁷⁴

The Commission continued, explaining that:

Thus, in this case, unlike *Westar*, NGPA sections 601(a)(1) did not exempt the upstream transportation on an interstate pipeline from the Commission's NGA jurisdiction. As a result, it cannot be found that the only reason BP's 18 sales were in interstate commerce was because of upstream exempt transactions. In these circumstances, the reasoning in *Westar* as to why NGPA sections 601(a)(1)(C) and 601(a)(2)(B) would exempt participants in downstream transactions from becoming natural gas companies subject to NGA jurisdiction is inapplicable.⁴⁷⁵

b. BP Rehearing Request

248. On rehearing, BP does not dispute the Commission's interpretation of the *Westar* precedent. However, it argues that Opinion No. 549 erred in its factual finding that the third party from whom BP purchased the gas it resold in the Group A sales had transported that gas on an upstream interstate pipeline under an NGA jurisdictional contract. BP asserts that Opinion No. 549 cites to a copy of a certain contract [CEMI's] [Contract No.133817] to support the finding that transportation on the interstate pipeline in question [NGPL] was pursuant to the pipeline's Part 284, subpart G, NGA section 7 blanket certificate to perform open access transportation service.⁴⁷⁶ BP concedes that the

⁴⁷⁴ *Id.* (emphasis added) (citing Ex. OE-167 at 173-175 (showing that one of the third parties' upstream contracts with an interstate pipeline was pursuant to that pipeline's Part 284, subpart G, NGA section 7 blanket certificate to perform open access transportation service)); Ex. OE-001 at 141, 142, 145.

⁴⁷⁵ Opinion No. 549, 156 FERC ¶ 61,031 at P 349 (citing Ex. OE-161 at 110-121 and 129-133).

⁴⁷⁶ BP Rehearing Request at 137 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 349 n.797 (Ex. OE-167 at pp. 173-75, 435)). NGA section 1(c) exempts from NGA jurisdiction any person engaged in the transportation or sale for resale of gas in interstate commerce if three conditions are met: (1) all of the gas is received from another person within or at the boundary of the state; (2) the gas is consumed within the state, and; (3) a state commission regulates the facilities, rates and service. This exemption is commonly referred to as a Hinshaw exemption. BP argues, on rehearing, that the ID erred in distinguishing the instant case from the *Westar* case in part on the fact that BP

title of this contract states that service is provided under Part 284 Subpart G. However, BP states that the interstate pipeline in question [NGPL] does not have separate forms of service agreements for transportation provided under the NGA and that provided under section 311(a)(1) of the NGPA. BP further states that the third party who entered into the transportation contract with the interstate pipeline indicated in its response to a data request that the contract was in fact a NGPA section 311 contract whatever its title.⁴⁷⁷ BP asserts that both the ID and Opinion No. 549 found jurisdiction on the basis that this contract provided for NGA transportation and that this finding is wrong. Accordingly, BP contends that all 18 of the Group A sales fall squarely under the dictates of *Westar*, because both the upstream transportation and the upstream sales were exempt from the Commission's NGA jurisdiction.

c. **Commission Determination**

249. On review of the instant record, we continue to find, as the Commission did in Opinion No. 549 and the ALJ did in the Initial Decision, that BP's Group A sales were subject to the Commission's NGA jurisdiction. We also continue to find, as the Commission did in Opinion No. 549 and the ALJ did in the Initial Decision, that the third party in these transactions had transported the gas on an upstream interstate pipeline pursuant to an NGA jurisdictional contract.⁴⁷⁸ As a result, it cannot be found that the only reason BP's 18 sales were in interstate commerce was because of upstream exempt transactions. In these circumstances, the reasoning in *Westar* as to why NGPA sections 601(a)(1)(C) and 601(a)(2)(B) would exempt participants in downstream transactions from becoming natural gas companies subject to NGA jurisdiction is inapplicable.

unlike *Westar* is not a Hinshaw pipeline. BP argues that given the structure of the NGPA this fact is not relevant to the instant case. *Id.* at 138 (citing Initial Decision, 152 FERC ¶ 63,016 at P 169). The Commission did not discuss this aspect of the ALJ's finding in Opinion No. 549 and does not rely on this distinction in the instant order to find that the cases cited by BP do not fall within the dictates of *Westar*.

⁴⁷⁷ *Id.* at 137 (citing Ex. OE-167 at 1-2, 2 n.2; Ex. OE-069; Ex. OE-053 at 8). In its Brief On Exceptions BP also asserted that "[I]t appears that the transportation service at issue may have been provided under a Part 284 Subpart G contract but BP notes that [] tariff does not set forth a separate service agreement Subpart B service." BP Br. on Exceptions at 79 n.369.

⁴⁷⁸ Opinion No. 549, 156 FERC ¶ 61,031 at P 350.

250. The third party's contract for transportation on the upstream interstate pipeline is contained in the record of this case.⁴⁷⁹ As BP admits, a simple review reveals that the contract at issue stated in its title that it was a "RATE SCHEDULE FTS AGREEMENT DATED December 21, 2008 UNDER SUBPART G OF PART 284 OF THE FERC'S REGULATIONS."⁴⁸⁰ Subpart G of Part 284⁴⁸¹ governs the issuance of blanket certificates to interstate pipelines for the performance of open access transportation service. Such certificates are granted pursuant to NGA section 7.⁴⁸² Thus, the title to the third party's contract with the interstate pipeline directly contradicts BP's position.

251. We disagree with BP's argument on rehearing that the Commission should nevertheless find that the third party's contract on the interstate pipeline was an NGPA section 311 contract, because the interstate pipeline did not have a separate form of service agreement for NGPA section 311(a) service and the third party so characterized the contract in a response to a data request in this proceeding. However, we note that the data request response cited by BP contains only a table with a listing of third party's transportation contracts. The table includes a column with the heading "Section 311 Contract?", and the answer for the third party's contract with the upstream interstate pipeline is "Yes."⁴⁸³ This is hardly enough to overcome the express statement on the face

⁴⁷⁹ Ex. OE-167 at 173-175.

⁴⁸⁰ *Id.* at 173. The Commission also notes that Bergin, in describing the sales examples that start with Part 284 Subpart G transportation under this contract describes the transaction using by stating that a Part 284 transaction was under taken by shipping interstate gas on an interstate pipeline and then outlining the NGPA 311 transactions that took place to complete the transaction:

In October 2008, [Chesapeake] *shipped interstate* gas from its own production that had been pooled at the [Midcontinent ("MidC") pooling point, which aggregates gas from Kansas, Oklahoma, and Texas. Chesapeake] *shipped the gas on the interstate pipeline* [NGPL], on various interstate 311 transportation contracts, and eventually to Katy Oasis. At Katy Oasis, the Texas Team purchased the gas from [Chesapeake.] Ex. OE-001 at 141:9-14. (emphasis added).

⁴⁸¹ 18 C.F. R. §§ 284.221 et seq. (2020)

⁴⁸² 18 C.F.R. § 284.221(a) (2020).

⁴⁸³ Ex. OE-53 at 8 and Ex. OE-69 at cells X10 and X54.

of the contract that it is a contract for service under Subpart G of Part 284, particularly since the contract explicitly provides that “[T]his Agreement states the entire agreement between the parties and no waiver, representation, or agreement affects this Agreement unless it is in writing.”⁴⁸⁴ If the interstate pipeline and the third party had mutually agreed that the contract be for service under NGPA section 311(a), instead of Subpart G of Part 284, then one would expect that they would have modified the form of service agreement to so indicate this fact. For example, they could have crossed out the reference to Subpart G of Part 284 and replaced it with a reference to NGPA section 311(a). The parties did not do any such thing. As a result, there is no indication on the contract itself that the parties signing the contract intended for it to have any other meaning than that set forth on the document. Nor does the record contain any explanation by the third party why it believed its contract with the interstate pipeline was for NGPA section 311(a) service, when the contract expressly states it is for Subpart G Part 284 service.

252. For these reasons, we find, as the Commission did in Opinion No. 549, that the third party’s contract for transportation service on the upstream interstate pipeline was for service subject to the Commission’s NGA jurisdiction. It follows that, for the reasons set forth in Opinion No. 549, NGPA section 601(a) did not exempt BP’s downstream fixed price sales for resale from the Commission’s NGA jurisdiction.

3. Whether NGPA Section 601(a) Exempts BP’s Group B Sales
a. Opinion No. 549

253. Opinion No. 549 next addressed BP’s contention that 18 of its Group B sales were non-jurisdictional, because it obtained the subject gas in non-jurisdictional intra-company transfers of gas among teams within BP.⁴⁸⁵ BP stated that in *Utah Power* the Commission held that intra-company transactions by and between the two divisions within an electric utility are not “sales for resale” subject to the Commission’s jurisdiction under the Federal Power Act.⁴⁸⁶ BP contended that the same reasoning applied to the Commission’s NGA jurisdiction.

⁴⁸⁴ Ex. OE-167 at 175.

⁴⁸⁵ See BP Br. on Exceptions at 79 n.372 (These sales also include one of the examples included in Bergin’s direct testimony (Example 2)). These particular sales are Example Nos. 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 33, 34, 36, 39, 44, and 46. BP Request for Rehearing at 139 n.445 (citing Ex. OE-161 at 111-122, 126-129, 132-133).

⁴⁸⁶ Initial Decision, 152 FERC ¶ 63,016 at P 165; see also, Opinion No. 549, 156 FERC ¶ 61,031 at P 325 (citing *Utah Power & Light Co.*, 45 FERC ¶ 61,095,

254. In Opinion No. 549, the Commission found that all 18 of BP's Group B sales of natural gas obtained in intra-company transfers were subject to the Commission's NGA jurisdiction. The Commission held that BP's reliance on *Utah Power* failed, because "[in] all 18 of BP's sales of natural gas it obtained in intra-company transactions, the natural gas had been transported on an upstream interstate pipeline under transportation agreements that were subject to NGA jurisdiction."⁴⁸⁷ The Commission held that, because the upstream transportation on interstate pipelines was subject to NGA jurisdiction, "nothing in NGPA section 601 exempted BP's subsequent sales of that natural gas at the Houston Ship Channel from NGA jurisdiction."⁴⁸⁸

b. BP Rehearing Request

255. On rehearing, BP contends that Opinion No. 549's conclusion that BP's intra-company transfer argument is irrelevant because the gas had been shipped on an interstate pipeline under an NGA transportation contract is in error. BP concedes, "it may be true that upstream of BP's sales, the gas had been transported on an interstate pipeline."⁴⁸⁹ However, it asserts that "the simple fact that transportation occurred on an interstate pipeline is not enough to bring the transportation within the Commission's NGA jurisdiction,"⁴⁹⁰ because it is possible to use an interstate pipeline for NGPA section 311(a)(1) transportation not subject to the Commission's NGA jurisdiction. BP asserts that Enforcement Staff has not shown that the transportation on interstate pipelines upstream of the intra-company transfers was subject to the Commission's NGA jurisdiction. BP asserts that Enforcement Staff also has not made such a showing with respect to any other of BP's Group B sales not discussed in the preceding section of this order. Accordingly, since the intra-company transfers are also non-jurisdictional, BP asserts that Enforcement Staff has failed to show that any sale or transportation transaction upstream of BP's Group B sales was subject to the Commission's NGA jurisdiction. Therefore, BP argues, Enforcement Staff has not shown that BP's subsequent sales for resale were not exempt from NGA jurisdiction pursuant to the *Westar* precedent.

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

⁴⁸⁷ *Id.* P 351 (citing Ex. OE-161 at 111-122, 126-129, & 132-133).

⁴⁸⁸ *Id.*

⁴⁸⁹ BP Request for Rehearing at 139.

⁴⁹⁰ *Id.*

c. **Commission Determination**

256. We continue to find as we did in Opinion No. 549 that the Group B sales are subject to the Commission's jurisdiction, but for different reasons than those set forth in Opinion No. 549. The record in this proceeding does not include the contracts under which the natural gas in BP's 36 Group B sales was shipped on the relevant upstream interstate pipelines. Accordingly, we agree with BP that Enforcement Staff has not shown that the interstate transportation upstream of the Group B sales was subject to the Commission's NGA jurisdiction. However, as discussed below, we find that the Group B sales were subject to the Commission's NGA jurisdiction.

257. It is undisputed that the natural gas BP sold in its Group B sales was in interstate commerce, having been transported on upstream interstate pipelines. It is also undisputed that BP's Group B sales do not qualify as "first sales" eligible for the exemption from NGA jurisdiction provided by section 601(a)(1). Therefore, the Group B sales must be subject to the Commission's NGA jurisdiction, unless they are exempted from NGA jurisdiction pursuant to NGPA section 601(a)(1)(C) and 601(a)(2)(B), concerning natural gas company status. BP argues that, as interpreted by *Westar*, those sections exempt BP from becoming a natural gas company with respect to its Group B sales, because Enforcement Staff has not shown that any of the upstream transportation and sales transactions that placed the subject natural gas into interstate commerce and brought it to BP were subject to NGA jurisdiction. Therefore, BP argues it was not a natural gas company with respect to its Group B sales, and those sales must be exempt from NGA jurisdiction.

258. After carefully considering BP's contention, we conclude that BP is interpreting *Westar* as providing a broader exemption from our NGA jurisdiction than we intended. For the reasons discussed below, we find that NGPA sections 601(a)(1)(C) and 601(a)(2)(B) only exempt from natural gas company status companies that do not engage in any NGA jurisdictional transactions. Because we have found above that BP's Group A sales were subject to our NGA jurisdiction, those sales rendered BP a natural gas company, and, as such, BP's Group B sales were also subject to our NGA jurisdiction, because they were in interstate commerce and they were not exempt first sales.

259. In *Westar*, Westar Transmission Co. (Westar), a Texas Hinshaw pipeline exempt from NGA jurisdiction under NGA section 1(c),⁴⁹¹ requested that the Commission declare that neither it nor any intrastate pipeline purchaser of natural gas from Westar

⁴⁹¹ NGA section 1(c) exempts from NGA jurisdiction any person engaged in the transportation or sale for resale of gas in interstate commerce if (1) all the gas is received from another person within or at the boundary of the state, (2) the gas is consumed within the state, and (3) a state Commission regulated the facilities, rates, and service of the pipeline.

would become subject to the Commission's NGA jurisdiction, if natural gas purchased by Westar in a first sale in Oklahoma and delivered to Westar by El Paso Natural Gas Co. (El Paso), an interstate pipeline, pursuant to NGPA section 311(a) is commingled with the stream of non-jurisdictional gas from which Westar makes sales to its intrastate customers. Westar stated that it currently took delivery of the gas from El Paso at a point on its system where the gas could only reach customers who were not concerned by the jurisdictional consequences of taking the gas. However, Westar preferred to take the gas at another point on its system where it could use the gas to satisfy its sales obligation to another intrastate pipeline. However, Westar stated that its intrastate pipeline customer and other customers of Westar who might receive the gas were concerned about the jurisdictional consequences of taking the gas from Oklahoma.⁴⁹²

260. The Commission granted the requested declaration. The Commission held that there was no doubt that NGPA section 601 removed from NGA jurisdiction the transactions up to Westar's receipt of the gas from El Paso. NGPA section 601(a)(1)(A) exempted the Oklahoma producers' first sales to Westar from NGA jurisdiction, and NGPA section 601(b)(1)(A) exempted El Paso's transportation of that gas to Westar under NGPA section 311 from NGA jurisdiction. The Commission then turned to what it described as the more difficult issue of whether NGPA section 601 also exempted from NGA jurisdiction "Westar's subsequent sales to its intrastate customers, those customers' sales for resale, and the transportation involved in those transactions."⁴⁹³

261. In resolving that issue, the Commission focused on NGPA sections 601(a)(1)(C) and 601(a)(2)(B).⁴⁹⁴ Those sections provide that for purposes of the NGA, the term "natural gas company"⁴⁹⁵ shall not include "any person by reason of, or with respect to" any sale or transportation of natural gas "if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such" sale or transportation "solely by reason of" NGPA section 601. The Commission found that NGPA sections 601(a)(1)(C) and 601(a)(2)(B) removed the downstream intrastate transactions from NGA jurisdiction. The Commission explained that these provisions exempt "any person," not just the

⁴⁹² *Westar*, 43 FERC at 61,139.

⁴⁹³ *Id.* at 61,141.

⁴⁹⁴ At the time of the *Westar* decision, current NGPA sections 601(a)(1)(B) and 601(a)(2)(A) were set forth in NGPA sections 601(a)(1)(D) and 601(a)(2)(B) respectively. In order to avoid confusion, we use the current designations of these sections throughout this order, including in discussing the *Westar* decision.

⁴⁹⁵ NGA section 2(6) provides, "'Natural Gas Company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

direct participants in the transactions exempted from NGA jurisdiction by NGPA sections 601(a)(1)(A) and 601(a)(2)(A), from becoming a natural gas company subject to NGA jurisdiction solely by reason of or with respect to such exempt transactions. The Commission then stated,

A holding that Westar's sales to its intrastate pipeline customers, their sales for resale, or any related transportation are jurisdictional would, however, result in those companies becoming natural gas companies "by reason of or with respect to" Westar's purchase of gas in Oklahoma and El Paso's transportation of that gas to Westar, transactions exempted from NGA jurisdiction by section 601(a)(1)(A) and (2)(A). The downstream transactions themselves occur entirely within a single state. Thus, the only reason those transactions could cause Westar and its customers to become natural gas companies is that the earlier exempt transactions placed the gas in interstate commerce, thus making the downstream transactions jurisdictional sales for resale and transportation of gas in interstate commerce. Accordingly, since the intent of sections 601(a)(1)(C) and 601(a)(2)(B) is to prevent any person from becoming subject to NGA jurisdiction by reason of exempt transactions, the Commission concluded that the most reasonable interpretation of those sections is that they remove the downstream transactions from NGA jurisdiction.⁴⁹⁶

262. The Commission also found that this result is consistent with Congress's purpose in enacting NGPA sections 311 and 601 of removing artificial restraints on the free flow of gas between the interstate and intrastate markets so as to create a national transportation network for gas. The Commission pointed out that intrastate pipelines are in the business of marketing gas. The Commission stated that, as a result, simply exempting from NGA jurisdiction an intrastate pipeline's purchase of certain gas from out of state and the transportation of gas to that intrastate pipeline cannot serve Congress's purpose of integrating the interstate and intrastate markets, unless the pipeline's subsequent transportation and sales for resale of the gas are also exempted from NGA jurisdiction. Otherwise the intrastate pipeline would be unwilling to engage in any of the transactions. That is because Westar's purely intrastate customers would not purchase or transport any natural gas that Westar purchased from out of state and transported into Texas under NGPA section 311, unless NGPA sections 601(a)(1)(C) and 601(a)(2)(B) protected them from becoming natural gas companies subject to our NGA

⁴⁹⁶ *Id.*

jurisdiction. The Commission concluded that, in these circumstances, providing the downstream entities an exemption from becoming natural gas companies subject to NGA jurisdiction was necessary to accomplish Congress's goal of integrating the interstate and intrastate markets.

263. Thus, in *Westar*, unlike in this case, the Commission was addressing a situation in which Westar's downstream customers did not engage in any transactions subject to NGA jurisdiction that could render them natural gas companies, except for Westar's exempt upstream transactions, and those downstream customers were unwilling to purchase any interstate gas if such purchases would jeopardize their status as purely intrastate companies not subject to any Commission regulation. The Commission made clear that this fact was critical to its decision in *Westar*. After making the holding quoted above, the Commission pointed out that the "gas in question here is consumed entirely within the state of Texas, and *none of the entities downstream from Westar or their affiliates would be subject to the Commission jurisdiction unless these transactions made them subject to the Commission's jurisdiction. If those circumstances change, then a different analysis would apply.*"⁴⁹⁷

264. In this case, by contrast, the downstream entity, BP, does engage in other sales which are subject to NGA jurisdiction. As we found in the preceding section, BP's Group A sales are subject to NGA jurisdiction. Those sales therefore render BP a "natural gas company" as defined in NGA section 2(6), and NGA section 1(b) provides for BP to be subject to NGA jurisdiction. We find that, in these circumstances, NGPA sections 601(a)(1)(C) and 601(a)(2)(B) do not exempt BP's Group B sales from NGA jurisdiction. By their terms, those sections are limited to preventing a company from becoming a "natural gas company" by reason of non-jurisdictional first sales or NGPA section 311 transportation. In *Westar*, we found that section 601(a)(1)(C) and 601(a)(2)(B) exempted the downstream entities from becoming "natural gas companies" as a result of Westar's exempt first sales and exempt NGPA section 311 transportation, because those exempt upstream transactions were the *only* reason that the downstream entities could become "natural gas companies." The downstream entities did not engage in any other transactions that could render them "natural gas companies. However, NGPA sections 311(a)(1)(C) and 311(a)(2)(B) do not exempt entities that make some sales that are downstream of exempt transactions from "natural gas company" status, where there are other bases for that status, such as the entity engaging in sales for resale in interstate commerce that are not exempt from NGA jurisdiction. Thus, NGPA sections 601(a)(1)(C) and 601(a)(2)(B) cannot prevent BP from becoming a "natural gas company" as a result of BP's jurisdictional Group A sales.

⁴⁹⁷ *Id.* at 61,141 n.13 (emphasis added).

265. Once BP is a “natural gas company” by virtue of its Group A sales, there is no longer any reason to shield it from being treated as a natural gas company when it makes other sales that may be downstream of a third party’s exempt first sales and NGPA section 311 transportation. Rather, once a company has become a natural gas company because of any jurisdictional activity, the jurisdictional status of its sales should be determined based on the attributes of its own sales, without regard to the jurisdictional status of upstream transactions. While it is possible for a natural gas company to make sales that are not subject to the Commission’s NGA jurisdiction, for example direct sales, that fact does not change its status as a “natural gas company,” as defined in NGA section 2(6). Here, BP’s Group B sales are sales by a natural gas company of natural gas that it in interstate commerce. The Group B sales also do not qualify as exempt first sales under NGPA section 2(21), because BP is affiliated with an interstate pipeline. Accordingly, we find that BP’s Group B sales are subject to our NGA jurisdiction.

266. Finally, there is no need to treat BP’s Group B sales as exempt from NGA jurisdiction in order to accomplish Congress’s purpose in enacting NGPA sections 311 and 601 of removing artificial restraints on the free flow of gas between the interstate and intrastate markets so as to create a national transportation network for gas. In *Westar*, the exempted entities had never engaged in any jurisdictional transactions, were not natural gas companies subject to our jurisdictional, and were unwilling ever to become natural gas companies. Therefore, providing them an exemption was necessary for them to be willing to accept natural gas that had been transported on an interstate pipeline. By contrast, BP has engaged in jurisdictional transactions, is a natural gas company, and thus engaging in additional jurisdictional transactions will not change its jurisdictional status. As a result, there should be no reason why it would be unwilling to accept additional natural gas that had been transported on an interstate natural gas pipeline.

267. Accordingly, we are not persuaded by BP’s arguments on this issue and conclude that BP’s Group B sales are subject to the Commission’s NGA jurisdiction.

VII. Civil Penalty Factors

268. Section 22(a) of the NGA provides that any person that violates the NGA or any rule, regulation, condition or order made by the Commission shall be subject to a penalty of not more than one million dollars per day per violation for as long as the violation continues. NGA section 22(c) provides that provide that “[i]n determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation.”⁴⁹⁸ Following more than four years of experience with the civil penalty authority granted by EPAct 2005, on March 18, 2010, the Commission issued a Policy Statement on Penalty Guidelines for

⁴⁹⁸ 15 U.S.C. 717t-1(c).

“the purpose of adding greater fairness, consistency, and transparency to our civil penalty determinations.”⁴⁹⁹ Following a robust notice and comment period, the Commission issued the Penalty Guidelines on September 17, 2010.⁵⁰⁰ The Penalty Guidelines make clear that the Commission will continue to base penalties on the seriousness of the violation, measured in large part by the harm or risk of harm caused, an organization’s efforts to remedy the violation, as well as other culpability factors, such as senior-level involvement, prior history, compliance, self-reporting, and cooperation.⁵⁰¹ The Penalty Guidelines state that “while these factors remain the same, organizations will now know with more certainty how each is applied. At the same time, the Penalty Guidelines do not restrict our discretion to make an individualized assessment based on the facts presented in a given case.”⁵⁰²

269. In the Hearing Order, the Commission directed the ALJ to make fact findings that relate to certain elements of the Penalty Guidelines.⁵⁰³ Specifically, the ALJ was directed to make findings as to: (1) the number of violations, if any, and the number of days on which such violations occurred; (2) the amount of loss, the quantity of natural gas affected (financial and physical), and the duration; (3) whether BP “committed any part of the [alleged] instant violation less than 5 years after a prior Commission adjudication . . . or less than 5 years after an adjudication of similar misconduct by any other enforcement agency”; (4) whether the violation “violated a judicial or Commission order or injunction”; and (5) findings respecting BP’s compliance program, including each of the factors specified in § 1B2.1 of the Penalty Guidelines.⁵⁰⁴ The ID

⁴⁹⁹ *Enforcement of Statutes, Orders, Rules, and Regulations*, 130 FERC ¶ 61,220, at P 1 (2010) (March 2010 Penalty Guidelines) (noting that “The Commission’s Penalty Guidelines [. . .] are modeled on portions of the United States Sentencing Guidelines [. . .], with appropriate modifications to account for Commission-specific considerations”). *Id.*

⁵⁰⁰ *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216 (2010) (Penalty Guidelines).

⁵⁰¹ *Id.* P 2 (Compare March 2010 Penalty Guidelines §§ 1C2.3, 2A1.1, 2B1.1 with *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at PP 54-68 (2008) (2008 Penalty Guidelines).

⁵⁰² *Id.*

⁵⁰³ Opinion No. 549, 156 FERC ¶ 61,031 at PP 369-70 (citing Hearing Order, 147 FERC ¶ 61,130 at PP 48-49).

⁵⁰⁴ *Id.* P 369 (citing Hearing Order, 147 FERC ¶ 61,130 at P 49(i)-(vi)).

comprehensively addressed each of the Commission's directives, which were mostly affirmed by the Commission in Opinion No. 549.

270. First, in determining the number of violations, Opinion No. 549 affirmed the ALJ's conclusion that every transaction made pursuant to a manipulative scheme counts as a separate violation; however, Opinion No. 549 found that based on the evidence, well over 600 violations, and—depending on how the various transaction are counted—perhaps more than 900 violations occurred in the course of the scheme. Therefore, Opinion No. 549 found that the maximum penalty for the scheme is at least \$716 million.⁵⁰⁵

271. Second, Opinion No. 549 affirmed the ALJ's findings regarding the amount of loss. Specifically, the Commission found that Enforcement Staff's methodology produced a reasonable approximation and that Enforcement Staff proved that every trade was at a minimum "in connection with" jurisdictional transactions. Opinion No. 549 also rejected BP's contention that Enforcement Staff must prove that every trade bore the same characteristics of manipulation.⁵⁰⁶

272. Third, Opinion No. 549 found that three prior federal regulatory settlements, involving market manipulation by BP for alleged improper conduct could be considered by the Commission in order to enhance BP's culpability score under the Commission's Penalty Guidelines.⁵⁰⁷ These prior settlements all occurred less than five years after a prior Commission adjudication, or less than five years after an adjudication of similar misconduct by any other enforcement agency. Opinion No. 549 further rejected BP's

⁵⁰⁵ *Id.* P 376.

⁵⁰⁶ *Id.* P 382.

⁵⁰⁷ *Id.* P 388. Opinion No. 549 noted the ALJ's finding that BP had entered into three settlements which constitute prior history of adjudication under the Penalty Guidelines—a 2007 settlement with the Commission (involving a seven million dollars penalty), and 2007 consent agreements with both the Department of Justice (DOJ) and CFTC for alleged manipulation of the propane market (totaling \$225 million in penalties and \$53.5 million restitution). *Id.* P 385 & n.909 (citing Initial Decision, 152 FERC ¶ 63,016 at P 213 (citing *BP Energy Co.*, 121 FERC ¶ 61,088 (2007) (BP Settlement)); *United States v. BP America, Inc.*, Deferred Prosecution Agreement, No. 07 CR 683, ¶¶ 7-9 (N.D. Ill. Oct. 25, 2007) (DOJ Deferred Prosecution Agreement); *Commodity Futures Trading Comm'n v. BP Prods. N. Am. Inc.*, No. 06-cv-03503, Consent Order for Permanent Injunction and Other Relief, ¶¶ 14-15, 38-43 (N.D. Ill. Oct. 25, 2007) (CFTC Settlement)).

contention that the prior settlements could not be considered because the settlements or conduct occurred before the Penalty Guidelines were promulgated, and because the DOJ Deferred Prosecution Agreement and CFTC Settlement caption different corporate subsidiaries.⁵⁰⁸

273. Fourth, Opinion No. 549 found that BP's culpability score should be enhanced for violating a judicial or Commission order or injunction. Specifically, Opinion No. 549 found that BP's instant manipulative scheme violated the CFTC Settlement's plain language that prohibited BP from manipulating any commodity, within five years.⁵⁰⁹

274. Finally, Opinion No. 549 upheld the ALJ's findings that BP's compliance program does not satisfy the factors listed in § 1B2.1 of the Penalty Guidelines. Opinion No. 549 further found that BP's compliance program was "deficient in structure and operation".⁵¹⁰ Based on these findings, the Commission assessed a civil penalty of \$20.16 million.⁵¹¹

275. On rehearing, BP expands upon many of the same arguments it raised in its brief on exceptions, which, among other things, includes contesting Opinion No. 549's findings with regard to: the number of violations; the Commission's methods for estimating loss; the treatment of the three prior settlements as adjudications, despite the fact that the DOJ Deferred Prosecution Agreement and CFTC Settlement both caption different BP subsidiaries; and that the compliance program failed to satisfy the factors set forth in the Penalty Guidelines. For the reasons discussed below, we are not persuaded by BP's request for rehearing on these grounds.

A. Number of Violations

1. Opinion No. 549

276. In Opinion No. 549, the Commission reviewed the findings in the ID that BP had committed "at least 48 violations."⁵¹² The Commission agreed with the ALJ that "every transaction made pursuant to a manipulative scheme counts as a separate violation" and

⁵⁰⁸ Opinion No. 549, 156 FERC ¶ 61,031 at PP 388-90.

⁵⁰⁹ *Id.* P 396.

⁵¹⁰ *Id.* P 402.

⁵¹¹ *See id.* PP 403-410 for an explanation of the calculation of this penalty.

⁵¹² *Id.* P 376.

therefore determined that the total number of violations was actually in excess of 600, and perhaps more than 900.⁵¹³

2. Request for Rehearing

277. In its Request for Rehearing, BP asserts that the calculation of 600 or more violations was unsupported, exceeding both Enforcement Staff's assertions and the ID's findings. BP states that there were 680 total fixed-price sales at issue, and that the number of bid-initiated sales at Houston Ship Channel with an available bid at Katy within the cost of transport, and offer-initiated sales at Houston Ship Channel, in which better prices could be had at Katy were "not additive" to the 680 total sales.⁵¹⁴ BP further contends that adopting the ID's calculation of 48 violations was erroneous because it was premised on the number of days of violations without regard to whether BP was a net seller. BP asserts that this calculation was in error because "net selling is not manipulative conduct" and because, it claims, "BP could not have engaged in the manipulative scheme on 48 days because its physical trading was profitable on over 40% of the days in the ID."⁵¹⁵ BP also states that Opinion No. 549 erred in assessing penalties for conduct in November that, according to BP, was inconsistent with the scieneter findings. BP further argues that the Commission erred in adopting Abrantes-Metz's quantification of the "four pieces of factual information."⁵¹⁶ Specifically, BP explains that Abrantes-Metz calculated: (1) the number of days in the Investigative Period on which the Texas Team was a net seller at Houston Ship Channel; (2) the number of fixed-price sales by the Texas Team at Houston Ship Channel; (3) the number of times that the Texas Team made sales at Houston Ship Channel by hitting bids when the best available contemporaneous bid at Katy was within the cost of transport; and (4) the number of times the Texas Team made sales at Houston Ship Channel by having their offers lifted when they could have lowered their offers at Katy and sold more economically.⁵¹⁷ BP asserts that Opinion No. 549 incorrectly upheld the ID's finding that each of these calculations indicated violations of the Anti-Manipulation Rule. In addition, BP contends that the Commission erred in adopting the ID's findings that BP's 680 fixed price sales at Houston Ship Channel furthered the scheme because "neither the

⁵¹³ *Id.*

⁵¹⁴ BP Rehearing Request at 151-52.

⁵¹⁵ *Id.* at 152.

⁵¹⁶ *Id.* at 153 & n.500 (citing BP Br. on Exceptions at 81 (quoting Initial Decision, 152 FERC ¶ 63,016 at PP 186-87)).

⁵¹⁷ *Id.* at 153-154 (citing Ex. OE-129 at 149:9-149:19).

Commission nor the NGA prohibit making fixed-price sales, selling at the beginning of a trading session, or selling via offer-initiated transactions.”⁵¹⁸

3. Commission Determination

278. We are not persuaded by BP’s request for rehearing on this issue. The ALJ found,⁵¹⁹ and BP does not dispute,⁵²⁰ that BP made 680 fixed-price sales at Houston Ship Channel. The ALJ explained that while Enforcement Staff’s recommendation of 48 minimum violations was predicated on the notion that “all transactions on a given day are treated as a single violation;” in actuality, “Commission rules allow counting each act as a violation” and thus “the record supports the finding that BP committed at a minimum 48 violations.”⁵²¹ In Opinion No. 549, the Commission clarified “that every transaction made pursuant to a manipulative scheme counts as a separate violation [... and] based on the evidence [...], while the ALJ was correct that this matter involved at least 48 violations, we find that it actually involved well over 600 violations.”⁵²²

279. We continue to find, as we did in Opinion No. 549 that each of the approximately 680 fixed-price sales made pursuant to the scheme constitutes an independent violation of the Anti-Manipulation Rule over a period of at least 48 days. Thus, by finding that BP consummated at minimum 600 fixed-price trades pursuant to its unlawful scheme, we also continue to find that BP committed at least 600 violations of law.⁵²³ Because our statute calls for a maximum penalty of \$1,193,970 per day per violation,⁵²⁴ we continue to find that these facts support a proposed maximum penalty of at least \$716 million. In so finding, we want to be clear that we are not holding that net selling, by itself, is a violation of the Anti-Manipulation Rule, nor are we finding that making fixed-price sales,

⁵¹⁸ *Id.* at 153.

⁵¹⁹ The ALJ correctly found that BP “had hundreds of affirmative acts in furtherance of the manipulative scheme during the Investigative Period” including “680 fixed-price sales at Houston Ship Channel . . .”. Initial Decision, 152 FERC ¶ 63,016 at P 187.

⁵²⁰ BP Rehearing Request at 7, 17, 29, 153.

⁵²¹ Initial Decision, 152 FERC ¶ 63,016 at P 187.

⁵²² Opinion No. 549, 156 FERC ¶ 61,031 at P 376.

⁵²³ *Id.*

⁵²⁴ NGA Section 22, 15 U.S.C. § 717t-1; *Civil Monetary Penalty Inflation Adjustments*, 155 FERC ¶ 61,320 (2016).

selling at the beginning of a trading session, or selling via offer-initiated transactions is, by itself, a violation of the Anti-Manipulation Rule. This matter is different. Here, we find that BP took actions that were not, by themselves, inherently manipulative and therefore unlawful, but rather were done as part of an intentional manipulative scheme, and therefore were unlawful as a consequence.⁵²⁵ Similarly, we hold that profitable trading is not a per se defense – the question is not whether the subject lost money trading – but whether the subject manipulated the market. Accordingly, we reject BP’s argument that Abrantes-Metz’s calculations did not demonstrate violations of the Anti-Manipulation Rule and BP’s assertion that Opinion No. 549 incorrectly upheld the ID’s finding that each of Abrantes-Metz’s calculations indicated violations of the Anti-Manipulation Rule. We find that Abrantes-Metz’s calculations help to explain BP’s scheme to suppress prices at Huston Ship Channel.

280. In addition, we disagree with BP’s assertions on rehearing that Opinion No. 549 erred in assessing penalties for conduct in November that, according to BP, was not included in the scienter findings. Both the ID and Opinion No. 549 defined the Investigative Period as running between September 18, 2008 and November 30, 2008.⁵²⁶ Opinion No. 549 found that “[t]he Texas Team’s manipulative intent is verified in the November 5 recorded call and further supported by the ID’s reasonable inferences from the November 5 unrecorded calls and subsequent actions taken by Comfort and Luskie.”⁵²⁷ Thus, we find that Opinion No. 549 properly upheld the ID’s finding that “the Texas Team’s actions during the Investigative Period constitute ‘suspicious timing or repetition of transactions, execution of transactions benefiting derivative positions, and lack of legitimate economic motive or economically irrational conduct,’ and that pursuant to the Commission’s holding in *Barclays*, these are evidence of scienter.”⁵²⁸

⁵²⁵ We further agree with Opinion No. 549’s analysis of the recorded call of November 5 and the conclusion that it revealed “probative evidence of . . . intent and guilt.” See Opinion No. 549, 156 FERC ¶ 61,031 at P 207.

⁵²⁶ Initial Decision, 152 FERC ¶ 63,016 at page 2; Opinion No. 549, 156 FERC ¶ 61,031 at P 2.

⁵²⁷ Opinion No. 549, 156 FERC ¶ 61,031 at P 192.

⁵²⁸ *Id.* P 193 (citing Initial Decision, 152 FERC ¶ 63,016 at P 113; *Barclays*, 144 FERC ¶ 61,041, at P 62 (2013)) (*Barclays*).

B. Amount of Loss and Duration**1. Estimate of Loss****a. Opinion No. 549**

281. In Opinion No. 549, the Commission affirmed the ID's holding regarding the amount of loss.⁵²⁹ Opinion No. 549 further agreed with the ID that Enforcement Staff's methodology concerning the estimate of loss caused by BP's scheme constituted a reasonable approximation. In particular, the Commission found "that Enforcement Staff proved that every trade was at a minimum 'in connection with' jurisdiction transactions because every trade made pursuant to the manipulative scheme went into an index that, in turn, affected the price of jurisdictional transactions such as cash-out sales."⁵³⁰ Opinion No. 549 further rejected BP's contention that Enforcement Staff must prove that every trade bore the same characteristics of manipulation; finding that there "is no singular list of characteristics that will be found in every manipulation or every transaction or act made in furtherance of a manipulative scheme."⁵³¹ Opinion No. 549 described that the ALJ had given "significant weight" to Abrantes-Metz's unchallenged methodology calculating that BP's scheme suppressed prices at Houston Ship Channel between 1.5 and 2.2 cents during between September 19 and 30, between 1.2 cents to 1.5 cents in October, and between 0.5 cents and 0.7 cents in November.⁵³² Opinion No. 549 further described that the ALJ found persuasive Ronn's calculation multiplying the sum of open interest positions by the estimates of price impact, which yielded a product of approximately \$1.3 to \$1.9 million.⁵³³ Opinion No. 549 affirmed the ALJ's statement that Bergin, found that the amount of physical gas involved in BP's sales was approximately 10.6 Bcf, and that the volume of affected financial positions was approximately 25.3 Bcf.⁵³⁴

⁵²⁹ *Id.* P 382.

⁵³⁰ *Id.*

⁵³¹ *Id.*

⁵³² *Id.* P 378 (citing Initial Decision, 152 FERC ¶ 63,016 at P 194 (citing Ex. OE-129 at 146:9-147:1)).

⁵³³ *Id.* (citing Initial Decision, 152 FERC ¶ 63,016 at P 195).

⁵³⁴ *Id.*

b. Request for Rehearing

282. In its request for rehearing, BP contends that Opinion No. 549 erred in concurring with the ID's findings on estimates of loss and states that the Commission did not specifically address BP's arguments on this point.

283. First, BP states that Enforcement Staff's loss estimates were unreliable and "without merit," and that the ID ignored BP's argument that expert Abrantes-Metz's analysis was "fatally flawed."⁵³⁵ Specifically, BP suggests that Abrantes-Metz's range of estimates was abnormally large and contained a high amount of uncertainty. BP also states that the estimates fail to control for "(i) changes in price at the Texas/Gulf area, or (ii) any other basic control variables of fundamental supply and demand, which are common in models assessing market price impacts."⁵³⁶

284. Second, BP states that Enforcement Staff's expert Ronn incorporated Abrantes-Metz's flawed analysis, and also incorrectly included the financial impact of trades that Enforcement Staff did not assert were jurisdictional or manipulative. BP further states that Ronn ignored the fact that another staff expert identified "only 24 trade days on which purportedly jurisdictional sales were made."⁵³⁷ BP disputes the holding in Opinion No. 549 that every such trade was, at a minimum, "in connection with" jurisdictional transactions because each was made as part of an overall scheme.⁵³⁸

285. Third, BP contends that Ronn's calculations erroneously included days in which BP's physical trading was profitable, "thereby contradicting the alleged scheme."⁵³⁹ BP also states that Ronn's calculations erroneously include trading at Katy, which, BP contends, was never alleged.

c. Commission Determination

286. BP's arguments regarding the reliability of Enforcement Staff's estimate, including the price impact analysis provided by Abrantes-Metz, were previously raised

⁵³⁵ BP Rehearing Request at 154.

⁵³⁶ *Id.* (citing BP Br. on Exceptions at 83).

⁵³⁷ *Id.* at 155 (citing BP Br. on Exceptions at 83).

⁵³⁸ *Id.*

⁵³⁹ *Id.*

and considered by the Commission in Opinion No. 549.⁵⁴⁰ We find that Opinion No. 549 fully addressed these issues. Nevertheless, we continue to find, as we did in Opinion No. 549, that Abrantes-Metz provided substantial testimony on how she quantified BP's suppression of prices at Houston Ship Channel, and that BP provides no evidence to substantiate its claim that she failed to control for certain variables.⁵⁴¹ We further note that the Commission in *Barclays* endorsed the methodology that Ronn used to estimate total losses, and agree with Enforcement Staff's conclusions that Ronn's estimate was in fact conservative because it did not include non-Intercontinental Exchange transactions directly affected by the scheme or BP's sales.⁵⁴² We further find that Ronn was correct to include Katy in his loss calculations because Katy prices were highly correlated to Houston Ship Channel (price discovery by Katy market participants was mostly done at Houston Ship Channel), and because the scheme impacted prices at Katy.⁵⁴³ Finally, as discussed in detail above,⁵⁴⁴ we are not persuaded by BP's arguments concerning the number of violations.

2. Market Harm

a. Opinion No. 549

287. In Opinion No. 549 the Commission considered BP's market harm to be the scheme's impact on prices. In so doing, the Commission estimated the amount by which the index was moved by the manipulation and BP's benefiting position, or the amount of volume exposed to the manipulated index.⁵⁴⁵

b. Request for Rehearing

288. BP asserts that the 52 examples addressed by OE as to BP were not shown to be sales for resale in interstate commerce or to meet any of the hallmarks of manipulation identified by Abrantes-Metz. BP argues that OE has not alleged or proven that any of these trades are anything other than intrastate trades. BP further argues that Opinion

⁵⁴⁰ See Opinion No. 549, 156 FERC ¶ 61,031 at PP 377-79, 381-82.

⁵⁴¹ See *id.* P 381 (citing Enforcement Staff Br. Opposing Exceptions at 69).

⁵⁴² See *id.* (citing Enforcement Staff Br. Opposing Exceptions. at 69-70).

⁵⁴³ See *id.* (citing Enforcement Staff Br. Opposing Exceptions at 70).

⁵⁴⁴ See *supra* at section VII.A.

⁵⁴⁵ Opinion No. 549, 156 FERC ¶ 61,031 at P 367.

No. 549 alleged that the impact of the Commission's regulation on intrastate markets is "merely incidental."⁵⁴⁶ Thus, BP reiterates that there was an "absence of any jurisdictional physical sales" and contends that the Commission's disgorgement of intrastate profits, including "losses to the intrastate market" from financial trades "exceeds the jurisdiction of the Commission, under *Hunter v. FERC*".⁵⁴⁷

c. Commission Determination

289. BP's arguments were raised and fully addressed by the Commission in Opinion No. 549.⁵⁴⁸ Thus, we find no reason to disturb the Commission's determination of market harm based upon BP's manipulative conduct. Nevertheless, as discussed in detail above,⁵⁴⁹ we are not persuaded by BP's arguments on rehearing and continue to find, as the Commission did in Opinion No. 549, that BP's actions were unlawful as a consequence of being part of an intentional scheme to manipulate the market.⁵⁵⁰

⁵⁴⁶ BP Rehearing Request at 158 (citing Opinion No. 549, 156 FERC ¶ 61,031 at P 301 [sic]).

⁵⁴⁷ *Id.* (citing *Hunter*, 711 F.3d 155).

⁵⁴⁸ Opinion No. 549, 156 FERC ¶ 61,031 at PP 366-68.

⁵⁴⁹ *See supra* section VII.A.

⁵⁵⁰ BP's scheme was to manipulate the price of Commission-jurisdictional transactions through uneconomic trading of next-day, fixed-price natural gas at Houston Ship Channel, and transportation of natural gas from Katy to Houston Ship Channel, in a manner designed to artificially suppress the Houston Ship Channel *Gas Daily* index price relative to Henry Hub, and thereby benefit BP's Houston Ship Channel-Henry Hub spread position. In short, what Enforcement Staff has alleged is a cross-product or related-position manipulation, a type of scheme that the Commission has encountered in jurisdictional markets, in which an entity makes uneconomic trades or transport in the physical market in order to influence average prices at a particular location and thereby benefit derivative financial positions whose value is in some measure tied to those prices. Opinion No. 549, 156 FERC ¶ 61,031 at P 16.

3. Unjust Profits

a. Opinion No. 549

290. Opinion No. 549 noted that in the Hearing Order, the Commission directed the ALJ to make findings regarding the amount of profits BP obtained from its alleged manipulative conduct and to entertain “any reasonable method for calculating this amount.”⁵⁵¹ The Commission specifically ordered findings of both “a gross number of profits and a net amount that deducts BP’s losses from its physical trading.”⁵⁵² Opinion No. 549 reviewed the ALJ’s findings, including: (1) that BP grossed between \$233,330 and \$316,170 from its scheme based upon Bergin’s testimony applying Abrantes-Metz’s analysis of price impact using “but-for-pricing” and BP’s exposure to the Houston Ship Channel index each month;⁵⁵³ (2) that approximating BP’s net profits by subtracting its next-day fixed-price losses at Houston Ship Channel was reasonable;⁵⁵⁴ (3) the rejection of BP’s counter-arguments regarding the alleged non-reliability of estimates based on hypotheticals and proposal to modify Bergin’s historical analysis to reflect incremental P&L in broader market price movements;⁵⁵⁵ (4) the rejection of BP expert Evans’s calculation of P&L against the index absent BP’s sales; (5) BP’s counter proposal to modify Abrantes-Metz’s hypothetical “but-for” analysis to show the financial position’s impact on prices since it allegedly “double counts” BP’s losses;⁵⁵⁶ and (6) that BP’s net profits amounted to between \$165,749 and \$248,589.⁵⁵⁷ Opinion No. 549 further reviewed the ALJ’s finding that BP did not dispute “the use of the total [Houston Ship Channel] *Gas Daily* exposure to derive gross profits” or provide sufficient evidence to meaningfully counter Abrantes-Metz’s methodology.⁵⁵⁸

⁵⁵¹ *Id.* P 358 (citing Hearing Order, 147 FERC ¶ 61,130 at P 49).

⁵⁵² *Id.*

⁵⁵³ *See id.* P 368.

⁵⁵⁴ *Id.* PP 359, 366-68.

⁵⁵⁵ *See id.* PP 360, 366-68.

⁵⁵⁶ *Id.* PP 360, 366-68.

⁵⁵⁷ *Id.* PP 359-61, 368.

⁵⁵⁸ *Id.* P 359.

291. Opinion No. 549 also considered BP's exceptions to Bergin's profit computations, which BP alleged: (1) used a combination of hypothetical variables and actual pricing data; (2) omitted relevant information; (3) did not consider all of BP's positions; improperly used actual instead of incremental P&L; and (4) erroneously mixed real pricing data outcomes with hypothetical gains and actual losses as part of his "but-for" analysis. Opinion No. 549 further considered BP's argument that its transport costs should have been included in any overall loss analysis and that the ALJ failed to consider BP's "counterfactual" analysis showing net profits of \$47,000-\$74,000.⁵⁵⁹

292. Opinion No. 549 ultimately agreed with the ALJ that Enforcement Staff provided a "reasonable estimate" of unjust profits and noted that disgorgement "need only be a reasonable approximation of profits causally connected to the violation."⁵⁶⁰ The Commission further found that BP did not meet its burden to show that Enforcement Staff's estimate was not reliable. The Commission specifically found reasonable the approach that gross gains could be estimated by calculating the scheme's impact on prices (in this case, how much the index was moved by the manipulation) and then applying BP's benefiting positions (in this case, how much volume was exposed to the manipulated index). The Commission also found reasonable the approach of subtracting losses suffered in BP's physical trades (which manipulated the index) from the gross gains to identify an appropriate amount of disgorgement.⁵⁶¹

b. Request for Rehearing

293. BP asserts that Opinion No. 549 failed to address its argument that Bergin's historical P&L analysis included only selected BP positions while excluding others that provided a more reliable measure of BP's strategy.⁵⁶² BP also argues that Bergin's analysis was flawed because he used actual P&L rather than incremental P&L and his "but-for" analysis improperly combined hypothetical gains and actual losses.⁵⁶³ BP further contests Opinion No. 549's rejection of BP expert Evans' sale and volumetric assumptions, in addition to his removal of BP's trades from the index to calculate P&L. According to BP, Opinion No. 549 should not have rejected Evans' analysis due to the

⁵⁵⁹ See *id.* PP 363, 366-68.

⁵⁶⁰ *Id.* P 366.

⁵⁶¹ *Id.* PP 366-67.

⁵⁶² BP Rehearing Request at 159.

⁵⁶³ *Id.* at 160.

“double counting” of BP’s losses and certain differences in his P&L calculations.⁵⁶⁴ BP contends that Opinion No. 549 did not provide a reasoned analysis for considering BP’s physical trading losses but not its transport losses, nor did the Commission support its decision to mandate disgorgement in the amount of \$207,169.⁵⁶⁵

c. Commission Determination

294. We continue to find, as we did in Opinion No. 549 that Enforcement Staff provided a “reasonable estimate” of unjust profits.⁵⁶⁶ Specifically, we reiterate that, consistent with precedent, “disgorgement need only be a reasonable approximation of profits causally connected to the violation”⁵⁶⁷ and that once Enforcement Staff has met its burden of introducing a reasonable approximation, BP is “then obliged clearly to

⁵⁶⁴ In rejecting BP’s arguments attacking Enforcement Staff’s approach to estimate BP’s gross gains and impact on prices, Opinion No. 549 considered BP’s arguments that were rejected by the ALJ. Specifically, Opinion No. 549 rejected: BP’s assertion that estimates cited by Enforcement Staff were not reliable because they were based on hypotheticals; BP’s counterexample which modified Bergin’s historical analysis to reflect incremental P&L; BP’s argument that P&L should be calculated by taking the difference between the recalculated Houston Ship Channel price and the actual index (which resulted in no net profits); and BP’s assertion that Bergin’s actual P&L calculation should be modified by Abrantes-Metz’s hypothetical “but for” analysis to show the financial position’s impact on prices. Opinion No. 549, 156 FERC ¶ 61,031 at PP 359-60, 367-68.

⁵⁶⁵ BP Rehearing Request at 163.

⁵⁶⁶ Opinion No. 549 found that Enforcement Staff reasonably calculated BP’s gross profits to be in the range of \$233,330 to \$316,170, and its net gains to be between \$165,749 and \$248,589. Within that reasonable range, the Commission selected a disgorgement amount of \$207,169, which was the mid-point of BP’s net profits. Opinion No. 549, 156 FERC ¶ 61,031 at P 368.

⁵⁶⁷ *Id.* P 366 & n.856 (citing *Barclays*, 144 FERC ¶ 61,041 at P 148 (quoting *SEC v. Whittemore*, 659 F.3d 1, 8 (D.C. Cir. 2011) (quoting in part *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir.1989))); see also *Zacharias v. SEC*, 569 F.3d 458, 470 (D.C. Cir. 2009) (quoting same); *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995) (the disgorgement amount “need only be a reasonable approximation of the profits causally connected to the violation.”); *Allstate Ins. Co. v. Receivable Fin. Co., LLC*, 501 F.3d 398, 413 (5th Cir. 2007) (quoting same).

demonstrate that the disgorgement figure was not a reasonable approximation.”⁵⁶⁸ Here, we find that the key metrics used by Enforcement Staff’s expert to quantify BP’s scheme on prices comprises a comprehensive and reasonable analytical approach that considered: (1) selling at both the Katy and Houston Ship Channel locations when better prices were available at Katy; (2) selling more volume earlier in the day to increase market share during the period of price discovery; (3) selling at artificially low prices at Houston Ship Channel; and (4) increasing the proportion of their sales by hitting bids.⁵⁶⁹

295. To the extent Enforcement Staff’s reasonable estimates of P&L incorporated some uncertainty, we reiterate that it is a “well-established principle . . . that the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoers who create that uncertainty.”⁵⁷⁰ Importantly, the stated volume of BP’s physical natural gas sales and the volume of BP’s financial positions remain uncontroverted. Accordingly, we continue to find that the approach followed by both the ID and Opinion No. 549, which calculated the amount by which BP manipulated the index to then determine market harm and gross profits, was both supported by the facts and reasonable.

C. Adjudications Within five years following an Adjudication of Similar Misconduct

1. Prior Adjudications

a. Opinion No. 549

296. Opinion No. 549 reviewed the ALJ’s findings and determined that the Commission Settlement, DOJ Deferred Prosecution Agreement, and CFTC Settlement should enhance BP’s culpability score under the Commission’s Penalty Guidelines.⁵⁷¹ Opinion No. 549 determined that the ID appropriately considered Enforcement Staff’s advisory calculations under the Penalty Guidelines because they were merely a means to assess penalties as required under the NGA.⁵⁷²

⁵⁶⁸ *Id.* P 366 (citing *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1232).

⁵⁶⁹ *See, e.g., id.* P 17.

⁵⁷⁰ *Zacharias v. SEC*, 569 F.3d at 473 (citations omitted).

⁵⁷¹ Opinion No. 549, 156 FERC ¶ 61,031 at P 388.

⁵⁷² *Id.*

297. In addition, Opinion No. 549 rejected BP's argument that its prior settlements could not be considered because they occurred before promulgation of the Penalty Guidelines. The Commission reiterated its longstanding position that the Guidelines are merely advisory and were promulgated to assist the Commission in assessing penalties according to the relevant statutory factors enunciated in Section 22(c) of the NGA: (1) "the nature and seriousness of the violation" and (2) "the efforts to remedy the violation."⁵⁷³

b. Request for Rehearing

298. BP argues that Opinion No. 549 erred in affirming the ID's finding that the three prior settlements should be treated as adjudications, and states that the Commission should not be bound by Penalty Guidelines in this particular case. BP specifically asserts that there is no authority, other than the Penalty Guidelines, to support the Commission's decision to treat settlements as adjudications. To support its position, BP relies upon *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1108 (D.C. Cir. 1974), and claims that the Commission violated the Administrative Procedure Act's (APA's) notice requirements by characterizing that the Penalty Guidelines are "policy," while applying them as binding precedent – without the benefit of and protections provided by public notice and the opportunity for comment."⁵⁷⁴

299. BP further argues that Opinion No. 549 erred in applying the Penalty Guidelines at all, considering its prior settlements all concluded prior to the September 17, 2010 issuance of the Penalty Guidelines. BP also argues that Opinion No. 549 failed to adequately explain its departure from the Penalty Guidelines, arguing that the purpose of the policy statement – to provide notice and an opportunity to contemplate and agency's views before those views are applied to particular factual circumstances.⁵⁷⁵

c. Commission Determination

300. Section 22(c) of the NGA requires that: (1) the nature and seriousness of the violation; and (2) efforts to remedy the violation, be considered to determine penalty

⁵⁷³ 15 U.S.C. § 717t-1(c).

⁵⁷⁴ BP Rehearing Request at 165.

⁵⁷⁵ *Id.* at 168 (citing *Panhandle E. Pipe Line Co. v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999)).

amounts.⁵⁷⁶ The Penalty Guidelines do not replace that statutory requirement, but rather serve to advise the Commission in developing relevant factors to consider when applying the statute. Contrary to BP's arguments on rehearing, the Penalty Guidelines were subject to a robust notice and comment period⁵⁷⁷ and were issued approximately four-and-a-half years after EAct 2005. Thus, the Penalty Guidelines are neither the origin nor limits of the Commission's authority. Cases predating the Penalty Guidelines relied, in part, on the United States Sentencing Commission Guidelines' (Sentencing Guidelines) principles, on which the Penalty Guidelines are patterned.⁵⁷⁸ The Commission elected to issue the Penalty Guidelines to "add greater fairness, consistency, and transparency to our enforcement program."⁵⁷⁹ The Policy Statement on Penalty Guidelines further states that "the modified Penalty Guidelines do not restrict our discretion to make an individualized assessment based on the facts presented in a given case".⁵⁸⁰ In this case, Opinion No. 549, made no representations that the Penalty Guidelines were binding; to the contrary Opinion No. 549 stated

At the outset, we note that the Penalty Guidelines are merely advisory,⁵⁸¹ and were promulgated to assist the Commission in assessing penalties according to the relevant statutory factors enunciated in Section 22(c) of the NGA [...]. Thus, BP is subject to the penalties and factors that Congress enunciated in [EAct 2005]. Since the Guidelines are merely

⁵⁷⁶ 15 U.S.C. 717t-1(c)). The NGA was amended by EAct 2005 to provide that "[i]n determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation."

⁵⁷⁷ We further note that contrary to BP's representations and the facts set forth in *Pickus v. U.S. Board of Parole*, where rules were adopted by the Board of Parole that related to determination of prisoners' eligibility for parole without notice and comment, the Penalty Guidelines were subject to notice and comment.

⁵⁷⁸ Penalty Guidelines, 132 FERC ¶ 61,216 at PP 3, 16.

⁵⁷⁹ *Id.* P 2.

⁵⁸⁰ *Id.*

⁵⁸¹ Opinion No. 549, 156 FERC ¶ 61,031 at P 388 (citing Penalty Guidelines, 132 FERC ¶ 61,216 at P 32 ("our decision to adopt a guidelines-based approach does not restrict the discretion that we have always exercised and will continue to exercise in order to make an individualized assessment based on the facts presented in a given case."))).

a means by which the Commission achieves the assessment that Congress directed, applying them here does not implicate questions about retroactive rulemaking.”⁵⁸²

It follows that we are not persuaded by BP’s arguments that the Penalty Guidelines were applied in a manner that equated to binding precedent. For these reasons, we also are not persuaded that BP’s arguments that Opinion No. 549’s consideration of the Penalty Guidelines constituted retroactive rulemaking.⁵⁸³

301. We further find no reason to alter the Commission’s long-stated position, as articulated in the Penalty Guidelines, that prior settlements may be considered as adjudications for purposes of determining culpability-based civil penalty enhancements.⁵⁸⁴ Here, the settlements are particularly relevant as one is a Deferred Prosecution Agreement with the Department of Justice and the second is a Consent Order for Permanent Injunctive Relief with the CFTC, both of which are public, court-approved documents that contain unequivocal admissions by BP that in February 2004 certain BP Products North America (BPPNA) traders manipulated the February 2004 propane market for propane. The end result of these settlements was that BP agreed to both civil and criminal penalties. We note that in a similar situation, in *Barclays*, the Commission considered that Barclays had recently settled claims of manipulating the London Interbank Offer Rate at approximately the same time as its manipulation of the power markets, and asserted that “this prior history aggravates the seriousness of the offense” per section 1C2.3(c).⁵⁸⁵

⁵⁸² *Id.* P 388.

⁵⁸³ We note that the Penalty Guidelines are similar to the Sentencing Guidelines § 8C2.5.

⁵⁸⁴ As stated in Opinion No. 549, the Penalty Guidelines rejected the argument that prior settlements not be considered as “adjudications” which trigger prior history enhancements for penalty purposes. Opinion No. 549, 156 FERC ¶ 61,031 at P 389 (citing Penalty Guidelines, 132 FERC ¶ 61,216 at P 162).

⁵⁸⁵ *Barclays*, 144 FERC ¶ 61,041 at P 123 (The Commission agreed and added another two points).

302. The third settlement was with the Commission, where BP agreed to a penalty in 2007. We reiterate that pursuant to

Commission practice and procedures, we do not reach the settlement stage of our investigations until we have received a recommendation from Enforcement Staff and have independently concluded that it is appropriate to pursue settlement discussions. [...] staff will continue to close investigations where no violation is found and to close some investigations without sanctions for certain violations that are relatively minor and that result in little or no harm. Thus, given that we assess penalties only after receiving a recommendation from staff and independently deciding that it is appropriate to pursue settlement discussions, we believe prior settlements should be treated as ‘adjudications’.⁵⁸⁶

For these reasons, we continue to find, as the Commission did in Opinion No. 549, that BP’s three prior settlements, which similarly concerned market manipulation, were properly considered as factors relevant to the Commission’s assessment of civil penalties in this case.

2. BPPNA’s Settlement with the CFTC Expressly Applied to BP America and All Other BP Subsidiaries

a. Opinion No. 549

303. Of the three prior settlements considered for penalty assessment purposes by Opinion No. 549, two involved separate settlements by BP subsidiaries: BP Products North America (BPPNA) and BP America, Incorporated. Opinion No. 549 observed that BP did not contest the ALJ’s holding that the Commission has the authority to disregard the corporate form when necessary to achieve the purposes of the statute and further concluded that the interests of justice support treating BP’s prior settlements as applicable penalty factors.⁵⁸⁷

b. Request for Rehearing

304. On rehearing, BP contends that Opinion No. 549 did not have a proper basis to pierce the corporate veil and include the CFTC settlement entered into by BPPNA. BP

⁵⁸⁶ Penalty Guidelines, 132 FERC ¶ 61,216 at PP 162-64.

⁵⁸⁷ Opinion No. 549, 156 FERC ¶ 61,031 at P 390.

again acknowledges the Commission's authority to disregard the corporate form but asserts that such practice should be extraordinary.⁵⁸⁸ BP also alleged that Opinion No. 549 disregarded "long-standing Commission precedent" that requires respect of BP's corporate structure.⁵⁸⁹

305. BP further argues that the Penalty Guidelines Commentary states that:

in determining the prior history of an organization with separately managed lines of business, only the prior conduct or record of the separately managed line of business, a subpart of a for-profit organization that has its own management, has a high degree of autonomy from higher managerial authority, and maintains its own separate books of account. Corporate subsidiaries and divisions frequently are separately managed lines of business.⁵⁹⁰

c. Commission Determination

306. We are not persuaded by BP's argument on rehearing that the Commission did not have a proper basis to "pierce the corporate veil" and include the CFTC Settlement entered into by BPPNA. BP's argument seems to rely on the caption of the CFTC Settlement that is titled "*U.S. Commodity Futures Trading Commission v. BP Products North America*" as evidence that this settlement should only apply to the BPPNA line of business. However, paragraph three of the CFTC Settlement clearly states

BP hereby warrants and represents that the Board of Directors of BP has duly authorized, in a specific resolution that is attached hereto, the entry of this Consent Order by BP. *BP further agrees that the terms and conditions of this Order are binding upon any BP subsidiary or BP business group or entity that operates with or provides services for BP [...] in the United States.*⁵⁹¹

This language clearly applies the terms of the CFTC Settlement not only to BPPNA but to BP and all of its subsidiaries, business groups, and entities that operate with or

⁵⁸⁸ BP Rehearing Request at 170.

⁵⁸⁹ *Id.* at 171.

⁵⁹⁰ *Id.* (citations omitted).

⁵⁹¹ CFTC Settlement, Civil Action No. 06-cv-03503, at P 3 (emphasis added).

provides services for BP in the United States. Moreover, the facts that give rise to the CFTC Settlement are the same facts that give rise to the DOJ Settlement, which BP does not dispute. Finally, we note that both the CFTC Settlement and DOJ Settlement were served to the same Stephen R. Winters, Associate Group General Counsel for BP America Inc. Accordingly, we find that the Opinion No. 549 correctly considered the CFTC Settlement.

D. BP Violated an Injunction for Purposes of Penalty Guidelines

1. Opinion No. 549

307. Opinion No. 549 found that BP's culpability score should be enhanced by two points because, in addition to its misconduct here, BP also violated the injunction order that the CFTC had imposed within the five year period enunciated by the Penalty Guidelines.⁵⁹² Opinion No. 549 considered the CFTC's order language, which prohibited BP from "manipulating any commodity" and determined that its conduct here violated that portion of CFTC's order.⁵⁹³

2. Request for Rehearing

308. BP argues that Opinion No. 549 erred by not analyzing whether BP violated the express consent order language, which

Permanently restrained, enjoined, and prohibited [BP] from directly or indirectly engaging in any conduct that violates Section 6(c), 6(d) and 9(a)(2) of the [Commodity Exchange Act] including [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; and . . . [c]oncerning or attempting to corner any commodity in interstate commerce.⁵⁹⁴

⁵⁹² Opinion No. 549, 156 FERC ¶ 61,031 at P 396 & n.940 (citing CFTC Settlement, Civil Action No. 06-cv-03503, ¶ 83(a)(i)).

⁵⁹³ *Id.* P 396.

⁵⁹⁴ BP Rehearing Request at 172 (footnote omitted).

BP argues that neither the ALJ, nor the Commission, has jurisdiction to find that BP violated the relevant provisions of the Commodity Exchange Act⁵⁹⁵ and that such a finding could only be made by the district court.

3. Commission Determination

309. We continue to find, as we did in the ID and Opinion No. 549 that BP's conduct here is in substance and form a violation of the CFTC injunction order and was thus properly considered as an enhancement to BP's culpability score.⁵⁹⁶ As stated by Opinion No. 549, it is not necessary for the Commission to re-litigate BP's CFTC case or to engage in a detailed legal review of the statutory provisions that BP was prohibited from violating. Rather, it is sufficient to review the plain language of the order and apply BP's subsequent misconduct to determine whether a violation exists. That plain language, which BP proffered in its exceptions, states that the CFTC prohibited BP from "manipulating or attempting to manipulate the price of any commodity in interstate commerce."⁵⁹⁷ This is the very language the ID and Opinion No. 549 applied in this instance. We continue to find, as we did in the ID and Opinion No. 549, that BP's culpability score was properly enhanced by two points because, due to BP's violation of the CFTC Settlement's injunction.

E. BP's Compliance Program Does Not Merit Reducing Its Penalties

1. Opinion No. 549

310. Opinion No. 549 addressed the ALJ and Commission's findings with respect to BP's compliance program under the various factors set forth in section 1B2.1(b) of the *Penalty Guidelines*, including: Factor 1, Internal Standards and Procedures to Prevent and Detect Violations; Factor 2, High-Level Management Knowledge and Oversight of Internal Compliance Programs; Factor 3, Reasonable Efforts to Screen Out "Bad Actors"; Factor 4, Reasonable Communications and Training Efforts; Factor 5, Reasonable Steps to Evaluate Program Effectiveness, Including Confidential Avenues for Employees to Report Noncompliance; Factor 6, Compliance Incentives and Noncompliance Sanctions; and Factor 7, Reasonable Responsive Steps After a Violation has been Detected.

⁵⁹⁵ *Id.* at 172-73.

⁵⁹⁶ If, as in this case, the prior history involved another enforcement agency, "it must be similar misconduct within the prior ten years for the enhancement to apply." *Penalty Guidelines*, 132 FERC ¶ 61,216 at P 166. We further note that this guideline closely tracks sections 8C2.5(c) and (d) of the Sentencing Guidelines.

⁵⁹⁷ CFTC Settlement at 83(a).

Opinion No. 549 also considered BP's exceptions regarding each discrete factor, as well as Enforcement Staff's response, and determined that BP's compliance program does not satisfy the factors articulated in the Penalty Guidelines.⁵⁹⁸

2. Request for Rehearing

311. BP asserts that Opinion No. 549 failed to provide reasoned decision making because it focused on what it deems are minor exceptions, rather than BP's overall extensive compliance efforts. BP further argues that the Commission should be bound by Enforcement Staff's previous finding that BP's compliance program was in line with industry standards and supported with sufficient resources. BP contends that its compliance efforts should be viewed more broadly, and outside the scope of its conduct at issue here.⁵⁹⁹

3. Commission Determination

312. BP's arguments on rehearing have not persuaded us that the findings in the ID and Opinion No. 549 regarding BP's deficiencies in its compliance program were in error. We find that the ALJ conducted extensive fact-finding and analysis on this issue.⁶⁰⁰ For instance, BP's monitoring reports failed to include key markers of manipulation, such as BP's actual trading positions, and failed to track traders' P&L.⁶⁰¹ A review of senior management's actions and involvement with compliance issues showed a lack of serious engagement and its processes were devoid of reasonable systems to screen out "bad actors."⁶⁰² Additionally, BP's anti-manipulation training failed to address physical for financial manipulation⁶⁰³ and BP took no discernable, reasonable steps to evaluate the effectiveness of its program.⁶⁰⁴ Upon this record as a whole, BP did not satisfy the Penalty Guideline's requirement that, to be an effective compliance program, an entity

⁵⁹⁸ Opinion No. 549, 156 FERC ¶ 61,031 at PP 397-402.

⁵⁹⁹ BP Rehearing Request at 176.

⁶⁰⁰ See Initial Decision, 152 FERC ¶ 63,016 at PP 239-64; Opinion No. 549, 156 FERC ¶ 61,031 at PP 401-2.

⁶⁰¹ Initial Decision, 152 ¶ FERC 63,016 at P 242.

⁶⁰² *Id.* P 249.

⁶⁰³ *Id.* P 251.

⁶⁰⁴ *Id.* PP 252-53.

must minimally meet each of the seven factors outlined in section 1B2.1(b) of the Penalty Guidelines.⁶⁰⁵ Finally, consistent with the ID's analysis, we also do not consider Enforcement Staff's investigatory position on the question of BP's compliance to be binding once new – and critical – evidence of BP's compliance program was revealed during the discovery phase of this litigation.⁶⁰⁶

VIII. Reconsideration or Clarification of Payment Functions

A. Opinion No. 549

313. Ordering Paragraph (B) of Opinion No. 549 states that “The Commission directs BP to pay to the United States Treasury by a wire transfer the sum of \$20,160,000 in civil penalties within 60 days after the issuance of this order, as discussed in the body of this order. If BP does not make this civil penalty payment within the stated time period, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19(a)(2020) from the date that payment is due.” Ordering Paragraph (C) states that “The Commission directs BP, within 60 days after the issuance of this order to disgorge its unjust profits in the amount of \$207,169 to the Low Income Home Energy Assistance Program of the state of Texas for the benefit of its energy consumers.”

B. Request for Rehearing

314. BP seeks clarification or reconsideration of the Commission's payment directives. BP interprets Ordering Paragraph (B) as stating that “BP may not pay the civil penalty within the 60 days specified, but that interest will accrue from the date of payment forward pursuant to Commission regulations while the Commission considers BP's request for rehearing and while a reviewing court considers BP's further appeal, if necessary.”⁶⁰⁷ BP states that, if that is in fact the intent of Ordering Paragraph (B), it does not object. However, if to the extent that Ordering Paragraph (B) contemplates a payment prior to the date on which Opinion No. 549 becomes final and non-appealable, BP seeks clarification or reconsideration. BP asserts that if the Commission on rehearing or a reviewing court determines that BP's objections are valid, wholly or in part, those objections may reduce or eliminate the civil penalty. Thus, BP argues that mandating

⁶⁰⁵ See, e.g., Enforcement Staff's summation of BP's compliance program deficiencies regarding each of the seven factors. Opinion No. 549, 156 FERC ¶ 61,031 at 401.

⁶⁰⁶ Initial Decision, 152 FERC ¶ 63,016 at P 240.

⁶⁰⁷ BP Rehearing Request at 195.

payment prior to that ultimate determination and requiring BP to seek recoupment from the United States Treasury would introduce needless delay, complexity, and uncertainty.⁶⁰⁸

315. BP asserts that unlike Ordering Paragraph (B), Ordering Paragraph (C) mandates the payment of the challenged disgorgement amounts to the Low Income Home Energy Assistance Program within 60 days. BP asserts that the Low Income Home Energy Assistance Program is not subject to the jurisdiction of the Commission and doubts that the Commission as a result could direct the Low Income Home Energy Assistance Program to return any disgorgement amounts ultimately disallowed by either the Commission on rehearing or by a reviewing court. BP states that it is both willing and able to post a bond (under protest) during the pendency of review proceedings in the full amount of the disgorgement amount. BP has no objection to providing additional interest on the disgorgement amounts during the pendency of the review proceedings, pursuant to Commission regulations.⁶⁰⁹

316. Following its Rehearing Request, on September 7, 2016, BP also filed a Motion for Modification of Payment Directive (Motion). In the Motion, BP states that it is unable to comply with Ordering Paragraph (C) directing disgorgement because it discovered that it cannot send the disgorgement monies to the Low Income Home Energy Assistance Program of Texas in the manner required by the Order.⁶¹⁰ BP explains that the Texas Department of Housing administers the Low Income Home Energy Assistance Program for Texas, and that department is only permitted to disburse amounts approved by the Texas legislature and is not set up to receive amounts directed by the Commission. BP stated that it had been provided with a list of charities that administer the Low Income Home Energy Assistance Program in Texas, and BP included that list in its filing. Accordingly, BP requested that the Commission modify Ordering Paragraph (C) to specify the charity or charities to which BP should pay the disgorgement amount.

317. On September 12, 2016, the Commission stayed the directive stated in Ordering Paragraph (C) of Opinion No. 549, provided that interest will continue to accrue on unpaid monies during the pendency of the stay, and determined that “[u]nless the

⁶⁰⁸ *Id.* at 195-96.

⁶⁰⁹ *Id.* at 196.

⁶¹⁰ Opinion No. 549 directed as follows: The Commission directs BP, within 60 days after the issuance of this order, to disgorge its unjust profits in the amount of \$207,169 to the Low Income Home Energy Assistance Program of the state of Texas for the benefit of its energy consumers. Opinion No. 549, 156 FERC ¶ 61,031 at Ordering Paragraph (C).

Commission orders otherwise, this stay will remain in effect until the Commission issues an order on BP's pending Request for Rehearing."⁶¹¹

C. Commission Determination

318. We disagree with BP's characterization of Ordering Paragraph (B), requiring BP to pay the civil penalty to the United States Treasury, in its request for clarification or reconsideration of the Commission's penalty payment. Whereas BP avers that Ordering Paragraph (B) of Opinion No. 549 states that BP "may *not* pay the civil penalty within the 60 days specified, but that interest will accrue from the date of payment forward. . ." (italics added),⁶¹² the actual order directs BP to pay the United States Treasury by a wire transfer the sum of \$20,160,000 in civil penalties within 60 days of the issuance of this order and further, if BP does not make the payment within this time period, interest will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a.⁶¹³

319. Ordering Paragraph (C) directs, within 60 days of the order, BP to disgorge unjust profits directly to the Low Income Home Energy Assistance Program in the amount of \$207,169. In light of BP's Motion on this point, Ordering Paragraph (C) of Opinion No. 549 is modified to direct that the disgorgement amount of \$207,169 be paid in full to one or more of the entities identified in the Motion's "*2016 Comprehensive Energy Assistance Program Subrecipient List*."⁶¹⁴ Our revised Ordering Paragraph (C) simply modifies that the disgorged profits be directed to non-profits that *disburse* the Low Income Home Energy Assistance Program of Texas funds, rather than to the Texas Department of Housing. To be clear, BP shall attempt to ensure that the Low Income Home Energy Assistance Program of Texas beneficiaries throughout the geographic regions of Texas are represented by the non-profit(s) chosen to receive the disgorged profits.

320. The Commission has statutory authority to order disgorgement of money received as the result of a violation (and other equitable remedies) through the "necessary or appropriate" powers set forth in NGA § 16: "[t]he Commission shall have power to

⁶¹¹ *BP America Inc.*, 156 FERC ¶ 61,174 at P 5.

⁶¹² BP Rehearing Request at P 195.

⁶¹³ Opinion No. 549, 156 FERC ¶ 61,031 at P 410.

⁶¹⁴ This approach will cure BP's assertion that Texas Department of Housing, the state agency that administers the Low Income Home Energy Assistance Program for Texas, is only permitted to disburse amounts approved by the Texas legislature and is not set up to receive amounts directed by the Commission.

perform any and all acts, and to prescribe . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of [the Act].”⁶¹⁵ This power mirrors the authority set forth in the FPA, the Commission’s other bedrock implementing statute.⁶¹⁶

321. Disgorgement is a key tool used by the Commission to prevent unjust enrichment and remedy harms. The Commission applies disgorgement “[i]n the case of pecuniary gains a result of the violation” and “enters a disgorgement order for the full amount of the gain plus interest.”⁶¹⁷ Thus, the Commission has made clear that its use of disgorgement is a *remedial* act to correct for unjust and unreasonable rates separate from civil penalties, which aim to encourage compliance with the law.⁶¹⁸

322. The disgorgement ordered by the Commission in this case is purely a remedial form of equitable relief; it is not a separate penalty. One of the key hallmarks that distinguishes penal disgorgement from remedial disgorgement is whether it is restitutionary.⁶¹⁹ Here, the disgorgement required by Ordering Paragraph (C) is entirely restitutionary. Pursuant to the Commission’s longstanding practice, once paid, the disgorgement amount will be returned to the victims of fraud in this case—that is, individuals impacted by the natural gas market during the Manipulation Period—through

⁶¹⁵ 15 U.S.C. § 717o.

⁶¹⁶ See e.g., *Niagara Mohawk Power Corp. v. F.P.C.*, 379 F.2d 153, 159 (D.C. Cir. 1967) (FERC has broad discretion to order disgorgement under the FPA); *Pub. Utils. Comm. of the State of Cal. v. FERC*, 462 F.3d 1027, 1048 (9th Cir. 2006) (FERC “has remedial authority to require that entities violating the [FPA] pay restitution for profits gained as a result of a statutory or tariff violation. This authority derives from [section] 309 of the [FPA]”); see also *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986) (it is within FERC’s remedial authority “to restore the *status quo ante* and prevent the unjust enrichment of the wrongdoer”).

⁶¹⁷ Penalty Guidelines, 132 FERC ¶ 61,216 at §1B.1.1(a).

⁶¹⁸ See *id.* at §1A1.1.2.

⁶¹⁹ See *Chauffers, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (“We have characterized damages as equitable where they are restitutionary, such as in action[s] for disgorgement of improper profits.”).

an allocation to non-profit entities that administer a Low Income Home Energy Assistance Program in Texas.⁶²⁰

323. Further, as we now continue to find that Opinion No. 549's overall conclusions, including its penalty directives, the interest payable shall be calculated as appropriate under 18 C.F.R. § 35.19(a) to the date of this order and added to the civil penalty and disgorgement of unjust profit sums previously set forth.⁶²¹

IX. Separation of Functions

A. Request for Rehearing

324. In its Request for Rehearing, BP does not allege any specific due process violations. Rather, it asserts that the Commission's separation of functions rule conflicts with the APA⁶²² in a manner that fails to prohibit invested investigators from participating in Opinion No. 549.⁶²³ Specifically, BP asserts that ALJ's decision to deny its request for a privilege log, to determine whether the Commission's investigators from the period before the Order to Show Cause participated in or advised the Commission's decision with respect to Opinion No. 549 in violation of section 554(d)(2) of the APA, also thwarted its ability to verify the Commission's compliance with 554(d)(2).⁶²⁴

B. Commission Determination

325. The Commission's rule regarding separation of functions is as follows:

In any proceeding in which a Commission adjudication is made after hearing, or in any proceeding arising from an investigation under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter, no officer, employee, or agent assigned to work upon the proceeding or to assist in the trial thereof, in

⁶²⁰ As the Commission's disgorgement is remedial and compensatory; it is distinguishable from the "disgorgement" at issue in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

⁶²¹ See also 18 C.F.R. §154.501 (2020) (discussing interest on refunds); 18 C.F.R. § 385.713 (2020) (a request for rehearing is not a stay of proceedings).

⁶²² 5 U.S.C. § 554(d)(2).

⁶²³ BP Rehearing Request at 194.

⁶²⁴ *Id.* at 191.

that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings. 18 C.F.R. § 385.2202 (2017) (Separation of functions (Rule 2202)).

326. The APA's relevant provision states as follows:

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. 5 U.S.C. § 554(d)(2) (2012).

327. Although both provisions address the issue with slight variation, both require the same fundamental condition: that an individual involved with the investigative or prosecutorial portion of the case cannot also participate in the agency review or decision on the matter.⁶²⁵ As such, we find that BP's argument that the Commission's long-

⁶²⁵ The Commission's separation of functions has recently been well described as such:

If the case is not resolved during the investigation stage, Enforcement staff may recommend that the Commission institute enforcement proceedings. The Enforcement staff first provides its recommended findings of fact and conclusions of law to the respondent, who may submit a response. The recommendations and any response are submitted to the Commission. If the Commission determines the matter should be pursued, the Commission issues an 'order to show cause and notice of proposed penalty,' which order gives the respondent an opportunity to explain why it did not violate the NGA or FERC's regulations, rules, or orders, as the Enforcement staff contends, and why proposed civil penalties should not be assessed. In this case, the Order to Show Cause directed that Plaintiffs 'should address any matter, legal, factual, or procedural, that they would urge the Commission to consider in this matter.' The Enforcement staff may then submit a reply for the Commission and respondent's consideration. Upon the issuance of an order to show cause, involved Enforcement staff members are

standing practice and procedures regarding separation of functions runs afoul of the APA is unsupported.

328. We reject BP's assertion that the ALJ's decision to deny its request for a privilege log thwarted its ability to verify the Commission's compliance with 554(d)(2). BP did not raise this issue in its brief on exceptions to the Initial Decision. Section 385.711(d)(2) of the Commission's procedural rules provides that, if "a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived."⁶²⁶ Accordingly, BP has waived any objection to the ALJ's denial of its request for a privilege log. Moreover, Section 385.711(d)(3) provides that, having waived an objection to the initial decision, a party may not raise that objection before the Commission on rehearing, unless otherwise ordered by the Commission.⁶²⁷ As a rule, we reject requests for rehearing that raise a novel issue, unless we find that the issue could not have been previously presented, *e.g.*, claims based on information that only recently became available or concerns prompted by a change in material circumstances.⁶²⁸ Here, we find that there are no material changes that warrant consideration of this issue.

designated as 'non-decisional' and may not advise the Commission on the disposition of the matter." *Total Gas & Power North America, Inc. v. Federal Energy Regulatory Commission*, Civil Action No. 4:16-1250 United States District Court (S.D. Texas) 2016 WL 3855865 (citing 2008 Policy Statement; 18 C.F.R. §§ 385.2201–.2202 (other citations omitted)).

⁶²⁶ 18 C.F.R. § 385.711(d)(2) (2020).

⁶²⁷ *Id.* § 385.711(d)(3).

⁶²⁸ *See, e.g., Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 250 (2016) (explaining that novel issues raised on rehearing are rejected "because our regulations preclude other parties from responding to a request for rehearing and such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision") (internal quotations omitted).

X. BP's Motion to Lodge, to Reopen the Proceeding, and to Dismiss, or in the Alternative, for Reconsideration

A. BP's Motion

329. In its Motion to Lodge, to Reopen the Proceeding, and to Dismiss, or in the Alternative, for Reconsideration (Motion), BP requests that the Commission lodge two judicial decisions issued in 2017 after the Commission issued Opinion No. 549, or reopen the record to the extent it deems necessary pursuant to Rule 716.⁶²⁹ These decisions are *FERC v. Barclays Bank PLC (Barclays II)*⁶³⁰ and *Kokesh v. SEC (Kokesh)*.⁶³¹ BP argues that the two judicial decisions represent changes in the law that applied throughout this proceeding with regards to the applicable five-year federal statute of limitations, 28 U.S.C. § 2462.⁶³² Based on that changed law, BP requests that the Commission dismiss the case.⁶³³ In the alternative, BP requests that the Commission treat its Motion as a request for reconsideration of Opinion No. 549.⁶³⁴

330. Section 2462 provides that “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued...”⁶³⁵ Thus, the statute requires that an agency enforcement “proceeding” be “commenced” within five years, otherwise it will be time-barred. In this case, BP’s alleged manipulative scheme occurred during an Investigative Period that runs from September 18, 2008 through November 30, 2008.⁶³⁶ Thus, the Commission was

⁶²⁹ 18 C.F.R. § 385.716(c) (2020).

⁶³⁰ *FERC v. Barclays Bank PLC*, No. 2:13-cv-02093-TLN-DB, 2017 WL 4340258, slip. op. (E.D. Cal. Sept. 29, 2017).

⁶³¹ *Kokesh*, 137 S. Ct. 1635.

⁶³² BP Motion at 2.

⁶³³ *Id.* at 1, 4-11, 12.

⁶³⁴ *Id.* at 1, 11-12.

⁶³⁵ 28 U.S.C. § 2462.

⁶³⁶ Opinion No. 549, 156 FERC ¶ 61,031 at P 2.

required to commence a “proceeding” by September 18, 2013, in order to satisfy section 2462 with respect to the entire Investigative Period.

331. BP relies on *Barclays II* to argue that the August 5, 2013 Order to Show Cause in this proceeding did not establish a “proceeding” within the meaning of section 2462.⁶³⁷ Rather, BP argues that the Commission did not establish the requisite “proceeding” until it issued the order setting this case for hearing on May 15, 2014, outside the requisite five-year period.⁶³⁸

332. In *Barclays II*, the Eastern District of California addressed what constitutes the requisite “proceeding” for purposes of tolling the statute of limitations in the context of the FPA, 16 U.S.C. § 823b(d)(3). Pursuant to the FPA, in order to assess civil penalties for violations, FERC must first give notice of the proposed penalty and inform the defendant of the opportunity to elect between two options for adjudicating whether a penalty should be assessed, and if so, in what amount.⁶³⁹ Generally, “Option 1” provides for assessment of “the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing...before an administrative law judge,” with the opportunity for traditional judicial review in a circuit court of appeals.⁶⁴⁰ “Option 2,” on the other hand, provides that the Commission “shall promptly assess such penalty, by order,” with subsequent *de novo* judicial review in a district court.⁶⁴¹ The respondent in *Barclays II* chose Option 2. Ultimately, in *Barclays II* the court found that the statute of limitations was not tolled when FERC Staff issued its order to show cause. The court found that, within the context of FPA “Option 2,” the order to show cause did not commence a “proceeding” within the meaning of section 2462.⁶⁴² Specifically, the court explained that the Option 2 Administrative Penalty Assessment Process triggered by the order to show cause, by which FERC “promptly” assessed a penalty without an

⁶³⁷ BP Motion at 9-11.

⁶³⁸ *Id.* at 11.

⁶³⁹ 16 U.S.C. § 823b(d)(1)-(3).

⁶⁴⁰ *Id.* § 823b(d)(2)(A)-(B).

⁶⁴¹ *Id.* § 823b(d)(3)(A)-(B).

⁶⁴² *Barclays II*, 2017 WL 4340258 at *9-14. The court also disagreed with FERC that because the order to show cause gave the defendant detailed notice of the allegations against him, it was sufficient to toll the statute of limitations. *Id.* at *14-15 (noting that in the FPA Congress did not provide for tolling based on statutory notice).

administrative hearing before an administrative law judge, “does not constitute a ‘proceeding’ within the meaning of § 2462” because it is not sufficiently adversarial.⁶⁴³

333. In its Motion, BP argues that under the holding of *Barclays II*, the Commission must establish an adversarial proceeding in order to satisfy the section 2462 statute of limitations. BP contends that the August 5, 2013 Order to Show Cause did not commence such an adversarial proceeding.⁶⁴⁴ BP argues instead that, at the earliest, an adversarial proceeding was initiated by the Order Setting the Matter for Hearing, which was not issued until May 15, 2014, outside of the five year limitations period.⁶⁴⁵ Therefore, BP argues that this proceeding is time-barred and should be dismissed.⁶⁴⁶

334. BP relies on *Kokesh* to argue that section 2462 applies not only to the \$20,160,000 in civil penalties imposed by Opinion No. 549, but also to the requirement that BP disgorge \$207,169 in unjust profits.⁶⁴⁷

335. In *Kokesh*, the Supreme Court held that the five year limitations period found in section 2462 applies to claims by the Securities and Exchange Commission (SEC) for “disgorgement imposed as a sanction for violating federal securities law.”⁶⁴⁸ The Court reached this holding based on its finding that “SEC disgorgement constitutes a penalty,” because it seeks to redress a wrong to the public at large (rather than to a particular individual) and it is imposed to deter future violations (rather than to compensate a victim).⁶⁴⁹ BP argues that therefore, based on its argument that the Order to Show Cause

⁶⁴³ *Id.* at *11-12, 14 (finding that a “proceeding” within the meaning of section 2462 “must involve an ‘adversarial adjudication’ to be tantamount to a ‘prosecution’” and that FERC’s Administrative Penalty Assessment Process was tantamount to a “decision to prosecute rather than a ‘prosecution’”).

⁶⁴⁴ BP Motion at 11.

⁶⁴⁵ *Id.*

⁶⁴⁶ *Id.* at 9-11.

⁶⁴⁷ *Id.*

⁶⁴⁸ *Kokesh*, 137 S. Ct. at 1639.

⁶⁴⁹ *Id.* at 1642-44.

did not trigger an adversarial proceeding such that the statute of limitations was tolled, the assessment of disgorgement in this proceeding was similarly time-barred.⁶⁵⁰

B. Answers

336. In its Answer, Enforcement Staff argues that BP has not provided adequate procedural or substantive grounds to reopen the proceeding, after failing to raise a statute of limitations defense at any point over the past four years.⁶⁵¹ Further, Enforcement Staff asserts that the *Barclays II* and *Kokesh* decisions do not represent an “extraordinary change in the law relevant to consideration of the statute of limitations” because neither decision addresses enforcement actions brought by the Commission pursuant to the Natural Gas Act (NGA), 15 U.S.C. § 717 *et seq.*⁶⁵² Enforcement Staff argues that *Barclays II* does not apply to this proceeding, because, unlike in *Barclays II* where the defendant elected the “prompt assessment” process of FPA Option 2 (with subsequent *de novo* review), the Order to Show Cause “in this NGA case commenced a single, unified adversarial administrative adjudication at the Commission, complete with discovery and an ALJ hearing that constituted a ‘proceeding’ within the meaning of section 2462.”⁶⁵³ Enforcement Staff also asserts that disgorgement under the NGA is remedial in nature and therefore remains unaffected by the limitations period in section 2462, “notwithstanding the *Kokesh* ruling, which was based on the *punitive* nature of the SEC disgorgement.”⁶⁵⁴ Finally, Enforcement Staff argues that BP waived its right

⁶⁵⁰ BP Motion at 9-11. In its Motion, BP does not go so far as to explain why it believes disgorgement under the Natural Gas Act should be treated the same as disgorgement for violations of federal securities law.

⁶⁵¹ Enforcement Staff Answer at 1-2. Enforcement Staff notes that the Commission requires “extraordinary circumstances” to reopen the record under Rule 716, given the need for “finality in the administrative process.” *Id.* at 4 (citing *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,624 (1991), *pet. for reviewed denied sub nom.*, *Michigan Mun. Co-op v. FERC*, 990 F. 2d 1377 (1993)). Enforcement Staff also notes that when seeking to lodge material in the record, parties must “act expeditiously to bring the information to the Commission’s attention” and must show that the information assists the Commission in its decision-making process. *Id.* at 5 (citing *Cal. Indep. Sys. Operator Corp.*, 139 FERC ¶ 61,072, at P 8 (2012)). Enforcement Staff asserts that BP has failed to meet both of these stringent standards. *Id.* at 4-6.

⁶⁵² *Id.* at 6, 8-23.

⁶⁵³ *Id.* at 9.

⁶⁵⁴ *Id.* at 18 (emphasis in original).

to raise a statute of limitations defense at this phase in the proceeding by previously failing to timely raise the defense, despite not being precluded from doing so.⁶⁵⁵

337. BP subsequently filed an Answer to Enforcement Staff's Answer arguing that it has met the standards for granting a motion to lodge, to reopen the record, or in the alternative for reconsideration.⁶⁵⁶ BP asserts that contrary to Enforcement Staff's arguments regarding the relevance and applicability of the two decisions, *Barclays II* and *Kokesh* go to the "core issue" of the Commission's authority to order civil penalties and disgorgement in this case.⁶⁵⁷ Finally, BP argues that it has not waived the defense of the statute of limitations, because prior to seeking rehearing, "Commission and judicial precedent did not support the argument that the civil penalty and disgorgement assessments were time-barred."⁶⁵⁸

C. Commission Determination

338. We find that BP has waived any statute of limitations defense and therefore has similarly waived its right to raise any argument or present any evidence in support thereof.⁶⁵⁹ Prior to filing the instant Motion, BP has not previously pled or asserted a statute of limitations defense.⁶⁶⁰

⁶⁵⁵ *Id.* at 23-28. Enforcement Staff asserts that no exception to the waiver rule should apply, because "BP cannot show...that there was a prior authoritative decision that made the statute of limitations defense unavailable." *Id.* at 8.

⁶⁵⁶ BP Answer to Enforcement Staff Answer at 2.

⁶⁵⁷ *Id.* at 3.

⁶⁵⁸ *Id.* at 8-10.

⁶⁵⁹ *SFPP, L.P.*, 150 FERC ¶ 61,097, at P 30 (2015) (finding waiver of procedural arguments when party failed to raise them in brief on exceptions; therefore, party could not raise those argument on rehearing); *Port Petroleum, Inc.*, 47 FERC ¶ 63,033, at 65,097 (1989) ("Matters asserted as affirmative defenses in the Answer but not argued on brief are deemed waived."); *Canal Ref. Co.*, 37 FERC ¶ 61,329, at 61,984 n.2 (1986) (failure to present argument on an affirmative defense results in waiver); *Exxon Co., U.S.A.*, 35 FERC ¶ 61,033, at 61,056 n.3 (1986) (same).

⁶⁶⁰ BP Answer to Enforcement Staff Answer at 8 (admitting failure to assert statute of limitations defense at any time prior to seeking rehearing).

339. In this case, the Commission issued its Order to Show Cause on August 5, 2013, directing BP to show cause why the Commission should not find that BP manipulated the next-day fixed price market at Houston Ship Channel from September through November 30, 2008. The Commission's procedural rules require that respondents "must, to the extent practicable...set forth every defense relied on" in their answer to an order to show cause.⁶⁶¹ The Order to Show Cause expressly referred to this requirement,⁶⁶² and included an ordering paragraph stating that "Respondent [in its answer] should address any matter, legal, factual or procedural, that it would urge the Commission to consider in this matter."⁶⁶³

340. BP filed its Answer to the Order to Show Cause on October 4, 2013. That was more than five years after the September 18, 2008 commencement of the Investigative Period. However, BP did not assert, in even the most conclusory fashion, any statute of limitations defense.⁶⁶⁴ Further, BP did not raise a statute of limitations defense in any manner during the lengthy administrative hearing. For example, while BP raised numerous issues in its June 13, 2014 request for rehearing of the May 15, 2014 order setting this case for hearing and denying BP's motion to dismiss, BP did not raise any issue concerning the statute of limitations. Nor did BP raise the issue in any of its pleadings filed with the Presiding Judge or in its brief on exceptions to the Initial Decision. Section 385.711(d)(2) of the Commission's procedural rules provides that, if "a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived."⁶⁶⁵ Moreover, Section 385.711(d)(3) provides that, having waived an objection to the initial decision, a party may not raise that objection before the Commission on rehearing, unless otherwise ordered by the Commission.⁶⁶⁶

⁶⁶¹ 18 C.F.R. § 385.213(c)(2) (2020).

⁶⁶² *BP America Inc.*, 144 FERC ¶ 61,100, at P 3 n.8 (2013) (Order to Show Cause).

⁶⁶³ *Id.* at Ordering Paragraph (C).

⁶⁶⁴ *See Canal Ref. Co.*, 37 FERC ¶ 61,329 at 61,984 n.2 (raising an affirmative defense without presenting any supporting substantive argument constitutes waiver of that defense); *see also Exxon Co., U.S.A.*, 35 FERC ¶ 61,033 at 61,056 n.3 (same).

⁶⁶⁵ 18 C.F.R. § 385.711(d)(2).

⁶⁶⁶ *Id.* § 385.711(d)(3).

341. Because BP has heretofore failed to raise the defense of the statute of limitations and therefore waived all arguments related thereto, we deny BP's Motion as an impermissible attempt to raise new defenses and/or arguments on rehearing that were not previously raised in the Answer to the Order to Show Cause, at hearing, or on exception to the Initial Decision.⁶⁶⁷ Regardless of how BP stylizes its Motion (to lodge, to reopen, to dismiss, or for reconsideration), it cannot overcome the prior waiver.

342. We do not agree with BP that prior to the issuance of the *Barclays II* opinion, BP was precluded from raising the issue of whether the issuance of the Order to Show Cause was sufficient to institute a "proceeding" within the meaning of section 2462, or whether such a proceeding was not initiated until issuance of the Hearing Order. BP contends that "at all times relevant to this matter...Commission and judicial precedent did not support the claim that the Commission's imposition of civil penalties and disgorgement in this case were time-barred by Section 2462"⁶⁶⁸ and that "[t]he Commission's position has consistently been that the issuance of an Order to Show Cause commences a "proceeding" within the meaning of Section 2462."⁶⁶⁹ To support this argument, BP cites Order No. 670⁶⁷⁰ and two federal district court decisions.⁶⁷¹ Order No. 670 merely states that the Commission intends, pursuant to section 2462, that "any administrative action for violation of the [anti-market manipulation rule] be commenced within five years of the date of the fraudulent or deceptive conduct."⁶⁷² Order No. 670 does not establish whether

⁶⁶⁷ See *Demand Response Compensation in Organized Wholesale Energy Markets*, 137 FERC ¶ 61,215 (2011) (denying motion to lodge where filing did not respond to any arguments raised on rehearing, but rather added supplemental material to rehearing request more than two months following the deadline for filing requests for rehearing); *Re CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 61,625 (1991) (rejecting motion to lodge supplemental materials where "they add arguments that, by law, must have been made within the 30-day filing deadline for rehearings").

⁶⁶⁸ BP Motion at 7.

⁶⁶⁹ *Id.* at 5-6.

⁶⁷⁰ Order No. 670, 114 FERC ¶ 61,047 at P 62 n.124, *reh'g denied*, 114 FERC ¶ 61,300 (2006).

⁶⁷¹ BP Motion at 6. BP cites the decisions in *FERC v. Silkman*, 177 F. Supp. 3d 683 (D. Mass. 2016) (*Silkman*) and *FERC v. Barclays Bank PLC*, 105 F. Supp. 3d 1121, 1133 (E.D. Cal. 2015) (*Barclays I*). BP also cites to a brief FERC Staff filed in the *Silkman* case. *Id.*

⁶⁷² Order No. 670, 114 FERC ¶ 61,047 at P 62 n.124.

an order to show cause or a hearing order commences the contemplated “proceeding.” Further, the *Barclays I* and *Silkman* judicial decisions BP cites as evidence that it was previously precluded from raising the argument were issued on May 19, 2015 and April 1, 2016 respectively, *after* BP filed its Answer to the Order to Show Cause on October 4, 2013, as well as after BP filed its request for rehearing of the Hearing Order.

343. In its answer to Enforcement Staff’s answer to its motion, BP points out that the Commission issued a Penalty Guidelines on Enforcement⁶⁷³ on May 15, 2008, in which the Commission stated, “[A]n Order to Show Cause commences a Part 385 proceeding.”⁶⁷⁴ In addition, BP points out that Rule 209(a)(2) of the Commission’s procedural regulations in Part 385, as in effect in 2013 and today, provides that “[t]he Commission may initiate a proceeding against a person by issuing an order to show cause.”⁶⁷⁵ However, neither Rule 209(a)(2) nor the 2008 Penalty Guidelines expressly address the issue of whether the proceeding initiated by an order to show cause would satisfy the section 2462 statute of limitations applicable to proceedings in which the Commission seeks to impose civil penalties under NGA section 22.

344. Rule 209(a)(2) is a general procedural rule governing Orders to Show Cause issued in all contexts, including in proceedings where the section 2462 statute of limitations does not apply, such as rate investigations under NGA section 5 and FPA section 206. The Commission adopted that rule well before Congress amended the NGA in the EPAct 2005 to provide the Commission civil penalty authority in NGA section 22,⁶⁷⁶ thus raising for the first time the issue of how the section 2462 statute of limitations should be applied in proceedings where the Commission seeks to impose civil penalties under the NGA. BP has not cited any Commission order issued before it filed its Answer to the Order to Show Cause deciding whether the issuance of an order to show cause pursuant to Rule 209(a)(2) constitutes the commencement of a “proceeding” for purposes of satisfying the section 2462 statute of limitations.

⁶⁷³ 2008 Penalty Guidelines, 123 FERC ¶ 61,156 at P 37.

⁶⁷⁴ BP Answer to Enforcement Staff Answer at 9 n.28.

⁶⁷⁵ 18 C.F.R. § 385.209(a)(2) (2020).

⁶⁷⁶ The Commission adopted Rule 209(a)(2) in Order No. 225 in 1982.

345. Moreover, the 2008 Penalty Guidelines did not foreclose BP from raising the statute of limitations as a defense. A statement of policy does not establish a “binding norm.”⁶⁷⁷ As the D.C. Circuit has explained,

“The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency’s tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.”⁶⁷⁸

346. Thus, BP has provided no compelling evidence that as of the date it filed its Answer to the Order to Show Cause, the issue of whether an Order to Show Cause is sufficient to commence a “proceeding” for purposes of the section 2462 statute of limitations was so settled that it would have been futile for BP to raise the issue and that *Barclays II* represents a material change in law. Regardless, even if BP had pointed to existing precedent that did not support its position at the time it filed its Answer, it still would not have shown that it was barred in some way from asserting the defense and raising new or fact-specific arguments to support application of the defense in this proceeding. As is true in all litigation, parties faced with unfavorable precedent always retain the right to argue that such precedent is not binding in the current instance, was based on unwise or outdated reasoning and should be overturned, was intended to be of narrow application, does not apply to a particular set of facts, etc. That numerous similarly situated respondents in other Commission enforcement proceedings raised statute of limitation defenses prior to the decisions in *Barclays II* and *Kokesh* belies BP’s claim that it was somehow precluded from doing so.⁶⁷⁹

⁶⁷⁷ *Pacific Gas and Electric Company v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).

⁶⁷⁸ *Id.*

⁶⁷⁹ Enforcement Staff Answer at 27-28; BP Answer to Enforcement Staff Answer at 9. The fact that other defendants’ statute of limitations defenses were “rejected by the Commission” *after* BP filed its Answer to the Order to Show Cause is irrelevant to an analysis of whether BP waived the statute of limitations defense by failing to raise it. *See id.* at 9.

347. Because we find that BP waived its statute of limitations defense, and more specifically waived all arguments regarding whether an order to show cause or a hearing order commences a “proceeding” for purposes of section 2462, BP’s argument that *Kokesh* represents a material change-in-law applying the five-year statute of limitations to the disgorgement of profits as well as civil penalties is moot. Even assuming *Kokesh* is a material change-in-law, it is too late for BP to raise the issue whether the Commission failed to establish a “proceeding” within the requisite five-year period for requiring disgorgement of profits.

348. Although the Commission may have “‘considerable discretion’ to consider motions to lodge...upon a finding of good cause,”⁶⁸⁰ such discretion cannot overcome a clear waiver. None of the cases BP cites in support of its request to lodge the *Barclays II* and *Kokesh* decisions involve parties seeking to lodge new facts or decisions related to issues never previously raised and/or argued in the proceeding.⁶⁸¹

349. Having found that BP waived any statute of limitations defense, we need not reach the question of whether, and if so how, the *Barclays II* and *Kokesh* decisions apply in the context of a Commission enforcement action pursuant to the NGA, 15 U.S.C. § 717 *et seq.*⁶⁸²

The Commission orders:

(A) In response to BP’s request for rehearing, Opinion No. 549 is hereby modified and the result sustained, as discussed in the body of this order.

(B) BP is hereby directed to pay to the United States Treasury by a wire transfer a sum of \$20,160,000 in civil penalties within 30 days after the issuance of this order, as discussed in the body of this order. If BP does not make this civil penalty payment within the stated time period, interest payable to the United States Treasury will accrue pursuant to the Commission’s regulations at 18 C.F.R. § 35.19(a) (20189).

⁶⁸⁰ *Id.* at 2 (citing *Pub. Serv. Co. of N.H.*, 56 FERC ¶ 61,105, at 61,403 (1991)).

⁶⁸¹ BP Motion at 4-5, nn.15-18.

⁶⁸² Nevertheless, we note the recent decision in *FERC v. Powhatan Energy Fund, LLC*, 949 F.3d 891 (4th Cir. 2020) (finding that “as prescribed by § 2462, FERC has five years from the date of the commission of the unlawful conduct to investigate an alleged violation and issue a notice of proposed penalty, which it does through an OSC”). *Id.* at 904. Here it is undisputed that the OSC issued within five years of the unlawful conduct.

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(C) BP is hereby directed, as discussed in the body of this order, to disgorge its unjust profits in the amount of \$207,169 to one or more of the entities identified in the Motion's "*2016 Comprehensive Energy Assistance Program Subrecipient List*" within 30 days of the date of this order.

By the Commission. Commissioner Clements is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

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